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COMMON PLEAS

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REPORTS of CASES ARGUED and DETERMINED
in the COURTS of COMMON PLEAS and EX-
CHEQUER CHAMBER. By HENRY BLACK-
STONE, of the Middle Temple. Vol. I. From
Easter Term, 28th GEORGE III. 1788, to Trinity
Term, 31st GEORGE III. 1791, both inclusive.
The Fourth Edition. With Additional NOTES
and REFERENCES to the subsequent DECI-
SIONS. London, 1827.

[1] CASES ARGUED AND DETERMINED IN THE COURT OF COMMON PLEAS, IN
EASTER TERM, IN THE TWENTY-EIGHTH YEAR OF THE REIGN OF GEORGE III.

DALLY *against* KING. 1788.

A writ of right cannot be maintained without shewing an actual seisin by taking the esplees, either in the demandant himself, or the ancestor from whom he claims. Qu. Whether in a devise, the words "estate of what kind soever" immediately preceded and followed by particular descriptions of personal property, will pass a remainder in fee of lands vested in the testator? (a)

This was a writ of right brought to recover a dwelling-house and lands at Thorpe in Surrey, tried at Croydon, before Mr. Justice Gould, at the Summer Assizes 1787. The count stated that "Maurice Bailey was seised in fee of the premises in question, and in the year 1729 devised them to his wife Jane for life, remainder to his son John Bailey for life, remainder to his two grandsons Maurice Bailey and John Bailey in fee, who upon the death of the testator were seised of a remainder in fee in common. Jane entered, and was seised by taking the esplees, on whose death John the son also entered, and was seised by taking the esplees, in whose lifetime Maurice the grandson died without heir of his body, by which his brother John Bailey the grandson became seised of the whole remainder in fee, who died so seised, and on his death the said remainder descended to the demandant as his cousin and heir, in the life-time of John Bailey the son, who afterwards died, and so the demandant was intitled."—Plea, "protesting that the remainder in fee did not descend to the demandant, on the death of John Bailey the grandson, alleged that John Bailey the grandson devised the said remainder to his mother Rachael Bailey, who on the death of John Bailey the son, was seised by taking the esplees, &c." and from her deduced a title to the tenant.

[2] Replication—traversed the devise of John Bailey the grandson to Rachael his mother, &c. Issue on the traverse.—Verdict for the demandant, subject to the opinion of the Court on the following case:—

(a) [As to the effect of the words "estate of what kind soever" and "testamentary estate," see *Doe dem. Burkitt v. Chapman*, post, p. 223, *Smith v. Coffin*, post, vol. ii. p. 444, see also *Holdfast dem. Cowper v. Marten*, 1 T. R. 411. *Fletcher v. Smiton*, 2 T. R. 656.]

C. P. IV.—1

The will of John Bailey the grandson, made in the year 1756, was in the following words;

"I give to my mother Rachael Bailey, all that freehold messuage, tenement, or dwelling-house, orchard, garden, and all other the appurtenances thereto belonging, situate at Thorpe, now in the occupation of A. B. as also two acres of arable land lying in the common field, as also the stock of corn, grain, hay, goods, chattels, and effects or estate of what kind soever, also all other the utensils of husbandry, which shall be found, or be, in the dwelling-house or farm which I now rent of my father, situate in Thorpe aforesaid," (this was the estate in question in which he had the remainder in fee) "as also all that freehold messuage, tenement, or dwelling-house, orchard, garden, and all other the appurtenances thereto belonging, in Thorpe aforesaid, late in the occupation of B. C. to her sole use and behoof, and to her heirs and assigns for ever."

On this case the question was, whether the words "estate of what kind soever," as they were inserted in the devise of divers particulars of personal property, "were sufficient to pass the remainder in fee vested in the testator?"

This was argued in Michaelmas term 1787, when

Hill, Serjt., for the tenant, contended that the word estate passed all the interest which the testator had in the premises.—That he meant to dispose of real property, because there are real estates expressly devised to his mother, both before and after this devise. Though the word estate be coupled with an enumeration of personal property, yet the sense of it cannot be restrained to such property, unless the whole be so restrained, which it evidently cannot be, as there is a specific description of real property.

Bond, Serjt., for the demandant, argued that the words "estate of what kind soever," followed by the words "all other utensils of husbandry," and preceded by an enumeration of personal property, could never be intended to give any real property, much less a remainder, which the testator does not appear to have had in his contemplation. He cited Cro. Car. 447, [3] 12 Mod. 594. Preed. in Chan. 471. Noy, 48. 1 Eq. Cas. Abr. 211. Sir T. Raym. 453. 14 Vin. Abr. 277. 2 Atk. 102. Cowp. 238, as relating to this point.

The Court seeming inclined to adopt the argument urged by Bond,

Hill moved in arrest of judgment, on the ground that the demandant appeared to be a purchaser, and had not counted on an actual seisin of the person from whom he claimed.

In this term, Bond shewed cause against the rule—arguing that it appeared on the record, that the demandant claimed an estate in fee-simple which was sufficient in a writ of right. His claim was founded on the seisin and will of Maurice Bailey, and the seisin of the several tenants for life under the will, by whose death the estate had devolved on him, as heir of John Bailey the grandson. He could not count in the ordinary form, alleging the taking of esplees, in John Bailey the grandson, who was only seised of a remainder, and had not actually taken the profits, neither could he claim under John Bailey the son, who was only seised for life. He has therefore stated his claim agreeably to the truth, and to the general form of the writ found in the Register, viz. he has claimed the land "as his right and inheritance" generally, and has then shewn his title by a special count. This case of a general writ, and special count, was frequent in the old law. Bro. tit. General Brief, pl. 13.—In Co. Litt. 52 b. it is said that an action of waste lies against a tenant for half a year, but in that case the writ must allege a term for years, being the only form in the Register. The words "right and inheritance" mean only a fee-simple, which is enough to support a writ of right. Fitz. Natur. Brev. p. 1. It is equally a fee-simple, whether it be by descent or purchase, and being a fee-simple, it is an inheritance. It appears from Litt. s. 1, that a person claiming by purchase as well as descent, may allege the estate to be his inheritance. In one sense the demandant is a purchaser, being the appointee of the estate under the Statute of Wills, and coming in the place of the heir. He is "haeres factus," and stands in a situation unknown in the law at the time when it was first decided, that the demandant in a writ of right, must claim on his own seisin, or that of his ancestor or predecessor. The Statute of Wills having put the devisee in fee in the place of the heir by descent, but having given him no specific remedy to recover [4] the interest devised to him, the only remedy which was used in similar cases, must be shaped to the case of a devise, and the devisee must be

allowed to found his claim on the seisin of his devisor, in the same manner as the heir by descent does on the seisin of his ancestor. This action in the present case arises from the same necessity, and bears a strong resemblance to the writ *ex gravi querelâ*, which was brought where lands were devisable by custom, in which the devisee stated the seisin of the devisor, and the devisee to himself as his claim to recover. F. N. B. 459. But when the right to devise lands, which was before good only by special custom, became general, no better form of action could be framed than that which was used in similar cases.—The writ *ex gravi querelâ*, could not be brought in the present case, being founded on the special custom of some city or borough, and only triable before the mayor or bailiff of the place. *Termes de la Ley*, 258.

Where the law regulates the forms of actions, by prescribing certain previous requisites, it does not adhere so rigidly to the rule as to deprive a party of his substantial right, through a mere defect of such formal requisites. The action of *quare impedit* is founded on a prior presentation of the party bringing it, his ancestor, or of those whose estate he has; but in cases of necessity, this requisite is dispensed with. F. N. B. 78. If this be allowed in *quare impedit*, a like necessity should prevail in the present case. Otherwise the clear right of a devisee in fee-simple would be defeated by an adverse possession.

But even if this objection were well founded, it is waived by the tenant having pleaded in bar. If the count be defective, it must be on account of a variation from the writ, either in substance or in form. Now it has been shewn not to have varied in substance, and if it be only in form, that ought to have been pleaded in abatement. But it does not vary even in form, since the count may particularize what was general in the writ. The tenant therefore ought not to be permitted after verdict to cavil at the form of the count which discloses an undoubted title to the lands demanded, and supports the allegation of the original writ.

Hill, for the tenant, contended that wherever it appears that the plaintiff is not entitled to his action, no pleading over, nor verdict can cure the defect. That it was clear on this count, that the whole estate of Maurice Bailey the grandfather, was [5] devised: no reverter was left in him. Both the grandsons took by purchase, the only way in which they could take; an estate for life being limited to the father, with remainder to them in fee. But no purchaser can maintain an action in which he must count on a seisin in the ancestor; for a seisin in the ancestor means only a seisin in the person from whom there is a descent. Neither can the demandant, in the present instance, maintain his action, not being able to shew an actual seisin in the devisee under whom he claims.

Per Curiam. In order to maintain a writ of right, the demandant must shew an actual seisin either in himself or his ancestor, by taking the esplees. The present case has neither of these requisites. The demandant does not state that either he or John the grandson, under whom he claims, were ever so seised.

Judgment arrested.

BEAVAN *against* DELAHAY AND LEWIS. 1788.

A custom that a tenant may leave his away-going crop in the barn &c. of the farm, for a certain time after the lease is expired, and he has quitted the premises, is good, and the landlord may distrain the corn so left, for rent arrear, after six months have expired from the determination of the term: [notwithstanding the statute 8 Anne, c. 14, s. 6, 7] (a).

Replevin—for taking corn on the 20th of September 1784, at Peterchurch in the county of Hereford.

(a) [The custom as to an away-going crop may be controlled by the agreement of the parties, *Boraston v. Green*, 16 East, 71. And where by such agreement a right is reserved to the tenants to take the crop, it is a prolongation of the term as to the land on which it grows, and the possession of the land continues in the tenant until it is taken. Per Bayley, J., *ibid.* p. 81. See also *Beaty v. Gibbons*, 16 East, 116, and *Earl of St. Germain v. Willan*, 2 B. and C. 216. The statute, 8 Anne, c. 14, s. 6 and 7, is not confined to cases of a tortious holding over, or to a holding of the whole. *Nuttall v. Staunton*, 4 B. and C. 51.]

Avowry and cognizance.—Locus in quo part of certain lands, &c. of which the avowant Delahay was seised in fee, and which he demised on the 2d of February 1780, to one William Beavan for one year, and so from year to year as long as both parties should please, at the rent of 168l. payable half yearly. William Beavan entered on the 3d of February 1780, and continued in possession till the 2d of February 1784, when the demise ended. Within the parish of Peterchurch an ancient custom, that every tenant and farmer of any lands, under any demise, from year to year, at the will of the parties, shall have to his own use, and reap at seasonable and proper times, his away-going crop, that is, all the corn growing upon the said lands, which, before the expiration of such term, hath been sown by such tenant and farmer upon any part of such lands, being arable land, not exceeding one third part of the arable lands so held under such demise, and which hath been left standing and growing upon such lands at the expiration of such term; and also deposit such away-going crop, when reaped, in the barns and out-houses, if any such there be, parcel of such demised premises convenient in that behalf, and thresh the same there, and keep the same in the [6] grain there then arising, in such barns and out-houses, until the first day of May next after the reaping of such corn. On the 1st of August 1784, William Beavan the tenant reaped his away-going crop, and placed and deposited the same in the said places in which, &c. being the barns and out-houses parcel of the said demised premises, and kept it there till the said time when, &c. which was before the 1st of May next after the reaping of the same, under the custom—rent arrear, distress, &c.

Plea in bar—protesting, no such custom, confesses that the demise ended on the 2d of February 1784, but says that the said goods and chattels were taken and distrained after the expiration of six calendar months next after the end and determination of the said demise, &c.

To this there was a general demurrer.

Lawrence, Serjt., in support of the demurrer, argued that although the distress was taken after six months had elapsed from the determination of the demise, yet the landlord had a good right to distrain. The case in *Keilway*, 96 a. is an express authority in point.—The tenant had an interest in the premises upon which the distress was so taken, by the custom of the country. By the feudal law, non-payment of rent, and non-performance of services occasioned a forfeiture of the feud. But in process of time, the remedy by distress was substituted in lieu of forfeiture. (Gilb. Law of Replevin, p. 3.) Wherever therefore a forfeiture might be incurred, there a distress might be taken. In the present case the tenant might have forfeited by several means the interest which the custom gave him, and being so liable to forfeiture he was also liable to distress. In 1 Rol. Abr. 670, pl. 10, it is laid down, that the landlord cannot distrain after the end of the term, because there is no privity of estate between him and the tenant, but this admits, that where there is such privity, a distress may be taken; and in the case before the Court there is such privity by the operation of the custom. In the case of *Stanfill v. Hicks*, 1 Ld. Raym. 280, it was determined, that there could be no distress, where the tenant had different interests in the estate, which implies, that where the interests of the tenant are the same, the landlord has a right to distrain; here, there is a continuation of the same interest, the custom of the country extending the term till the day specified. That such a custom is good appears from *Wigglesworth v. Dallison*, Dougl. 201, and the case of *Lewis v. [7] Harris*, tried before Chief Baron Skynner, at Hereford Summer Assizes 1778 (a).

(a) *Lewis v. Harris*, Summer Assizes at Hereford, before Chief Baron Skynner, 1778.

Trover for a quantity of wheat—plaintiff proved the taking and conversion—defendant justified under a distress for rent. The distress was made in March, the term having ended the Candlemas twelve-month before; but it was during the time the wheat was in a barn, part of the demised premises, and also during the time allowed by the custom of the country to the off-going tenant to get in and dispose of his off-going crop.

Kenyon, for the defendant, insisted, that the tenant's right to these advantages was a continuance of his term in that part of the lands to which it extended, and was, as it were, an excrescence of his term. Therefore the distress was during the term, though more than six months after it had expired in the rest of the farm.

Kirby, Serjt., contended that the avowry was inconsistent, as it states the term to have ended on the 2d February 1784, and that until that time the tenant continued in possession; and sets up a custom that he should keep possession of the barns, &c. for putting in his corn till the first of May, after the reaping of the corn.—By the statute 8 Anne, c. 14, s. 6, a power is given to landlords, which they had not at common law, to distrain after the expiration of the term granted, but it is expressly limited by the 7th section, to the period of six months after such expiration. In the present case it appears by the avowant's own statement, that the distress was taken contrary to the statute, being long after six months had expired subsequent to the determination of the demise.

The case in *Keilway* ought to have little or no weight, as it has been contradicted by the Legislature in the 8th of Anne, and as it appears to have been against the opinion of two Judges of the Court in which it was decided. It is also an anonymous case, and does not shew upon what occasion it came before the Court.

The case of *Wiglesworth v. Dallison* proves only the goodness of a custom to take away an off-going crop after the expiration of the term; it does not establish a right to distrain six months after the term has expired, against the express authority of an [8] Act of Parliament, nor does it authorize a tenant to keep possession of a barn, &c. after the expiration.

The case of *Lewis v. Harris* was trover by the tenant against the landlord, in which the tenant claimed to hold the premises beyond the term, who ought therefore to submit to all the powers which a landlord has over a tenant. There the Chief Baron went into the equity of the case, saying, that as the tenant did not come into possession of part of the premises, till after the commencement of the term, it was but just that he should continue, after it ended. At best that was a mere *Nisi Prius* decision, which appears to have been acquiesced in, because the value of the corn was too small to hazard any further expence.—The case of *Stanfill v. Hickes* is strongly in favour of the present plaintiff, which lays it down, that where the tenant has two interests in the premises, no distress can be taken. Here the tenant had two different interests, one arising from the demise, and the other from the custom, supposing the custom to be good.

Lawrence in reply.—The term was continued by the custom of the country till the 1st of May after the harvest; and if it continued for one purpose, it must also continue for every other. As the tenant might hold possession of the barn, &c. so all the rights of the landlord attached upon him, and with those rights, that of distress.

The Court took a few days to consider, after which

LORD LOUGHBOROUGH delivered their opinion as follows.—A few short principles are sufficient to determine the present case. If by tacit consent of the landlord and tenant, the contract between them continues beyond the time for which they originally contracted, all the rights and properties belonging to the original contract, must also be continued. It has been often determined, that if there be a lease, and after the determination of it the tenant holds over, he must hold upon the terms, and liable to all the conditions and covenants of the lease. The rights therefore of the landlord must in such case continue. Now it is not material whether the interest and connection between the landlord and tenant be extended, by such holding over, or by the operation of a custom like the present.

I have seen Sir John Skynner, and consulted him on the case of *Lewis v. Harris*, which I find was correctly stated at the Bar. On that case he took the opinions of all his brethren of the [9] Exchequer, who agreed with him in his decision, which was acquiesced in, and never afterwards called in question.

Judgment for the defendants.

Beareroft insisted, for the plaintiff, that it was bad by common law, and not within the statute 8 Anne, c. 14, s. 7.

Chief Baron Skynner.—The question is new to me; I must resort to the reason of the thing. The tenant entered originally on part only, and could not have the benefit of the residue. During his right to continue he was immediate tenant, and could have maintained trespass while his customary right continued. ("He offered Beareroft a case for the opinion of the Court, but the matter being of small value, it was, with Kenyon's consent, reserved for his further consideration, and the plaintiff had a verdict subject to his opinion.")

He afterwards continued of the same opinion, and a nonsuit was entered.

THOROLD *against* FISHER. 1788.

Though the rule to bring in the body has expired, yet if the defendant justifies bail before plaintiff moves for an attachment against the sheriff it is in time to prevent the attachment (a)¹.

The rule to bring in the body expired on Saturday the 19th of April, on Monday the 21st, defendant's bail were justified;—On the same day Runnington, Serjt., moved for and obtained an attachment against the sheriff for not bringing in the body.—On a subsequent day Bond, Serjt., obtained a rule to shew cause why the attachment should not be set aside with costs.—Runnington now shewed cause, contending that by the known practice of both this Court and the King's Bench, as soon as the rule for bringing in the body expired, immediately the sheriff was in contempt and fixed, and that the defendant could not afterwards put in bail without special leave from the Court.—To this Bond answered, that the bail were justified before the attachment was moved for, which was therefore irregular. The Court referred to the prothonotary as to the practice, who said, "That though the rule for bringing in the body had expired, yet if the defendant justifies his bail before the plaintiff moves for an attachment, the sheriff is not liable to the attachment."

Rule absolute with costs.

FANO *against* COKEN. 1788.

The return day of a *clausum fregit* and the *quarto die post*, are both reckoned inclusively. There is no difference whether the return day be on a Sunday or any other day.

The defendant was served with a *clausum fregit* returnable in four weeks from Easter day. The return day was Sunday, April 20th. The defendant not appearing on the Wednesday following, the plaintiff on the Thursday sued out a *distringas*. On that day the defendant entered an appearance. On Friday morning the plaintiff's attorney levied 40s. under the *distringas*, on the defendant's goods.

Kerby, Serjt., obtained a rule to shew cause why these issues should not be repaid to the defendant with costs, on the ground that the return day being Sunday, the defendant had till Thursday to appear, and as the *distringas* issued on that day, it was irregular.

[10] To this it was answered, that by the uniform practice of the Court, the defendant was bound to appear within four days of the return of the writ, which are inclusive both of the return day and the *quarto die post*, and that Sunday was to be considered like any other return day.

The Court, after consulting the secondaries as to the practice, were of opinion against the defendant.

Rule discharged.

COOKE *against* DOBREE. 1788.

An affidavit to hold to bail, must shew how the debt arose. The Court will not stay proceedings against the defendant till the debt and costs recovered by him in a former action against the plaintiff, be paid (a)².

Kerby, Serjt., moved to discharge the defendant out of custody, and to deliver up the bail bond, on entering a common appearance, there being a defect in the affidavit

(a)¹ [So where an attachment has been moved for, and afterwards, on the same day, bail are justified, the attachment will be set aside. *Turner v. Bristow*, 2 Bos. & Pul. 38. But the plaintiff in such case is entitled to the costs of moving for the attachment. *Ibid.* *Jarret v. Creasy*, 3 Bos. & Pul. 603, and see *R. v. Sheriff of Middlesex*, 2 M. & S. 562.]

(a)² [See 3 Bos. & Pul. 23, note (a). Where the plaintiff in an action of trespass, brought in K. B., to try the validity of a commission of bankruptcy against him, being unprepared with proofs at the trial, was nonsuited, and brought an action for the same cause in C. P., that Court staid the proceedings till the costs of the former action should

to hold to bail.—The affidavit was, that the defendant was indebted to the plaintiff “in the sum of 500l. and upwards.”—The objection was, that it did not appear, how the debt arose.—On this the Court granted a rule to shew cause. He then prayed that the proceedings might be staid in this action, till the debt and costs in two other actions for which the defendant had obtained judgment against the plaintiff, should be paid.—This was prayed upon an affidavit, stating the judgment in those actions, that the defendant had never since their commencement had any dealings with the plaintiff, and that the present action was founded on the same circumstances with those others. But

The Court refused this, saying that they could not on motion try the merits of the cause.

Bond, Serjt., then proposed a supplemental affidavit, on the part of the plaintiff, which was also refused (a)¹, and afterwards the

Rule made absolute.

WARD against SNELL. 1788.

A prisoner suing the gaoler as a party grieved on the Habeas Corpus Act, for refusing a copy of his warrant of commitment, having recovered the penalty, is entitled to costs (a)².

Debt for the penalty of the Habeas Corpus Act, 31 Car. 2, c. 2, s. 5, against the defendant who was keeper of Colchester Gaol, for refusing the plaintiff (being the party grieved) a copy of his warrant of commitment.

[11] Plea nil debet.—Verdict for the penalty 100l. but no damages nor costs.

Marshall, Serjt., having obtained a rule to shew cause why the prothonotary should not tax the plaintiff his costs, and why the associate should not indorse them on the postea, argued in support of it,

That the first case which arose on the Statute of Gloucester (6 Ed. 1, c. 1), was *Pilfold's case* (10 Rep. 116), which, if it seem to militate against the plaintiff in this action, has been in great measure contradicted by Lord Coke himself (2 Inst. 288), and shaken by modern decisions (d).

The present action is not brought for damages, but for a certain penalty given to the party grieved. Now where a statute gives a certain penalty, the party recovering such penalty must also recover costs, because, as the penalty is intended for a recompense to the party grieved for the damage he has received, if he could recover no more, it often would be in vain to sue, since his costs would exceed the penalty. But where a statute gives no certain penalty but only damages, such statute is introductive of a new law, and gives a remedy where there was none at common law, in which case no

be paid, *Crawley v. Impey*, 8 Taunt. 407. Tidd's Pr. 584, 8th edit. It should be observed that the application in this principal case was to stay proceedings until the debt and costs recovered in the former action should be paid, *Doe d. Church v. Barclay*, 15 East, 233.]

(a)¹ [“The discretion to permit a plaintiff to file a supplemental affidavit ought to be very sparingly exercised.” Per Gibbs C.J. in *Armstrong v. Stratton*, 7 Taunt. 408; and see *Garnham v. Hammond*, 2 Bos. & Pul. 298. *Sands v. Graham*, 4 B. Moore, 13. Tidd's Pr. 191, 8th edit.; see also *Hobson v. Campbell*, post, p. 245.]

(a)² [So a party grieved who recovers damages against the sheriff for not taking bail under 23 H. 6, c. 9, is entitled to costs, *Creswell v. Hoghton*, 6 T. R. 355. The principle upon which this case was decided, is, that where a statute, since the Statute of Gloucester, gives a remedy in a case in which damages were recoverable before the Statute of Gloucester, the plaintiff is entitled to costs by the latter statute. See *Wilkinson v. Allott*, Cowp. 367. So, costs are recoverable in an action on the statute 9 G. 1, c. 22, against the hundred. *Jackson v. Inhab. of Calesworth*, 1 T. R. 71. So also in an action against the sheriff for extortion, on 28 Eliz. c. 4, *Tyte v. Glode*, 7 T. R. 267. It is indeed said that the plaintiff is entitled to costs in all cases where single damages are given by statute to the party grieved, although costs are not particularly mentioned in the statute. Tidd's Pr. 981, 8th edit.]

(d) *Witham v. Hill*, 2 Wils. 91.—*Jackson v. Inhabitants of Calesworth*, Term Rep. of B. R. vol. 1, p. 71.

costs shall be recovered; the reason is, no certain sum being specified, the jury may give a full compensation in damages.

It is an established rule of law, that where a penalty is given to a party grieved, he shall have his costs; as appears from *North v. Wingate*, Cro. Car. 559.—1 Roll. Abr. 574.—*Eton v. Barker*, 1 Vent. 133.—*Corporation of Plymouth v. Collins*, Carth. 230. *Company of Cutlers v. Ruslin*, Skynn. 363.—*Bellasis v. Burbriche*, 1 Ld. Raym. 172.—*Shore v. Madiston*, Salk. 206.—*Greatham v. Inhabitants of Theale*, 3 Burr. 1723.—*Gynes (qui tam) v. Stephenson*, Cooke's Cases of Practice, 87.

But even admitting the authority of *Pilfold's case*, yet the plaintiff may have his costs, consistently with that case, which says, "That where a statute, since the Statute of Gloucester, in a new case gives damages, the plaintiff shall not recover costs, this being an Act which creates a recompense, where there was none before." Now the plaintiff is entitled to damages for the detention of the penalty, by common law, Cro. Car. 559, 1 Vent. 133, [12] before cited, which also shews that he is entitled under the very terms of the Statute of Gloucester, which are, "This shall hold place where the party is to recover damages."

He might also have recovered damages at common law on another ground (Hawk. P. C. 90). The offence of obstructing bail, is punishable at the suit of the party, as well as by indictment. Now it is necessary for a prisoner to have a copy of his commitment, in order to be more speedily bailed, otherwise the Habeas Corpus Act would not have made it so penal to refuse it; the refusal therefore is an obstruction of bail. If a person in a distant part of the kingdom were committed to gaol for a misdemeanor without knowing the cause of his commitment, and forced to sue out a habeas corpus, in such a case he would have been prevented from being bailed; for had he known by a copy of the warrant, that it was for a misdemeanor, any justice of the peace might have bailed him.

Bond, Serjt., against the rule, contended, that *Pilfold's case* ought to be relied on as law.

That case distinguishes Statutes of Addition from Statutes of Creation, and lays it down, that on those of the latter description costs are not recoverable. That case ought to govern the present. The Habeas Corpus Act is a creative not an accumulative statute, giving a new remedy to the party suing, to which he was not entitled at common law. There are no instances of an action at common law having ever been brought, for the injury against which that Act provides a remedy. If then no action would lie against the defendant at common law, the Habeas Corpus Act cannot be included amongst those statutes which give costs, according to the description in *Pilfold's case*, viz. "such as increase the damages and costs given by the common law." Nor does the present case fall within the Stat. of Gloucester, which gives costs only where damages were before to be recovered. There is no more reason to consider the Habeas Corpus Act as an Accumulative Statute, than the Statutes of Waste (6 Ed. 1, c. 5,) or of tithes (2 and 3 Ed. 6, c. 13); in neither of which cases the party could recover costs, till the Legislature expressly interfered for that purpose. Where costs are meant to be given together with a penalty by a statute, they are expressly mentioned, as in the statute 23 H. 6, c. 14, for the regulation of the return of members of Parliament, the words of which are, "The said 100l. (the penalty, &c.) with his costs [13] spent in that case. So in the statute of 7 & 8 W. 3, c. 7, on the same subject, costs are distinctly given, besides the penalty. When therefore no mention is made of costs in a penal statute, it is to be inferred, that the Legislature meant to exclude them.

LORD LOUGHBOROUGH saw no reason to doubt the authorities cited in support of the plaintiff's right to costs. The Statute of Gloucester is a remedial Act, and ought to have a favourable interpretation. The penalty in the present case accrues to the party grieved before action brought, who having recovered a debt, is entitled to the costs attending such recovery.

GOULD, J., of the same opinion—costs are in the nature of a satisfaction.

This is not a popular action; it is like an action on a bond to recover a debt already due, a right of action vests in the party grieved as soon as the grievance is committed; but it is otherwise of a common informer, who has no interest till judgment.

HEATH and WILSON, Justices, of the same opinion.

Rule absolute.

WALLACE *against* KING AND OTHERS. 1788.[Overruled, *Robinson v. Waddington*, 1849, 13 Q. B. 753.]

Trover will not lie for goods irregularly sold under a distress, the statute 11 Geo. 2, c. 19, s. 19, having declared that the party selling should not be deemed a trespasser ab initio, and having given an action on the case to the party grieved by such sale. The five days allowed before a distress can be sold, are inclusive of the day of sale (a). —Q. Whether goods distrained in the parish of A. can be appraised by appraisers sworn before the constable of the parish of B., each parish being in the same hundred, but in different divisions, and each having different constables?

This was an action on the case for selling goods distrained for rent in arrear, before five days had expired next after the distress was taken and notice given. The declaration consisted of three counts: the first count was for an excessive distress; the second, for an irregular distress; and the third was in trover for the goods distrained.

Plea, general issue—not guilty.

The cause came on to be tried before Lord Loughborough at the sittings after last Hilary term at Westminster.

At the trial it appeared that the plaintiff held three rooms of the defendant, King, in Oxford-Street, in the parish of St. Mary-le-Bone. That three quarters of a year's rent being in arrear, the defendant King, together with the defendants Freeman, Cooper, and Wenham (who were assistants to King), on Saturday the 12th of May, 1787, distrained the plaintiff's goods, made an inventory, and gave a regular notice of sale. On Thursday afternoon, May the 17th, they removed the goods and sold them. The appraisement was made by appraisers, who were sworn [14] before one John Wood, who was constable of the parish of St. George's Hanover-Square, and not for the parish of St. Mary-le-Bone; and who was chosen by the vestry of St. George's, and returned and sworn in constable at the leet of the dean and chapter of Westminster. It was proved that the parishes of St. Mary-le-Bone and of St. George's were both in the hundred of Ossulstone (which has five divisions, viz. Holborn, Finsbury, The Tower, Kensington, and Westminster), but that St. Mary-le-Bone was in the Holborn division, and St. George's in the Westminster division, and that no part of Westminster extended into the parish of St. Mary-le-Bone.

It was contended at the trial by Bond, Serjt., 1st, that the defendants could not legally sell the distress before Friday, May 18th, as the party distrained must have full five days to replevy his goods in, next after the distress was taken and notice given (2 W. & M. sess. 1, c. 5, s. 2). 2dly, that the appraisement was not regular, not being under the inspection "of the constable of the hundred, parish, or place, where such distress was taken."

LORD LOUGHBOROUGH thought these points proper to be argued in Court, and also whether trover would lie. He therefore directed a verdict to be entered on the count in trover for the value of the goods, and that the Court should be moved for a rule to shew cause why the verdict should not be set aside, and a nonsuit entered.

A rule to shew cause having been obtained, Bond, Serjt., argued that the Statute of 2 W. & M. (sess. 1, c. 5, s. 2), the first Act which gave landlords a power to sell the tenant's property, had, out of mercy to the tenant, allowed him five full days in which he might make replevin. In order therefore to give effect to the intention of the statute, those five days must be reckoned exclusive both of the day on which the distress was taken, and also of the day when the sale was made.

But this objection the Court over-ruled, saying, that on the Thursday afternoon, five days from the time of the distress, had completely expired.

(a) [But trover will lie for goods taken under a wrongful distress, *Shipwick v. Blanchard*, 6 T. R. 298, that is, under such a distress as since the statute 11 Geo. 2, c. 19, is properly the subject of an action of trespass; as to which see *Winterbourne v. Morgan*, 11 East, 395. *Massing v. Kemble*, 2 Campb. N. P. C. 115. *Owen v. Legh*, 3 B. & A. 470.

A party who purchases goods under a distress irregularly conducted, has a sufficient title to maintain trover. *Lyon v. Weldon*, 2 Bingh. 334.]

He then argued, that where a constable, without any special warrant from a magistrate, is intrusted with the execution of any powers, either by common law or by statute, he can only execute them within the parish or district of which he is appointed constable. For this he cited 2 Ld. Raym. 1296, *The Queen v. Tooley*, 1 Salk. 175, case of *The village of Chorley*, Foster's [15] Crown Law, 312, 2 Blac. Rep. 1135, *Hill v. Barnes*, and *Blatcher v. Kemp* (a) (tried before Lord Mansfield on the Home Circuit, at the Summer Assizes 1782). The defendant, in the present case, could not be supposed to have authority in the county at large, as he was appointed under a particular franchise, at the leet of the dean and chapter of Westminster. The statute 2 W. & M. c. 5, directs that the overplus of the money arising from a sale of the distress, shall be left in the hands of the known officer of the district, but by no means intended that a stranger should interfere. If it were permitted to the constable of one parish, to step out of his line, and exercise his office in another, it would open a door to numberless frauds upon tenants.

If then the defendants had exceeded their authority and disobeyed the statute, they were evidently wrong doers, and their selling the property of the plaintiff was a tortious conversion. Trover therefore might well be supported. The legality of the [16] sale of a distress has often come in question in an action of trover, as appears from the case of *Waller v. Rumball*, 4 Mod. 385, and Lord Raym. 53. Although the statute 11 Geo. 2, c. 19, s. 19, declares that a party making an irregular sale of a distress, shall not be deemed a trespasser ab initio, yet it gives an action on the case

(a) *Blatcher v. Kemp*, Maidstone Summer Assizes, 1782.

This was action of trespass for entering plaintiff's house. Defendant had acted under a warrant from a justice of peace to search for nets, the warrant on being produced was directed "to the constable of Shipborne, to Samuel Carter, and to all other officers of peace in the county of Kent." Evidence was given that the defendant was borsholder of the hundred of Little Peckham, which adjoined to the hundred of Shipborne, in which the plaintiff's house was situated.

Peckham, for the defendant, contended that he was constable for the county, and came within the warrant, which was directed to all officers of the peace in the county of Kent.

Erskine and G. Bond, for the plaintiff, argued that when a justice directed a warrant generally to a constable of a given district, and all other peace officers within the county, it was *reddendo singula singulis* to the constable of each district in the county according as the warrant might require execution in any part of the county. But no justice could by such a warrant authorize a constable of one hundred to act in another, without specially appointing him so to do. This was a wise and politic regulation, for if the execution of warrants were given to mere strangers, force would often be repelled by force, and infinite mischief would attend the departure from the antient rules of local magistracy. If the defendant not being constable of Shipborne, had been required to execute the warrant and had refused, he could not have been punished for his refusal. He was only a volunteer, neither generally described in the warrant nor specially named, and was not entitled to notice under the statute.

Lord Mansfield.—This is a most unjust action, plaintiff having received no sort of damage, and defendant having acted *bonâ fide*. I therefore wished much to get rid of it. But the law is correctly brought to my recollection, and I am sorry to find it with the plaintiff. No constable can act under a warrant, out of his district: it is certainly to be taken, *reddendo singula singulis*. I remember a famous case at Norwich, where it was so determined. The reasons given by the counsel for the plaintiff are good ones; they weighed with me in the Norwich case. This warrant is directed "To the constable of Shipborne, to Samuel Carter, and to all other peace officers;" the defendant is neither constable of Shipborne [see the observations of Bayley, J. 1 B. and C. 293] nor Samuel Carter, and the general direction is to be taken to each within his district. Therefore as the warrant was not directed to the defendant, he cannot justify under it, and plaintiff must have a verdict for 1s.

[So where a warrant was directed "To A. B. to the constables of W. and to all other His Majesty's officers;" it was held that the constables of W. (their names not being inserted in the warrant) could not execute it out of their district, *R. v. Weir*, 1 B. & C. 288. See also *Milton v. Green*, 5 East, 233.]

to the party aggrieved, to recover satisfaction for the special damage sustained. Trover is an action on the case suited to the special damage sustained, viz. the sale and conversion of the plaintiff's goods. Under this statute therefore, as well as at common law, trover is here the proper form of action.

Marshall, Serjt., for the defendant, argued, that since the statute of 11 Geo. 2 (c. 19, s. 19) had given an action on the case, and declared that the party selling the distress should not be deemed a trespasser ab initio, trover could not be maintained. If trover could be brought against the defendants, it might also be brought against the buyer under the sale of a distress.

The Court, without deciding whether the constable had exceeded his authority, were clearly of opinion, that the count in trover on which the verdict was taken, could not be supported, not being a remedy which could be pursued, since the statute of 11 Geo. 2, c. 19, as it tended to place the landlord in the same situation as before the passing of the Act, by considering him as a trespasser ab initio.

Rule absolute.

[17] CASES ARGUED AND DETERMINED IN THE COURT OF COMMON PLEAS, IN TRINITY TERM, IN THE TWENTY-EIGHTH YEAR OF THE REIGN OF GEORGE III.

FIELDER *against* STARKIN. 1788.

[Distinguished, *Adams v. Richards*, 1795, 2 H. Bl. 574. Applied, *Pateshall v. Tranter*, 1835, 3 Ad. & E. 106. Discussed, *Poulton v. Lattimore*, 1829, 9 B. & C. 265.]

Where a horse has been sold warranted sound, which, it can be clearly proved, was unsound at the time of sale, the seller is liable to an action on the warranty, without either the horse being returned or notice given of the unsoundness (a)¹.

This was an action on the warranty of a mare, "that she was sound, quiet, and free from vice and blemish."

Plea, non-assumpsit, on which issue was joined.—

The cause came on to be tried at the last assizes at Thetford, before Mr. Justice Ashurst, and a verdict found for the plaintiff. It appeared on the trial, from the learned Judge's report, that the plaintiff had bought the mare in question of the defendant at Winnel Fair, in the month of March 1787 for 30 guineas, and that the defendant warranted her sound, and free from vice and blemish.—Soon after the sale, the plaintiff discovered that she was unsound and vicious (a)², but kept her three

(a)¹ [But where there is an agreement to take the horse back, if on trial he shall be found faulty, though accompanied with an express warranty, it is incumbent on the purchaser to return the horse as soon as the faults are discovered, unless the seller by a subsequent misrepresentation induce him to prolong the trial, *Adam v. Richards*, post, vol. ii. p. 573. So the horse must be returned, before the purchaser can maintain assumpsit for money had and received, as upon a contract rescinded. *Towers v. Barrett*, 1 T. R. 133; and it must be returned within a reasonable time; per Buller, J. *ibid.* 136. And in the same state as when sold, and not diminished in value by doctoring. *Curtis v. Hannay*, 3 Esp. N. P. C. 82. And unless the horse has been accepted again by the vendor, the contract will not be rescinded, and money had and received cannot be maintained. *Payne v. Whale*, 7 East, 274. Unless by the terms of the contract the purchaser alone may rescind it. *Towers v. Barrett*, 1 T. R. 136. If the horse has been returned, the damages recovered in an action on the warranty will be the price of the horse; if the horse has been kept, the difference between the value and the price. *Caswell v. Coare*, 1 Taunt. 566. Unless the horse has been tendered, the purchaser cannot recover the expenses of his keep, *ibid.*

(a)² The instances of which, were that "she was a roarer, had a thorough pin through the hock, and had a swelled hock from kicking."

[Roaring is not unsoundness, unless it proceed from some disease or organic infirmity which renders the horse incapable of performing his usual functions. *Bassett v. Collis*, 2 Campb. N. P. C. 523. *Onslow v. Eames*, 2 Stark. N. P. C. 81. Any infirmity which renders a horse unfit for present service, is an unsoundness. *Elton v. Brogden*, 4 Campb. N. P. C. 281. 1 Stark. N. P. C. 127, S. C. but see *Garment v.*

months after this discovery, during which time he gave her physic and used other means to cure her. At the end of the three months he sold her, but she was soon returned to him as unsound. After she was so returned, plaintiff kept her till the month of October 1787, and then sent her back to the defendant as unsound, who refused to receive her. On her way back to the plaintiff's stable, the mare died, and on her being opened, it was the opinion of the farriers who examined her, that she had been unsound a full twelvemonth before her death. It also ap-[18]-peared that the plaintiff and defendant had been often in company together during the interval between the month of March, when the mare was sold to the plaintiff, and October, when he sent her back to the defendant; but it did not appear that the plaintiff had ever in that time acquainted the defendant with the circumstance of her being unsound. The jury found a verdict for the plaintiff with 30 guineas damages.

Le Blanc, Serjt., having obtained a rule to shew cause, why the verdict should not be set aside and a nonsuit entered;

Adair, Serjt., shewed cause. Three questions arose in this case upon which the jury had a right to decide. 1st, whether there was a warranty from defendant to plaintiff?—2d, whether such warranty was true or false?—3d, whether the plaintiff returned the mare to the defendant and gave him notice of the being unsound within due time? These were clearly questions of fact which it fell within the province of the jury to determine. Although it has been sometimes considered as a question of law, what shall be reasonable notice and due diligence, yet in the present case, whether the plaintiff returned the mare, and gave notice of her unsoundness in due time, is a question of fact, depending upon the situation of the parties, their places [19] of abode, and the facility of communication between them. As the jury have decided in favour of the plaintiff upon these facts, the Court will not now interfere. It is plain that the jury gave no credit to that part of the evidence which tended to shew, that the plaintiff and defendant were seen together after the mare was discovered to be unsound, and that the plaintiff at that time neglected to give notice to the defendant. This neglect if it had been proved, would have been perhaps a waiver of the right to return the mare, but as the verdict is found, this evidence must be taken to be false. The jury have exercised a discretion, which they have a right to exercise, of believing or disbelieving any part of the evidence, and of which discretionary power many instances have occurred.

Le Blanc, in support of the rule, confined himself to the question, whether the plaintiff had used due diligence to return the mare to the defendant, and had given reasonable notice of her being unsound? This, he argued, was a question of law, arising out of facts. The undisputed facts were, that plaintiff had early discovered the unsoundness of the mare, but he took no pains to make inquiry for the defendant, to give him no-[19]-tice of the mare being unsound, or to return her till six months after he knew she was unsound. The inference of law from these facts must be, that he has not used due diligence, nor given reasonable notice to the defendant. This is like the case of a bill of exchange being dishonoured, where it is necessary in order to make the indorser liable, that the holder of the bill should use due diligence and give reasonable notice to the indorser. But in such case what is due diligence and reasonable notice, is a question of law arising from particular circumstances (a).—The plaintiff in the present case, was so far from returning the mare in proper time after he knew her to be unsound, that he endeavoured by every method to cure her, and exerted the highest act of ownership, by selling her to a third person.

LORD LOUGHBOROUGH.—Where there is an express warranty the warrantor undertakes that it is true at the time of making it. If a horse which is warranted sound at the time of sale, be proved to have been at that time unsound, it is not necessary that he should be returned to the seller. No length of time elapsed after the sale, will alter the nature of a contract originally false. Neither is notice necessary to be given. Though the not giving notice will be a strong presumption against the buyer, that the horse at the time of the sale had not the defect complained of, and

Barrs, 2 Esp. N. P. C. 673. Crib-biting is said not to be an unsoundness within a general warranty. *Broennenburgh v. Haycock*, Holt's N. P. C. 630; see also the note by the reporter. A cough, unless it be a temporary malady merely, has been held to be an unsoundness. *Shillitoe v. Claridge*, 2 Chitty's Rep. 425.]

(a) *Tindal v. Brown*, Term Rep. B. R. vol. i. p. 167.

will make the proof on his part much more difficult. The bargain is complete, and if it be fraudulent on the part of the seller, he will be liable to the buyer in damages, without either a return or notice. If on account of a horse warranted sound, the buyer should sell him again at a loss, an action might perhaps be maintained against the original seller, to recover the difference of the price (a)¹. In the present case it appears from the evidence of the farriers who saw the mare opened that she must have been unsound at the time of the sale to the plaintiff.

GOULD, J. of the same opinion, remembered many cases of express warranty, where a return was held not to be necessary.

HEATH, J.—If this had been an action for money had and received to the plaintiff's use, an immediate return of the mare would have been necessary; but as it is brought on the express warranty, there was no necessity for a return to make the defendant liable.

[20] WILSON, J. of the same opinion, recollected a cause tried before Mr. Justice Buller, at Nisi Prius, where the defendant had sold the plaintiff a pair of coach-horses and warranted them to be six years old, which were in reality only four years old. It was contended that the plaintiff ought to have returned the horses; but Mr. Justice Buller held, that the action on the warranty might be supported without a return. As to part of the evidence being contrary to the verdict, the jury have a right to use their discretion either in believing or disbelieving any part of the testimony of witnesses.

Rule discharged. (b).

ALEXANDER *against* COMBER. 1788.

The Statute of Frauds will prevent a parol agreement to buy goods without either earnest or delivery, from giving the buyer any property in them. In such case therefore the buyer cannot maintain trover against the vendor, who sells them to another person. Where a sale is not immediate, it is not within that statute.

Trover for sheep.—Tried before Mr. Justice Grose, at the last assizes at East Grinstead. It appeared that the plaintiff had agreed to buy the sheep of the defendant at Lewes Fair, and to take them away at a certain hour. There was no money paid, nor any sheep delivered. The plaintiff not coming at the time appointed, nor sending to take the sheep, the defendant sold them to another person. Verdict for the plaintiff.

A rule having been obtained to shew cause why the verdict should not be set aside, and a nonsuit entered;

Bond, Serjt., argued against the rule, that as the sheep were sold to the plaintiff, there was a sufficient property in him to maintain the action; and as they were re-sold by the defendant, a sufficient conversion on his part.

But the Court held, that the Statute of Frauds prevented any property from vesting in the plaintiff, so as to enable him to maintain trover, there being neither earnest, delivery, nor agreement in writing.

WILSON, J. observed, that where a sale is not immediate it is not within the Statute of Frauds, such as a contract to purchase a carriage when it shall be built, and the like.

Rule absolute (a)².

[21] CAMDEN, CALVERT, AND KING, *against* EDIE. 1788.

Defendants having agreed under a consolidation rule not to bring any writ of error, cannot do it, though there be manifest error on the record. But the Court will not

(a)¹ [S. P. per Mansfield, C.J. in *Caswell v. Coare*, 1 Taunt. 568.]

(b) See Term Rep. B. R. vol. i. p. 136, *Dr. Compton's case*, there cited.

(a)² See 4 Burr. 2101, *Clayton v. Andrews*.—1, *Strange*, 506, *Towers v. Sir John Osborne*. [See also *Rondeau v. Wyatt*, post, vol. ii. p. 63. *Groves v. Buck*, 3 M. & S. 178. *Garbutt v. Watson*, 5 B. & A. 613. As to the delivery sufficient to constitute an acceptance of goods within the Statute of Frauds, vide post, vol. ii. p. 316, note (a).]

grant an attachment against the attorney for having brought such writ of error, if it appears that it was not done for delay, and that he was led into a mistake (a)¹.

The plaintiffs having brought twenty-five actions on a policy of insurance against the defendant and others, a rule was obtained to consolidate; by which it was ordered (among other things) that the defendant should be at liberty to prosecute a bill filed by them in the Exchequer, upon their undertaking not to file any other bill against the plaintiffs for an injunction, nor to bring "any writ of error."

The cause went to trial, and a verdict was found for the plaintiffs for a total loss. The costs were taxed and paid by the defendant's attorney, and the damages settled between the parties themselves, who had an open account with each other. All the other defendants (except one, who became a bankrupt) paid their subscriptions.

The plaintiffs' attorney was afterwards served with an allowance of a writ of error in this cause; upon which a rule was obtained in Easter term last to shew cause why an attachment should not issue against the defendant's attorney for contempt and breach of the consolidation rule, and why all further proceedings on the allowance of the writ of error should not be stayed. On shewing cause against this rule, it appeared by the affidavit of the defendant's attorney, that he had consulted some very eminent counsel, who gave it as their opinion, that there was manifest error in the record; upon which, and also conceiving that the defendant was only bound by the rule not to bring a writ of error for delay, he brought the writ of error in question, the damages and costs being previously satisfied.

On this the Court called upon the defendant's counsel (who were Bond, Cockell, Runnington, and Marshall, Serjts.) to point out the error on the record.

They stated the stat. 25 G. 3, c. 44, which enacts, "That no person or persons shall make any policy of assurance, without inserting in such policy his, her or their own name or names, as the person or persons interested therein," &c. and that every policy made "contrary to the statute, should be void." By the declaration it appeared that the action was brought jointly by the plaintiffs Camden, Calvert, and King, stating that they caused to be made a policy, purporting thereby, and containing therein, that "Messrs. Camden and Calvert [22] (leaving out King) as well in their own names as in the name and names of every other person," &c. &c. and averring that the assurance so made was made for the benefit and on the account of them (the plaintiffs), and that they were interested in the premises, &c.

This omission of the name of King in the policy, as stated in the declaration, was a radical defect, which nothing could cure, inasmuch as it avoided the policy itself (a)². Though there was no authority decided expressly on this point, yet it was the general opinion of persons conversant in actions of this sort, that the terms of a consolidation rule only were meant to restrain the party from bringing a writ of error merely for delay, but not to extend to any manifest pregnant error on the record. That the writ in the present case was not brought for delay, was evident, as the damages and costs were paid immediately after the verdict.

Adair, Le Blanc, and Lawrence, Serjts., for the plaintiffs, in support of the rule, contended that by the terms of the rule the defendant was bound generally not to bring any writ of error; the meaning of which was, that after a fair trial had been obtained, and substantial justice done, no writ of error whatever should be brought. It was like a release of all errors in a warrant of attorney. In a legal impediment like the present, where the error is against the justice of the case, the Court will bind the party down to the terms of his consent. The rule is an undertaking to abide by whatever, from the event of the trial, should appear to be the justice of the case. The defendant may resort to equity for any purpose, except that of an injunction, if there are any real merits. But this proceeding is contrary to good faith. If the plaintiff had been aware of the error pretended, he might have precluded it expressly by the rule, or gone on with all the other actions. If the Court should allow this writ of error to be brought, the plaintiff will remain without redress, as the policy was vacated

(a)¹ [See *Baddely v. Shafto*, 8 Taunt. 434].

(a)² *Wilton and Others v. Reaston*, tried at Guildhall, after Michaelmas term, 1787.—There were several plaintiffs, and policies made in the name of "Mr. William Wilton and the rest of the owners," &c. Mr. Justice Buller held the policy was void under the statute 25 G. 3, c. 44.

and discharged. On a Judge's order to plead issuably, a defendant is not permitted to plead the Statute of Limitations, which, though a legal, is not [23] a conscientious plea. So far from this rule relating only to errors for delay, that if the words "for delay" had been inserted, they should have objected to them. *Executors of Wright, Bart. v. Nutt*, Term Rep. B. R. vol. i. 338.

An affidavit was read of the plaintiffs' attorney, that the defendants were partners at the time of effecting the policy, and as such jointly interested in the ship and cargo.

LORD LOUGHBOROUGH.—It is contrary to justice to permit the defendant to proceed in the writ of error, since he has by his own act and consent prevented the plaintiff from pursuing the common course of law in the other actions.

Cur. advis. vult.

In this term the Court said, it was not regular to take notice of the extra opinions of counsel, yet, as the attorney appeared to have been led into a mistake, discharged that part of the rule which related to the attachment against him, but made the other part absolute with costs, for staying the allowance of the writ of error.

SCHOOLE against NOBLE, LETT, AND BYRNE. 1788.

[Distinguished, *Holroyd v. Breare*, 1820, 4 B. & Ald. 47, 700. Followed, *George v. Elston*, 1835, 1 Bing. N. C. 515. Discussed, *McCormack v. Ross*, [1894] 2 Ir. R. 548.]

Where there are many defendants, and some go to trial, and obtain a verdict, but others suffer judgment by default, the Court will permit the costs and damages on the judgment by default to be deducted from the costs taxed on the postea to those defendants who had a verdict (*a*). An attorney has only such a lien on the costs, as is subject to the equitable claims of the parties in the cause (*b*).

The plaintiff brought trespass against the defendants for breaking and entering his house, &c. Defendants Lett and Byrne had suffered judgment to go by default. Noble went on to trial, and obtained a verdict. Damages were assessed against Lett and Byrne at one halfpenny each. On which Runnington, Serjt., obtained a rule to shew cause why the costs which might be taxed against Lett and Byrne on the judgment by default, and the damages assessed, should not be deducted out of the costs taxed to Noble on the postea, and allowed to the plaintiff, and in the mean time execution against them stayed.

This was moved on an affidavit, stating that the defendants Lett and Byrne had acted under the authority of Noble, who had undertaken to pay the damages and costs.

Bond, Serjt., against the rule, said that this was a new application, and against justice, inasmuch as it tended to deprive the attorney of that lien on the costs, to which he was legally entitled. But

[24] The Court held that the attorney can only have such a lien on the costs as is subject to the equitable claims of the parties in the cause, and therefore made the Rule absolute.

See 3 Wils. 396, *Barker v. Braham*.—2 Blac. 826. *Thrustout, on demise of Barnes, v. Crafter*.

(*a*) [But in an action against four defendants, where there was a verdict against one, and three were acquitted, the Court refused to allow the costs of the latter to be deducted out of the costs due from the former, *Mordecai v. Nutting*, Barnes, 145. Bull. N. P. 336, S. C. See Tidd's Pr. 1029, 8th edit.]

(*b*) [See *Nunes v. Modigliani*, post, p. 217. *O'Connor v. Murphy*, post, p. 657. *Vaughan v. Davies*, post, vol. ii. p. 440. *Dennie v. Elliott*, post, vol. i. p. 587. *Emdin v. Dashey*, 1 Bos. & Pull. N. R. 22. *Brown v. Sayce*, 4 Taunt. 322. But the King's Bench will not in general suffer a set-off of costs until the attorney's bill has been discharged. *Middleton v. Hill*, 1 M. & S. 240. *Stephens v. Weston*, 3 B. & C. 535. *Holroyd v. Breare*, 4 B. & A. 43. Tidd's Pr. 340, 8th edit. See *Hall v. Ody*, 2 Bos. & Pull. 28, where Lord Eldon, C.J., expressed himself dissatisfied with the rule adopted by the Common Pleas. See also *Worrall v. Johnson*, 2 Jac. & Walk. 216.]

VERNON, Widow, against WYNNE. 1788.

The plaintiff in replevin may pay the rent into Court for which the defendant avows (a)¹.

Replevin.—Several avowries for rent arrear. Runnington, Serjt., moved for leave to pay 9l. into Court, being the rent specified in the third avowry, on payment of which, and the costs of the action, all further proceedings might be stayed. Le Blanc, Serjt., shewed cause, contending that in this action it could not be done, because it would be permitting a plaintiff to pay money into Court, which had never yet been known, an indulgence of this kind having been always confined to defendants.

Runnington, in answer, cited Salk. 597, *Gregg's case*, in which an instance is mentioned of a plaintiff in replevin being permitted to bring the rent into Court; and Richardson's Practice of the Common Pleas, vol. i., p. 157. He contended that it might be, and was done, in all actions where the demand was certain, but not where the damages were unliquidated. Salk. 596. Barnes's Notes, 429. That this was a reasonable application, and the demand certain, was apparent from the defendant's own avowry, which stated only 9l. to be due, the whole of which the plaintiff offered to pay, with costs. Kerby, Serjt., Amicus Curiae, mentioned that he remembered in an action of trespass, where the defendant had justified for non-payment of rent in this Court, the plaintiff was permitted to pay the rent into Court.

Per Curiam. This is a reasonable application, and ought to be allowed.

Rule absolute.

See also 7 Mod. 147.

[25] DOE ON THE SEVERAL DEMISES OF THOMAS DAVIES AND JAMES WILLIAMS, THE YOUNGER, against THOMAS WILLIAMS. 1788.

A deed of release containing the words "all lands, &c. belonging, used, occupied, and enjoyed, or deemed taken or accepted as part thereof, &c." will pass leasehold lands which answer that description, as well as freehold, especially against the releasor (a)².

Ejectment for three acres of land called Portway, tried before Mr. Justice Heath at the last assizes for Hereford. The title of the lessors of the plaintiff was founded on an indenture of release of the 23d of October, 1781, between James Williams, the Elder, James Williams, the Younger (the lessor of the plaintiff), and Thomas Williams (the defendant) of the first part; James Maddey of the second part; and Thomas Davies (lessor of the plaintiff) of the third part; by which the parties of the first part conveyed all that messuage, mill, and lands, called Clock Mills, in the possession of James Williams, the Elder, James Williams, the Younger, Thomas Williams, or some or one of them, and all lands or meadows to the said messuage or mill belonging, or used, occupied, and enjoyed, or deemed taken or accepted as part thereof, to Thomas Davies as a trustee for the payment of an annuity to James Williams the Elder, for life, remainder to James Maddey for forty years, to raise portions, &c. remainder to James Williams, the Younger, in fee.

The lands in dispute were holden for the remainder of a term of 1000 years, but had been occupied with, and reputed part of the Clock Mill estate from the year 1748 to 1785.

In May, 1785, the defendant got into possession; on whose part it was objected at the trial, that these lands being leasehold, did not pass by the release of 1781. The learned Judge therefore directed a verdict to be found for the plaintiff, with liberty for the defendant to enter a nonsuit, if the opinion of the Court should be in his favour.

(a)¹ [But the Court will not stay proceedings on the application of the plaintiff upon payment of the costs up to the time of tender, where a tender has been made after the distress, but before the goods replevied. *Hopkins v. Shrole*, 1 B. & P. 382. In what cases the Court will stay proceedings at the instance of the defendants in replevin, see *Hodgkinson v. Snibson*, 3 B. & P. 603. *Banks v. Brand*, 3 M. & S. 525.]

(a)² [In what cases leaseholds will pass under a general description in a will, see *Lane v. Earl of Stanhope*, 6 T. R. 345. *Thompson v. Lady Lawley*, 2 Bos. & Pul. 303. 5 Ves. 478.]

Le Blanc, Serjt., having obtained a rule to shew cause why the verdict should not be set aside, and a nonsuit entered,

Adair and Runnington, Serjts., shewed cause.

Under the deed in question, the leasehold lands must be taken to pass as well as the freehold. The cases which have established the rule of law, that where the general words, "lands, tenements, and hereditaments," are used, freehold lands only will pass, have arisen on the construction of wills containing no specific local description of other lands not freehold. Though [26] it may be fair to infer, that where the enumeration of lands concludes with the word hereditaments, only lands of inheritance will pass, yet where in a deed there is so exact and specific a description as the present, there leasehold lands which have in fact been holden with and deemed part of the same estate with the freehold for a considerable length of time, must be included in that specification. If this be denied, the right of the grantor to convey them is denied; for as he has described all the premises, if the leasehold be not allowed to be included in that description, his right to include them is denied, and his intention frustrated.

Le Blanc, *contrà*. The leasehold lands cannot pass by this deed, if either the nature of the conveyance or the words of it be considered. The nature of a lease and release, is adapted to freehold, but not to leasehold estates; the proper conveyances of term for years being by assignment.

The words "all lands," &c. must be construed to mean only freehold, since there are freehold lands sufficient to answer them.

In the construction of wills, where great latitude is allowed to the intention of the testator, it has been uniformly decided even against strong indications of intention, that where general and comprehensive words are used in the disposal of lands, if there be freehold lands to which those words will apply, such lands only will pass. If it be thus with respect to wills, much stronger will the ease be with respect to deeds, where no particular regard is paid to intention. *Rose v. Bartlett*, Cro. Car. 292. *Day v. Trigg*, 1 P. Wms. 286. *Davies v. Gibbs*, 3 P. Wms. 26. *Knotsford v. Gardiner*, 2 Atk. 450. *Pistol on demise of Randal v. Riccardson*, B. R. Hil. 24 Geo. 3 (a).

LORD LOUGHBOROUGH.—This being a case arising on a deed, is to be distinguished from those of a like nature which have arisen on wills. In general, where there is a question on the [27] construction of a will, neither party has done any thing to preclude himself from the favour of the Court. But in the present instance, the rule of law applies, that "a deed shall be construed most strongly against the grantor." For if it be determined that the lands in dispute did not pass by the release of 1781, the defendant will be permitted, after an interval of near forty years, to invalidate his own conveyance, for the purpose of obtaining an unjust possession.

GOULD, J.—This not being the case of a devise, is not governed by *Rose v. Bartlett*, or the others cited. But even if a devise had been made in such specific and particular words as are contained in this deed of release, I should have very little doubt but that all lands would pass, as well leasehold as freehold. My Lord has taken a just distinction between the construction of devises and deeds of conveyance, as to the

(a) *Pistol on demise of Randal v. Riccardson*, Hil. 24 Geo. 3, B. R.(b).

Ejectment for two leasehold farms in Cumberland, tried at Carlisle before Mr. Justice Buller. The case reserved, stated that one Christian Riccardson being seised in fee of several lands, and also possessed of the two farms in question for the remainder of two terms of 1000 years, devised "all and every of his several lands, messuages, tenements, and hereditaments, whatsoever and wheresoever, whereof he was seised and interested in or entitled to," to his son for life, remainder to the heirs of his body. He then devised his personal estate to his wife and daughter, and made the wife sole executrix.

The question was, whether the son took the leasehold lands by the above words of the will, or whether they were part of the personal estate?

After two arguments, Lord Mansfield delivered the opinion of the Court, "That the leasehold lands did not pass to the son, but were part of the personal estate."

(b) [S. C. 2 P. Wms. 459(n). The authority of this case is doubted by Lord Kenyon in *Lane v. The Earl of Stanhope*, 6 T. R. 353. But see *Thompson v. Lady Lawley*, 2 Bos. & Pul. 316, where Lord Eldon, C.J. considers it a case of great authority.]

equal favour to which both parties are entitled in the former, and the strictness which ought to prevail in the latter. The word "grant" is as proper to convey leasehold as freehold property.

HEATH, J. of the same opinion.

WILSON, J.—The rule of construction established in *Rose v. Bartlett*, and the other cases, with regard to devises, does not extend to the present case of a deed. A conveyance by lease and release is certainly most properly used to pass estates of inheritance, but it may also convey a leasehold interest. If the leasehold lands had been expressed as such in this deed, they would clearly have passed; if the intention of the parties at the time was to convey them, they shall also pass. That such was their intention sufficiently appears from the circumstances of the case, and from the lands having been considered as part of the Clock Mill estate during such a number of years. The defendant, who was one of the grantors, shall not be suffered to deny the effect of his own deed.

Rule discharged.

[28] BALDWIN *against* TANKARD AND OTHERS. 1788.

A Judge's certificate that a Custom House officer "had probable cause for seizing goods" does not extend to injuries accompanying such seizure, so as to prevent the plaintiff from recovering damages and costs under stat. 23 Geo. 3, c. 70, s. 29, and 26 Geo. 3, c. 40, s. 31 (a).

Trespass against the defendants who were officers of the Customs, for forcibly entering the plaintiff's house, breaking locks, doors, &c. making disturbance, &c. and seizing the goods, &c. to wit, one piece of printed callico, &c.

Plea, not guilty.

The cause was tried before Mr. Justice Ashhurst, at the Lent Assizes, 1787, at Aylesbury, and a verdict found for the plaintiff with 100l. damages. But the Judge, being applied to by the counsel for the defendants, certified, "That there was a probable cause for the defendant seizing the goods."

In Easter term, 1787, a rule was obtained to shew cause why the plaintiff should not enter up judgment for his damages and costs, notwithstanding the Judge's certificate.

This rule in Trinity term was enlarged till Michaelmas following, and in that term was further enlarged till Hilary term, when Adair, Serjt., argued that as the Judge had certified on the record a probable cause of seizure, under the statutes of 23 Geo. 3, c. 70, s. 29, and 26 Geo. 3, c. 40, s. 31, the plaintiff was entitled to no more than twopence damages, besides the value of the goods.

In support of the rule, Le Blanc and Lawrence, Serjts., argued that the statutes, and the certificate of the Judge extended only to seizing the goods and not to any injuries accompanying the seizure, such as were charged in the declaration. The verdict is general, the several charges might have been distinguished, on the separate counts, but the jury have found the defendants guilty of all, and having given above 40s. damages, the plaintiff is entitled to them and his costs.

Cur. adv. vult.

In this term the Court declared their opinion in favour of the plaintiff, and made the

Rule absolute.

[29] LEWIS *against* PIERCY. 1788.

Where a debt arises before bankruptcy, but a verdict is obtained and costs taxed after, the costs are considered as part of the original debt, and the certificate extends

(a) [So where in trespass against Custom-House officers for taking plaintiff's goods, which had been returned in a deteriorated state before action brought, a verdict was found for the plaintiff for the difference in price between the value of the goods at the time of the seizure and the time when they were returned, and the Judge certified that there was probable cause for the seizure; it was held that the plaintiff was not precluded by the 28 Geo. 3, c. 37, s. 24, from taking out execution for the damages found by the jury. *Laugher v. Brefitt*, 5 B. & A. 762.]

to both (a)¹.—Insuring in the lottery is not gaming within the stat. 5 Geo. 2, c. 30, s. 12, which will prevent a bankrupt's certificate being allowed.

[Held overruled, *Walker v. Barnes*, 1814, 5 Taunt. 779.]

Kerby, Serjt., obtained a rule to shew cause why the defendant who was in execution should not be discharged out of custody, on the following affidavit:

"That the debt arose before he became a bankrupt, but that the verdict was obtained and the costs taxed after the bankruptcy, though before his certificate was allowed."

An application having been previously made to Mr. Justice Gould for a discharge, he directed the Court to be moved, on a suggestion of the attorney for the plaintiff, that the costs having accrued after the bankruptcy, made a new debt.—Kerby argued that the costs were part of the original debt, and that as the defendant had obtained his certificate, his privilege extended to both.—*Boutefleur v. Coats*, Cowp. 25.—*Graham v. Benton*, 1 Wils. 41 (a)².

GOULD and WILSON, Justices, (Lord Loughborough and Heath, Justices, not being in Court), said that the certificate seemed to them to extend to the costs as well as the debt itself.

Bond, Serjt. on shewing cause, did not urge that the costs were not to be considered as part of the original debt, but produced an affidavit stating that "within twelve months before the bankruptcy, the defendant had lost 500l. by insurance in the English and Irish lottery" which he said was within the statute 5 Geo. 2, c. 30, s. 12, and therefore deprived the defendant of any benefit of a certificate. But

(a)¹ [In order to render the certificate a bar to the costs there must have been either a debt in existence previously to the bankruptcy, or judgment for the costs must have been signed before the bankruptcy, which itself constitutes a debt, *Ex parte Charles*, 14 East, 197. *Willett v. Pringle*, 1 N. R. 190. Therefore where damages were recovered in an action for seduction, and the verdict was before, but the judgment after the bankruptcy, the certificate was held to be no bar. *Buss v. Gilbert*, 2 M. & S. 70. The sum recovered was not a debt, but merely damages until judgment signed. So where the defendant had a verdict, and the plaintiff after verdict, but before judgment, became bankrupt, it was held that the costs taxed for the defendant were not barred by the plaintiff's certificate. *Walker v. Barnes*, 1 Marsh. 346. But where a debt exists prior to the bankruptcy, it is immaterial when the judgment is obtained, for the costs bear relation to the original debt, and not merely to the judgment as in the above mentioned cases, where damages only were due before the bankruptcy, or where the costs are awarded to the defendant. *Scott v. Ambrose*, 3 M. & S. 326. *Dinsdale v. Eames*, 2 B. & B. 8.

The case of *Watts v. Hart*, 1 Bos. & Pul. 134, is at variance with the authorities above cited. It was there held, that if a plaintiff become bankrupt after a nonsuit at Nisi Prius, and before judgment of nonsuit, the costs of the nonsuit are a debt proveable under the commission. That case however was reluctantly decided on the authority of *Longford v. Ellis*, which has been since overruled (see the next note), and of *Hurst v. Mead*, 5 T. R. 365, which rests upon no better foundation; see also *Ex parte Todd*, cited 3 Wils. 270, and quere *Beeston v. White*, 7 Price, 209.

Costs being in the nature of an accessory, are barred where the debt to which they bear relation is barred, for where the right to the principal is barred, the right to the accessory is barred also. *Van Sandau v. Corsbie*, 3 B. & A. 19. Thus where there is a judgment against the bankrupt before his bankruptcy, and it is revived by sci. fa. after the bankruptcy, the costs of the sci. fa. have reference to the judgment, and are barred by certificate. *Philips v. Brown*, 6 T. R. 282. So the costs of a writ of error upon a similar judgment affirmed (*ibid.*), *Graham v. Benton*, cited 14 East, 201. And so where plaintiff sued defendant for a debt before the bankruptcy of defendant, and went on with the suit after his bankruptcy, and had judgment, and the defendant obtained his certificate and afterwards brought a writ of error which was nonprossed, and costs of nonpros in error were awarded against him, it was held that the defendant was discharged by his certificate from these costs. *Scott v. Ambrose*, 3 M. & S. 326.

As to proving costs, see *Ex parte Hill*, 11 Ves. 646. *R. v. Davis*, 9 East, 318. *Ex parte Poucher*, 1 G. & J. 385. 6 Geo. 4, c. 16, s. 58.]

(a)² [S. C. 2 Str. 1196. 14 East, 200 (n).]

The Court were clearly of opinion that insuring in the lottery was not gaming within the statute, and made the

Rule absolute for the defendant's discharge.

B. R. EAST. 25 GEO. 3.—LONGFORD *against* ELLIS (*b*).

This was an action of slander. Verdict for the plaintiff.

Law had obtained a rule to shew cause why the defendant should not be discharged out of the custody of the Sheriff of Leicestershire, upon common bail, as to this action, he having obtained his certificate under a commission of bankrupt, and in the mean time all proceedings be stayed.

The facts were,

That the action was brought for words spoken of the plaintiff in his trade, tried at the last Summer Assizes at Nottingham, and a verdict for the plaintiff and 10l. damages.

That on the 28th of September 1784, between verdict and judgment, the defendant became bankrupt.

[30] On the 9th of December 1784, final judgment was signed, and increased costs taxed at 45l. 10s.

On the 27th of January 1785, the plaintiff sued out a test. ca. sa. into Leicester-shire, upon which the defendant was taken.

Balguy, against the rule contended that this action sounded merely in damages, and therefore that it does not become a debt until it be ascertained by judgment, and could not be proved under the commission, and if so, could not be discharged by the certificate.

Law, for the rule, cited the case of *Graham v. Benton*, 1 Wilson, 41, where it is holden that a bankrupt getting his certificate after judgment, shall be discharged on motion; and contended that in this case the debt became ascertained by the verdict. He also cited *Blandford and Foot*, Cowp. 138, to shew that if the cause of action arises before bankruptcy, interest and costs accrued after, are likewise discharged by stat. 12 Geo. 3, c. 4, s. 2; and he also contended that the costs followed the verdict.

Balguy replied, that the cases cited were founded on actions brought for an existing debt, at the time of bringing the action; which was not the case here, for even at the time of the bankruptcy there was nothing but a mere right to recover damages.

WILLES, J.—There is no distinction between a tort and a contract, where a judgment follows the verdict.

Rule absolute.

See Cooke's Bank. Laws, p. 227, last edit.

ROE, ON THE DEMISE OF PERRY, *against* JONES AND OTHERS. 1788.

A possibility coupled with an interest is devisable (*a*).

This was an ejectment to recover a house and garden, &c. at Ivelchester, tried at the Summer Assizes 1787, at Bridgewater, in which a special verdict was found as follows:

"John Lockyer, being seised in fee of the premises in question, on the 13th of June 1734 made his will, and after charging all his lands and hereditaments with the payment of certain annuities, devised in the following manner:

"And my said lands and hereditaments, thus charged as aforesaid, I give unto my brother Thomas Lockyer, until his son John, or any other of his younger sons, shall attain the age of twenty-one years, which shall first happen; and in case he shall

(*b*) [S. C. 14 East, 202 (*n*). Overruled by *Ex parte Charles*, 14 East, 197. *Bass v. Gilbert*, 2 M. & S. 71.]

(*a*) [Affirmed on error in K. B. 3 T. R. 88. See *Goodtitle dem. Gurnall v. Wood*, Willes, 212. But a mere possibility, like that which an heir has from his ancestor, is not devisable (3 T. R. 93) nor is a possibility devisable where the person who is to take it is not ascertained. *Doe d. Calkin v. Tomkinson*, 2 M. & S. 165. *Fearne Cont. Rem.* 371.]

have no younger son that shall live to attain the said age, but shall have only one son that shall live to attain the said age, then until such only son shall attain the said age, in trust that the clear rents, issues, and profits of the premises, after all charges, and reparations deducted (except my now dwelling-house at Ivelchester, and the garden and orchard thereto belonging, which I will shall be enjoyed by him for his own use during the time above-mentioned), be preserved and improved; and the same, with the produce thereof, I will shall be laid out and employed in manner as is herein-after directed [31] with regard to the overplus of my personal estate. And when and as soon as my said nephew John Lockyer, or any other of the younger sons of my said brother Thomas Lockyer, born or to be born, shall attain the age of twenty-one years, then I give my said dwelling-house, orchard, and garden, and all other my said lands and hereditaments, thus charged as aforesaid, unto my said nephew John Lockyer, or unto such other son as for the time being shall be a younger son of my said brother Thomas Lockyer, and shall first attain his said age of twenty-one years, and to the heirs and assigns of such younger son for ever. But if my said brother Thomas Lockyer shall have but one son that shall live to attain the said age, then I give the same unto such only son, his heirs and assigns for ever."

The testator died on the 23d of October 1734, leaving the said Thomas Lockyer his brother his heir at law, and Joseph Tolson Lockyer and John Lockyer, the two sons of Thomas Lockyer, living at the time of his decease, and who were the only issue of the said Thomas Lockyer. John Lockyer, the younger son, died on the 6th of June 1751, under twenty-one years of age. Joseph Tolson Lockyer married Maria Perry, the lessor of the plaintiff, on the 20th of February 1752, and on the 26th of September 1759 made his will in the following words: "All such worldly estate, of what nature or kind soever, whether in possession, remainder, or reversion, that I shall die seised or possessed of, interested in, or entitled to, invested in, or shall belong to me at my decease, wheresoever or howsoever, in any manner or wise, I do give, devise, and bequeath, and every part and parcel thereof, fully, wholly, and absolutely, unto my wife Maria Lockyer, to be by her, her executors, administrators, and assigns, peaceably and quietly held, occupied, and enjoyed for ever, free from the claims or demand of any other person or persons whatever out of, from, or to the same, or any part thereof."

Joseph Tolson Lockyer died in March 1765. Thomas Lockyer, the father of Joseph Tolson Lockyer, entered into possession of the premises on the death of John Lockyer, the original testator, and continued in possession till his death in 1785, when the defendants obtained possession.

This cause was argued in Michaelmas term 1787, by Lawrence, Serjt., for the lessor of the plaintiff, and Bond, Serjt., for the defendants; and in Easter term last by Le Blanc, Serjt., [32] for the lessor of the plaintiff, and Rooke, Serjt., for the defendants.

On behalf of the lessor of the plaintiff it was contended, that this was a vested interest in Joseph Tolson Lockyer, though it was subject to be divested by the birth of another son of Thomas Lockyer. *Boraston's case*, 3 Rep. 19. *Taylor v. Biddal*, 2 Mod. 289. *Edwards v. Hammond*, 3 Lev. 132. *Stocker v. Edwards*, 2 Shower, 398. *Gibson v. Lord Mountfort*, 1 Vezey, 485. *Goodright, on demise of Larmer, v. Searle et Ux.*, 2 Wils. 29. *Pelham v. Gregory*, 5 Browne's Cas. in Parl. 435. If it were a vested interest, it was clearly devisable.

But supposing it to be only a possibility, it is in that case also devisable. A possibility is transmissible. It may be assigned by commissioners of a bankrupt. 3 P. Wms. 132. A fine will pass it. 3 P. Wms. 372. *Vick v. Edwards*. Pollexfen, 54. *Weale v. Lower*. It is also descendible. 2 Ventr. 347. 1 P. Wms. 566.

If then it be transmissible, assignable, and may descend, there can be no reason why it should not also be devised. The Statute of Wills (27 H. 8, c. 10, s. 11) has the word "hereditaments"; but whatever is transmitted from the ancestor to the heir is an hereditament, as the heir does not take by purchase, but by descent. That a possibility is in truth devisable, is determined by the case of *Selwin v. Selwin*, 1 Black. 222, and *Roe, on demise of Noden, v. Griffith*, id. 605, which rule Blackstone has adopted in his Commentaries (vol. ii. p. 290).

For the defendants it was argued,

1. That this was not a vested interest in Joseph Tolson Lockyer, (since during the life of the father another younger son might be born,) but was only a possibility.

That if it were vested, yet the ejectment was barred by the Statute of Limitations; for after Joseph had attained the age of twenty-one, the interest of the father in the mansion-house ceased, and his possession was from that time adverse; but that possession continued above twenty years.

2. That being a possibility, it was not devisable. Descendible and devisable are not convertible terms. A right of entry may descend, but cannot be devised. A possibility at common law was not assignable. Shep. Touchst. 238, 414. Moore, 806. [33] Popham, 5. And is only assignable on a bankruptcy, by virtue of the statute (13 Eliz. c. 7), which says, "whatever the bankrupt may depart withal;" but as he may release a possibility, he may depart with it. A fine levied of it operates only by estoppel against the cognizor. The possibility of a term may be devised, it being holden, that as the remainder of a term must go to the executor, he takes it as a trustee for the devisee. *Wind v. Jekyl*, 1 P. Wms. 572. But in that very case it is expressly said by the Chancellor, that a man cannot devise a fee simple, which he has not at the time of making the will. In pleading a devise, it is stated that the testator was seised, but he cannot be seised of a mere possibility. The Statute of Wills puts a devise on the same footing with a conveyance, but a mere possibility cannot be the subject of a grant. A contingent freehold interest was never considered in the law as being devisable, till it was so considered by Lord Mansfield in *Selwin v. Selwin*. But the decision of the Court in that case was founded on the bargain and sale, and recovery, being all one conveyance. *Wright v. Wright*, 1 Vezey, 409. Fitzgibbon, 236. *Bunter v. Coke*, 1 Salk. 237. *Bishop v. Fountain*, 3 Lev. 427. *Pheasant v. Pheasant*, 2 Ventr. 340. 1 Roll. Abr. 609.

3. Supposing this to have been a devisable interest, it did not pass by the will of Joseph Tolson Lockyer, not being specifically named.

Cur. advis. vult.

In this term the following judgment of the Court was delivered by

LORD LOUGHBOROUGH.—Three questions have been made in this case. 1. Whether there was a vested interest in Joseph Tolson Lockyer? 2. Whether, if it were contingent, it was devisable? 3. Whether it passed by the will of Joseph Tolson Lockyer?

The discussion of the first question is unnecessary; for taking it to be a springing contingent executory use in Joseph, we are all of opinion that it was devisable, and passed by his will.

The case of *Selwin v. Selwin* has determined this point: and we think ourselves bound by that determination, confirmed as it is by the case of *Moor et Ux. v. Hawkins* ([2 Eden's Cases in Chancery, 342, S. C.]), in Chancery, before Lord Northington, in the year 1765, which was this:

[34] "James Grubb devised all his real estates, in trust for his son James, and if he should die without issue under age, then, that all his estates should go to Cochran, his heirs and assigns."

Cochran devised "all the estates whereof he was seised in possession, remainder or reversion to the plaintiff, and died in the lifetime of James Grubb the son, who afterwards died under twenty-one and without issue."

On a bill brought by the devisee of Cochran, a question was made, whether the possibility given to Cochran was devisable? Lord Chancellor said, "I have never had any doubt, since I was twenty-five years old, but that these contingent interests were devisable, notwithstanding some old authorities to the contrary. I sent the question however into the King's Bench in the case of *Selwin v. Selwin* for the satisfaction of the parties, and the certificate of the Judges in that case implies, I think, that they agreed with me in this opinion." Upon which the Solicitor General de Grey, and Mr. Skynner waived all further argument on the other side, and Lord Northington added, "This argument is properly withdrawn, as the point is settled and ought not to be shaken. It is a liberal and right determination."

On these authorities therefore we give

Judgment for the lessor of the plaintiff.

Rooke then moved to stay the postea, till the event of a writ of error which the defendants meant to bring, should be known. This was granted on condition that they should undertake to account for the mesne profits from the day of the demise.

NOBLE *against* KING AND SMITH. 1788.

In an action against executors in their own right, on a covenant for good title and quiet enjoyment against any person or persons whatever, contained in an assignment of a lease of the testator by way of mortgage, the declaration must shew a breach by some act of the covenantors, [or that the evictor's title commenced prior to the assignment made by them] (a)¹.

This was an action of covenant brought against the defendants in their own right, (who were executors of one Joseph King), for a breach of the following covenant contained in the assignment, by way of mortgage of a lease belonging to the testator :

"And further, that for and notwithstanding any act, deed, matter, or thing whatsoever, had, made, or done, by the said Mary King and Samuel Smith, or either of them, the said [35] therein before recited and assigned indenture of lease is a good and sufficient lease, valid in law, and the term of years thereby created is not forfeited, surrendered, or otherwise determined, or become void or voidable. And also, that they the said Mary King and Samuel Smith, have not nor hath either of them, at any time or times, since the decease of the said Joseph King, made, done, or committed, or wittingly or willingly suffered any act, matter, or thing, whereby, or by reason or means whereof the said piece or parcel of ground, and the messuage or tenements, shop and premises, or the term of years thereof granted as aforesaid, are, or is, or shall or can be in any wise incumbered or charged in title, charge, or otherwise howsoever. And that for, and notwithstanding any such act, they, the said Mary King and Samuel Smith, or one of them, now have in themselves, herself, and himself, good right, full power and lawful and absolute title and authority, to bargain, sell, and assign the said piece or parcel of ground, and the messuages or tenements, shop and premises thereon erected, with their and every of their appurtenances, unto the said John Noble, his executors, administrators and assigns, in manner and form aforesaid : and also that it shall and may be lawful to and for the said John Noble, his executors, administrators and assigns, from time to time, and at all times from and after breach or default shall happen to be made in payment of the said sum of, &c. and lawful interest for the same, peaceably and quietly to enter into the said demised premises, &c. and to take the rents and profits, &c. (in the usual way) without the lawful suit, let, trouble or denial of or from the said Mary King and Samuel Smith, or either of them, their, or either of their executors, administrators, or assigns, or any other person or persons whomsoever."

The breach assigned was, that the plaintiff was evicted in consequence of a judgment in ejectment, obtained by one John Yates having lawful title to the premises.

To this declaration the defendant specially demurred. The causes of demurrer were, "That it does not appear by the said declaration, that the said John Yates therein mentioned, at the time of the supposed eviction and expulsion therein also mentioned, or at any time before or since, had any lawful title to the said premises by, from, or under, the said Mary and Samuel, or either of them, or by reason or means [36] of any act, matter, or thing made, or committed, or wittingly, or willingly suffered by them the said Mary and Samuel, or either of them, &c."

Joinder in demurrer.

This was argued in Easter term by Runninton, Serjt., in support of the demurrer, who contended, 1st. That executors can only be understood to covenant against their own acts ; the words therefore, "any other person or persons whomsoever must be restrained to persons claiming under them" (a)².

2d. That it does not appear, that Yates's title commenced by any act of the

(a)¹ [But where from the special circumstances of the case it can be gathered that the person evicting had a lawful title not derived from the plaintiff, it is sufficient after verdict, though there is no express allegation of that fact. *Campbell v. Lewis*, 3 B. & A. 392. So it is sufficient if it be stated that the title of the party evicting accrued to him before or at the date of the conveyance to the plaintiff, or that his title was under the defendant. *Foster v. Pierson*, 4 T. R. 617. *Hodgson v. East India Company*, 8 T. R. 278. 2 Saund. 181 a. notes. 5th edit.]

(a)² Shep. Touchst. c. 7, p. 163, fol. edit.—1 Burr. 287. 3 Burr. 1640. Aleyn, 27. Aleyn, 41. Term Rep. B. R., vol. i. 310, 672.

defendants, or prior to the assignment made by them to the plaintiff, who might therefore have been evicted by means of some act done by himself since the assignment.

Le Blanc, Serjt., *contrà*. This is an express covenant for quiet enjoyment, and was intended to go farther than the usual covenants by executors. The words cannot be restrained, for the prior covenants against their own acts were sufficient to protect the plaintiff to that extent. This therefore is an additional covenant. In the case of *Woodroffe v. Greenwood*, Cro. Eliz. 517, a covenant of this kind was taken against the covenantor; and in *Mountford v. Catesby*, Dyer, 328, the same doctrine is laid down, though that was assumpsit for quiet enjoyment, &c. against all persons, &c. It was there holden that the undertaking extended to a trespasser, and though in *Vaughan*, 120, that part of the case is denied, and it is said that the warranty only related to one having legal title, still that case applies to the present.

As to the second objection, it was not material to state in the declaration, that Yates's title was paramount to that of the plaintiff—the defendants ought to have pleaded it, after verdict this objection would not prevail, and is not now a cause of demurrer.

Cur. adv. vult.

In this term, on the second point made by Runnington, the Court gave Judgment for the defendants.

Adair, Serjt., then moved to amend the declaration, which the Court refused, on the ground that they would not interfere [37] to assist the plaintiff in an action brought against executors in their own right, who appeared only to have acted in the disposition of the testator's effects.

JOHN COOPE, JOSEPH COOPE, WILLIAM JESSER COOPE, CHARLESSON, PIERCY THE ELDER, PIERCY THE YOUNGER, PRITZLER, AND BROWN, *against* EYRE, ATKINSON, WALTON, HATTERSLEY, STEPHENS, AND PUGH. 1788.

A. B. C. and D. enter into an agreement to purchase goods in the name of A. only, and to take aliquot shares of the purchase; but it does not appear that they are jointly to resell the goods. On failure of A. the ostensible buyer, B. C. and D. are not answerable to the seller as partners with A. ([See *Waugh v. Carver*, post, vol. ii. p. 235, and the note there.])

This was an action brought by the owners of a Greenland ship called the "Earl of Chatham," against the defendants, on an agreement to purchase oil, the cargo of the ship.

The declaration stated, that on the 29th of August, 1786, the plaintiffs sold the cargo to the defendants, at the rate of 20l. per tun, to be received as soon as it was boiled and ready. That by way of collateral security, two bills of exchange were deposited in the hands of the plaintiffs, one of which was accepted by defendants Eyre, Atkinson and Walton. That the sale being so made, and it being expected that the defendants would not take away the oil pursuant to the terms of the sale, it was afterwards agreed between the plaintiffs and defendants, by the name of Benjamin Eyre and Co. "that the plaintiffs should keep the oil in their possession till the 1st of January following; and if the defendants did not pay for it on or before that day, the plaintiffs were to be at liberty to authorize the broker to resell it at the best price he could get; and if, upon such resale, the oil should not produce 20l. per tun with all charges, &c. the plaintiffs were to deduct the difference of the price out of the bills placed in their hands as a collateral security." That the defendants neither paid for nor took away the oil; whereupon the plaintiffs authorized the broker to resell it. That the deficiencies upon the resale amounted to 4000l. besides brokerage, &c. 100l. That the bill of exchange accepted by the defendants, was presented to them for payment, and refused.

Second count. Sale to defendants; their refusal to pay or take the oil. Resale at a loss of 400l. and expences 100l. There were also the common counts—damages 3000l.

[38] Plea, general issue, by all the defendants except Eyre, who suffered judgment by default, with notice that damages would be assessed against him according to the event of the cause. Before the action was brought Eyre and Co. had become bankrupts.

This was tried at the sittings after last Hilary term, before Lord Loughborough by a special jury, when it appeared, that on the 24th of August, the defendants, Eyre for himself and partners (who were Atkinson and Walton, general merchants) Hattersley for himself and Stephens, who were oil merchants, and Pugh for himself and son (a)¹, who were also oil merchants, agreed to purchase jointly as much oil as they could procure, on a prospect that the price of that commodity would rise. That Eyre should be the ostensible buyer, and the others share in his purchase at the same price which he might give. Hattersley and Co. were to have one-fourth, Pugh one-fourth, and Eyre and Co. the remaining moiety. That they bought large quantities of oil belonging to other ships, and other traders besides the plaintiffs, in the name of Eyre and Co. That Hattersley and Pugh occasionally came forwards and gave directions as to the delivery of the oils, and otherwise interfered in the transaction, and also made many declarations, "that they were all jointly interested in the different purchases, and that there was a general concern between them" (a).²

[39] On the part of the defendants, it was insisted on at the trial, that the contract for sale was made between the plaintiffs and Eyre and Co. only, and that the agreement which the defendants entered into between themselves, was only a sub-contract, and did not constitute a partnership. Lord Loughborough, after declaring his opinion (that as the defendants did not appear to have been jointly concerned, further than the purchase of the oil, they had not such a joint interest in the profits and loss as the law made necessary to a partnership), directed a verdict to be found for them, which was accordingly done.

Marshall, Serjt., having obtained a rule to shew cause, why a new trial should not be granted on the misdirection of the Judge, in Easter term,

Bond and Le Blanc, Serjts. shewed cause. The only question is whether the three houses jointly contracted with the owners of the ship, so as to make them partners? This could not be, since in order to make men partners, they must either pledge their joint credit, or be equally interested. Now the credit was here given to Eyre and Co. alone, and the shares of the purchase were unequally divided. Whether it be a secret or avowed partnership, the principle is the same; the parties must be possessed like joint tenants per my et per tout; each must be interested in the whole, and have a right of survivorship. But if Eyre and his partners had died, Hattersley and Pugh could have had no claim to their shares of the purchase, which would have vested in

(a)¹ The son died before the action was brought.

(a)² The evidence as to this point was in substance as follows:

Garforth, the broker, proved the contract signed by Eyre for himself and Co.—General orders from Eyre only, to purchase any quantity of oil which might offer—Hattersley and Pugh told him they were to have a part of what was purchased in the firm of Eyre and Co. and that they were jointly concerned. They went to receive a cargo sold by Thwaites at Blackwall. Thwaites, who had also sold oil to the defendants, proved that Hattersley said, "It is all the same whether Eyre or I buy it—it is the same concern;" and that Pugh said, "Hattersley and I am concerned;" that they attended to see the oil gauged. Strickland, who had the care of Greenland Dock, proved that Hattersley and Pugh said, "We have purchased your oil." That on failure of Eyre and Co. Pugh sent an order not to deliver the oil of the ship "Britannia." which had been purchased by Eyre and Co. and had the cellars locked.

Kilbington sold oil to Eyre and Co. by Garforth the broker, delivered to Hattersley, who gave in payment a bill accepted by Eyre and Co. and his own note to indemnify the witness in making an indorsement.

Captain Hastings sold oil to Eyre and Co. by the same broker, for which Pugh signed an agreement.

Captain Dowson also sold oil by Garforth to Eyre and Co. for which Pugh gave a receipt; and being asked whether the buyers were responsible persons, told the witness that he was safe, saying, "I am concerned, Hattersley is concerned, and there is a house at Norwich which can buy us all." Pugh afterwards repeated this in the presence of Hattersley, who acknowledged it to be true.

Phelps proved that he was agent to sell oil for a Mr. Yeomans, and not trusting to Eyre only, whom he considered as a mere speculator, required the names of the others concerned to be given in, upon which Garforth the broker gave in the names of Hattersley and Co.

their executors. The plaintiffs only contracted with Eyre and Co., there was no privity between them and the other defendants.

If a lessee makes an under-lease, the landlord cannot sue the sub-lessee for his rent. If a man should buy a set of horses and sell a pair of them, the buyer of the pair would not be liable for the whole set, in default of the original purchaser.

In *Hoare v. Dawes* (Doug. 371), and *Grace v. Smith* (2 Black. 998), it is established as essential to a partnership, either that there should be a contract to share profit and loss, or that the parties should offer their joint credit to the vendor. In *Hoare v. Dawes*, the ostensible agent was alone liable. There a number of persons employed a broker to procure others to join in the purchase of tea; but there is no material difference whether a broker be jointly employed to make a purchase, or separately to find joint-purchasers.

The agreement between the defendants can only be considered as a sub-contract, and not of such a nature as to constitute a partnership.

Adair, Marshall and Runnington, Serjts., in support of the rule, admitted that a participation of profit and loss was necessary to constitute a partnership, and argued that this was a contract of that nature. Whether the agreement be, to divide the goods themselves at a given time, on the produce on the sale of them; each party runs the same risk, and each has his share of profits and loss, either in the increased or decreased value of the goods, or the increased or decreased price for which they might actually be sold.

The defendants, Hattersley and Pugh, occasionally permitted their names and credit to be used, and holden out as persons jointly concerned: neither of them could say "Non hæc in federa veni," while the speculation promised well, and they feared that the whole profit would belong to the assignees of Eyre and Co., they went to Greenland Dock, to secure to themselves their respective shares of the concern; this was holding themselves out as jointly concerned in some of the contracts: but if they were concerned in some, they were so in all, as they were all made under the same order. It was known that Eyre had several other persons concerned with him, otherwise he could not have gained credit to so large an amount; but it was not necessary that the vendors should know who the private partners were; they gave credit to them though not by name. The broker would not have made a bargain which could not be fulfilled; he knew that he was acting for responsible persons. But it shall not be in their power after three months have elapsed, by their own act to convert a partnership into a mere agreement. In the case of *Riche v. Coe* (Cowp. 636), the owners of a ship let for a term of years to the master, who covenanted to repair her at his sole expense, were held liable for repairs, though the ship-builder supposed the master to be the owner, and gave credit only to him.—The firm of a house may have a different meaning according to the nature of the trade. Eyre and Co. as general merchants might mean Eyre, Atkinson and Walton, but in the oil trade (which was known to be an extraordinary concern) Eyre and Co. meant Eyre and the other defendants, because they were all concerned together in the oil contracts. It is objected that this is not a partnership but only a sub-sale or sub-contract. A sub-contract is a secondary contract depending upon some primary and antecedent one. In the case of a purchase, of goods, it means a subsequent agreement to take a part of what has been previously bought, it is like an under-lease of lands. But a previous agreement to share in an intended purchase is a contract of partnership. So if before a lease was granted, the intended lessee were to agree to let another have a share in the concern, that could not be regarded as a sub-contract, the person sharing would in such case be deemed a co-lessee in equity, and would be liable to the rent and covenants; for qui sentit commodum, sentire debet et onus.—It could not be a sub-sale to Hattersley and Pugh, because each was to have a share on the same terms as Eyre and Co. purchased. But Eyre and Co. were merchants, and merchants never buy to sell again at prime cost. Hattersley and Pugh must therefore be said to have shared originally in these bargains, and not to have purchased any second part of them. The spirit of buying and selling is gain, the spirit of partnership is mutual participation of gain.

It is also objected, that the relation of partners does not exist where one cannot bind the whole, and here no one could sell all that was bought.

This rule is right, but does not apply. The broker did not buy a specific lot for each, but one purchase for all. Till they divided it therefore, each was entitled to

it per my & per tout, for each had an undivided share. As Eyre could authorize the broker to buy the whole, so could he authorize him to sell it. Suppose that Eyre had actually sold it, neither Hattersley nor Pugh could have maintained trover against the vendee for their shares; because any joint owner of a mere personal thing, may sell it, and the vendee will have a good title; the co-proprietors can only call upon the vendor for their shares of the purchase-money. If Eyre, before division, had sold the whole at a great profit, Hattersley and Pugh, though they had never advanced any money, would have been intitled to their share of the pro-[42]-fits, which proves, that they could not claim as sub-purchasers. If Hattersley and Pugh had advanced to Eyre their respective shares of the purchase-money, and Eyre, instead of dividing the oil, had immediately sold it, and divided 15 or 20 per cent. profit, in that case either Hattersley and Pugh must have received usurious interest, or they must have been partners. If the plaintiffs had refused to deliver the oil, and Eyre and Co. having tendered the money, had brought an action against them for the non delivery, if the previous agreement with Hattersley and Pugh had come out at the trial, Eyre and Co. would have been non-suited, for not joining with Hattersley and Pugh as plaintiffs. But if Eyre and Co. had been permitted to recover in such an action the amount of the improved value of the oil, he must have accounted to Hattersley and Pugh for their respective shares of the profits.

But if Eyre and Co. could not sell, they could make no title to the vendee, and then Hattersley and Pugh might bring trover against the vendee for their shares. But their shares being undivided, the vendee might have pleaded in abatement, that Eyre and Co. ought to have been joined as plaintiffs, and if they had been joined, the vendee might have shewn a sale from some one of the joint plaintiffs and non-suited them. From hence it follows, that all the defendants had a joint property in the goods till division, that any one of them therefore in possession might sell, and bind all the others, and consequently that they were partners.

Cur. advis. vult.

In this term the Judges delivered their opinions as follow;—

GOULD, J.—The facts of the present case are shortly these; the defendants and Eyre and Co., order one Garforth a broker to buy quantities of oil.—The defendants Hattersley and Co. and Pugh and Co. were to have for their respective shares, each one fourth.—The broker buys divers ship-loads; and to some of the vendors, the defendants, during the treaty, declare it to be a common concern between them and Eyre and Co., in whose name the purchases were made.

But with respect to the plaintiffs, the purchase was made singly in the name of Eyre and Co., without any notification that the defendants had any concern in it.

These purchases were made on speculation, there being a prospect that oil would rise in price; but it afterwards fell, and [43] then the defendants contend that they are not liable to make good the difference, Eyre and Co. having failed.

Upon these facts, two questions arise, 1st, whether the defendants are partners with Eyre and Co.? 2d, if not, whether they are to be deemed joint-contractors in the purchase for Eyre and Co. and so liable for the whole?

As to the first, I think they cannot be considered as partners with Eyre and Co. in this purchase from the plaintiffs. Although there may be partnerships in many other instances besides what are merely commercial, as in the case of farms rented by several persons jointly, and of partnerships of attorneys, and the like, yet I think the true criterion is as stated by Mr. J. Blackstone, in the case of *Grace and Smith*, “Whether they are concerned in profit and loss,” and the same doctrine is in effect held by Chief Justice de Grey, in that case.

This is strongly illustrated by *Bloxam and Fourdrinier v. Pell and Brooke*, in B. R. which was cited in *Grace and Smith*. It there was agreed, that whether the sum of money was a fresh loan, or left in the hands of the man who was originally concerned in the trade in partnership with the person advancing or leaving the money, made no difference.

In both cases the money was left. In *Bloxam's case* he was to have (besides interest) 200l. per annum, as and in lieu of his share of the profits, and to have the inspection of the books.

This was properly held to continue his connection as a partner, and excluded him from being at liberty to set himself up as an usurer.

In the case of *Grace and Smith*, Smith stipulated to have, besides interest, an annuity

of 300l. per annum, but not a word to refer it to the trade.—And therefore as the jury found that the defendant was no partner, a new trial was refused, and Blackstone lays it down, that the supposition of its being usury had no influence on the question.

In both instances the annuities were limited to seven years.

It was held in both the cases, that the inequality of the concern as to profit and loss was immaterial to those who dealt with them, however it might be a regulation between themselves.

But in the present case there was no communication between the buyers as to profit or loss. Each party was to have a distinct share of the whole, the one to have no interference with [44] the share of the other, but each to manage his share as he judged best. The profit or loss of the one, might be more or less than that of the other.

In this light I am of opinion there is no foundation for the Court to adjudge the present case a partnership; and the jury having found for the defendants, that there is no reason to disturb the verdict.

2d. Whether they can be considered as joint purchasers?

I think it would be attended with great inconvenience in the common dealings between man and man, to admit that position.—The stipulation is, that the purchase should be made as for Eyre and Co. in the total, and each is to have a separate and distinct part.—A man goes into Yorkshire to buy as many horses as he can collect, or a limited number, and agrees with a friend that he shall have two. It surely cannot be contended, that this could make the friend a joint contractor to subject him in failure of the other, to pay for the whole bargain (a).

So in a familiar case, a man is about to buy a tun of wine and agrees that a friend shall have a hoghead.

And I think the case of *Hoare and Dawes* is strong on this head: I need not state the case, it having been already stated several times.

Lord Mansfield holds it merely “an undertaking with the broker by each for a particular quantity, no undertaking by one to advance money for the other, not to share with one another in profit or loss.

“It would be most dangerous if the credit of a person who engages for a 40th part (for instance) should be considered as bound for the 39 others.”

This doctrine falls in exactly with my ideas—I think cases of this nature should stand on broad lines—not on subtleties and refinements, the source of litigation and disputes.

HEATH, J.—The question for the determination of the Court, is whether the contract made with the plaintiffs is so far binding on the defendants Pugh, Hattersley, and Stephens, as to make them liable on the failure of Eyre and Co.?

If this contract may be considered independently of the other contracts given in evidence, there could be little doubt.—Eyre and Co. employ Garforth, their broker, to buy oil, and it is agreed that the other defendants shall have aliquot parts when the commodity is purchased.

[45] This is a sub-contract—by a sub-contract I mean a contract subordinate to another contract made or intended to be made between the contracting parties on one part, or some of them, and a stranger. Eyre and Co. are the only purchasers known to the plaintiffs; more entire credit was given to them alone. Pugh, Hattersley, and Stephens, can be liable only in the event of a concealed partnership, on this principle, “that the act of one partner binds all his co-partners, on account of the communion of profit and loss.” In truth they were not partners, inasmuch as they were only interested in the purchase of the commodity, and not in the subsequent disposition of it.

(a) [“If the parties agree amongst themselves that one house shall purchase the goods and let the other have an interest in them, that other being unknown to the vendor, in such a case the vendor could not recover against him although such other person would have the benefit of the goods” (per Gibbs, J., *Young v. Hunter*, 4 Taunt. 583); but see what is said by Lord Ellenborough in *Gouthwaite v. Duckworth*, 12 East, 426. “If all agree to share in goods to be purchased, and in consequence of that agreement one of them go into the market and make the purchase, it is the same for this purpose as if all the names had been announced to the seller, and therefore all are liable for the value of them.”]

Great reliance has been placed on this being a joint concern and a joint speculation. It is so between the defendants, but the contracts made with the other vendors are different. A contract made between A. and B. cannot be given in evidence to explain a contract made between A. and C.—It is *res inter alios acta* (a). In fact the defendants have pledged themselves explicitly with other persons in a different manner. The contracts made with the other merchants, are not admissible evidence in this cause, except to prove a fraud, if the facts had gone that length; namely that the house of Eyre and Co. as a failing house, was to stand forwards in order to protect the other defendants, who by such means might have the benefit of the speculation if it proved fortunate, without sustaining any loss in the event of its failing. No such evidence has been adduced: on the contrary, it appears that the objection made by the other vendors to the firm of Eyre and Co. was, “that they were unknown and new in the trade.”

If Pugh, Hattersley, and Stephens had authorized the broker to purchase aliquot shares for them, this case would have resembled that of *Hoare v. Dawes*, the doctrine of which is confirmed by a passage in the Digest, lib. 17, tit. 2, Pro Socio, § 33, “Qui nolunt inter se contendere, solent per nuntium rem emere in commune, quod a societate longè remotum est.”

No detriment from this decision can arise to trade, or affect the credit of merchants; for it behoves every contracting party to consider the responsibility of the persons with whom he contracts, and he has also the resource of a dormant partnership, if any such exist and can be proved. For these reasons I am of opinion that the rule ought to be discharged.

WILSON, J. I am so unfortunate as to differ in opinion from the rest of the Court on the present question.

[46] The contract was actually made between the plaintiffs and Eyre and Co., but if the other defendants were jointly concerned in it, they ought to be responsible, as much as if they had personally contracted. That they were so concerned sufficiently appears from the contracts with the other merchants, and their own declarations; these I think were proper to be given in evidence, being against themselves, to which evidence the verdict was contrary.

The defendants were all concerned in a general speculation. There was an original agreement between them to purchase as much oil as they could procure. Of what nature that agreement was, there is no evidence precisely to prove, no witness having been present when it was concluded. It might have been such as would have made them jointly answerable, or it might not. How then are we to collect what it was? Surely from the declarations of the parties themselves.

Thwaites' evidence proves that Hattersley said “It is all the same whether Eyre or I buy it, it is the same concern.” This shews it was not a sub-contract. If Hattersley had bought the oil himself, he would have been a contractor with Thwaites; and when he who knew what the agreement was between the defendants, declares it to be the same thing whether he or Eyre bought it, he puts himself expressly in the place of an original contractor; the Court then cannot say that he was a sub-contractor. This declaration was before the purchase of the cargo of the “Earl of Chatham,” on which the action is brought.

Kilbington, the keeper of Greenland Dock, proved that Hattersley and Pugh both said to him “we have purchased your oil.” This was a direct avowal of their having jointly contracted, which was not done with a view to strengthen the credit of Eyre and Co. being after the purchase was made.

When Captain Dowson expressed some doubts whether Eyre and Co. to whom he had also sold his oil, were able to pay him, Pugh who received it, told him “you are safe” and declared that “he was concerned, and Hattersley was concerned, and a house at Norwich who could buy them all.” Now if they were sub-contractors, this declaration was not true. How could their sub-contract make the vendor safe? Here then is clearly a direct acknowledgment of their being original contractors. The evidence also of the broker shews that they all originally con-[47]-tracted; he delivered accounts to them, and informed Hattersley and Pugh how matters went on. In one instance he was so conscious of their being jointly concerned, that he gave in

(a) Vide *Saville v. Robertson*, 4 T. R. 725.

their names as such to the agent of Yeomans, who would not otherwise have given credit to the name of Eyre and Co.

Upon failure of Eyre and Co., Hattersley and Pugh gave orders to the keeper of the dock, not to give up the oil remaining in the dock in the name of Eyre and Co., and took it as their own. Now they could have had no right to do this if they had been only sub-contractors. Admitting that after goods are delivered, there cannot be such a participation of profit and loss as will make a partnership unless the parties originally contracted, yet their dividing the goods, and each taking his share, after delivery, will be good evidence of an original contract. Whether the contract were joint or separate, nothing done subsequent can alter the nature of it, but there may be subsequent evidence to prove of what nature it was.

In *Grace v. Smith* (1 Black. 998) the terms of the contract were stated. If the terms of this contract had been stated, we might have judged of the responsibility of the defendants; but not being stated, we must receive their own acknowledgments of responsibility.

In *Hoare v. Dawes* (Dougl. 371), the question was not between the buyer and seller; the East Indian Company were the sellers, and the money must have been paid before the delivery of the goods. In that case there was no agreement between the defendants, but here the declarations of the parties themselves are strong evidence of an original joint contract. They who best knew what their contract was, have declared it to be joint, and we cannot say it was separate. Being acknowledged to be joint in many instances, we must take it to be so in all.

Clavering v. Wesley (3 P. Wms. 402) does not apply to the present case, being on the covenants of a lease, which only bound the parties to them. Here all the defendants were interested in the subject-matter.

It has been said that as the credit was given to Eyre and Co. only, the vendors could not be injured, if Eyre and Co. only were liable. But this argument goes to prove that no dormant partner would be answerable for the act of the ostensible agent.

I am therefore of opinion that a new trial ought to be granted.

[48] LORD LOUGHBOROUGH.—The first impression on my mind was against the defendants, but in the course of the trial my opinion changed, and I thought they were not liable as partners; I still continue to think so, and consequently that the verdict was proper.

This being an action on a contract of sale, the vendor can have no remedy against any person with whom he has not contracted, unless there be a partnership, in which case all the partners are liable as one individual. It has been justly observed, that a secret partnership can be no consideration to the vendor; though for reasons of policy and general expedience the law is positive with respect to the secret partner, that when discovered he shall be liable to the whole extent. In many parts of Europe limited partnerships are admitted, provided they be entered on a register; but the law of England is otherwise, the rule being, that if a partner shares in advantages, he also shares in all disadvantages. In order to constitute a partnership, a communion of profits and loss is essential. The shares must be joint, though it is not necessary they should be equal. If the parties be jointly concerned in the purchase, they must also be jointly concerned in the future sale, otherwise they are not partners. The late case of the cotton purchase resembled the present, so far as the several parties were each to take aliquot shares; but there no part of the commodity was to be resold without the consent of all concerned. Here, Eyre was a mere speculator, and the other defendants were to share in the purchase, but were not jointly interested in any subsequent disposition of the property. Though they may by other purchases have concluded themselves as to some particular vendors, yet in the transaction in question there was not that communion between them necessary to make them partners; their agreement was a sub-contract, which, as my brother Heath observed, may be executory; it was to share in a purchase to be made. The seller looked to no other security but Eyre and Co.: to them the credit was given, and they only were liable.

Rule discharged.

[49] FULLER *against* PRENTICE. 1788.

The Court will not grant an attachment against a witness for not obeying a subpoena to attend at a trial, unless the whole expenses of the journey, and of the necessary stay at the place of trial, be tendered at the time of serving the subpoena (a)¹.

Adair, Serjt. moved for an attachment against the defendant, who lived at Brandon in Suffolk, for not appearing in obedience to a subpoena, to give evidence in a cause tried before Lord Loughborough, at the sittings after last Easter term, at Westminster, on the following affidavit, namely: "That she was personally served with the subpoena ticket, and that the original was shewn to her. That 2s. and 6d. were given her and a promise made her to bear all her expences. That a place was taken for her in the stage-coach from Brandon to London. That she accordingly undertook to go in the coach at the time appointed. But when the coach was ready to take her up, and more money also ready to be given her by the deponent, she confined herself within her house and refused to go."

But the Court refused the attachment, saying that it might afford a dangerous precedent, by which witnesses coming from their places of abode to attend at trials, might be deprived of the repayment of their necessary expences; the whole of which, as well of their going to the place of trial, as of their return from it, and also during their necessary stay there, ought to be tendered to them, at the time of serving the subpoena, otherwise an attachment would not lie.

RASTALL *against* STRATON. 1788.

In an action on a judgment, if the declaration states the judgment to have been recovered in a term different from that which appears on the record it is a failer of record (a)². It is also a variance, if the declaration states the judgment against one defendant only, when it was against more than one (b).

Debt.—Declaration stated that in Trinity term 1787, the plaintiff recovered by a judgment in B. R. 42l. 1s. for his costs in the defence of an action brought by the defendant against him the said plaintiff in that Court.

Plea.—Nul tiel record.—

The record being brought by mittimus from the Court of B. R.,

Runnington, Serjt., moved that it might be read, which being done, it appeared that the judgment on which the plaintiff declared, was recovered in Easter term 1788, instead of Trinity term 1787; this he urged was a failer of record.—It also ap-[50]peared that the judgment in question was recovered in an action brought by the defendant against the present plaintiff and one William Avarne, whereas the declaration stated it to have been only against the plaintiff.—This he contended was a fatal variance.

On both these grounds, but chiefly on the last, the Court gave

Judgment for the defendant.

But afterwards leave was given to amend (a)³.

(a)¹ [Unless his expenses are paid, he may at the trial refuse to give evidence, and may afterwards maintain an action for his expenses. *Hallett v. Mears*, 13 East, 15. See also *Holme v. Smith*, 1 Marsh. 410. 6 Taunt. 10, S. C. *Ashton v. Haigh*, 2 Chitty's Rep. 201.]

(a)² [This being an action of debt on judgment, it was necessary to state the judgment with a prout patet per recordum. (Co. Litt. 303.) In which case it seems that the statement of the term in which the judgment was recovered is matter of description; *Purcell v. Macnamara*, 9 East, 161; and a variance will be fatal. But where the judgment is merely stated as matter of inducement, such variance will not be material even if the judgment has been set out with a prout patet, &c. *Phillips v. Shaw*, 4 B. & A. 435. *Stoddart v. Palmer*, 3 B. & C. 3.]

(b) [Acc. *Readshaw v. Wood*, 4 Taunt. 13.]

(a)³ See Term Rep. B. R. vol. ii. p. 366.

MEDDOWCROFT *against* HOLBROOKE. 1788.[Overruled, *Vincent v. Holt*, 1812, 4 Taunt. 455.]

A solicitor in Chancery may practise in the Equity side of the Exchequer without being admitted a solicitor in that Court (a).

The plaintiff brought an action against the defendant for 126l. 3s. 4d. the amount of his bill as an attorney and solicitor in the King's Bench, Common Pleas, Chancery, and Equity side of the Exchequer. To this there was a set-off, and the balance due to the plaintiff was 25l. 1s. 6d. for which a verdict was found, subject to a reduction, if the Court should think fit, of such part as was charged for business done in the Equity side of the Exchequer, he not being a solicitor of that Court, though he had been admitted in Chancery. A rule having been obtained to shew cause why the verdict should not be rectified, by reducing the sum from 25l. 1s. 6d. to 3l. 4s.,

Bond and Cockell, Serjeants, shewed cause, arguing that the plaintiff did not come within the meaning of the 24th section of the statute of 2 Geo. 2, c. 23. It is not necessary that an attorney should be admitted in the same Court in which he occasionally acts. If he be admitted in one Court, he may act in another, by consent of an attorney of that other. Solicitors in Courts of Equity ought to have this privilege as well as attorneys in Common Law Courts. But a consent in writing is unnecessary, in Courts of Equity, where the proceedings are in the names of the clerks in Court.

Lawrence and Runnington, Serjeants, in support of the rule, contended that the plaintiff was strictly bound by the Act, the third section of which prohibits any person from acting as solicitor in any Court of Equity without being admitted in such Court, which prohibition is not relaxed by the 10th section, which relates only to attorneys; but even if it extended to solicitors, [51] a consent in writing was necessary, which the plaintiff had not obtained.

LORD LOUGHBOROUGH.—The statute of the 2 Geo. 2, c. 23, is a penal law, and ought to be strictly construed. The 3d and 7th sections are confined to persons who practised before the Act passed, and therefore cannot refer to the 24th, as to the present case. The words of the 24th section are, "without being admitted and inrolled as aforesaid." The answer is, the plaintiff has been admitted, and inrolled in Chancery; and being so admitted, he was entitled to practise of course on the Equity side of the Exchequer. A previous consent in writing is necessary in a Court of Law, but would have been useless, where the proceedings are in the name of the clerk in Court.

Rule discharged without costs.

STEEL *against* HOUGHTON ET UXOR. 1788.

[Dictum approved, *Neill v. Devonshire*, 1882, 8 App. Cas. 156; *Smith v. Andrews*, [1891] 2 Ch. 703; *Hanbury v. Jenkins*, [1901] 2 Ch. 420; *Simpson v. Attorney-General*, [1904] A. C. 491.]

No person has, at common law, a right to glean in the harvest field. Neither have the poor of a parish legally settled (as such) any such right.

Trespass for breaking and entering the closes of the plaintiff, at Timworth in the county of Suffolk, treading down grass and corn, &c. and taking and carrying away corn, barley in the straw, &c. done by the wife.

Plea.—Justification, that the premises had been sown with barley, and the crop lately reaped, and carried off the land; "Wherefore the defendants, being parishioners and inhabitants of the said parish of Timworth, legally settled therein, and being poor and necessitous, and indigent persons, after the crop growing in the year aforesaid, in and upon the said close, in which, &c. had been reaped, cut down, taken and carried away by the said plaintiff from and off the said close, in which, &c. to wit, at the said times when, &c. the said Mary (the defendant) entered into the said close, in

(a) [Dub. *Vincent v. Holt*, 4 Taunt. 452. Where it was held that a solicitor of the Equity side of the Exchequer is not entitled to practise in Chancery.]

which, &c. to glean and gather the straw containing ears of barley, remaining and being dispersed and scattered abroad in the said close, in which &c. after the said crop had been so reaped, cut down, taken and carried away as aforesaid, being the gleanings of the said crop so remaining dispersed and scattered abroad in and upon the said close, in which, &c."

To this there was a general demurrer.

This cause was argued in Easter term 1787, by Le Blanc, Serjt., for the plaintiff, and Lawrence, Serjt., for the defendants; [52] and on a second argument in Trinity term 1787, by Bolton, Serjt., for the plaintiff, and Rooke, Serjt., for the defendants.

These arguments were fully entered into by the Court, who in this term gave judgement as follows:

LORD LOUGHBOROUGH:—When the claim of a right to glean was first brought before the Court, it was laid indefinitely to be in poor, necessitous, and indigent persons, I was then of opinion against the claim.

1st, I thought it inconsistent with the nature of property which imports exclusive enjoyment.

2dly, Destructive of the peace and good order of society, and amounting to a general vagrancy.

3dly, Incapable of enjoyment, since nothing which is not inexhaustible, like a perennial stream, can be capable of universal promiscuous enjoyment.

This right is now claimed by poor persons legally settled; but in this form also it is equally liable to objection. There can be no right of this sort enjoyed in common, except where there is no cultivation, or where that right is supported by joint labour; but here neither of those criteria will apply. The farmer is the sole cultivator of the land, and the gleaners gather each for himself, without any regard either to joint labour or public advantage. If this custom were part of the common law of the realm, it would prevail in every part of the kingdom, and be of general and uniform practice; but in some districts it is wholly unknown, and in others variously modified and enjoyed.

Although the division of parishes is of very high antiquity, yet a right to a maintenance by settlement was first introduced by the statute of the 43 of Eliz. In ancient times tithes were divided into three parts—the first for the maintenance of religion, the second for the church, and the third for the poor; but the third division was a matter of charity rather than of right. When by the second Lateran Council, in the 12th century (A.D. 1139), tithes were appropriated to particular parishes, they were not considered as making in any part a provision for the poor, which might be claimed as a right.

Although the law of Moses has been cited for a foundation for this claim, the political institutions of the Jews cannot be obligatory on us, since even under the Christian dispensation the relief of the poor is not a legal obligation, but a religious duty.

[53] The authority in our law upon which the right to glean is supported, is a dictum of Sir Matthew Hale, in the *Trials per Pais*; but though I entertain the highest respect for the authority and character of that great Judge, yet it would be doing injustice to his memory, to take every hasty expression of his at *Nisi Prius* as a serious and deliberate opinion. In truth, that dictum imports no more than that the question could not be raised without being put upon the record.

The consequences which would arise from this custom being established as a right, would be injurious to the poor themselves. Their sustenance can only arise from the surplus of productive industry; whatever is a charge on industry, is a very improvident diminution of the fund for that sustenance; for the profits of the farmer being lessened, he would be the less able to contribute his share to the rates of the parish; and thus the poor, from the exercise of this supposed right in the autumn, would be liable to starve in the spring.

GOULD, J.—Supposing a general right of leasing (lesing) in England, I think it must be in the case stated in these pleadings, which is after the crop is reaped and carried away, and for the poor and indigent parishioners. If there be such a general right, it must be by the common law of the land; and though it should be admitted that in certain places there may be particular regulations of its exercise by custom, that will not derogate from the general right, any more than special modes of descent

in certain districts will derogate from the course of descent by the common law, which will be intended to prevail, unless a custom is shewn to the contrary.

In the case of *Worlledge v. Manning* (a)¹, in this Court, it was well observed by my brother Walker (a very learned and accurate lawyer), that it was a singular task to be called upon to prove the general common law of the land: that depends on general knowledge, it being universally exercised, or so understood. [54] Speaking for myself, I have always understood this custom to prevail in such parts of this country where I have been conversant, and never heard it doubted; and I cannot but impute the reason of so few passages in the books of our law recognising it, to the conviction of its being a right too well established and too notorious to be disputed.

The first passage which I shall mention is that in *Trials per Pais* (8th edition, p. 534). In trespass against one for gleaning on his ground, per Hale, Norfolk, Summer Assizes, 1668, "The law gives licence to the poor to glean, &c. by the general custom of England; but the licence must be pleaded specially, and cannot be given in evidence on, Not guilty."

This opinion is cited by Lord Chief Baron Gilbert, in his *Law of Evidence* (p. 250, 4th edit.); and after allowing that it ought to be pleaded, he says, "It had been a sufficient justification, for by the custom of England the poor are allowed to glean after the harvest; which custom seems to be built on a part of the Jewish law, that allowed the poor to glean, and made the harvest a general time of rejoicing."

Here the opinion of Hale is recognised by a learned Chief Baron, who affirms the right to be by the custom of England.

The next author who mentions it, is that eminent Judge, Mr. Justice Blackstone, a text writer, and with great deliberation: his words are (3 Comm. 212 and 213). "It hath been said, that by the common law and custom of England the poor are allowed to enter and glean upon another's ground, without being guilty of trespass." For this he refers to Gilbert, and *Tri. per Pais*, supra; and then adds, "Which humane provision seems borrowed from 'the Mosaic law';" and refers to *Leviticus* and *Deuteronomy*. This is in substance the same as is said by Gilbert.

I will read the texts in *Leviticus*.

Leviticus, c. xix., vv. 9, 10. "And when ye reap the harvest of your land, thou shalt not wholly reap the corners of thy field; neither shalt thou gather the gleanings of thy harvest; and thou shalt not glean thy vineyard, neither shalt thou gather all the grapes of thy vineyard; thou shalt leave them for the poor and stranger: I am the Lord your God."

In *Leviticus*, c. xxiii., v. 22, there is the same prohibition to gather the gleaning of the harvest, and conclusion, "Thou shalt [55] leave them unto the poor and to the stranger: I am the Lord your God."

From what better fountain could it be drawn than the Holy Scriptures? It was evidently founded on charity, and fit to be received in every country. It might be liable to be abused; but that would be redressed by the law, and the party abusing become a trespasser ab initio, as in other cases of abuse of a legal right or licence, the known case of coming into an inn or tavern, &c.

From *Selden* (a)², it appears that the actual property was vested in the poor, unless

(a)¹ *Worlledge against Manning*, East. 26 Geo. 3, C. B.

Trespass for breaking and entering closes, &c. taking corn, &c.

Justification—That the said closes had been sown with wheat, barley, &c. That the crop was reaped, and after it was carried off the land, the defendant, being a poor, necessitous, and indigent person, entered, &c. to glean and gather the straw containing ears of corn remaining and being dispersed and scattered abroad in the said closes, &c. after the crop had been reaped and carried away, &c. being the gleanings of the said crop, for the necessary support of him the said defendant, &c.

Demurrer, &c.

Judgment for the plaintiff.*

(a)² *De jure et naturali et gentium juxta discip.* &c. Ebræ. lib. 6, c. 6.

* [See Loft's Edition of Gilbert's *Law of Evidence*, p. 509. Where it is said that the Court gave judgment for the plaintiff in this case on general demurrer, because it was not averred in the plea that the defendant was an inhabitant at the time of the gleaning, of the parish where the lands gleaned were situate, and see *Selby v. Robinson*, 2 Tr. 758.]

they absolutely neglected the collection, and then it belonged to the owner of the field; and it did not accrue to the poor as a donation but a legal right.

It was thought to be of so sacred a nature, that it was exempted from tithes (Seld. Hist. of Tithes, vol. vi. p. 1087).

It hath been said the established provision for the poor by the stat. 43 Eliz. hath had the effect of abolishing this right, supposing it to have existed. But Lord Hale, Gilbert, and Blackstone had no such idea; they consider it as a subsisting right, without regard to that provision.

Indeed there seems to me to be no ground to support such a notion. I think ever since the settlement of parishes, the poor inhabitants were esteemed as parishioners, and their necessities to be relieved by the parish to which they belonged.

Under the Saxon constitution, they were restrained to villis, and the inhabitants were to be in pledge, or in manupast; the policy of which was admirable, to restrain them from becoming vagabonds, in subjecting those who received them, if they suffered them to continue above three nights, to answer for their misdeeds.

After the institution of parishes, we find in that ancient treatise the *Mirroure* (a) this paragraph: "It was ordained that the poor should be sustained by the parsons, rectors of churches, and by the parishioners, so that none should die for want of sustenance." This necessarily supposes the residence of the poor. This is strongly enforced by the statute 15 R. 2, c. 6, which, reciting that damages happen to parishioners by approbation of benefices of the same places, enacts, that "upon a [56] licence of appropriation of a parish church, the Ordinary shall ordain a convenient sum to be distributed yearly of the profits of the church, by the appropriators, to the poor parishioners, in aid of their living and sustenance."

The effect of the 43d of Eliz. is to establish a more clear and strict obligation on parishes for the maintenance of the poor; and the very description of the officers is overseers of the poor of the same parish. Since that Act, modes of obtaining settlements in parishes, and for removing or sending the poor thither, have been introduced; but before, it seems the settlement was by birth, and the provisions were first made by the Stat. 22 H. 8 (22 H. 8, c. 12, Rastall's edition), for sending vagrant or wandering persons to the parish where born, if it could be known, otherwise where they last dwelled for three years; and by the 39 Eliz. (39 Eliz. c. 4, Rastall's edition), where born, if known; if not, then to the parish where they last dwelled for the space of one year; and if neither known, then to the parish where they last passed without punishment; so that it is evident they were restrained in point of residence, and the place of birth was the primary object; and there, according to the *Mirroure*, confirmed by the Act of 15 Ric. 2, their wants and necessities were to be provided for. In this light the recital in the 15th R. 2 of damages to the parishioners, and the provision for future appropriations in aid of the poor, are clear and intelligible.

The Stat. 39 Eliz. rendered begging and wandering abroad inexcusable, but affords no ground for construction to take away the charitable and humane (as Blackstone calls it) provision for the poor, permitting them to gather the derelict ears of corn, after the owner has carried away the crop. Nor is there a colour to say, that the practice has been discontinued since that statute, or that any such idea occurred to either of those lawyers whose opinions have been quoted.

The etymology of the names which this custom has received in England, plainly proves, that the custom itself was known both in Germany and France. Minshew, in voce *Glean*, explains them thus:—The French, *Glainer*, quasi *Graner*, i.e. *Colligere Grana*; the Belgic, *Arenlesen*; the Teutonic, *Ahrlesen*, ex *Ahr*, *Spica*, and *Lesen*, i.e. *Colligere*; and goes on with the Spanish, &c. Then follows—A *Gleaner*, or *Leaser of Corn*; French, *Glaneur*; Teutonic, *Ahrlesen*; Belgic, *Ahrenleser*; English, A *Leaser*.

[57] It is clear to me, the word leasing was brought from the Germans, and gleaning from the Normans; and that from *ahr* proceeds *ahrish*, used in many parts of England for stubble.

Plato says, "Qui intelligit nomina, res etiam intelligit;" and Isidorus, "Nomina rerum si nescis, perit cognitio rerum."

In the case of *The King v. Price*, 4 Burr. 1927, Mr. Justice Hewit says, "The right of leasing does appear in our books (he must mean in *Trials per Pais*, and *Gilbert*);

(a) Ch. 1, p. 14. This passage is cited in 3 Inst. 103.

but it must be under proper circumstances and restrictions." I presume he means after harvest or clearance of the crop, and in a proper manner and time; or, in case of a custom, that such custom is to be observed.

With respect to the exercise of this right, the case upon this record states, that what the defendants did, was after the crop was carried. This corresponds with Lord Chief Baron Gilbert's expression of after the harvest. As to the times of beginning it, it appears by Selden, as already mentioned, that it ought not to be delayed; for a palpable neglect would be a desertion of it. If no precise time were limited, our law would call it a convenient time.

By an Act of Parliament passed in the year 1786, for inclosing the common fields of Basingstoke, the gleaning or leasing is to begin after the crop is carried. Times are mentioned, one for wheat, and another for other species of grain, for the exercise of this right; and the owners of the land are restrained under penalties (a strong circumstance to shew their sense of the right of the poor) from putting in cattle or hogs, within those respective times. On the other hand, the poor are restrained, by a summary penalty, from breaking the fences (which, it might be apprehended, from the former open state, they might be apt to do) and are confined to pass through the gates.

This seems to have been a prudent regulation to prevent disputes. I will recite the provisions made by the Act.

"And whereas the poor people of the town of Basingstoke aforesaid have, time immemorial, claimed, exercised, and enjoyed the privilege of gleaning or leasing, in, over, and upon the said common fields, when and as soon as the corn has been carried from the same, in the time of harvest, in every year, which privilege the owners and proprietors of the said common fields are desirous of continuing to the said [58] poor people, under proper regulations; be it therefore further enacted, that the poor people of Basingstoke aforesaid may, and they are hereby authorized, from time to time, and at all times after the passing of this Act, to enter and go into and upon all and every the lands in the said common fields, to glean or lease in the time of harvest; provided that none of the said poor people do or shall enter into and upon any such land for the purpose aforesaid, until the crop or crops growing therein shall be cleared or carried off by the owners or occupiers of such land, and the owners of the tithe, and that none of such poor people do or shall continue to glean or lease in any such land for any longer time than six days, if the same shall have been sown with wheat, and three working days if sown with any other corn, to be computed from the time of clearing and carrying off the same as aforesaid; and in case any of such poor people do or shall, at any time after the said intended division and inclosure shall take place, glean or lease, or enter for that purpose into any of the new allotments to be made by virtue of this Act, before the crop or crops growing therein shall be cleared or carried off as aforesaid, or shall break, or tread down, pull up, prostrate, destroy, or damage any hedge or fence belonging to any of the said new allotments as aforesaid, in going to or returning from any such land to glean or lease, or, under pretence of going to or returning from any such land to glean or lease, shall go into or return out of any inclosure, by any other way than the gate or way through which the corn shall have been carried out of or from such inclosure, or over any stile within the same, every person so offending shall, for every such offence, forfeit and pay any sum not exceeding five shillings, as the justice before whom such information and complaint shall be exhibited (as hereinafter mentioned) shall think meet, over and above such penalties as are inflicted on the said offenders or offender, for either of the offences aforesaid, by any law or statute now in force.

"And, in order that the said poor people may not be deprived of such privilege as aforesaid, by cattle or swine being turned into the said lands during the time of their being authorized to glean or lease as aforesaid, be it further enacted, that in case any owner or occupier of the lands within which the said poor persons are authorized to glean or lease [59] as aforesaid do, or shall permit or suffer any cattle or swine to be turned into or remain in or upon any such land, to depasture or feed therein, before the expiration of the time hereinbefore allowed for gleaning or leasing in such land, every such owner or occupier shall, for every day or less time such cattle or swine shall be depasturing or feeding as aforesaid, forfeit and pay for every head of cattle the sum of two shillings, and for every swine the sum of one shilling."

The Act calls it a privilege, but says it had been claimed and exercised from time

immemorial. What is this but a right? the enjoyment of which, the landholders secure to the poor, by penalties on themselves.

Upon the whole, therefore, I am of opinion, that judgment ought to be for the defendants.

HEATH, J.—This is a demurrer to a plea of the defendant's, who justifies the trespass of his wife in the plaintiff's close, under a claim of gleaning.

On these pleadings the general question is, "Whether the indigent and necessitous poor of a parish have a right to glean after the crop is carried away?"

It is our province to take notice of all general customs. This is usually not attended with much difficulty, as the evidence of such customs is to be found in our books, and is matter of general practice. Although it is insisted on, that this custom of gleaning is coeval with the constitution, and derived from the most remote antiquity; yet the first mention of it is in the *Trials per Pais*, a mere extrajudicial opinion of Lord Chief Justice Hale, "That by the custom of England the poor have a right to glean." The next author who mentions it, is Lord Chief Baron Gilbert, who, in copying the above passage with a marginal reference, says, that the poor are "allowed to glean," which implies a licence and permission, rather than a right. Mr. Justice Blackstone has received the same passage into his *Commentaries*, not as a clear and undeniable rule of law, but with expressions of distrust and doubt, and gives no opinion of his own. The whole weight then of legal authority to prove this custom rests on the dictum of Sir Matthew Hale.

It has been argued in favour of this claim, that no corn is claimed but what is abandoned by the owner; as if the owner had cast it from him, and it became the property of the poor by [60] a sort of occupancy. By the law of England, no property can be lost by abandonment, for the owner may at any time resume the possession. Here there can be no abandonment, as the owner never parted with the possession.

Such a custom as will support the plea, must be universal, and every where the same, otherwise it is void for its uncertainty. If it exists only in particular counties or districts (such as the custom of being discharged from the payment of tithes of wood in some hundreds in the wilds of Kent and Sussex, or the custom of gavelkind), it is partial, and no part of the general customs of the realm. From the best inquiries I have been able to make, I find that this custom is not universal. In some counties it is exercised as a general right, in others, it prevails only in common fields, and not in inclosures, in others it is precarious, and at the will of the occupier. In the county where this action was brought, it never in practice extended to barley; nor is the time ascertained. In some counties the poor glean whilst the corn is on the ground; here the usage is laid to be after the crop is harvested.

The practice of gleaning was originally eleemosynary. But it is the wise policy of the law, not to construe acts of charity, though continued and repeated for never so many years, in such a manner as to make them the foundation of legal obligation. If A. and his ancestors have from time immemorial repaired a bridge or a highway, there is no obligation on him to continue the repair, unless he is so bound by the tenure of lands, or the like.

Wherever there is a right, the law provides a remedy, if that right be obstructed. But suppose the owner of a field were to set fire to the stubble, or to flood it, and prevent the poor from gleaning, what remedy could they have? No action on the case has ever been brought for such an injury, and according to the reasoning on the *Statute of Westminster 2d* (13 Ed. 1, c. 24) no action on the case would lie.

Tithes are due of right, and by the general usage of the realm; but the parson had no remedy at common law till they were set out, therefore the consent of the occupier of the land was necessary to be obtained before the parson could take a single sheaf. The case of tithes is much stronger than that of gleaning, because the church was originally endowed by the [61] owners of lands, and the parson, in consideration of that endowment, undertook the cure of souls; so that there was a valuable consideration for the right of tithes, which is wanting with respect to gleaning. Yet the wisdom of our ancestors left it to the conscience of the occupier of the land, whether or not he would set out his tithes, though that conscience was to be corrected by the authority of the Spiritual Court.

I shall next consider what force this custom derives from being a Jewish institution. Every institution which is to be found in the law of Moses was not enforced by the Judge, many of them being left to the consciences of men with temporal blessings

on those who observed them. The right of gleaning is given by the same law as well to the "stranger" as the "fatherless and poor." We have already infringed it, as we have decided that the stranger has no right to glean in the case of *Worledge v. Manning*.

The law of Moses is not obligatory on us. It is indeed agreeable to Christian charity and common humanity, that the rich should provide for the impotent poor; but the mode of such provision must be of positive institution. We have established a nobler fund. We have pledged all the landed property of the kingdom for the maintenance of the poor, who have in some instances exhausted the source.

The inconvenience arising from this custom being considered as a right by the poor, would be infinite; and in doubtful cases, arguments from inconvenience are of great weight. It would open a door to fraud, because the labourers would be tempted to scatter the corn in order to make a better gleaning for their wives, children and neighbours. It would encourage endless disputes between the occupiers of land and the gleaner. It would raise the insolence of the poor, and leave the farmer without redress. Experience shews that during the time of harvest, the poor employ their time in gleaning, to the great detriment of husbandry. In many places the farmer ploughs the land while the shocks of corn are upon the ground. Is the cultivation of the country to stand still while the labourers are gleaning?

It has been alleged as a reason for this claim, that the poor ought to have a share of benefit, at the time of general rejoicing. To this it may be answered, that they receive from the advanced price of labour, a recompense in proportion to their industry. [62] But to sanction this usage, would introduce fraud and rapine, and entail a curse on the country.

To conclude, as there is no evidence of this custom of gleaning prevailing uniformly throughout the kingdom, as the practice of it is uncertain and precarious, and as it would be attended with great public inconvenience, if it were enforced as a right, I am of opinion, that it is not part of the general law of the land; that the plea is therefore bad, and judgment must be given for the plaintiff.

WILSON, J.—I am of the same opinion with my Lord Chief Justice, and my brother Heath, on the question now before the Court.

No right can exist at common law, unless both the subject of it, and they who claim it, are certain. In this case both are uncertain. The subject is the scattered corn which the farmer chooses to leave on the ground, the quantity depends entirely on his pleasure. The soil is his, the culture is his, the seed his, and in natural justice his also are the profits. Though his conscience may direct him to leave something for the poor, the law does not oblige him to leave any thing. The subject then is uncertain and precarious.

Next, the persons claiming this right, are vague and undefined. The term poor is merely relative. Before the statute of the 43d of Eliz. there was no method of legally ascertaining who were of that description. Since that statute, justices and overseers are to determine what persons are of the number of poor, to whom also must be added the qualification of a settlement. It cannot be urged that the demurrer admits that the claimants are poor, because a demurrer admits nothing but what is well pleaded, and here the matter is ill pleaded on account of its uncertainty.

They who claim this right then, are equally uncertain and precarious.

The practice also of gleaning is itself uncertain and changeable. In some counties it is entirely excluded, in others partially admitted, and in others modified with every possible variety.

The law of Moses is not binding on us, except so far as we have thought proper to adopt it. There are many precepts of the Gospel which the law of England does not enforce as obligations. It is the duty of every man to "honour his father and mother," but the law of England has no method to compel [63] such honour. Charity to the poor is also a Christian duty, but it must be voluntary, and cannot be compelled.

But if there be a right, there must also be a remedy if that right be infringed. Now if a rich man were to glean in a harvest field, to the exclusion of the poor, they could have no remedy. So if a farmer were to give permission to his brother, or friend of another parish, to glean his fields, the poor of his own parish could have no remedy in law, for what they might think a prior right.

Next, the authorities are to be considered. The passage cited from the Trials per

Pais, contains a dictum, but not a judicial opinion of Sir Matthew Hale. Every one who hears me must acknowledge the impropriety of construing all the conversation which passes between a Judge and the counsel at Nisi Prius, as legal decision. It would in this instance be a want of respect to the memory of Hale, to argue that he meant to give a serious opinion on the right of gleaning, when his dictum tends only to prove that such a right must be pleaded, and not given in evidence under the general issue. Gilbert and Blackstone have copied from Hale. In the case of *The King v. Price*, 4 Burr. 1927, Mr. Justice Yates says, "As to the right of leasing it will be time enough to determine that point when it comes directly in question." This is a full answer to the argument "that there are no cases on this subject, because the custom was too well established to admit of a question."

But it has been farther argued, that the farmer having abandoned the leavings of his crop, the poor are entitled to them.

Now supposing a right could arise from abandonment, it would be in the first occupier, the property would be as in a state of nature, the poor could not have any exclusive right. But the truth is, there can be no abandonment, while the property remains on the soil of the owner. It might with as much reason be urged, that a man had abandoned the property of his horse, who having right of common, had turned him out to pasture.

For these reasons therefore, I am of opinion that the law should not interfere in this case, but that every man's conscience should be his law.

Judgment for the plaintiff.

[64] ELMES *against* WILLS. 1788.

Where there is a promise "to pay a bill of exchange within a fixed time, if during that time no proof be brought of its being already paid," though the promise be broken (no proof being brought within the time), and the plaintiff in an action on the bill with an insimul computassent, gives evidence under the insimul computassent of the special promise, yet the defendant may also prove under that count, that the debt for which the bill was originally given was paid, and thereby avoid the promise by shewing it was without consideration.

Assumpsit, by the indorsee of a bill of exchange against the drawer, the bill being refused acceptance—2d, count for money paid—3d, money had and received—4th, insimul computassent.—

Plea general issue, and set-off.—

This cause came on to be tried before Mr. Justice Gould, at Hertford Assizes in the summer 1787.

It appeared in evidence, that the plaintiff and defendant had mutual dealings together, and had applied to one Rawnsley to settle their accounts, who accordingly adjusted all matters in dispute, except the bill on which the action was brought. This, the defendant said, he could prove he had paid. Upon which, it was agreed that the bill should be deposited in the hands of Rawnsley, and if the defendant brought proof of the payment within a month, the bill should be delivered up to him, if not, he promised to pay it to the plaintiff. No proof being brought by the defendant within the month, the bill was delivered to the plaintiff, who brought his action upon it.

The counsel for the defendant offered to give evidence that the original debt was paid, for which the bill was given, and that the defendant could not within the month find the witness by whom it might have been proved according to the agreement, he having absconded to avoid an arrest.

But this evidence the Judge refused to admit, holding that the defendant was bound by his agreement to pay the bill, if he did not bring the necessary proof within the month (a).

In Michaelmas term last a rule was obtained to shew cause why a new trial should not be granted, on the ground that this evidence ought to have been admitted. Lawrence, Serjt., shewed cause against the rule, and Rooke, Serjt. argued in favour of it.

(a) See 1 Lutw. 663. Cro. Jac. 381.

Now in this term,

GOULD, J., after having stated the facts, said that he was of opinion at the trial that the plaintiff had a right to prove the special promise of the defendant, under the general count of insimul computassent, on the authority of Buller's *Nisi Prius*, p. 139, and that promise not being performed, was entitled to recover, the defendant not being at liberty to bring evidence in [65] excuse for his non-performance, where the undertaking was peremptory. That such an undertaking was upon sufficient consideration, he cited the case of *Amie v. Andrews*, 1 Mod. 166, and *Knight v. Rushworth*, Cro. Eliz. 469.

The rest of the Court were of opinion, that though this was a new promise on a special agreement, and though under a general count of insimul computassent, such a promise might be given in evidence, yet as in the present instance it was to pay an old debt, the condition not being performed, it was to be considered only as evidence of the debt, and the effect of it was, to shew that the plaintiff had *primâ facie* only, a right to recover. The defendant therefore ought to have been admitted to prove that the debt was discharged, because by so doing he would avoid the promise by shewing there was no consideration for it.

Rule absolute for a new trial.

FRAMPTON *against* PAYNE. 1788.

Where issue is joined early in a term, notice of trial must be given in the same term (*b*).

Le Blanc, Serjt. moved for judgment as in case of a nonsuit, issue having been joined in this cause within the six first days of last term, and no notice of trial given.

Runninton, Serjt., contended that the Court would not compel the plaintiff to take two steps in the same term; that notice of trial is not necessary to be given in the same term in which issue is joined.

But the Court were of opinion against the plaintiff, as there was time enough in the term to have given notice, and therefore made the

Rule absolute.

JAQUES *against* WITHY AND REID. 1788.

Money paid for insuring tickets in the lottery may be recovered back from the keeper of the office. A contract declared by a statute to be illegal, is not made good by a subsequent repeal of the statute (*a*).

This was an action of assumpsit brought against the defendants as partners and

(*b*) [Semb. overruled by *Baker v. Newman*, post, 123, and *Du Costa v. Ledstone*, post, vol. ii. p. 558, Tidd's Pr. 825, 8th edit. See also *Munt v. Tremamondo*, 4 T. R. 557. So in a country cause the plaintiff is not bound to proceed to trial at the next assizes after the term in which issue is joined, *Prentice v. Blott*, 2 Bingh. 360.]

(*a*) [The late decisions with regard to the cases in which a party is entitled to recover money paid by himself in pursuance of an illegal contract, may be classed under the following heads:

I. He is entitled to recover it while the contract remains executory, even though he is in *pari delicto* with the defendant; *Tappendal v. Randall*, 2 Bos. & Pul. 467. *Aubert v. Walsh*, 3 Taunt. 277. *Busk v. Walsh*, 4 Taunt. 290. S. P. per Buller J., *Lowry v. Bourdieu*, Dougl. 468. A distinction however has been taken between contracts merely illegal and contracts to perform some act *malum in se*, or grossly immoral, in which latter case it is said the Courts will not interfere to compel the repayment of the money though the contract remains executory, (per Heath,) *Tappendal v. Randall*, 2 Bos. & Pul. 471; but the distinction between *mala prohibita* and *mala in se*, has been frequently denied. See *Farmer v. Russell*, 1 B. & P. 298. *Aubert v. Maze*, 2 B. & P. 371. *Cannan v. Bryce*, 3 B. & A. 179.

II. He is entitled to recover it from a stakeholder, into whose hands it has been paid upon an illegal contract, which has been executed by the happening of the event upon which the wager is made, unless the money has been paid over by the stake-

keepers of a lottery-office, to recover back a sum of money paid by the plaintiff, for insuring tickets in the lottery of 1781.

At the trial the plaintiff was nonsuited, on the ground that both parties being engaged in an illegal transaction, a Court of Justice could not be called upon to the aid of either.

[66] Adair, Serjt., having obtained a rule to shew cause why the nonsuit should not be set aside, in Hilary term last, Bond Serjt. shewed cause, and contended that where a man comes for relief to a Court of Justice, he must appear to have acted in a lawful manner. Here the plaintiff had tempted the defendant to insure in defiance of a positive statute (19 Geo. 3, c. 21, repealed by 22 Geo. 3, c. 47). Though the penalty might only attach on one, both were in the eye of the law to a certain degree criminal. The directory and declaratory parts of a law are as much to be attended to as that part which inflicts the penalty. This law had directed that no such insurance should be made, and if it were made, that the contract should be void. When the statute was to be considered as acting upon the offence itself, it ought to be liberally expounded, to repress the evil which it was calculated to restrain, though when the inflicting the penalty was in question, it might only affect the keeper of the lottery office. If the construction were otherwise, the greatest encouragement would be given to gaming, by permitting the gamester to recover back the money which he had risked. The true distinction seemed to be, that where two persons acted in concert to evade the law, neither of them could apply to a Court of Justice for relief, unless there appeared circumstances of fraud or oppression used by one party to the other. This principle is to be collected from the cases on the subject. In *Jaques v. Golightly* (2 Blac. 1073), the lottery-office keeper refused to pay what the plaintiff had won, and yet insisted on retaining the premiums, and on this ground the Chief Justice and the Court founded their decision. Notwithstanding the doctrine laid down by Mr. Justice Blackstone in that case seems to imply that the office keeper alone was criminal, it was not necessary to decide so much. In *Clarke v. Shee and Another* (Cowp. 197), Lord Mansfield has expressly said that both the office keeper and insurer were equally criminal, and also that the law will not protect either party, except where there has been fraud or delusion. The same distinction is recognized in *Lowry v. Bourdieu* (Doug. 451). In the present case the plaintiff had received all the winnings, and yet came before the Court to recover back the consideration on which they were paid (b).

But on another ground the nonsuit may be supported. This gaming in the lottery was before the 25th of July 1782, and [67] the action commenced after that date. All transactions of this sort relating to lotteries before that date, are buried in oblivion by the 22 Geo. 3 (ch. 47, s. 27) which repeals all other Acts respecting the regulation of lottery-offices, and only provides that the repeal shall not operate upon actions commenced or depending before the commencement of the Act. The right of action then in the present case is taken away, and it is now the same as if gaming in the lottery of 1781 had never been prohibited. *Miller's case* (1 Blac. 451. [Mackenzie's

holder to the other party before demand; *Colton v. Thurland*, 5 T. R. 405. *Bate v. Cartwright*, 7 Price, 540. *Smith v. Bickmore*, 4 Taunt. 474; and see 1 R. & M. N. P. C., 214 (note).

III. He is entitled to recover it though the contract is executed, provided he be not in pari delicto with the defendant; *Jaques v. Withey*, *suprà*. *Williams v. Hedley*, 8 East, 378.

IV. He is not entitled to recover it where the contract is executed, and he is in pari delicto with the defendant. *Andree v. Fletcher*, 3 T. R. 266. *Howson v. Hancock*, 8 T. R. 575. *Vandeyck v. Hewitt*, 1 East, 96. *Morck v. Abel*, 3 Bys. & Pul. 35. *Thistlewood v. Cracroft*, 1 M. & S. 500. *Stokes v. Twitchin*, 8 Taunt. 492.

The agent of a party to an illegal contract, who receives money under it to the use of his principal, cannot set up the illegality of the transaction in an action brought against him by his principal. *Tenant v. Elliott*, 1 B. & P. 3. *Farmer v. Russell*, *ibid*. 296; but see *McGregor v. Lowe*, 1 R. & M. N. P. C. 57.

As to the recovery in equity of money paid under an illegal contract, see *Morris v. McCulloch*, Amb. 432, 2 Eden, 190, S.C. *Whittingham v. Burgoyne*, 3 Anstr. 900.]

(b) But qu. as to this fact, that the plaintiff had received all the winnings? If he had, perhaps the Court would have given a different judgment.

case, Russ. & Ry. C. C. 429]) is an authority to prove, that offences committed against a repealed clause in a statute before its repeal, cannot be punished after the repeal without a special exception.

Adair in support of the rule. This action is not brought upon the 19th Geo. 2, for a penalty, but to recover back money paid upon a void and illegal consideration; it cannot therefore be affected by the repeal of that statute.

It is a principle of law, that money paid upon a void contract may be recovered back again, and the question as to the validity of the contract must relate wholly to the time of making it; if it was then void, it is not material by what means it was rendered so. If it had been originally a good contract, and a statute had passed to make it void, and then that statute had been repealed, the contract would have been set up again. But here there was originally a void contract, being entered into while the statute was in full force, and therefore cannot be made valid by the repeal.

In the case of *Lowry v. Bourdieu*, the judgment of the Court was founded on the circumstance of both parties being equally culpable. Here the keeper of the lottery-office is the only person upon whom the prohibition or penalty attaches. In that case it is true that Mr. Justice Buller said "there is a sound distinction between contracts executed and executory," but that was not the ground of the decision; it was the opinion only of a single Judge however eminent, and is contrary to the case of *Smith v. Bromley* (cited in the notes of *Jones v. Barkley*, Dougl. 696), which was on a contract executed.

Where an action is an affirmation of an illegal contract, and the object of it is to enforce the performance of an engagement prohibited by law, clearly such an action can in no case be maintained. But where the action proceeds in disaffirmance of such a contract, and instead of endeavouring to enforce it pre-[68]-sumes it to be void, and prevents the defendant from retaining the benefit which he derived from an unlawful act, there it is consonant to the spirit and policy of the law that the plaintiff should recover. An attention to this distinction will reconcile many of the cases on this subject, which appear at first sight to be somewhat inconsistent. *Clarke v. Shee and Johnson* (Cowp. 197), *Browning v. Morris* (Cowp. 790), and *Jaques v. Golightly* (2 Black. 1073), are expressly in favour of the plaintiff, and ought to be relied on.

Cur. adv. vult.

In this term,

LORD LOUGHBOROUGH declared the unanimous opinion of the Court, that the objection raised on the repeal of the statute ought to be over-ruled; and that the other three Judges (contrary to his opinion) thought the case of *Jaques v. Golightly* good law, and fit to govern the present.

Rule absolute.

End of Trinity term.

The reporter having been favored with the following case conceives that it will not be unacceptable to the profession, though of a date prior to the commencement of his undertaking.

HARRISON *against* BULCOCK, AND SIX OTHERS. 1788.

[Hilary Term, 28 Geo. III. 1788.]

[Referred to, *Colchester v. Kewney*, 1866-67, L. R. 1 Ex. 379; L. R. 2 Ex. 253.]

A house within the limits of an hospital, appropriated to an officer of the hospital for the time being, is not assessable to the land-tax (a).

Trespass for taking the goods of the plaintiff.—Plea, general issue.—Verdict for the plaintiff, subject to the opinion of the Court on the following case.

The plaintiff at the time when the goods were taken was treasurer of Guy's Hospital, in the parish of St. Thomas, Southwark. By an assessment made on the 19th of May, 1786, he was assessed to the land-tax for the house in which he lived. Five of the defendants were commissioners, and the other two collectors. The plaintiff appealed to the commissioners against the rate, who dismissed his appeal.

(a) [Acc. *All Souls College Oxford*, v. *Costar*, 3 Bos. & Pul. 635.]

On his refusing to pay the sum assessed, the goods in question were taken under a warrant of distress.

[69] The hospital originally consisted of only two squares, built on land demised by the Mayor and Commonalty of London as governors of St. Thomas's Hospital, to the founder, Thomas Guy, in the year 1720.

By an Act of the 11th of Geo. 1, certain persons were incorporated, in pursuance of the will of the founder, by the name of president and governors of the hospital founded by Thomas Guy.

To whom being incorporated, the Mayor and Commonalty of London, as governors of St. Thomas's Hospital demised another piece of land, in the parish of St. Thomas, Southwark, on which many houses, &c. stood, but which the said president and governors, by virtue of the powers vested in them by the Act of Parliament and the will of the founder, pulled down, and in their place built another square in addition to, and communicating with the hospital, in which square the plaintiff's house is situated.

No part of the ground on which the hospital now stands was ever part of the scite of St. Thomas's Hospital, but this ground, before the two demises of it to the founder and governors of Guy's Hospital, was covered with houses let to different persons, and in the year 1693, and from thence to the building of Guy's Hospital, was assessed to the land-tax.

The house in which the plaintiff lived has been constantly occupied by the treasurer for the time being, for whose sole use it was erected.

The plaintiff paid no rent for it, but occupied it as incident to his office.

Bond, Serjt., on behalf of the plaintiff, contended, that he was exempted from payment of the land-tax, in respect of the scite of the hospital and the buildings within the limits of it, being stated to live in a building within those limits. He paid no rent for his house, but held it as incident to his office. The treasurer is the servant of the hospital, and as such protected by the exception given to the hospital. The protection given to charities is very ancient. It is to be found in the old Subsidy Acts, and was preserved in the first land-tax bill of William the Third.—The Subsidy Act of the 1st Eliz. (Runnington's Appendix, vol. x. p. 163, s. 34), contains a general exemption of hospital property, for it declares that it shall not extend to the goods and lands of any hospital, &c. used [70] for the sustentation and relief of the poor, &c. and the 4th of W. & M. c. 1, s. 25, contains a protection to the scite of hospitals, which has been inserted in all the land-tax bills which have been passed since the Revolution, with the material addition of "any of the buildings within the walls or limits of the hospital." From hence it is clear, that the Legislature has been anxious to extend the exemption to the appendages of an hospital, which are inhabited either by the objects of the charity or the servants of it. The scite of a building means the land upon which the building and all its dependencies and offices are situated. The stat. 32 H. 8, c. 20, mentions the scite of monasteries, and under that description not only the land upon which the walls of a monastery were built, but the garden, orchard, and all the appurtenances may at this day be exempted from tithes. But lest the term might be ambiguous, the Legislature expressly added the words "any of the buildings within the walls or limits of the said hospitals" (Land-Tax Act, 27 G. 3, s. 25). Now what are these buildings? Certainly such as are necessary to the hospital. The necessity of the superintendence of the chief officers is as obvious as that of the service of the inferior agents, and such officers must have a residence suitable to their rank. If the treasurer, chaplain, or physician be assessable, so are the porters, gardener, and other servants who live within the hospital. They have all an interest of the same nature, differing only in their respective emoluments, which are proportioned to their several employments. They are all servants. By taxing either, the benevolent intentions of Parliament would be defeated; for the reason of the exemption is a regard to the public funds of the hospital, which would be lessened by a tax laid upon the servants, who would look to the public stock for repayment. The funds of hospitals are but barely equal to the charitable purposes of their institution. If a tax be laid on persons who will be reimbursed out of the public funds of a charity, the charity itself is taxed.

The land-tax in this instance bears no analogy to other taxes. Under the window-tax the plaintiff would be assessable because the Act is positive that "all dwelling-houses shall pay." The poor's rate is a tax proportioned by a general estimate of the

property of the rateable occupier. The plaintiff could not have any claim in such case on the treasury of the hospital for re-[71]-imbursement. But when charged with the land-tax, he is charged only with respect to his house.

It is objected, that the part of the hospital buildings in which the plaintiff resides, stands upon land which once paid the land-tax; and that as a certain fixed sum must be raised by the parish, the quota to be paid by each individual will be increased, if any part which has before borne a share of the burthen should be discharged. Now it is true that a certain sum must be paid by every district; but whether that sum is to be collected from a greater or less number of individuals, depends upon the state of property within the district. This makes the principal difference between the ancient subsidy and the modern land-tax. In the case of *The King v. The Occupiers of St. Luke's Hospital*, 2 Burr. 1064, Lord Mansfield says "Whether property is chargeable by a rate or other payment, depends upon the will of the proprietor. The owner of a house may if he pleases, pull it down, and convert it into a toft; the owner of lands may suffer them to lie barren and unoccupied. Tithes and the rights of them vary, according to the different species of the produce of the land, yet the landholder may sow it, or plant it, or use it, in the manner he likes best, or even not at all, if he so chooses." As the parish then is to pay collectively a certain sum, the question in the present case is not between the hospital and the public, but between the hospital and the parish; the same contribution will be made to the public revenue, from whatever source that contribution may arise.

Le Blanc, Serjt., for the defendants, argued,—1st, that the Court had no jurisdiction in the present case, the twentieth section of the Act having made the appeal to the commissioners final.—2dly, that the exemption was meant by the Legislature to protect only the buildings of hospitals at that time appropriated to the immediate objects of charity, and not to extend either to subsequent acquisitions, or to those buildings which were erected for the accommodation of the officers. This rule has obtained with regard to the poor's rates and window tax. Buildings inhabited by the distressed objects of a poor's rate are not assessed, like those which are occupied by the necessary officers. There is no reason why the plaintiff should be protected from the land-tax when he is liable to the poor's rate and window tax. In *The King v. Gardner* (Cowp. 79), it is ex-[72]-pressly said that the master of Catherine Hall, was rated for his garden, upon which houses had formerly stood, and which had been purchased by the college and added to their lands.

The hospital could not be injured, if the plaintiff were assessed, for he could have no claim to call upon the funds of the charity for reimbursement. The parish might be essentially injured, if the exemption claimed should be allowed, and the hospital should go on to increase the buildings belonging to it, as the number of persons to pay the sum required would be continually lessened. But whether the dispute be between the parish and the plaintiff, or the revenue and the plaintiff, the law is the same.

The opinion of the Court was thus delivered by

LORD LOUGHBOROUGH.—This being a building within the limits of the hospital, not let, nor yielding any profit, but in the occupation of a necessary officer, comes under the exemption of the Act. That there might be no ambiguity in the word *scite*, the Legislature goes on to say "any of the buildings within the walls or limits of the said colleges, halls, and hospitals." None of the buildings therefore within those limits are chargeable, unless they are charged as such, in some other clause of the Act, and no such clause is to be found.

The tax must be either on the owner or tenant of the hospital, but the plaintiff is neither owner nor tenant.

The objection to the jurisdiction of the Court is of no weight, the appeal to the commissioners being alone final, when the question arises, as to the quantum of the tax, and whether lands belonging to hospitals, &c. were assessed as such in the 4th year of William & Mary, or have been purchased since that time (a).

Judgment for the plaintiff.

(a) [See *The Earl of Radnor v. Reeve*, 2 Bos. & Pul. 391.]

[73] CASES ARGUED AND DETERMINED IN THE COURT OF COMMON PLEAS, IN MICHAELMAS TERM, IN THE TWENTY-NINTH YEAR OF THE REIGN OF GEORGE III.

PEARSON *Demandant*, PEARSON *Tenant*, AND BROUGHAM *Vouchee*.
Wednesday, Nov. 12th, 1788.

The Court will not grant leave to amend a recovery on affidavit only; it must appear on the face of the deed to lead the uses, that there is sufficient ground for an amendment (a)¹.

In a recovery, a farm called Thieftside, otherwise Thieveshead, was described to be situated in the forest of Inglewood, in the parishes of Hesket in the Forest, and St. Mary's Carlisle, or one of them, in the county of Cumberland. It was afterwards discovered that the whole of the said farm was not within the parishes of Hesket in the Forest and St. Mary's Carlisle, as described in the recovery, but that part of it was in the parish of Lazonby, in the county of Cumberland.

Bond, Serjt., moved to amend the recovery, by inserting "The parish of Lazonby," on an affidavit of the owner of the land, the vouchee, stating as above, and "that he meant to include all his estates in the county of Cumberland, in the recovery, and that he did not know, when he suffered the recovery, that any part of the said farm called Thieftside, was in the parish of Lazonby." In support of this motion he cited *Henzel v. Lodge*, 2 Black. 747, and Cruise's Essay on Common Recoveries, 183, 2d edit. (reported also 3 Wils. 154).

The Court would not on this affidavit alone grant leave to amend; but upon reading the deed to lead the uses, there was [74] found the following clause "and all other the estates, manors, or lordships, messuages, lands, tenements, and hereditaments, whatsoever, situate, lying, and being in the county of Cumberland." This was holden by the Court, sufficient to warrant an amendment, as it appeared on the face of the deed itself.

Rule absolute for the amendment.

GAWLER *against* JOLLEY. Friday, Nov. 14th, 1788.

The Court will set aside proceedings against bail, if the ca. sa. be tested of a term prior to that in which judgment is signed against the principal (a)².

The defendant was bail for one Page, against whom the plaintiff signed judgment on the 14th of April in Easter term last, and sued out ca. sa. tested the 12th of February, the last day of Hilary term, returnable on the 19th of April, to which the sheriff returned non est invent. On this the plaintiff took out a sci. fa. against the defendant, tested the 9th of April, the first day of Easter term, returnable the 23d of April, and a second sci. fa. tested the 23d of April, and returnable the 30th of April. On the 17th of May the plaintiff signed judgment against the present defendant, and sued out a fi. fa. under which his goods were taken by the sheriff.

A rule was obtained to shew cause why the proceedings should not be set aside, and the goods taken in execution restored, the ca. sa. being tested, the term before judgment was signed against the principal.

Le Blanc, Serjt., shewed cause, contending that the proceedings were irregular; that though the ca. sa. was tested before judgment was signed, yet in fact it issued after; that it was common to sue out writs in vacation tested as of the preceding term.

Runnington, Serjt., for the rule, argued that the ca. sa. could not regularly be tested in a term prior to that in which judgment was signed; that the sci. fa. also ought to have been tested the day of the return of the ca. sa.

(a)¹ [See *Cross v. Grey*, 1 Bos. & Pul. 137. *Dowse v. Lloyd*, 2 Bos. & Pul. 578. *Phillips v. Jones*, 3 Bos. & Pul. 362. And the cases collected in 2 Saund. 94, notes, 5th edit.]

(a)² [See Tidd's Prac. 1148, 8th edit.]

Le Blanc in reply. Bail are fixed in law at the return of the ca. sa., but by indulgence four days' notice are allowed. Here the bail might have had notice by searching in the office. It is immaterial when the sci. fa. was tested, if there was sufficient time before the return.

[75] The Court held the proceedings irregular, as they said such practice would tend to fix the bail, without giving them an opportunity to surrender the principal, and therefore made the

Rule absolute.

SAUNDERSON *against* MARR. Monday, Nov. 17th, 1788.

A warrant of attorney given by an infant is absolutely void, and the Court will not confirm it, though the infant appear to have given it (knowing that it was not valid), for the purpose of collusion (a)¹.

The defendant being an infant, joined with his brother in giving a warrant of attorney to the plaintiff, to confess a judgment, which was accordingly entered up, and the defendant taken in execution. In order to procure his discharge, he alone gave a second warrant of attorney, on which judgment was again entered, and he again taken in execution. On this, a rule was granted to shew cause, why the last judgment should not be set aside, and the warrant of attorney cancelled, on the ground that the defendant was an infant at the time of giving it.

Marshall, Serjt., shewed for cause, a declaration of the defendant, when he gave the second warrant of attorney, that he would take no advantage of his infancy, a promise to pay the debt, and some circumstances of collusion between him and his brother. This application, Marshall said, was made to the equitable jurisdiction of the Court; and in equity, the acts of an infant are often confirmed; such as an agreement to settle an estate, and the like. But the Court said,

Such acts of an infant as are only voidable, are allowed in equity to be confirmed, but not such as are actually void. A warrant of attorney is of the latter description, which the Court cannot make good, though there appear circumstances of fraud on the part of the infant.

Rule absolute without costs.

[76] LAING *against* CUNDALE. Wednesday, Nov. 19th, 1788.

An artied clerk to an attorney, cannot be bail (a)².

Motion to justify bail.—It was objected by Bond, Serjt. that one of them was an articles clerk to an attorney.

The Court, on considering the rule (b) made on this subject, held, that being for the protection of attorneys, it extended to their artied clerks as well as themselves, and Rejected the bail.

(a)¹ [Acc. *Chambers v. Burnett*, T. 32 G. 3, C. P. Tidd's Pr. 594, 8th edit. *Wood v. Heath*, M. 1814, K. B. 1 Chitty's Rep. 708 (notes), see also *Wilkins v. Wetherill*, 3 Bos. & Pul. 220.]

(a)² [Acc. *Cornish v. Ross*, post, vol. ii. p. 349. *Fenton v. Ruggles*, 1 Bos. & Pul. 356. *Wallace v. Arrowsmith*, 2 Bos. & Pul. 49. *Redit v. Broomhead*, ibid. 564. So in the Exchequer, *Stoneham v. Pink*, 3 Price, 263. Tidd's Pr. 246, 8th edit.]

(b) Mich. 6 Geo. 2. It is ordered by the Lord Chief Justice, and the rest of the justices of this Court, that from and after the last day of this term, no attorney of this or any other Court, or any person practising as such, shall be bail in any suit or action depending in this Court.

Collection of rules and orders of the Court of Common Pleas, 8vo. edit. 1739, p. 258.

The same practice prevails in B. R. *Boulogne v. Vautrin*, B. R. T. 18 Geo. 3, cited in a note. Dougl. 466, last ed.

MITCHELL AND OTHERS, Assignees of Robertson, *against* GIBBONS.
 Wednesday, Nov. 19th, 1788.

Bail to the sheriff are liable, beyond the sum sworn to and costs, to satisfy the whole debt due, to the full extent of the penalty of the bail-bond (a).

The defendant being arrested at the suit of the plaintiffs, for "50l. and upwards" found bail, who entered into the common bail bond to the sheriff, in the penalty of 100l. The defendant not appearing, the bail paid to the plaintiff's attorney 50l. and offered to pay the costs, which the attorney refused to accept, unless they would pay 29l. more; the plaintiff's debt being in fact 79l. The bail not thinking themselves answerable for more than the sum sworn to and costs, refused to pay the overplus. The bond was assigned, and an action brought.

On which, a rule was granted to shew cause why the bond should not be given up, the sum sworn to having been paid, and a tender made of the costs.

In support of this rule, Bond, Serjt., contended that the bail were liable to no more than the sum sworn to and costs; that the stat. 12 Geo. 1, (cap. 29) had expressly prohibited the sheriff from taking bail to a greater amount; if he were to do so, he would be subject to the penalty of the stat. 23 Hen. 6, as having acted *colore officii* (cap. 9). The case of *Jackson v. Hassell* (Doug. 330), shews that [77] bail are not liable to more than the sum sworn to and costs; in the present case, 50l. was the sum sworn to, and the costs had been tendered. Where indeed a Judge makes an order to hold to bail, it is a matter of discretion in him to decide in what sum the bail shall be liable, but the liability of bail taken by the sheriff, is determined by the sum indorsed on the writ. If the sheriff were to take no bail, he would be only answerable for the sum sworn to, and costs.

Adair, Serjt., argued against the rule, that by the constant practice of the Courts, bail were liable in double the sum sworn to. The stat. 12 Geo. 1 prohibits the sheriff from taking more than double the sum. Where damages are uncertain, as in cases of tort, there they are measured by the discretion of the Judge, but where they are certain, as in cases of contract, the oath of the plaintiff is to prevail, and then double the sum is required. But why require double the sum, if only the single demand is to be recovered?

The Court took time to consider till the next day, when judgment was delivered as follows, by

LORD LOUGHBOROUGH.—We have considered this case, and find the practice for more than fifty years past, to have been, that the bail are liable to the whole extent of the penalty of the bond, to satisfy the debt really owing to the plaintiff. Soon after the 12th year of George the First, namely, in the 1st of George the Second, the case of *Turner v. Bailey* arose, which was on a motion to set aside a judgment obtained upon a bail-bond; the defendant insisted that such an action could not be maintained, because the bail-bond was taken in more than double the sum the plaintiff had sworn to be due; the Court seemed to be of opinion that, if the judgment was regular, the point about taking more than double the sum, could not come in question; but that this case might be settled, they put it off till the next term, it being a new point on the Act of the 12th Geo. 1, c. 29, but the parties having agreed, the point was not then settled: subjoined to this case, which is reported in Cooke's Cases of Practice (page 43), is the following note, "It seemed to be agreed, that the bail-bond may be taken in double the sum sworn due." The next case was in the third year of George the Second, reported in Fortescue Aland (b), and which was a demurrer to a declaration on a bail-bond, it appearing that [78] the writ was for 30l. and the bond for 40l.; it was contended that since the new Act (meaning the 12th of Geo. 1,) the bond was void, being for more than the sum in the writ; but the Court held it was not void, and that the Act was directory to the sheriffs: and of this opinion were the Court of Exchequer. In the 11th of George the Second, the same question came before the

(a) [Acc. *Stevenson v. Cameron*, 8 T. R. 29, see also *Dahl v. Johnson*, 1 Bos. & Pul. 205. But bail above are only liable to the amount of the sum sworn to and costs. *Clarke v. Bradshaw*, 1 East, 91. As to the extent of the sheriff's liability, see post, p. 233.]

(b) *Jenyns v. Goostrey*, Fortes. 366.

Court, in the case of *Mule v. Mitchell* (Pract. Reg. of C. B. 67), in which, though the Court seemed to think that the sheriff had done wrong in taking the bail-bond in more than double the sum sworn to, yet they said it would have been right for the sheriff to have taken the bond in double the sum sworn to, and indorsed on the writ. There is also a case in Mr. Justice Blackstone's Reports (*b*) on the same subject, in which a motion was made to stay the proceedings on a bail-bond, the defendant having paid his principal's whole debt, and his own costs, all except 40s. which he had tendered; but the Court on considering precedents, held, that the costs of the action against the principal and the other bail must also be paid, before the proceedings could stay. We have likewise consulted the officers of the Court, who say that it has always been the received practice, that the bail are liable to the utmost extent of the penalty of the bail-bond, as far as justice requires, for the payment of the whole debt due, and the costs.

Finding therefore the practice to be thus established, we do not feel ourselves authorized to set it aside.

Rule discharged.

SPENCER *against* GOTER. Wednesday, Nov. 19th, 1788.

The Court will not alter a verdict, unless it appears on the face of it, that the alteration would be according to the intention of the jury (*a*).

This was an action for words, tried before Lord Loughborough, at the sittings, at Westminster, after last Trinity term. The declaration consisted of six counts, the first five of which, were for accusing the plaintiff of being a dog-stealer, and stealing a dog of the defendant, and the last, for maliciously and without probable cause giving information before a justice, that there was cause to suspect that a dog which had been stolen from the defendant, was concealed in the house of the plaintiff: causing the justice to issue a search-warrant, and a constable to enter the house and search for the dog, which was neither found [79] in the house, nor there concealed; nor was it otherwise in the possession or custody of the plaintiff, &c.

Plea—Not guilty; on which issue was joined.—2d, Justification, that the words spoken were true. Replication, *de injuriâ suâ propriâ absque tali*, &c., on which also issue was joined.—

At the trial, there was sufficient evidence to support the counts for the words, it appearing that they were spoken, after a search had been made in the plaintiff's house, where the dog was not found: but it also appeared, that there was probable cause for the defendant's suspicion, and of course for his applying to the justice for a search-warrant. Lord Loughborough therefore directed the jury to find for the plaintiff, on the counts for the words spoken, and for the defendant on the last. But they found a general verdict for the plaintiff with 1s. damages, and 40s. costs.

A rule having been granted to shew cause, why the verdict should not be entered for the plaintiff, on the first and second counts only, agreeable to the notes of the Chief Justice, or why it should not be set aside, and a new trial granted,

Le Blanc, Serjt., contended that a general verdict having been found, the Court could not interfere to enter it on any particular count, and determined on which part of the evidence it was grounded. To enter it on any particular count, it must appear from the notes of the Judge, that the evidence applied only to that count. To grant a new trial, it must appear from the evidence, that the jury could not find the verdict which they have found.

Cockell, Serjt., in favour of the rule, urged that the last count was not supported by evidence. There was no proof of malice, the defendant had good ground to apply for a search-warrant.

The Court said, they could not alter a verdict, unless it clearly appeared on the face of it, that the alteration would be agreeable to the intention of the jury; and that the proper remedy in this case was a new trial.

(*b*) *Walker v. Carter*, 2 Black. 816.

(*a*) [Vide *Williams v. Breedon*, 1 Bos. & Pul. 329. *Richardson v. Mellish*, 3 Bingh. 334.]

It was then recommended to the parties to agree to a new trial; which they afterwards did, and accordingly the

Rule was made absolute for a new trial.

[80] COHN *against* DAVIS. Saturday, Nov. 22d, 1788.

Although an exception to bail has been regularly entered, and the defendant's attorney having had verbal notice of it proceeds by giving notice of justification, and attempting to justify, yet notice in writing of such exception must have been given, to make the sheriff liable to an attachment for not bringing in the body (a)¹.

An exception to bail was regularly entered in the filazer's book, of which the defendant's attorney had verbal notice, but afterwards proceeded by giving notice of justification, and attempting to justify bail who were rejected. The rule for bringing in the body having expired, and no bail being justified, an attachment was granted against the sheriff (ante, 9, *Thorold v. Fisher*).

A rule was obtained to shew cause why this attachment should not be set aside, on the ground, that a written notice of exception was not given to the defendant's attorney.

Adair, Serjt., shewed cause, arguing that under the circumstances of this case, the necessity of a written notice was waived, as the attorney for the defendant had received verbal notice of the exception being entered, and had afterwards himself given notice of justification, and in fact attempted to justify. He also contended that notice of justification, was an admission that notice of exception had been given.

Bond and Lawrence, Serjts. supported the rule. To shew that the practice of giving notice in writing was strictly to be observed, they cited the cases of *Satchwell v. Lawes*, 2 Barnes, 61, and *Goswell v. Hunt*, 2 Barnes, 83 (octavo edit.). They also urged, that there was no waiver by the defendant; but even if there had been a waiver on his part, still the irregularity was not cured, as relating to the sheriff; for though "Quisque potest renunciare juri pro se introducto," yet a third person could not be affected by such a renunciation, particularly one who stood in a criminal view; in which a sheriff stands, under an attachment for contempt.

Per Cur. Where there are two parties, and one of them takes a step, previous to which the other ought to have taken a step, the former waives the obligation which the latter was under, as between themselves, but not as relating to a third person. Here the waiver by the defendant, if it were one, was not a waiver by the sheriff. The rule ought to be strictly followed to prevent confusion.

Rule absolute.

[81] WILLIAMS *against* MILLINGTON. Saturday, Nov. 22d, 1788.

[Principle applied, *Woolfe v. Horne*, 1877, 2 Q. B. D. 358. Followed, *Davis v. Artingstall*, 1880, 49 L. J. Ch. 610. Referred to, *Woold v. Baxter*, 1883, 49 L. T. 47. Applied, *Consolidated Company v. Curtis*, [1892] 1 Q. B. 499.]

An auctioneer employed to sell the goods of a third person by auction, may maintain an action for goods sold and delivered against a buyer, though the sale was at the house of such third person, and the goods were known to be his property (a).²

The plaintiff was an auctioneer, and employed by one Crown to sell his goods by auction. The sale was at the house of Crown, and the goods were known to be his property. The defendant bought goods to the amount of 7l. 9s. 6d. and after packing them in a cart, which he had prepared ready at the door, paid the plaintiff 2l. 4s. 6d. in cash, and put a receipt into his hand, for five guineas as for a debt due from Crown to the defendant. While the plaintiff was hesitating about the propriety of taking

(a)¹ [Acc. *Rogers v. Mapleback*, post, p. 106, see also *Hodson v. Garrett*, 1 Chitty's Rep. 174. Tidd's Pr. 257, 8th edit.]

(a)² [But if the buyer settle with the principal, the auctioneer cannot recover, unless perhaps he give notice of his lien to the purchaser. *Coppin v. Walker*, 7 Taunt. 237. 2 Marsh. 497, S. C.]

the receipt in payment, the defendant drove off the cart with the goods. Afterwards the plaintiff being called upon by Crown, paid to him (who refused to accept the receipt) the whole sum for which the goods were sold to the defendant, and brought this action to recover the five guineas, in lieu of which the receipt was offered.

The declaration was for goods sold and delivered, with the usual money counts.

Plea, general issue.—Verdict for the plaintiff.

A rule was granted to shew cause, why this verdict should not be set-aside, and a nonsuit entered.

In support of which rule, Adair, Serjt., argued, that as the goods in question were known to be the property of Crown, and sold as such, the plaintiff was not entitled to bring an action for goods sold and delivered. He allowed, that where the possessor was the only visible owner, he might maintain this action, but here public notice was given that Crown was the owner. The plaintiff himself printed the proposals of sale, which was actually holden at the house of Crown. The goods were liable to every demand against Crown both at law and in equity, as much as if they had been bought of Crown himself, and he only, not the auctioneer, would have been answerable for a refusal to deliver. The payment of the money to Crown by the plaintiff, was in his own wrong, and therefore cannot be the foundation of an action; he could not be liable to the owner for more than he had actually received. If the plaintiff were permitted to maintain this action, the vendee would be deprived of the benefit of a set-off against the owner, and manifest injustice would ensue.

[82] Marshall, Serjt., also supported the rule. He contended, that as the owner of the goods might have brought this action against the defendant, so it was clear that the auctioneer could not bring it, because it is a rule of law to which there is no exception, that several persons cannot maintain distinct and separate actions on the same contract, against the same defendant. The inconvenience arising from different persons bringing separate actions on the same contract, would be, that while the action was brought by one, the defendant might pay the other, and give the payment in evidence under the general issue. The law abhors multiplicity of actions; and therefore wherever it appears on record, that two writs have been sued out against the same defendant for the same cause, the second shall abate. If two persons could bring separate actions for the same thing, as neither could have a priority, each might proceed at the same time, and the right being equal in both, neither could be pleaded against the other; if either could be pleaded against the other, each might be reciprocally, and then both must abate. If Crown were now to bring an action against the defendant, the present action depending could not be pleaded in abatement; such a plea would be bad, (because it would admit that the first plaintiff had a right to sue, and if so, the second had not,) and would amount to the general issue. If the auctioneer had a right to sue, it must be on a presumption that he gave the credit to the buyer, but if he gave the credit, he alone can sue. If the goods were not delivered to the buyer, the owner would alone be liable to an action. The auctioneer never had possession of them, as they were sold on the premises of the owner. All the precedents of declarations shew that the owner must be sued.

The case of a factor stands upon very different grounds, arising from the custom of merchants and convenience of commerce. But the law relating to factors is not in favour of the present plaintiff; for though a factor to one beyond sea may maintain an action in his own name for goods sold, being the only visible owner, according to the doctrine laid down in Buller's *Nisi Prius* (a), yet, in general, a factor is a mere agent or servant to the principal, and has only the custody of the goods, the property remaining in the principal. Cowp. 255.

The next point is, whether the plaintiff can maintain the count for money paid, for the sum he paid to Crown, after he [83] had notice from the defendant not to pay it. One of the first principles of law is, that an assumpsit cannot be raised by payment of the debts of another against his will, 1 Term Rep. B. R. 20. Nor does it lie in the power of any man at his election, to vary the rights of two other contending parties. When Crown refused to take the defendant's receipt in payment, the plaintiff knew the subject of contention between them, and therefore, as he was not bound to pay more money than he had actually received, he elected, by paying the amount of the receipt, to deprive the defendant of the benefit of his claim on Crown.

(a) *Gonzales v. Salden*, p. 130.

Bond, Serjt., against the rule made two points, 1. Whether the plaintiff could maintain this action. 2. Whether the defendant might not have given evidence of the debt due from Crown.

As to the second point, he contended, that though under the general issue, evidence of the debt could not be given without notice of set-off, yet the defendant might have averred, that the plaintiff was the agent of Crown, then stated the debt, and pleaded payment of the residue. That in an action on a bond brought by a trustee, the defendant had been permitted to plead a debt due to him from the cestui que trust (a). This was a liberal construction of the Statutes of Set-off, and of which the defendant might have availed himself; no objection therefore could be made by him on this ground, to the present action.

The only question then was, whether the plaintiff could maintain an action for goods sold and delivered, and money paid? An auctioneer is not a mere servant, but a special bailee, and has a sufficient property in goods which he is to sell, to maintain trover, and rebut a prosecution for felony.

As to multiplicity of action, the law equally abhors circuity of action, and will not admit trifling distinctions. If two actions were brought for the same cause against the same person, the Court would interfere, and relieve upon affidavit. Here only one action was brought. If a carrier has a commission to sell goods, he has a special property in them, and may maintain an action for goods sold and delivered. An auctioneer is upon the same footing, both being special bailees. It is the daily practice for auctioneers to bring actions of this kind, whether they [84] are considered as agents only, or as selling in their own names. Tattersall, the auctioneer of horses, has often brought actions against the buyer. So a merchant employed to sell the produce of an estate in the West Indies, though without a commission del credere, may, and often does, being an action in his own right against a purchaser. An auctioneer has frequently been made defendant, and if he may be defendant, he may also be plaintiff. *Law v. Skinner*, 2 Black. 996. The plaintiff also is entitled to recover the money which he has wrongfully paid on a count for money had and received. *Moses v. Mackfarlane*, 2 Burr. 1005. The authority cited from the Term Reports, B. R. 20, is not applicable to this case, here being an implied contract.

Adair replied, that the only question was, whether a special property in goods was sufficient to support an action founded on contract. He admitted, that in cases where an injury was done, an action on the tort might be maintained. He also admitted, that where the auctioneer was the only ostensible owner, there perhaps he might bring an action on the contract of sale; as in the case of the West India merchant, where the real owner was unknown. But in the present case, as the goods were sold on the premises of the owner, and as it was publicly declared, that they were his property, the plaintiff could not make a contract in his own name. The mode of sale made the whole difference. The case of *Simon v. Metivier* (a), is an authority to shew that an auctioneer is only the channel through which the vendor contracts with the vendee, and that being an agent for both parties, he cannot have a sufficient interest in the goods to maintain this action.

LORD LOUGHBOROUGH.—This case arises on circumstances which do not often happen, the defendant having practised a trick upon the plaintiff by driving off the goods in a cart, and at the same time holding out the money in sight, together with the paper containing a receipt for the debt due from Crown the owner. Though the defendant shall not be suffered to avail himself of such contract, yet I entertain no sort of doubt on the general question being extremely clear, that an auctioneer has a possession, coupled with an interest, in goods which he is employed to sell, not a bare custody like a servant or shopman. There is no difference, whether the sale be on the pre-[85]-mises of the owner, or in a public auction-room, for on the premises of the owner, an actual possession is given to the auctioneer and his servants by the owner, not merely an authority to sell. I have said a possession coupled with an interest: but an auctioneer has also a special property in him, with a lien for the charges of the sale, the commission, and the auction-duty, which he is bound to pay. In the common course of auctions, there is no delivery without actual payment, if it be otherwise, the auctioneer gives credit to the vendee, entirely at his own risk. Though he is like a

(a) *Winch v. Keeley*, Term Rep. B. R. vol. 1, p. 619.

(a) 3 Bur. 1921, more accurately reported in B. N. P. 280, 1 W. Bl. 959. S. C.

factor therefore in some instances, in others the case is stronger with him than with a factor, since the law imposes the payment of a duty on him, and the credit in case of a delivery, without the recompense of a commission *del credere*. It is not a true position, that two persons cannot bring separate actions for the same cause: the carrier and the owner of goods may each bring actions on a tort; the factor and owner may each have actions on a contract. I am therefore, upon the whole, decidedly of opinion that this action may well be maintained.

GOULD, J.—I have listened attentively to what has been delivered by my Lord Chief Justice, and have no doubt but that the law is precisely as he has stated; I shall therefore only say, that I entirely agree with him in opinion.

HEATH, J.—I am of the same opinion. It is the same thing, whether goods be sold on the premises of the owner, or in an auction-room; the possession is in the auctioneer, and it is he who makes the contract; if they should be stolen, he might maintain trespass, or an indictment for larceny: he therefore has a special property in them, which is all that is necessary to support this action. It was said, that the case of *Simon v. Metivier* proved that an auctioneer was only the channel through which the contract was made between the buyer and seller: but this must be taken *secundum subjectam materiem*; though he is an agent to some purposes, he is not so to all: he is an agent for each party in different things, but not in the same thing: when he prescribes the rules of bidding, and the terms of the sale, he is the agent for the seller, but when he puts down the name of buyer he is agent for him only. Here the deposit was to be paid to the auctioneer, who had a sufficient property to maintain this action.

WILSON, J.—I am inclined to think this verdict properly found, though I am by no means so clear as my brothers; I [86] should therefore have wished to give it further consideration. I think the verdict right, because the defendant having contracted with the plaintiff for the goods, shall not be permitted to say that the plaintiff had no right to contract: having the benefit, property and possession of them, it shall not lie in his mouth to dispute the validity of the contract: he who claims under the plaintiff shall not say, "I will not pay, because you had no property in the thing sold." Without doubt the right of Crown, was superior to that of the plaintiff: how far he might be preferred to the plaintiff in bringing the action, or how far a notice from him to the buyer not to pay, would prevent the auctioneer from maintaining this action, might be fit to be considered (*a*). But the defendant had no right to put any owner forward, in order to prevent the auctioneer from having this remedy. It struck me as material that the goods were sold on the premises of the owner, and in his name; as if it were with him that the contract was made. In the north of England, where cattle are often sold by auction, it would be thought a strange thing if the auctioneer could maintain such an action as this: there he is employed merely to sell cattle on the premises, and is not considered as having any sort of interest in them. Where indeed the auctioneer has rooms for the purpose of selling, he is answerable to the owner, and has a special property. The plaintiff also in the present case, might have had a special property, but I rather doubt whether that would give him a right to dispose of the absolute property, upon which the action for goods sold and delivered is founded. I therefore think the verdict right, inasmuch as the party who has gained possession of the goods, shall be estopped from saying, to avoid a just payment, that there was no property in him from whom that possession was derived. Another circumstance also in favour of the plaintiff is, that every part of the declaration is proved (*b*). Property is not stated to be in him, because it is implied by law, but only that the goods were sold and delivered by him to the defendant; this is proved, and affords a strong reason why the defendant should not be permitted to dispute the effect of the sale and delivery.

Rule discharged.

(a) [Where a sale had been made by a factor, and afterwards there was a communication between him and his principal, when the latter agreed to consider the purchaser as his debtor, Lord Ellenborough held that the factor's right to sue was gone. *Sadler v. Leigh*, 4 Campb. N. P. C. 196.]

(b) [See *Atkins v. Amber*, 2 Esp. N. P. C. 493.]

[87] TOWERS *against* POWELL ET UX. Monday, Nov. 24th, 1788.

Where the plaintiff does not declare, after having obtained time for that purpose, the defendant may sign judgment of non pros. without giving a rule to declare.

In Michaelmas vacation, 1787, a *capias ad resp.* was issued in this cause, returnable on the octave of St. Hilary, to which the defendants appeared. On the last day of Easter term, the plaintiff obtained a rule for time to declare, until the first day of Trinity term; and then a rule for further time till the last day of Trinity term; but not having declared in that term, the defendant in the vacation signed judgment of non pros. as of Trinity term.

Runnington, Serjt., obtained a rule to shew cause why this judgment should not be set aside, the defendant not having given a rule to declare.

Against which, Le Blanc, Serjt., urged that the judgment was regular:

1st. Because by a rule of Court of Hilary term, in the 9th of Anne (a)¹, where the plaintiff does not declare within two terms after the return of the writ, the defendant must sign judgment of non pros. in the vacation after the second term; he cannot wait therefore till the next term.

2ndly. Though where further time has not been granted, a rule to declare is necessary to be given previous to signing judgment, yet where such time has been granted, there a rule to declare is not necessary. The plaintiff having himself obtained time, is presumed to know when he ought to declare, without notice from the defendant. On the same principle where a defendant has had time to plead, and has neglected so to do, the plaintiff may sign judgment without giving him a rule to plead. *Starkie v. Wilkes*, 1 Crompt. Prac. 166 (b).

Runnington in support of the rule. At the end of the second term, the plaintiff may of course have a rule for farther time, from the secondaries, but if a rule be given by the defendant to declare, a summons may be taken out before a Judge, who will grant farther time at his discretion. Where the defendant does not give a rule to declare, the plaintiff has till the *essoign* day of the third term to deliver or file his declaration. Prac. Reg. C. B. 121. The reason why a rule to plead is not [88] necessary for a defendant, who has obtained time, is because by so doing he admits himself to be in Court.

Per Curiam. The plaintiff having himself obtained time to declare, has no right to call upon the defendant for notice. Where time to plead has been given, no rule to plead is necessary, and the case of declaring, bears in this respect a strict analogy to that of pleading.

Rule discharged.

BACON *against* SEARLES. Thursday, Nov. 27th, 1788.

[Questioned, *Purssord v. Peck*, 1841, 9 Mee. & W. 200, 201. Overruled, *Jones v. Broadhurst*, 1850, 9 C. B. 187.]

The indorsee of a bill of exchange having received part of the contents from the drawer, cannot recover more than the residue from the acceptor. Where the drawer pays the whole, the acceptor is entirely discharged (a)².

Assumpsit by the indorsee of a bill of exchange against the acceptor.

The bill was drawn for 95l. 10s. by one Seymour on the defendant, payable to his own order, by him indorsed to the plaintiff, and accepted by the defendant after it became due, Seymour the drawer paid the plaintiff 60l. 10s. as part of the contents; the defendant paid the residue with interest into Court, and pleaded the general issue.

This cause was tried before Lord Loughborough at Guildhall, at the sittings in the

(a)¹ See Rules, Orders, and Notices of the Court of Common Pleas, fol. edit. 1742.

(b) [But a summons for further time to plead, not attended by the party taking it out, does not waive the necessity of a rule to plead. *Decker v. Shedden*, 3 Bos. & Pul. 180.]

(a)² [See *Walwyn v. St. Quintin*, 1 Bos. & Pul. 652.]

present term, and a verdict found for the defendant, with leave to move the Court to enter a verdict for the plaintiff.

This motion was accordingly made by Bond, Serjt., who contended that the payment by the drawer was not a discharge of the acceptor, he having by his acceptance made himself liable to the holder of the bill. The contract between the indorser of a bill and the indorsee was, he argued, totally different from that between the drawer and acceptor; the former being merely a contract of indemnity, but the latter an undertaking that the acceptor has effects of the drawer in his hands to the amount of his acceptance, by which he gives currency to the bill, and makes himself liable for the whole. *Parminster v. Symons*, 4 Brown's Parl. Cas. 604. 1 Wils. 185. The payment of the drawer in the present case gave him a lien on the bill, for the sum he had paid; the holder also had a lien for the whole amount; but as a personal contract cannot be severed, and made the ground of two actions, the holder must bring the action for the whole, and be considered as a trustee for that [89] part which the drawer had paid. *Johnson v. Kennion*, 2 Wils. 262. *Hawkins v. Cardy*, Lord Raym. 360.

WILSON, J.—Mentioned the case of *Beck v. Robley* (a), as being contrary to Bond's argument.

LORD LOUGHBOROUGH.—When a bill of exchange is drawn, the drawer orders the acceptor to pay so much of his money to a third person; but if he anticipates the acceptor, and pays the money himself, he thereby releases the acceptor from his undertaking; so that if the acceptor were to pay the bill after notice given him that the drawer had already paid it, an action would lie for the drawer against the acceptor to recover back the money so paid. Another reason which weighs much with me is, the great mischief which would ensue to merchants, among whom accommodation bills are circulated to a vast extent, if after a bill had been taken up by the drawer, the acceptor should be liable to be called upon for payment.

(a) *Beck against Robley*, Tr. 14 Geo. 3, B. R.

[Overruled, *Jones v. Broadhurst*, 1850, 9 C. B. 186.]

Indorsee of a bill of exchange against the acceptor. It appeared in evidence, that Brown drew a bill of exchange upon Robley, payable to Hodgson or order, which was accepted by Robley and indorsed by Hodgson. Not being paid when due, Hodgson returned the bill, and Brown took it up, Hodgson's indorsement still remaining. Brown afterwards gave the bill to Beck, as a security for money, and when he gave it, acquainted Beck with the whole transaction, but did not tell him whether Robley had effects in his hands. Upon this evidence the jury found a verdict for the defendant, being of opinion that the acceptor was discharged by Brown's taking up the bill, and that there was an end of its negotiability.

Mansfield moved for a new trial, on the ground that the jury had mistaken the law. He insisted that the drawer of a bill, which in a course of circulation came back to his hands, might maintain an action as indorsee (Mr. J. Ashhurst said he remembered several instances of such actions). And here the bill was indorsed to Brown, who might either have maintained his action as indorsee, or put it again in circulation, unless the acceptor's refusal to pay could prevent the negotiability of it, which certainly could not be the case.

Wallace, contra. A bill of exchange is payable at a given time, and is till that time negotiable. If payment is then refused, it goes back to the drawer, and when he has taken it up, there is an end of it. If it were otherwise, Hodgson would be liable, who certainly never meant that his name should give a title to the bill after it had been returned to the drawer.

LORD MANSFIELD.—I first thought at the trial that the action was maintainable, but am now clearly satisfied that the jury did right. When a draft is given, payable to A. or order, the purpose is, that it shall be paid to A. or order; and when it comes back unpaid, and is taken up by the drawer, it ceases to be a bill. If it were negotiable, Hodgson would be liable, for which there is no colour (b).

Rule for a new trial refused.

(b) [But where a bill payable to the order of the drawer, is returned to, and paid, and re-issued by him, the acceptor may be sued on such bill. *Callow v. Lawrence*, 3 M. & S. 95.]

GOULD, J.—The doctrine contended for would go the length of proving, that the holder of a bill having received the whole money from the drawer, might recover it again from the acceptor.

[90] HEATH, J., of the same opinion.

WILSON, J.—I had no doubt on this question, till the case of *Johnson v. Kennion* was cited; but that was done away by what has fallen from my Lord. Indeed that case is inaccurately reported (a)¹; and I am much disposed to think, that the Chief Justice never said what he is there stated to have said. That also might have been the case of a promissory note instead of a bill of exchange. But there my brother Gould says, that where the defendant had paid the amount of the bill, there was an end of the contract; so here, the drawer having paid part, and the acceptor the residue, the contract was at an end, the acceptor being the agent of the drawer. There also my brother Gould says, where the drawer of a bill has paid part, you may indorse it over for the residue. But that is for the protection of the indorsee. Here the plaintiff knew how much was due; no such special indorsement was necessary. The case then of *Johnson v. Kennion*, does not influence the present; but even if it did, I shall think the justice of this cause much in favour of the defendant. The plaintiff has received all the money, and yet desires to be a trustee for the drawer, and received again from the acceptor that which the drawer has paid. Besides, though the presumption is, that the acceptor of a bill of exchange has effects of the drawer in his hands at the time of the acceptance, yet in fact the effects are often sent after the acceptance.

Rule refused.

JENKINS against TUCKER. Friday, Nov. 28, 1788.

Where a husband goes abroad and leaves his wife, who dies in his absence, a third person who voluntarily pays the expences of her funeral (suitable to the rank and fortune of the husband) though without the knowledge of the husband, may recover from him the money so laid out, especially if such third person be the father of the wife (a)². Quære, whether such third person can recover from the husband, money which he has expended after the death of the wife in discharging debts which she had contracted in her husband's absence (b)? Quære also, whether the defendant can demur to the evidence, after having paid money into Court (c)?

The defendant married the plaintiff's daughter; and some time after the marriage went to Jamaica, leaving her and an infant child in England. During his absence she died; and this action was brought by her father against the husband, to recover the money which he had expended after her death, in discharging debts which she had contracted while her husband was in Jamaica (by living with her child in a manner suitable to her husband's fortune), and in defraying the expenses of her funeral, which were also proportioned to the husband's fortune and station. The declaration was in the usual form, [91] for necessaries and funeral expenses, with the common money counts. The defendant paid 100l. into Court, and pleaded non assumpsit as to the residue.

At the trial, the evidence on the part of the plaintiff proved, that the defendant was possessed of a large estate in Jamaica; that he lived with his wife till he went thither; that he left her in bad health, and much in want of money; that after her death the plaintiff paid the debts which she had incurred in the absence of the defendant, and her funeral expences.

To this evidence the counsel for the defendant demurred.

(a)¹ [See a note of the same case, Bull. N. P. 271, ed. 3, said by Eyre, C.J., to be probably Lord Bathurst's own note, 1 Bos. & Pul. 656.]

(a)² [Vide *Besfich v. Coggil*, 1 Palmer, 559. *Church v. Church*, cited T. Raym. 260. *Pellans v. Van Mierop*, 3 Burr. 1672. 3 Bos. & Pul. 251, note.]

(b) [It should seem that such payments cannot be recovered, since they are made without the request of the husband, either express or implied, see *Stokes v. Lewis*, 1 T. R. 20. *Exall v. Partridge*, 8 T. R. 310. *Child v. Morley*, 8 T. R. 613.]

(c) [It seems that he can. Tidd's Pr. 675, 8th edit. post. vol. ii. p. 375.]

In support of the demurrer, Runnington, Serjt., now contended, that a sufficient consideration was not disclosed by the evidence to raise an assumpsit. A consideration on which the law will imply an undertaking, must be either beneficial to the defendant, or detrimental to the plaintiff; 1 Roll. Abr. 24; but in the present case there was neither one nor the other: the plaintiff paid the money in question without either the knowledge or consent of the defendant, and therefore without his special instance and request. Request is a matter of proof on record. 3 Lev. 366. It is necessary to be alleged. Dyer, 272, *Hunt v. Bate*. Payment of money for another without his consent and against his will, is no ground for an assumpsit. 1 Roll. Abr. 11. Hob. 105. Term Rep. B. R. 20. If such an action were allowed, it would occasion a manifest injury to the defendant, as he would be precluded from contesting the legality of the original demand, and from the advantage of a set-off.

Generally speaking, assumpsit will not lie, except where debt will. Here debt could not be brought, there being neither privity nor contract between the parties. Hardr. 485, where the Chief Baron said, that if there be a mere collateral engagement, debt would not lie. This was a collateral obligation, that could not be supported without a special request being proved. If it were otherwise, the greatest inconveniences would arise. In the present instance the husband would be liable for the debts of the wife beyond what were for necessities. Though in some particular cases the law will raise an assumpsit where a man is under an obligation of conscience or equity to pay the sum demanded; yet in this case the defendant was neither bound in conscience or equity, to repay money laid out on his account, without either his consent, knowledge, or request.

[92] Rooke, Serjt., contra. The Court will not presume that the money in question was paid without the consent of the defendant, because it does not appear to have been paid expressly at his request. It is possible that a previous consent might have been given. This was a matter for the discretion of the jury, who would have determined by a verdict whether there was a sufficient consideration. The rule, that such a consideration as will raise an assumpsit, must be either beneficial to the defendant, or detrimental to the plaintiff, has been often holden to be too narrow. Cowp. 290, *Hawkes v. Saunders*. But allowing this rule to be in full force, this case comes within the meaning of it, for it was a benefit to the defendant to have his father-in-law his sole creditor in the room of many others; and it was also a detriment to the plaintiff to have advanced so much money.

This was not the interference of a stranger, but of a father, whom common decency required to relieve the distresses of his daughter, and give direction for her funeral in the absence of her husband. There appears then, a sufficient consideration on the record to maintain this action. But besides this, the defendant, by paying money into Court, acknowledges that the action was well brought; he pays it in full discharge, and therefore confesses a ground of action on every count of the declaration. Term Rep. B. R. 464, *Cox v. Parry*.

The cause of action therefore being admitted, a demurrer to evidence could not be supported, the jury ought not to have been prevented from ascertaining the quantum of damages.

Runnington, in reply. This is an abstract question of law, whether or not there appears a sufficient consideration on the record? As to presuming that the defendant gave a previous consent to the plaintiff, there is no reason to warrant such a presumption. Admitting that decency required the plaintiff to direct the funeral, yet the charges made were greater than were necessary. But if the plaintiff has a right in law to recover, the sum cannot be apportioned, and he must recover the whole. Though the case of *Hawkes v. Saunders* be good law, it does not affect the present, as in that there was both consent and an equitable consideration, which are wanting in this. As to payment of money into Court, it does not admit a right of action to the extent contended for, but only for so much as is really paid [93] in. The practice of paying money into Court arose from the Court's permitting, on equitable grounds, the defendant, after the action was commenced, to have the advantage of a plea of tender, when he was too late in fact to plead it. If the plaintiff takes the money out of Court, he is entitled so far to costs; but if he proceeds, it is at his peril, and beyond this he is subject to strict legal proof. The case of *Cox v. Parry*, is in favour of the defendant: the words of Mr. Justice Ashhurst in delivering the opinion of the Court in that case, are, "As the defendant has paid money into Court, he has thereby admitted that the

plaintiffs are intitled to maintain their action to the amount of that sum, but he has admitted nothing more."

LORD LOUGHBOROUGH.—This demurrer to evidence strikes me as being extremely absurd, since by payment of money into Court, the defendant admits a cause of action (*a*)¹, (so that where money is paid into Court, there can be no such thing as a nonsuit) (*b*)¹; and also, because it was for the jury to determine the quantum of damages. The Court cannot anticipate the province of a jury, and ascertain damages on a writ of enquiry. It was not my intention that any of the debts contracted by the defendant's wife, which the plaintiff discharged after her death, should have gone to the jury; but as the counsel for the defendant thought proper to demur to the evidence, the judgment on the demurrer must be general. They ought at the trial to have contended for a verdict: they seem to me to have taken the wrong method for their client.

I think there was a sufficient consideration to support this action for the funeral expences, though there was neither request nor assent on the part of the defendant, for the plaintiff acted in discharge of a duty which the defendant was under a strict legal necessity of himself performing, and which common decency required at his hands; the money therefore which the plaintiff paid on this account, was paid to the use of the defendant. A father also seems to be the proper person to interfere in giving directions for his daughter's funeral in the absence of her husband. There are many cases of this sort, where a person having paid money which another was under a legal obligation to pay, though without his knowledge or request, may maintain an action to recover back the money so paid: such as in the instance of goods being distrained by the commissioners of the land-tax, if a neighbour should redeem the goods, and pay the tax for the owner, he might maintain an action for the money against the owner (*a*)².

[94] GOULD, J.—It appears from this demurrer, that the defendant was possessed of a plantation in Jamaica, from the time he left his wife, till her death, which annually produced above 120 hogsheads of sugar, the value of which, at a moderate estimation, amounted to near 3000*l.* a year. He was therefore bound to support her in a manner suitable to his degree; and the expences were such as were suitable to his degree and situation in life. The law takes notice of things suitable to the degree of the husband in the paraphernalia of the wife, and in other respects. In the present case, the demurrer admits that the money was expended on account of the wife, and being for things suitable to the degree of the husband, the law raises a consideration, and implies a promise to pay it.

HEATH, J.—The defendant was clearly liable to pay the expences of his wife's funeral.

WILSON, J.—If the plaintiff in this case had declared as having himself buried the deceased, the husband clearly would have been liable (*a*)³; and as the case stands at present, the plaintiff having defrayed the expences of the funeral, the husband is in justice equally liable to repay those expences, and in him the law will imply an assumpsit for that purpose.

Judgment for the plaintiff (*b*)².

(*a*)¹ [See *Hitchcock v. Tyson*, 2 Esp. N. P. C. 482, note.]

(*b*)¹ [Contrâ, *Smith v. Vale*, 2 Esp. N. P. C. 607. Tidd's Pr. 675, 8th edit. See also 1 Campb. N. P. C. 327, note, and post. vol. ii. p. 374. *Anderson v. Shaw*, 3 Bingh. 290.]

(*a*)² [Quere, whether the stranger could recover unless he had paid the money to redeem his own goods, as in *Exall v. Partridge*, 8 T. R. 308? See also 1 Saund. 264 (*n.*) 5th edit.]

(*a*)³ [A stranger may bury an intestate at the expense of his estate, without becoming an executor de son tort, Vin. Ab. Executor (B. a.), 24, 2 Bl. Com. 507.]

(*b*)² The cause was tried a second time before Mr. Justice Heath, at the sittings after this term at Guildhall, who directed the jury to confine their attention to the funeral expences, and only to consider whether the 100*l.* paid into Court was sufficient to defray them; being of opinion that the debts of the deceased, which the plaintiff had paid, could not be recovered, but allowing that point to be reserved for the further consideration of the Court. The jury accordingly found a verdict only for the funeral expences; but it was for the whole amount of the undertaker's bill, 140*l.* 15*s.* The Court was not afterwards moved on the subject of the debts.

LUSHINGTON *against* WALLER. Friday, Nov. 28th, 1788.

Where judgment has not been entered within a year and a day, on a warrant of attorney given with a post-obit bond, and the obligee does not apply to the Court for leave to enter it till after the death of the person on whose death it is payable, the Court will not grant leave without a rule to shew cause. A post-obit bond is a security of a doubtful nature.

Adair, Serjt., moved to enter up judgment on a warrant of attorney, on an affidavit stating that a bond for 1800l. was given by the defendant to the plaintiff in the year 1780, conditioned for the payment of 900l. (in consideration of 400l. advanced at the time of the execution of it) on the death of the [95] defendant's father, in case the defendant should survive, together with the warrant; that the father died in September last, and the son was still living. But

The Court said, that in common cases, where judgment has not been entered on a warrant of attorney within a year and a day from the date, it was necessary to apply to the Court for leave to enter it; as this was a post-obit bond, a security of a questionable nature, which had been often disputed with success, leave to enter up judgment ought not to be granted without a rule to shew cause. If judgment is entered immediately on giving the warrant, or within a year and a day after, transactions of this sort may probably be brought to the knowledge of the family of the obligor, and a guard raised against fraud and imposition. But if the obligee waits till the death of the father or relation, the Court will prevent his having immediate execution, by which he might force the obligor to submit to such terms as he should think proper to impose, and will require him to give due notice of his intention.

Adair, on hearing this opinion, took nothing by his motion.

End of Michaelmas term.

[97] CASES ARGUED AND DETERMINED IN THE COURT OF COMMON PLEAS, IN HILARY TERM, IN THE TWENTY NINTH YEAR OF THE REIGN OF GEORGE III.

ROE ON THE DEMISE OF JORDAN *against* WARD. Saturday, Jan. 24th, 1789.

[Discussed and applied, *Kelly v. Patterson*, 1874, L. R. 9 C. P. 684.]

Tenant for life makes a lease for years, to commence on a certain day, and dies before the expiration of the lease) in the middle of the year. The remainder-man receives rent from the lessee (who continues in possession, but not under a fresh lease) for two years together, on the days of payment mentioned in the lease. This is evidence from which the Court will presume an agreement between the remainder-man and the lessee, that the lessee should continue to hold from the day, and according to the terms of the original demise, so that notice to quit ending on that day is proper (a).

Ejectment for a messuage, &c. John Jordan was tenant for life, remainder to his son the lessor of the plaintiff for life, remainders over. John Jordan, the father, on the 22d of June, 1785, made a lease of the premises by indenture, to the defendant for twenty-one years, to commence from Old Lady-Day, which was the 5th of April then last; on which day the defendant had entered. On the 30th of September, 1785, John Jordan, the father, died; on whose death, the estate came to the lessor of the plaintiff, his son. The defendant continued in possession, and paid rent to the lessor of the plaintiff, after the death of his father, for two years together, on Old Lady-Day and Old Michaelmas-Day. Before Old Michaelmas-Day, 1787, the

(a) [That the acceptance of rent, in such case, is evidence of a tenancy from year to year, see *Doe d. Martin v. Watts*, 7 T. R. 83. *Right d. Dean of Wells v. Bawden*, 3 East, 260. *Roe d. Burne v. Prideaux*, 10 East, 187. That the tenant will hold on the conditions of the former lease, see *Doe d. Rigge v. Bell*, 5 T. R. 471. *Digby v. Atkinson*, 4 Campb. N. P. C. 275. *Doe d. Castleton v. Samuel*, 5 Esp. 173.]

lessor of the plaintiff gave the defendant notice to quit on Old Lady-Day the 5th of April then next; and on his refusing to quit brought this action.

[98] An objection was made at the trial, that the notice to quit on the 5th of April was bad; that it ought to have been on the 30th of September, the end of the year, dated from the death of John Jordan the father; all the defendant's interest derived from the lease having ceased on that event, as John Jordan, the father, had no power to make a lease to endure beyond his own life.

Mr. JUSTICE ASHHURST, who tried the cause, left it to the jury, whether they would not presume a new agreement between the lessor of the plaintiff and the defendant, that the defendant should continue to hold according to the terms of the original lease; as the lessor of the plaintiff had received rent from him during two years, after the death of John Jordan, the father, on the original days of payment; namely, Old Michaelmas and Old Lady-Day; and if so, the notice to quit was proper. But a verdict was found for the defendant.

In Trinity term last, a rule was granted to shew cause, why this verdict should not be set aside, and a new trial granted.

Against which, Lawrence, Serjt., now shewed cause. He argued, that as the lease was made by a tenant for life, at his death, all the interest of the lessee in the premises must cease: at that time, he was either a trespasser, or he still continued to be tenant. But he was clearly not a trespasser, and as there was no express agreement as to the term for which he was to hold over, and as it is now a settled point of law that there can be no such thing as a tenancy at will; he was tenant from year to year. If so, as during the tenancy for life of the father, there could be no contract implied between the lessor of the plaintiff and the defendant; the year must have commenced at the death of the father; namely, on the 30th of September, and on that day the notice to quit ought to have ended.

Le Blanc, Serjt., in support of the rule, contended, that though perhaps it might have been presumed that the defendant's interest began from the 30th of September, if no rent had been paid on the 5th of April, yet, as the rent was in fact paid on the 5th of April during two years; such a presumption was totally destroyed. If the interest of the defendant had in truth commenced on the 30th of September, on that day the rent would have been paid: but it appeared to be otherwise from the Judge's report. The law draws a conclusion, that a tenant [99] holds from the day on which he pays rent. If the lessor of the plaintiff had given notice to quit on the 30th of September, he would have been nonsuited, since he would have been estopped, by having accepted rent on the 5th of April for two years together, from saying, that the defendant's term began on any other day. The defendant then ought also to be estopped, by his own act, having paid rent on the 5th of April during the same period of two years. The notice to quit therefore was regular, and the verdict wrong.

LORD LOUGHBOROUGH.—The jury found a wrong verdict in this case. The notice to quit on the 5th of April was proper, as payment of the rent had been made on that day. It was also fair and just in the lessor of the plaintiff, to give the tenant notice to quit when his year ended, that the course of his husbandry might not be disturbed.

HEATH, J.(a).—The defendant was tenant at sufferance, on the death of the tenant for life, and the rent being paid on the 5th of April, was evidence of an agreement to hold from that day.

WILSON, J.—As there was no express agreement between the lessor of the plaintiff and the defendant, relating to the premises, given in evidence, we must collect what their agreement was, from something done by them. The payment of rent by one, and the acceptance of it by the other, on the same day on which the defendant originally entered, was sufficient evidence of a relation back between them; and though the indenture itself was made on the 22d of June, it related back to the 5th of April. Although the title of the defendant under the indenture, ended on the 30th of September, yet the payment of rent on the 5th of April was evidence of an agreement that he should continue to hold in the same manner as he did by the indenture; insomuch, that if in the lease, there had been covenants for particular modes of husbandry, and the defendant after the death of the tenant for life, had neglected to perform them, the lessor of the plaintiff might have maintained an action

(a) Mr. Justice Gould was absent.

on the case against him, stated the covenants, and then averred an agreement to perform them, according to the terms of the original lease; of which agreement the continuing to pay rent on [100] the 5th of April, for two years together, would have been good evidence.

Rule absolute without costs.

See 1 Term Rep. B. R. 159, *Right v. Darby and Another*.

DUTENS Clerk *against* ROBSON. Tuesday, Jan. 27th, 1789.

Where the subject of a suit in an Inferior Court is within the jurisdiction of that Court, though in the proceedings a matter be stated which is out of its jurisdiction, yet unless it is going on to try such matter, a prohibition will not lie (a)¹.

Cockell, Serjt., moved for a rule to shew cause why a prohibition should not issue to the Consistory Court of the Bishop of Durham, in a suit for subtraction of tithes. The ground of his motion was, that the libel stated, an immemorial custom and prescription for the rector to receive from the parishioners a composition for the tithe of milk. This he urged, being matter of common law cognizance, was improper to be discussed in an Ecclesiastical Court, and, as it appeared on the face of the libel, afforded good ground for a prohibition.

But as the defendant had not in his plea denied the custom, the Court refused to grant the prohibition. They said that as the subject-matter was within the jurisdiction of the Ecclesiastical Court, a prohibition would not lie, unless that Court were proceeding to try the question of custom, but in this case, as the custom was not denied, it could not be put in issue.

Rule refused.

WORGMAN *against* PLANK. Wednesday, Jan. 28th, 1789.

The notice to appear, annexed to common process, must contain the name of the defendant on whom it is served (a)².

The defendant was served with a copy of a common capias, but his name was not mentioned in the notice to appear, which was, "You are served, &c." leaving out the name. For this irregularity, Lawrence, Serjt., moved to quash the writ, as being contrary to the statute 5 Geo. 2, c. 27, s. 4 (b), and cited 1 Wils. 104 (c).

No cause being shewn, the rule was made absolute.

[101] PORZELIUS *against* MADDOCKS. Wednesday, Jan. 28th, 1789.

Where a plaintiff has once proceeded to trial, judgment as in case of a nonsuit cannot be entered, for not proceeding to a new trial (a)³.

The plaintiff obtained a verdict at the sittings after Easter term: in Trinity term a new trial was granted; to which he not having proceeded,

Kerby Serjt., now moved for judgment, as in case of a nonsuit.

But the Court held, that where a plaintiff had once proceeded to trial, judgment

(a)¹ [See *Garc v. Gapper*, 3 East, 472. *Gould v. Gapper*, 5 East, 345. See also *Carlake v. Mapledoram*, 2 T. R. 473.]

(a)² [So where a wrong name is inserted, the proceedings will be set aside. *Jones v. Armytage*, 2 Bos. & Pul. 38. Tidd's Pr. 166, 8th edit. But see *Wilson v. Stafford*, 2 Chitty's R. 355. *Badgett v. Lee*, *ibid*.]

(b) Which requires the notice to be "A. B. you are served, &c."

(c) *Behema v. James*, in which the Court of B. R. quashed a latitat for the same omission.

(a)³ [So where the cause is made a remanet at the assizes. *Mewburn v. Langley*, 3 T. R. 1. Aliter at the sittings in London and Westminster. *Gadd v. Bennet*, 2 B. & A. 709. The defendant must carry the cause down by proviso, as before the statute. 2 Saund. 336 c. notes, 6th edit.]

as in case of a nonsuit could not be entered, for not proceeding to a new trial; a subsequent neglect not being within the statute 14 Geo. 2, c. 17 (b)¹, and therefore Refused the rule.

THORNTON AND ANOTHER *against* DUNPHY. Wednesday, Jan. 28th, 1789.

Where a prisoner has been brought into Court to be discharged under the Lord's Act, and upon his examination, the Court have refused to discharge him, they will not afterwards discharge him on that Act, though he make an affidavit of circumstances in answer to the cause shewn, on his examination, against his discharge, and that those circumstances were not then disclosed, owing to a mistake. The 5th section of the 26 Geo. 3, c. 44, is only meant to remedy a neglect, in not taking the benefit of the Lord's Act, within the time limited by that Act (a)¹.

The defendant was a prisoner in B. R. to which he was removed by habeas corpus, after having been charged in execution in this Court. In Michaelmas term last (the next term after he was taken into execution) he was brought up for his discharge under the statute 32 Geo. 2, c. 28, s. 13 (b)², commonly called the Lord's Act; but upon cause shewn the petition was rejected, and he was remanded. Le Blanc, Serjt., now moved to bring him into Court a second time, and that the plaintiffs should again shew cause why he should not be discharged, on an affidavit containing some circumstances in answer to the cause before shewn by the plaintiffs, which, through mistake, as was stated, were not then disclosed. In support of this motion Le Blanc cited the 5th section of the stat. 26 Geo. 3, c. 44 (a)², within the benefit of which, he said, the defendant came.

But the Court, upon looking into the two statutes, were clearly of opinion, that the defendant did not come within the meaning of the 26 Geo. 3, c. 44, s. 5, which was only designed to remedy a neglect in not taking the benefit of the 32 Geo. 2, c. 28, s. 13, within the time limited by that Act. In this case, the defendant had petitioned,

(b)¹ Sect. 1. Which enacts, "That where any issue is, or shall be joined, in any action, or suit at law, in any of His Majesty's Courts of Record, &c. and the plaintiff or plaintiffs in any such action or suit, hath, or have neglected, or shall neglect to bring such issue on to be tried, according to the course and practice of the said Courts respectively, it shall and may be lawful for the Judge or Judges of the said Courts respectively, at any time after such neglect, upon motion made in open Court (due notice having been given thereof) to give the like judgment for the defendant or defendants in every such action or suit, as in cases of nonsuit, &c."

(a)¹ [See *Pearce v. Taylor*, 4 T. R. 231.]

(b)² Which enacts, "That if any person or persons shall be charged in execution for any sum or sums of money, not exceeding in the whole 100l. or on which execution or executions, there shall at any time remain due, as shall be made appear by oath, a sum or sums of money not amounting to above the said sum of 100l. and shall be minded to deliver up, to his, her, or their creditor, or creditors, who shall so charge him, her, or them in execution, all his, her, or their estate and effects, for or towards the satisfaction of the debt, or debts, wherewith he, she, or they shall so stand charged, it shall and may be lawful to and for any such prisoner, before the end of the first term, which shall be next after any such prisoner shall be charged in execution by his creditor or creditors, to exhibit a petition to any Court of Law, from whence the process issued, upon which any such prisoner or prisoners was or were taken and charged in execution, as aforesaid or to the Court into which any such prisoner or prisoners shall be removed by habeas corpus, or shall be charged in custody, and shall remain in the prison thereof" (upon which, and on the terms there prescribed, the Court shall make a rule to discharge the prisoner).

(a)² Which enacts, "That where any debtor shall have neglected to take the benefit of the said Act, (the 32 Geo. 2, c. 28,) within the time limited by the said Act, and shall have remained in prison by the space of one year, and shall make it appear to the Court, out of which such execution issued, that such neglect arose from ignorance or mistake, such debtor shall then be intitled to take the benefit of the said Act, as if he or she had taken the same, within the time by the said Act, so limited as aforesaid."

and been brought into Court, within the limited time, namely, before the end of the first term after he was taken in execution. There was no instance of a second petition being allowed, after the merits of the first had been finally decided. If such practice were suffered, it would produce infinite vexation.

Rule refused.

SEGAR *against* ATKINSON, Administratrix of Atkinson. Thursday, Jan. 29th, 1789.

In an action against an administrator, on promises of the intestate an insimul computasset with the administrator, as such, of money due from the intestate, does not make him personally liable (a).

Assumpsit.—The declaration consisted of four counts. The first, for goods sold and delivered to the intestate; second, quantum valebant; third, money paid to the use of the intestate; fourth, that the plaintiff accounted with the defendant as administratrix, as aforesaid, of, and concerning divers sums of money, &c. owing from the intestate to the plaintiff, [103] and upon that account the intestate was found in arrear and indebted to the plaintiff, &c. and being so found in arrear and indebted, she the said defendant, as administratrix as aforesaid, in consideration thereof, promised, &c.—Plea, that the promises, &c. in the declaration, were made to the plaintiff and one William Cox jointly, and a release from the said William Cox, &c.

Replication, that they were made to the plaintiff solely, and not to him and William Cox jointly, &c.

Special demurrer, that the replication hath not expressly traversed, &c. the plea, &c.

Runnington, Serjt., gave up the demurrer, but took an exception to the declaration. He argued that here was a misjoinder of action, 1 Wils. 248. 2 Wils. 231. 3 Wils. 348, and that the three first counts, being on the undertaking of the intestate, but the last on that of the administratrix herself, the judgment on the former must be de bonis testatoris, and on the latter de bonis propriis, 9 Co. 91. Cro. Eliz. 91 & 406. 10 Mod. 70 & 254. Cowp. 284 & 289. But if there is not a misjoinder, yet the last count is not supported by a sufficient consideration to raise a personal undertaking. 1 Vezey, 125, and chiefly 1 Vent. 268, which shews that the promise by the defendant should have been on request to account.

Cockell, Serjt., contra. The cases cited, are not applicable: an account stated raises no new debt, but it is an acknowledgment of the old, 1 Salk. 208, *Elwes v. Mocatoe*. It is a sufficient consideration, that the intestate was indebted. This is not a personal promise, but made merely as administratrix. It is the usual practice to lay a promise from an administrator on an account stated, to take the case out of the Statute of Limitations. The judgment would be the same on all the counts, viz. de bonis testatoris. *Rann v. Hughes*, 7 Brown Parl. Cas. 550 ([7 T. R. 350, (n.) S. C.]).

Runnington in reply. The *Anonymous case* in Ventris, 268, was on an account stated by an executor, and the Court held it sufficient to bind him personally. Here a request from the defendant to account is not stated. In the case cited from 1 Salk. 208, the action was brought by an executor, here it is against the administratrix.

On the next day, judgment was given, by Heath, J. (Lord Loughborough and Mr. Justice Gould being absent).—

[104] This is an action brought against an administratrix for a debt due from the intestate. The first count of the declaration is for goods sold and delivered to the intestate, the second, is on a quantum valebant, the third for money paid to the intestate's use, and the fourth, on which the question arises, is on an account stated between the plaintiff and defendant, as administratrix, of money owing from the intestate, and in consideration of the intestate being found indebted, a promise is stated from the defendant to pay. To this declaration it has been objected that there is a misjoinder of action: that the judgment on the three former counts, must be de bonis testatoris, and on the latter de bonis propriis, because in the last count the defendant is said to be charged in her own right. Unquestionably, if the judgment

(a) [*Ellis v. Bowen*, Forrest, 98, S. P. So a count upon an insimul computasset of money due from the defendant as executor, may be joined with counts on promises by the testator. *Powell v. Graham*, 7 Taunt. 580. 1 B. Moore, 305, S. C.]

were to be, as it has been contended, in one instance *de bonis testatoris*, and in the other *de bonis propriis*, the declaration would be bad; but we are of opinion, that the objection is not founded in truth, and that the defendant is charged, as administratrix, on all the counts. The authority which my brother Runnington chiefly relied upon, was, an *Anonymous case* in Ventris (1 Ventr. 268), more correctly reported in 2 Levinz (122), by the name of *Hawes v. Smith*, which was a writ of error, on an action in this Court, against an executor, in which the plaintiff declared on an account stated at the request of the defendant: the judgment was for the plaintiff *de bonis propriis*, and on error brought, this judgment was affirmed in the King's Bench, it being holden not to be error, because the plaintiff was not bound to account with the executor, and yet did account at the request of the executor; therefore a good consideration was raised. But it is very difficult to reconcile that case with any true principle of law. The plaintiff was bound in equity and conscience to account: the defendant might have had a writ of account against him, by the Statute 31 Ed. 3, as it appears from Lord Coke's Commentary on the Statute of Westminster the Second (cap. 23, p. 404). It is also said in the case of *Hawes v. Smith*, that the promise was in consideration of forbearance to sue; but so far is it from being like forbearance to sue, that the defendant desires to account, and facilitates the bringing a suit by ascertaining the sum due. The principal case cited on behalf of the plaintiff, was that of *Elwes v. Mocatoe* (1 Salk. 207); but that was on an *in simul* computassent brought by an executor, and whether good law or not, does not affect [105] the present case. It was also said, that the plaintiff did not account at the request of the defendant, and so there was no consideration for the promise; but it is expressly stated that they accounted together, and that the defendant promised as administratrix. This is the common mode of declaring against executors and administrators, to save the Statute of Limitations; but if it were to be considered as making them personally liable, I do not know who would ever take out administration.

Judgment for the plaintiff.

JOHNSON *against* SMITH. Saturday, Jan. 31st, 1789.

The Court will not refer a matter which concerns an officer of the Court, to the prothonotary for examination. The warden of the Fleet cannot demand an additional fee for expedition, in returning a writ of habeas corpus.

On a former day, Kerby, Serjt., moved to refer a charge made by the warden of the Fleet on a prisoner for fees, to the prothonotary for examination. In answer, the Court said, this was not like an attorney's bill which the prothonotary might settle, but being a matter in which an officer of the Court was concerned, was proper to be examined before the Court itself. The reference therefore was not allowed; but a rule was granted to shew cause why the warden should not refund what appeared to be exorbitant. On shewing cause, it appeared that the charge on the prisoner was two guineas, for making, at his request, an expeditious return to a habeas corpus; that he knew the usual fee, and was informed of the additional one to be paid for expedition. It was urged by Adair, Serjt., (and by the warden himself who was in Court,) that though the Court might disapprove of such practice, and alter it in future, yet it would be hard to have a retrospect, and compel the warden to refund and pay costs, who had only followed the example of his predecessors in office. But the Court said, whatever effect the prisoner's consent to pay might have between the warden and him, this was a question between the warden and the public. As the duty of an officer required him to make an expeditious return (a), he could have no pretensions to demand an additional fee for expedition. It was not to be endured, that advantages of this kind should be taken of the distress of persons under confinement.

Rule absolute with costs.

(a) Stat. 31 Car. 2, c. 2, s. 1.

[106] PARQUOT *against* ELING. Tuesday, Feb. 3d, 1789.

The Court will not require a plaintiff to give security for costs, merely on account of his residence abroad. There must be special circumstances to induce the Court to require it (a)¹.

On a former day, Adair, Serjt., moved to stay proceedings, till the plaintiff, who was abroad, gave security to pay the costs, in case a verdict should be found against him. The Court would not grant a rule, on the circumstances alone, of his being resident abroad (b), but required an affidavit of "his having gone thither to avoid payment of his debts, of his insolvency in a foreign country," or the like, saying that the practice was now settled in this Court, that the plaintiff should not be compelled to give such security, merely because he was in another country.

An affidavit of this sort being now produced, a rule was granted to shew cause, which was afterwards made absolute, no cause being shewn.

PORRIER *against* CARTER. Tuesday, Feb. 3d, 1789.

The Court will not require the plaintiff to give security for costs, either on account of his being a foreigner, or insolvent; if he reside in England (a)².

Bond, Serjt., moved to stay proceedings till the plaintiff gave security for costs, on an affidavit stating, "that he was a foreigner, had left France to avoid being arrested for debt, and was in England insolvent." But the Court refused the rule, saying, that neither the plaintiff's being a foreigner, nor his insolvency in this country, were sufficient reasons to require such a security.

ROGERS *against* MAPLEBACK. Tuesday, Feb. 3d, 1789.

Notice of justification of bail, is not such a waiver of the default of not giving notice of exception, as to support a rule on the sheriff to bring in the body; though it is a waiver as between the plaintiff and defendant.

Bond, Serjt., moved to discharge a rule on the sheriff to bring in the body, on an affidavit stating "that the defendant had put in bail, and, upon searching the office, no exception was found to have been made."

[107] Runnington, Serjt., shewed for cause, that notice of justification had been given by the defendant, which he contended was a waiver of the necessity of notice of exception; and cited a rule of this Court, 12th of May 1784 (a)³, in which it was settled, that when a rule to bring in the body had been served, bail must not only be put in, but justified, though the defendant be rendered. He also said, that this was analogous to the case of delivering a declaration in chief, in a bailable action, before bail were put in, which, on all hands, was agreed to be a waiver of the necessity of putting in bail. But

The Court held, that although there was a waiver as between the parties, yet the irregularity was not cured, as respecting the sheriff, according to the principle of the case of *Cohn v. Davis* (ante, p. 80) decided last term; and therefore made the rule, for the discharge of the former rule, absolute with costs.

BARNARD *against* MOSS. Wednesday, Feb. 4th, 1789.

In an action of debt for the penalty of the stat. 2 & 3 Ed. 6, c. 13, for not setting out tithes, with a count in the declaration for the single value; after a demurrer

(a)¹ [But see *Ganesford v. Levy*, post, vol. ii. p. 228, and the note there.]

(b) This practice differs from that of B. R., where a security for costs is required from the plaintiff, without any other ground than that of his being in a foreign country. 1 Term Rep. B. R. 267. The same, if he be in Ireland, *ibid.* 362.

(a)² [*Ciragno v. Hassan*, 6 Taunt. 20. Tidd's Prac. 579, 8th edit. and see post, vol. ii. p. 228, note (a).]

(a)³ Impey's New Instructor Clericalis, C. B. 2d edit. 156.

to the declaration, the parties submit to arbitration, and the arbitrator awards the single value to be less than 20 nobles (6l. 13s. 4d.). The plaintiff is not entitled to costs on the counts for the penalty, under the stat. 8 & 9 W. 3, c. 11, s. 5, the value not having been found by a jury; but the Court will allow him to have the costs taxed, on the count for the single value (a)¹.

This was an action of debt on the stat. 2 & 3 Ed. 6, c. 13, to recover treble the value of tithes not set out: there was also a count for the single value.

The defendant demurred to the declaration, but the parties afterwards agreed to submit to arbitration, and judgment was entered to stand as a security for costs. The arbitrator determined, the single value of the tithes to be 6l. 7s. 6d. and awarded treble that sum to the plaintiff, viz. 19l. 2s. 6d. together with the costs of the reference, and that he might sue out execution.

Lawrence, Serjt., now moved that the prothonotary might tax the costs of suit to the plaintiff, grounding his motion on the stat. 8 & 9 W. 3, c. 11, s. 3, which enacts, "that in all actions of debt upon the statute for not setting forth of tithes, wherein the single value or damages found by the jury, shall not exceed the sum of 20 nobles (6l. 13s. 4d.) the plaintiff obtaining judgment, or an award of execution, after plea pleaded, or demurrer joined, shall likewise recover his costs of suit."

[108] Cockell, Serjt., opposed the motion, contending that the plaintiff was not entitled to costs of suit, unless the single value or damages had been found by a jury, the words of the statute being positive; and cited the case of *Biddulph v. Cooper*, in this Court, Hil. 23 Geo. 3, which was an action for not setting out tithes, on the stat. 2 & 3 Ed. 6, c. 13; the plaintiff declared for less than 20 nobles, and signed judgment for want of a plea; after which he applied to the prothonotaries to tax his costs. They consulted Mr. Justice Gould, who informed them, that as no trial or inquisition was had by a jury, the plaintiff was not entitled to costs.

Lawrence replied that the case of *Biddulph v. Cooper* could only be in point, if on the demurrer, final judgment had been here given for the plaintiff: but the reference to the arbitrator, was like an application to the Court for leave to go to trial after a demurrer, the arbitrator being substituted in the place of a jury. At all events, the plaintiff was entitled to his costs on the count for the single value.

The Court held, that the statute was confined to the case of the single value or damages being found by a jury, and therefore refused the rule, as far as it respected the counts for the penalty, but allowed the costs to be taxed on the count for the single value.

ROSE AND MERCY his Wife, against BOWLER AND READ, Executors
of Bowler. Wednesday, Feb. 4th, 1789.

[Referred to, *Jones v. Cuthbertson*, 1873, L. R. 8 Q. B. 512.]

Where the cause of demurrer to a declaration is, that the counts are improperly joined, the plaintiff cannot enter a nolle prosequi as to some, and leave the others remaining (a)². An executor cannot be charged as such either for money had and received by him, money lent to him, or on an account stated of money due from him as such; those charges making him personally liable (b). The wife can only join with the husband in bringing an action, where she is the meritorious cause of action, as where a legacy is left to her (c). Qu. Whether an executor can be sued as such, for a legacy left by the testator? (d)

This was an action of assumpsit, brought to recover a legacy left by the testator,

(a)¹ [See *Pedley v. Frampton*, 2 Chitty's Rep. 155. 3 Price, 474, where a verdict is taken subject to a reference.]

(a)² [*Drummond v. Dorant*, 4 T. R. 360, S. P. 1 Saund. 285, notes. 5th edit.]

(b) [*Brigden v. Parkes*, 2 Bos. & Pul. 424, S. P. But a count on an account stated of money due from the defendant as executor, may be joined on counts with promises by the testator. *Powell v. Graham*, 7 Taunt. 580. Ante, p. 102. 2 Saund. 117 e. notes, 5th edit.]

(c) [So where a promissory note is made to her during coverture. *Philliskirk v. Pluckwell*, 2 M. & S. 393.]

(d) [No action at law can be maintained for a legacy. *Deeks v. Strutt*, 5 T. R. 690.

of whom the defendants were executors, to Mercy Rose the plaintiff, after her marriage. The first count of the declaration stated the devise, &c. and averred assets in the hands of the defendants sufficient to pay the legacy, over and above the debts, legacies, and funeral expenses, whereby the defendants as executors became liable to pay, &c. and being so liable, promised as executors, &c. Second count, money had and received by the defendants as executors, [109] to the use of the plaintiffs, &c. 3d, money lent to them as executors by the plaintiffs; 4th, an account stated of money due from them as executors, to the plaintiffs, and as such a promise, &c.

Special demurrer, that the plaintiffs had declared against the defendants as executors, whereas they ought to have been declared against in their own right; that the plaintiffs had declared against the defendants, on debts and promises, &c. as having respectively accrued, and been made by them as executors, whereas such debts and promises could not by law accrue, or be made, in that capacity, but personally only; and that there was a misjoinder of action, in this, that some of the causes of action accrued to the plaintiffs jointly, and others to the husband alone, &c.

Nolle prosequi as to the three last counts, and joinder in demurrer to the first, &c.

On the part of the defendants, Marshall, Serjt., began by making three objections to the first count.—1. That an action at common law would not lie for a legacy. 2. If such an action would lie, the husband and wife could not join in it. 3. That the defendants could not be sued as executors in such action. As to the first point, although the modern cases determined in *B. R. Cowp.* 284 & 289 are authorities to prove that this action will lie, yet those decisions are contrary to the antient authorities. *Dyer*, 264, pl. 41. *Sir Tho. Raym.* 23. 11 *Mod.* 145.—1 *Salk.* 315.—*Moore*, 917. But if an action at common law will lie for a legacy, yet as this legacy became due during the coverture, it was vested in the husband, he alone could sue for it. The husband and wife ought to join in all actions to recover a chose in action, due to the wife before coverture, as a debt on bond, for rent, and the like; they ought also to join in actions which arise during the coverture, if such actions would survive to the wife; but where the wife cannot have the action if she survive, the husband must sue alone. Where the wife before marriage is entitled to a chose in action, the marriage does not vest it in the husband, unless reduced into possession; but where a chose in action is given to the wife during the coverture, it vests absolutely in the husband. 1 *Com. Dig.* tit. *Baron & Feme*, p. 555. 3 *Lev.* 403. 1 *Mod.* 179. A legacy left to the wife during the coverture does not survive to her. 2 *Roll. Rep.* 134.

But whether the plaintiffs could join in this action or not, the defendants cannot be sued as executors. An executor cannot be sued as such, where he may be sued in his own right, [110] because there are different judgments, affecting different funds. The representative of the testator cannot be sued on any contract which the testator did not make. Wherever therefore, an executor is sued on a contract made by himself, he must be sued in his own right, though it relate to the concerns of the testator. Here the testator made no contract to give the legacy; he could not be liable in his life-time to an action for it; both the consideration and the promise were personal in the executors, *King v. Thom*, 1 *Term Rep. B. R.* 487. The law will not allow an action to be maintained against any person who cannot plead the proper pleas belonging to such an action; here the defendants could not plead *plene administraverunt*. 1 *Term Rep. B. R.* 691.

The three last counts are bad, because the husband and wife cannot join in an action on any of the promises contained in them, nor the defendants be sued as executors on those promises, neither can those counts be joined with the first, supposing the first to be good against the defendants as executors. Of this the plaintiffs were sensible, and entered a nolle prosequi. But a nolle prosequi is not to

Farish v. Wilson, Peake's N. P. C. 72. *Mayor of South v. Graves*, 8 *T. R.* 593. Unless it be a specific legacy to which the executor has assented, in which case an action lies. *Doe v. Guy*, 3 *East*, 120. Or unless it be a legacy payable out of land, in which case it is said that an action may be maintained against the heir or terretenant. *Ewer v. Jones*, 2 *Salk.* 415. *Buller v. Buller*, 2 *Sid.* 21. *Nicholson v. Sherman*, *T. Raym.* 24. *Webb v. Jiggs*, 4 *M. & S.* 119. Quære, whether an action can be sustained for a legacy after an express promise by the executor in consideration of assets. See 2 *Saund.* 137, c. new notes, 5th edit.]

be allowed, in this stage of the proceedings, to prevent the operation of the demurrer. The ground of a demurrer may be, an union of incongruous matter, on which the Court could not give a proper judgment. But if the objectionable parts be withdrawn by a nolle prosequi, the demurrer has nothing to act upon, for though it was proper when put in, it is rendered nugatory by an act of the party, whose fault made it at first necessary. Part of the plaintiffs' allegation remained unanswered, and the defendants are put to an useless expense. If this may be done, why do parties ever move to amend? Why is not a nolle prosequi entered on the whole declaration? But even supposing that a nolle prosequi may be entered, as in this case, yet it is here irregular, being by attorney and not by the defendants in person, *Beecher's case*, 8 Co. 58. Cro. Jac. 211.

But the husband and wife cannot join in the three last counts, because, if the defendants have received money to the use of the plaintiffs, the husband alone is entitled to it. A feme covert cannot assent to a statement of accounts, but as the servant of the husband, and then it is his contract. 2 Black. 872. 1 Term Rep. B. R. 40. Neither can the action be maintained against the defendants as executors on these last promises. 1 Term Rep. [111] B. R. 487, *supra*. Either the first count charges them in a wrong character, or if they are there rightly charged as executors, that count is misjoined with the other three, on which the judgment must be *de bonis propriis*. In every point of view, therefore, the declaration is bad.

Le Blanc, Serjt., on behalf of the plaintiffs, argued that at any period a party might withdraw any part of the pleadings, leaving enough to support his action, for which one cause was sufficient. The defendant may withdraw such of his pleas as are ill-founded, provided he leaves one plea good, and the Court will not compel him to go on to an erroneous judgment. So where the parties go to trial after verdict, damages may be severed, the judgment entered on such counts as are good, and a remittitur for the bad ones, on payment of costs. Where a nolle prosequi is entered, after joinder in demurrer, it is optional in the defendant either to proceed or withdraw his demurrer, which he may do of course without leave of the Court, and be entitled to the costs of the demurrer: but if after notice of a nolle prosequi, he does not plead over, he goes on voluntarily with the demurrer. As to the nolle prosequi being entered by attorney, unless it be so expressed, the Court will not presume it; in the case in *Croke James*, it was expressly said to be by attorney. As to the other objections, Lord Mansfield says, in *Atkins v. Hill*, that the defendant had by his demurrer admitted that he has sufficient to pay the legacy, so here there is the same admission by the demurrer. Where an executor promises in consideration of assets, a Court of Law will compel the performance. *Atkins v. Hill*, Cowp. 284. *Hawkes v. Saunders*, [112] Cowp. 289. *Lewis v. Lewis (a)*, tried at Nisi Prius before Lord Mansfield, at

(a) *Lewis v. Lewis, Administrator*, with the will annexed. Sittings at Westminster after Trinity term, 1778.

Assumpsit against an administrator with the will annexed, to recover a legacy of 400 guineas, given to the plaintiff by the testator.

The declaration stated that one Thomas Lewis made his will, and afterwards a first and second codicil, and by his second codicil gave to the plaintiff 400 guineas to be paid out of his India bonds. That the testator died, and administration with the will and codicils annexed, was granted to the defendant. That the testator was possessed of India bonds to the amount of 3000*l*. and of goods and chattels to a large value; all which India bonds and goods and chattels came to the hands of the defendant, and were sufficient to satisfy all the testator's debts and legacies; that the defendant might have paid the plaintiff his legacy out of the said bonds, and by reason of the premises, became liable, as administrator, to pay, and being so liable, promised, as administrator to pay the legacy.

Plea, non assumpsit.

The cause was tried at the sittings after Trinity term, 1778, at Westminster, before Lord Mansfield. The plaintiff proved the will, codicils, administration, and India bonds sufficient, and that the defendant had offered to pay the plaintiff his legacy, if he would deduct 100*l*. which he pretended to be due from the plaintiff to the testator; but which the plaintiff denied, and refused to deduct. Lord Mansfield directed the jury to find a verdict for the plaintiff, for 420*l*. with leave to move the

the sittings after Trinity term 1778. The next objection is, that the husband and wife could not jointly sue. But where an action would survive to the wife, there she must join with her husband. Here the legacy would survive to the wife, not having been reduced into possession by the husband. If the husband had died, she might have claimed it, and not his representatives. The last objection is equally without foundation, namely, that executors can only be sued as such, on contracts made by the testator. They are liable as executors for funeral expences, which are to be paid before debts or legacies. Though the legacy in question was not a debt in the testator's life-time, yet it was a charge made by him on his effects. This was a qualified promise by the defendants to pay out of assets in their hands, which is admitted by the demurrer. It is objected that they promised as executors, and therefore could not be sued in their own right. The case of *King v. Thom* shews that executors may sue as such, on a contract made after the death of the testator, where the money would be part of the assets; by parity of reason, executors may be sued as such, where the money, if recovered, would be deducted from the assets. *Rann v. Hughes*, 7 Brown, Parl. Cas. 550 ([7 T. R. 360 (n.) S. C.]) proves that though an executor be charged personally for a debt of the testator, yet judgment will be *de bonis testatoris*.

Marshall in reply. There is no instance of a demurrer being withdrawn, and the party entitled to his costs, as a thing of course, after a *nolle prosequi*. The *nolle prosequi* was clearly entered by attorney. A warrant of attorney being placed at the beginning of the record, the parties are in Court by attorney in all the subsequent pleadings, except in pleading in abatement, when it is expressed that the party pleads in his own proper [113] person, otherwise it is error. As to funeral expences, decency requires them to have a priority. A man cannot be charged for a legacy bequeathed by him during his life-time, any more than he can have an heir in his life-time: the original cause, therefore is not in him.

WILSON, J., observed, that in the cases cited of *Atkins v. Hill*, and *Hawkes v. Saunders*, the question was, whether executors had made themselves personally liable, in which an averment of assets was necessary. But here the principal question was, whether by the general common law, an executor, as such, was liable to be sued for a legacy, in which case it would be surplusage to allege assets, and the defendant might plead *plene administravit*. This, he said, being a question of great importance, and as yet undecided, and only two Judges able to attend (a), they meant to give judgment on the other points of the cause, according as they should find them upon consideration.

On this day, HEATH, J., gave judgment as follows:

This is an action of *assumpsit* brought by husband and wife against executors for a legacy bequeathed by the testator to the wife. The first count states, that the defendants were liable as executors to pay the legacy, and that being so liable they promised as executors to pay it. The second count is for money had and received by the defendants as executors to the plaintiff's use. The third is for money lent to them as executors by the plaintiffs; and the fourth is on an account stated between them. To this declaration there is a demurrer, the causes of which are, that the defendants are sued as executors, and not in their own right, and that there is a misjoinder of action, some of the causes of action accruing to the plaintiffs jointly, and others to the husband alone. The plaintiffs have entered a *nolle prosequi* as to the three last counts, and joined in demurrer. But there is no case to prove that in this stage of the proceedings a *nolle prosequi* can be entered, and as it is certain, that no experiment of this kind has ever been made, it affords a strong argument, that it cannot be made. It was contended at the Bar, that there was an analogy between entering a *nolle prosequi* in this state of the pleadings, and severing of issues after a verdict; but here the objection is, that distinct and inconsistent rights of action are joined: for this cause there is a [114] demurrer, and after joining in demurrer, there is no instance of the plaintiff being permitted to do away the ground of the demurrer, by separating the rights of action. On this point, therefore, we are of opinion against the plaintiff. The next objection is, that the husband is improperly

Court for a new trial; and said, if there was not an absolute promise here to pay the legacy, there was at least strong evidence of the defendant's assent to it.

But the defendant submitted, and never brought the cause before the Court.

(a) Lord Loughborough and Mr. Justice Gould were absent.

joined with the wife. As to this, the rule is, that where the wife is the meritorious cause of action, there she may join with the husband, but not otherwise, as is evident from the authorities of *Croke James*, 644 (*Abbot & Ux. v. Blofield*), and 2 *Wilson*, 414 (*Weller and Others v. Baker*). Now in the present case, though in the first count the legacy appears to have been left to the wife, yet there is no meritorious consideration on her part for the three last promises, which are on general money counts. These counts are also such as would make the defendants personally liable, and with which they could not be charged as executors, and are therefore not to be joined with the first.

Here are then several counts, in one of which the husband is entitled in right of his wife, and on the others in his own right, but he is joined with his wife in all; the defendants are also declared against as executors in every count; but the latter are such as can only make them personally liable. For these reasons therefore, we give

Judgment for the defendants.

JACKSON *against* VERNON. Saturday, Feb. 7th, 1789.

A. the owner of a ship executes an absolute bill of sale of it to B. and by another deed of the same date, assigns other property to B., which deed of assignment (reciting that the bill of sale was for the better securing a sum of money lent by B. to A. and also reciting a bond and warrant of attorney given by A. to B. to secure the said sum) declares that these "several deeds and instruments were made to enable B. by sale of all the things comprised in them, to raise the sum lent, without the concurrence of A., at any time before the money should be paid off;" but in the same deed there is a covenant, "That upon payment of the money, B. shall re-convey to A., but so as not to prevent B. from selling, &c. at any time before the full payment, &c." Under these conveyances, B. is not absolute owner of the ship, but only mortgagee, and is not liable for necessities provided for the ship, before he takes possession (a).

This was an action for goods sold and delivered, in which a verdict was found for the plaintiff, subject to the opinion of the Court, on the following case.

The plaintiff was a rope-maker: on the 7th of February, 1787, and the 22d of July, and 1st of August 1788, supplied the ship "Three Sisters" with cordage and stores, by order of one Palmer the owner of her, without the knowledge of the defendant. On the 6th of February, 1789, Palmer gave a bond to the defendant for 3000*l.*, conditioned for the payment of [115] 1500*l.* and a warrant of attorney to confess a judgment thereon, which was accordingly entered as of Hilary term 1787. On the same day, Palmer executed an absolute bill of sale of the ship to the defendant, in consideration of 1500*l.* paid by the defendant; and also a deed of assignment of various articles of personal property, and among them a policy of insurance on the ship, towards payment

(a) [The authority of this case was doubted by Lord Kenyon in *Westerdell v. Dale*, 7 T. R. 312; and so far as it is founded upon *Eaton v. Jaques*, must be considered as overruled by *Williams v. Bosanquet*, 1 Brod. & Bing. 238. It may however be a question, whether the decision of the principal case is not supportable on other grounds, viz. that the defendant was not liable for necessities provided for the ship, by the order, not of the master, but of a third person (the mortgagor); see *Young v. Brander* 8 East, 10; *Abbott on Shipp.* 21; and *Jennings v. Griffiths*, 1 Ry. & M. N. P. C. 42. *Harrington v. Fry*, 2 Bingh. 179, *Coc v. Keil*, 1 R. & M. N. P. C. 199. From the latter cases it appears that registered ownership is only *primâ facie* evidence of liability to repairs, &c. subject to be rebutted by other evidence, as that the beneficial ownership has been parted with, and that the legal owner has ceased to interfere in the management of the ship. The question in such cases is, "Were the repairs &c. done or the goods supplied on the credit of the legal owner?" But now see the new Registry Act, 4 Geo. 4, c. 41, s. 43, by which mortgagees of ships are not to be deemed owners, except so far as may be necessary to render the ship available for the payment of the debt.

and satisfaction of the sum of 1500l. that day lent and advanced to him by the defendant, which deed of assignment further recited, "That whereas to the intent and purpose of better securing to the defendant, the said principal sum of 1500l. and the interest thereof, Palmer had by deed-poll bearing date therewith bargained, sold, assigned, conveyed, and assured to the defendant the said ship or vessel, &c. to hold to him, his executors, administrators and assigns absolutely, and the said Palmer had likewise entered into a bond of equal date therewith, in the sum of 3000l. conditioned for the payment of 1500l. and interest, and had also at the same time executed a warrant of attorney for better securing the same, and then

"That indenture further witnessed, and it was covenanted, &c. that the said several deeds and instruments were so executed by the said Palmer, for the purpose of enabling the defendant, his heirs, executors or administrators, either by public sale or private contract, to sell and dispose of the several matters and things therein respectively comprised, or other the effects of the said Palmer, and thereby to raise and pay the said sum of 1500l. so lent and advanced, &c. and the interest thereof without any farther, or other concurrence of the said Palmer, his heirs, executors, administrators or assigns, or any of them, at any time, before the same should be paid off or discharged by the said Palmer, his heirs, executors, or administrators."

But in this deed there was a covenant, from the defendant to Palmer,

"That in case Palmer should pay off and discharge the said principal sum of 1500l. and interest, &c. before the said several matters and things should be sold or disposed of, for the purposes aforesaid, that then and in such case the defendant should and would re-convey and re-assign the said several matters and things thereinbefore mentioned, in such manner as the said Palmer should reasonably require. And [116] it was thereby also declared and agreed, that nothing therein contained should prevent the defendant, from selling and absolutely disposing of all and every the said premises, matters and things therein before mentioned, at any time previous to the full payment of the said sum of 1500l. with interest," &c.

On the 30th of July, 1788, Palmer assigned the freight to the defendant.

On the 7th of August, 1788, the defendant took possession of the ship, and received the freight due to the owner.

On the 22d of August, 1788, the defendant sold the ship, and gave an indemnity to the purchaser against all demands on her prior to that date.

The question for the opinion of the Court was, whether the defendant was liable to pay for the cordage and stores furnished by the plaintiff, subsequent to the bill of sale, and deed of assignment and defeasance, of the 6th of February, 1787?

Cockell, Serjt., on behalf of the plaintiff. A tradesman who supplies a ship with necessaries, has a treble security. 1. The person of the master. 2. The ship itself. 3. The person of the owner; to either of which he may resort for payment. Here the defendant was complete owner, from the 6th of February, 1787, at which time the bill of sale was executed. It was not necessary that the plaintiff should know, at the time of furnishing the stores, &c. who were the owners. He had given credit, specifically to the ship, and generally to the owner, who was liable as soon as known, because all these materials being for the use of the ship, the owner must receive benefit from them. *Rich v. Coe*, Cowp. 636. *Farmer v. Davies*, 1 Term Rep. B. R. 108.

Bond, Serjt., on the part of the defendant, argued that he was not owner, but only mortgagee of the ship, when the goods in question were furnished; the deed of defeasance making void the bill of sale, upon payment of the money owing. It is a rule of law, that a mortgagee, whether of goods or land, is not liable to debts or other incumbrances of the mortgagor, till he comes into possession. Here the defendant took possession of the ship for the first time, on the 7th of August, 1788; and then only began to be liable as owner. So a mortgagee of lands out of possession, is not entitled to rent reserved in a beneficial lease. *Eaton v. Jaques*, Dougl. 438, and *Walker v. Reeves* there cited. There is no substantial difference between a mortgage of real and of personal property; the only variation is in the mode of proceeding in [117] Courts of Law and Equity. In both, the intent of the parties is consulted; as at law, the mortgagee may have possession, and a legal title till repayment of the money, so in equity the mortgagor may redeem: though the ceremonies are different, the essence of the contract is the same: but as the mortgagee is not entitled to the profits before he is in possession, neither ought he to be liable to incumbrances, for "Qui sentit

commodum, sentire debet onus," *Chinnery v. Blackburne* (a), [118] B. R. Pasch. 24 Geo. 3. Nor can the plaintiff charge the ship itself with this demand. Though by the civil law, necessities advanced for a ship are a charge on the bottom, yet in our law it is otherwise, the credit being given to the personal security of the owners; except the ship be in a foreign port, in which case the captain is allowed to hypothecate, and the

(a) *Chinnery v. Blackburne*, B. R. East, 24 Geo. 3.

[Discussed, *Rusden v. Pope*, 1868, L. R. 3 Ex. 274. Distinguished, *Shillito v. Biggart*, [1903] 1 K. B. 686.]

General indebitatus assumpsit for freight of goods.—Plea, general issue.—Verdict for the plaintiff, subject to the opinion of the Court on a case which stated, that by an indenture of assignment dated January 4, 1783, Robert Merryfield, in consideration of 1166l. 18s. which he owed to the plaintiff, assigned to her the ship "B." &c. in which indenture there was a covenant from the plaintiff to re-assign the said ship, &c. to Merryfield, on payment of 1166l. with lawful interest, on or before the 10th of November then next ensuing; that at the time of the execution of the deed, the ship was in the river Thames, and afterwards sailed to Portsmouth, and continued there till the middle of March following, in the possession, and under the command of A. B., and that the plaintiff did not then take possession: that Merryfield navigated, victualled, and manned the ship, as owner thereof, at his own expence and risque, both from England to Antigua, and on her return from thence: that Merryfield at Antigua, gave the command of her to Captain Drysdale, and sent her to England, with orders to the captain to address himself to Messrs. Dunlop, of London, merchants, who were to sell her according to the directions contained in a letter, in which letter Merryfield also said, "Mrs. Chinnery has a demand against me for near 1200l. sterling, which I hope to remit shortly to you, or Mrs. Merryfield, so as to pay her;" that Messrs. Dunlop being applied to as consignees, lent two sums of 50l. to Captain Drysdale, declaring they should consider him as responsible, in case they should not receive the same by freight, &c. and that they afterwards received the money from Drysdale: that the ship completed the delivery of the cargo, on the 27th of September, 1785; that the plaintiff took possession on the 29th of September following, immediately on receiving information of her arrival in the Thames; that the defendant had goods from Antigua on board, the freight of which amounted to 76l. 9s. 11d. for the recovery of which the action was brought: that Captain Drysdale paid for lights, custom-house dues, and for clearing the ship, which the plaintiff repaid him, and also paid his and the mariners wages for the voyage from Antigua, to the amount of 234l. 7s. 7d. after she took possession of the ship; and that the plaintiff afterwards sold the ship by auction for 710l. &c.

Wood for the plaintiff, contended that she was the legal owner of the ship by virtue of the deed, and beneficial owner, having advanced more than the value. A mortgagee of a ship in possession may sue for freight accrued after the mortgage, as a mortgagee of land coming into possession is entitled to the intermediate rents, growing due after the mortgage, though before he takes possession. *Moss v. Gullimore*, Dougl. 266. Freight is as incident to the ownership of a vessel, as rent is to that of land: as the plaintiff pays all his expences, she is entitled to all gains. This is to be considered, as between mortgagor and mortgagee; though a set-off between the defendant and the mortgagor, or an attachment of the debt in London, might have made a difference, if they had existed.

Chambre for the defendant.—This is a contract by a third person, not for the benefit of the plaintiff, who cannot therefore recover in her own name. It bears no analogy to rent issuing out of land, which is incident to the reversion. The cause of action arises on a personal contract, not on the ship itself. A mortgagee cannot recover rent received from the mortgagor. Here the mortgagor has been in the enjoyment of the whole, and the cargo was delivered before the mortgagee had any claim. The mortgagee surely cannot bring actions against a vendee of the mortgagor for any supply of goods, &c. There could be here no set-off between the mortgagor and his creditors, if the mortgagee be permitted to bring this action. If the mortgagee takes the benefit of the contracts of the mortgagor, he ought also to be liable for any losses that might happen, which is not contended. If Merryfield had become a bankrupt, his assignees would have been entitled to the freight. The plaintiff paid

necessaries advanced, create a lien on the ship itself. Salk. 34, *Justin v. Ballam*. 2 P. Wms. 367, *Watkinson v. Bernadiston* (a).

Cockell replied, that nothing had been adduced to shake the authority of *Rich v. Coe*, which was decisive on this point. He also urged, that defendant was actual owner of the ship by virtue of the bill of sale, and had a right to sell immediately, not an interest becoming absolute at a future time: that the deed of defeasance was a distinct conveyance, and related to other property. But even if the defendant were only mortgagee by virtue of those deeds, yet he had reduced the mortgage into possession by having the freight assigned to him: he might also have recovered on the policy assigned to him if a loss had happened.

HEATH, J. (b).—As we both agree in opinion on this question, [119] and have no doubt, it would be wrong to put the parties to the expense of a second argument. This is an action for goods sold and delivered for the use of the ship “Three Sisters,” and the question is, whether the defendant be such an owner as is liable for the payment? Palmer on the 6th of February, 1787, executed a bill of sale to him, and on the same day another deed, reciting the bill of sale, with a defeasance.

It has been argued, that this is not a mortgage; but though it is not in the modern form, yet it is like an antient mortgage by deed absolute, with another deed of defeasance; no day of payment and reconveyance is mentioned, because Vernon the defendant insisted on having a right to sell the ship when he pleased, on account of the insolvency of Palmer. From the nature therefore of the transaction, and the circumstances attending these deeds, the assignment of the ship to the defendant was in reality a mortgage.

Then the question is, whether a mortgagee out of possession is answerable for goods furnished for the use of the ship? Now, though the owners are bound by the contracts of the captain, he being their agent, yet the mortgagee is not such an owner till he has possession. The case of *Rich v. Coe* is only applicable to the present, inasmuch as there Harwood, who had hired the ship, was not liable for necessaries, but was considered merely as the agent for the real owners. The cases of *Eaton v. Jaques*, *Walker v. Reeves*, and *Chinnery v. Blackburne*, are in point to shew, that the mortgagee, out of possession, is not answerable for the contracts of the mortgagor.

WILSON, J.—The only question is, whether the conveyance to Vernon were absolute, or only by way of security? No one, I think, who reads these deeds, can have any doubts of its being a mere mortgage for a loan of money. Here is a bond for 3000l. conditioned for the payment of 1500l. lent by Vernon to Palmer; a warrant of attorney, and judgment entered on it; then a conveyance of the ship by a bill of sale, in consideration of the same sum of 1500l. and as a farther security, a deed of assign-

the wages, &c. merely to get possession of the ship, discharged of any lien there might be upon it.

LORD MANSFIELD.—The justice of the case struck me forcibly at first, as between the mortgagor and mortgagee: but the mortgagor is no party; the action is brought after the mortgage, against a person who contracted with the mortgagor. This action must be founded on the idea, that the mortgagor in possession is the servant and agent for the mortgagee, which is not the case. Till the mortgagee takes possession, the mortgagor is owner to all the world; he bears the expences, and he is to reap the profits.

ASHHURST, J.—If the voyage had proved unprofitable, could the mortgagor have recovered against the mortgagee the expense of the outfit? Yet this must have been the case if the mortgagee were entitled to the profits.

BULLER, J.—If the mortgagor be considered as agent, he must be so throughout, and then the mortgagee would be answerable for every loss, damage, &c. The payments by the plaintiff were voluntary, to get possession of the ship free from any liens, and are at most but evidence of the mortgagee's possession.

Postea to the defendant (a).

(a) See also *Wilkins v. Carmichael*, Dougl. 101.

(b) Lord Loughborough and Mr. Justice Gould were both absent.

(a) [But it is now settled that the assignee of a ship is entitled to the freight, although he must sue for it in the name of the assignor. *Morrison v. Parsons*, 2 Taunt. 407. *Case v. Davidson*, 5 M. & S. 79. Affirmed on error, 2 Brod. & B. 379.]

ment with a defeasance annexed. In this deed of assignment there is no covenant for a reconveyance, because as an additional security, Vernon, the defendant, stipulated for a power to sell the ship, at any time, without further leave from Palmer. It was understood by Palmer to be merely as a pledge for the money due, as he contracted for freight, after the conveyance to Vernon; for if that conveyance had been absolute, he could not properly make a contract for freight. On the 7th of August, [120] Vernon takes possession, till which time, Palmer was the possessor, subject to Vernon's claim, who was not liable till he had actual possession. The owners of a ship are liable for furniture and necessaries, because they receive the immediate benefit of the freight, and it is for that reason the contracts of the captain are binding upon them, he being their agent or servant. But the cases which have established this to be law, do not affect a mortgagee not in possession, who cannot be considered as an owner, nor, as such, entitled to the freight. The case of *Chinnery v. Blackburne* was decided on the ground, that as a mortgagee out of possession was not liable to the charges of the ship, so he was not entitled to the freight.

Postea to the defendant.

FROST *against* EYLES AND JAKES. Monday, Feb. 9th, 1789.

It is not necessary to add the name of the filazer to a common capias.

Motion to set aside proceedings for irregularity, the name of the filazer not being on a common capias. But the Court held the proceedings regular, the addition of the filazer's name not being necessary.

Rule discharged with costs.

Bond, Serjt., for the plaintiff, and Adair, Serjt., for the defendant.

ANDERSON *against* HAYMAN. Tuesday, Feb. 10th, 1789.

A tradesman delivers goods to A. at the request and credit of B. who says, before the delivery, "I will be bound for the payment of the money as far as 800l. or 1000l." This promise of B. not being in writing, is void by the Statute of Frauds, if it appear that credit was given to A. as well as B.(a).

The plaintiff was a woollen draper in London, and employed one Biffin as a rider to receive orders from his customers in the country. The defendant meeting with Biffin at Deal, desired him to write to the plaintiff, requesting him to supply the defendant's son (who traded to the West Indies) with whatever goods he might want, on his, the defendant's credit, and at the same time said, "Use my son well, charge him as low as possible, and I will be bound for the payment of the money, as far as 800l. or 1000l." Biffin accordingly wrote to the plaintiff the following letter, "Mr. Hayman of this town says his son will call on you and leave orders, and he has promised me to see you paid, if it amounts to 1000l., Mr. William Pitches was also present as a witness."

[121] "N.B. If deal for 12 months credit, and pay in 6 or 8 months, expects discount in proportion." Soon after, the son received goods from the plaintiff to the amount of 800l., which were delivered to him in consequence of the abovementioned order from the father. The son was debited in the plaintiff's books, and being applied to for payment, wrote an answer to the plaintiff as follows:

"Your favour of the 27th past has been forwarded to me from Ostend by my clerk, in answer to which, I can only say, that I understood your credit for the goods was 12 months which was also mentioned by your rider to my father. I shall at this rate, make your remittances for the different parcels as they come due, and remain, &c.

"THOS. HAYMAN, Jun."

He afterwards became a bankrupt, and this action was brought against the father, to recover the value of the goods.

The declaration contained seven counts; the first was on an agreement by the

(a) [Acc. *Dixon v. Broomfield*, 2 Chitty's Rep. 205.]

defendant to pay, &c. in consideration that the plaintiff would sell the goods to his son. 2d. Quantum valebant. 3d. Goods sold and delivered to the son at the request of the defendant. 4th. Quantum meruit. 5th. Money paid to the use of the defendant. 6th. Goods sold and delivered to the son, on a promise by the defendant to see the plaintiff paid, to the amount of 800l. 7th. Same promise on a quantum meruit.

Plea general issue. Mr. Justice Heath, who tried the cause, directed the jury to consider, whether the plaintiff gave credit to the defendant alone, or to him together with his son; that in the former case, they should find a verdict for the plaintiff; in the latter, for the defendant; being of opinion, that if any credit was given to the son, the promise of the defendant, not being in writing, was void by the Statute of Frauds. A verdict was found for the defendant.

A rule was obtained to shew cause, why this verdict should not be set aside, and a new trial granted.

Against this rule, Bond, Serjt., relied on the case of *Matson v. Wharam*, 2 Term Rep. B. R. 80.

On behalf of the rule, Le Blanc and Runnington, Serjts, said that in *Matson v. Wharam* the undertaking was collateral, but here it was direct, the original credit being given to the defendant; and cited the cases of *Birkmyr v. Darnell*, 1 Salk. [122] 27, and *Monebrey v. Cunningham*, mentioned in *Jones v. Cooper*, Cowp, 228.

But the Court were clearly of opinion that this promise, not being in writing, was void by the Statute of Frauds, as it appeared from the evidence of the letter of Hayman the Younger, that credit was given to him, as well as to the defendant.

Rule discharged.

GRIFFIN *against* EYLES, Warden of the Fleet. Tuesday, Feb. 10th, 1789.

An attorney has a lien for his bill of costs, on money levied by the sheriff under an execution on a judgment recovered by his client, and is entitled to have it paid over to him, notwithstanding the sheriff has had notice from the party against whom the execution issued to retain the money in his hands, and that the Court would be moved to set aside the judgment for irregularity; and notwithstanding a docket has been struck against the client becoming a bankrupt.

The plaintiff having in Michaelmas term last, recovered judgment against the defendant for 252l. 5s. 5d. in an action of debt for the escape of one Jaques, (a prisoner charged in execution at the suit of the plaintiff), sued out a fi. fa. directed to the Sheriff of Surrey, who made a levy, to that amount, on the defendant's goods. Soon after, the defendant gave notice to the sheriff, to retain the money levied, stating that he should make an application to the Court to set aside the proceedings for irregularity. On the receipt of this notice, the sheriff refused to pay the money to the plaintiff's attorney, who demanded it. In consequence of which, the attorney obtained a rule to shew cause why the sheriff should not pay to him the money in question, with interest, from the time it was levied, on an affidavit, which stated, amongst other things, that the whole sum was due to him for his bill of costs, as attorney for the plaintiff; viz. part for the debt, for which Jaques was taken in execution, (which was the amount of costs taxed in an action brought by Jaques against the present plaintiff in the Exchequer,) and the remainder for the costs taxed in the action in this Court against Eyles for the escape of Jaques.

Against the rule Alair and Runnington, Serjts., urged, that the sheriff had done right in retaining the money, because a docket had been struck against the plaintiff, who, after he recovered judgment, became a bankrupt.

Bond, Serjt., in support of the rule, relied on the cases of *Turwin v. Gibson*, 3 Atk. 720, and *Welch v. Hole*, Dougl. 226 ([238, edit. 1790]).

On the authority of these cases, particularly of the last, the Court, after consideration, made the

Rule absolute with costs, leaving out that part which respected interest for the money; and said, that the circumstance of the docket being struck, was immaterial.

[123] BAKER *against* NEWMAN. Tuesday, Feb. 10th, 1789.

The plaintiff has the whole of the term, next to that in which issue is joined, to try his cause in (a)¹.

On the third of February in this term, Lawrence, Serjt., moved for a rule to shew cause why judgment, as in case of a nonsuit, should not be entered, on an affidavit stating that issue was joined in Michaelmas term last, and that the plaintiff had not proceeded to trial. On a subsequent day, Adair, Serjt., shewed for cause an affidavit on the part of the plaintiff, stating, that issue was in fact joined on the 7th of December, in Michaelmas vacation, and that a note dated the 25th of January had been sent to the defendant's attorney, purporting that the plaintiff could not proceed to trial, on account of the absence of some of his witnesses. On this day the Court said the application was premature (a)², as the plaintiff had the whole of the term, next after that in which issue was joined, to proceed to trial in, and therefore

Discharged the rule with costs.

FOLLIOTT *against* OGDEN. Tuesday, Feb. 10th, 1789.

[Affirmed, 3 T. R. 726; 100 E. R. 825; 4 Bro. P. C. 111; 2 E. R. 75. See *Phillips v. Eyre*, 1870, L. R. 6 Q. B. 27; *Huntington v. Atrill*, [1893] A. C. 156.]

A. and B. being inhabitants of the United States of America, while those States were colonies of Great Britain, and before the war broke out between the two countries, B. executes a bond to A. During the war, after the declaration of independence by the Congress, both parties are attainted, their property confiscated, and vested in the respective States, of which they were inhabitants, by the Legislative Acts of those States, and a fund provided for payment of the debts of B. A. may maintain an action on the bond against B. in England. The several Acts of Attainder and Confiscation, being passed by sovereign independent States, do not disable A. from suing, nor exempt B. from being sued in England. Neither is it a good plea in bar of an action at law, that an ample fund was provided out of the effects of B. for the payment of his debts, to which A. might and ought to have resorted, and been paid, though it may be a ground for relief in equity (a)³.

Debt on bond, dated New York, October 10, 1769, for 4000l. of current money of the province of New York in North America, being 2250l. of lawful money of Great Britain.

Plea, after oyer, (by which it appeared that the defendant, one Richard Morris, and Lewis Morris were jointly and severally bound,) 1st. Richard and Lewis Morris solverunt post diem. 2d. Defendant solvit post diem. 3d. That at the time of making the said writing obligatory, the plaintiff, Richard Morris, Lewis Morris, and the defendant, were severally and respectively persons residing within the United States of America, and [124] continued so, &c. till after the 22d of October 1779, that on

(a)¹ [See *Frampton v. Payne*, ante, p. 65.]

(a)² There were other days appointed for sittings in the term, after 3d of February. Quære, whether the defendant would not have been entitled to judgment, as in case of a nonsuit, if he had waited till the end of the term before he made his motion?

(a)³ [This judgment was affirmed by the Court of K. B. on a writ of error, Trin. 30 Geo. 3, 3 T. R. B. R. 726, but on grounds different from those on which the Court of C. P. had proceeded; the Court of K. B. holding that the Act of Confiscation passed in the several States of North America after the declaration of independence, and before the treaty of peace, by which this country acknowledged their independence, were to be considered as a nullity in the Courts of Law here. The judgment of the Court of K. B. was affirmed in Dom. Proc. 25 Feb. 1792. See 4 Parl. Cases (8vo.) 111, and the note there; see also the case of *Dudley v. Folliott*, E. 30 Geo. 3, 3 T. R. B. R. 584, where the Court of K. B. having no doubt on the law, and thinking that it would lead to improper discussion, would not permit the question to be argued. See *Doe v. Thomas v. Acklum*, 2 B. & C. 779. *Wolff v. Ocholm*, 5 M. & S. 92, see also *Quin v. Keefe*, post, vol. ii. p. 553.]

that day, the said sum of money, &c. being due and unpaid, &c. and the plaintiff then residing at New York, then being one of the United States of America, by a law of the State of New York, he was ipso facto attainted of the offence of adhering to the enemies of the said State of New York, and all and singular the estate, both real and personal, held or claimed by him, on the 22d October 1779 was forfeited to and vested in the people of New York, which said law of the said State of New York, from thenceforth hitherto hath been, and still is, in full force and effect, and that the said writing obligatory, and all the money due thereon, became and was, and from thenceforth hitherto hath remained and continued, and still is forfeited to, and vested in the people of the said States of New York, &c.

4th. That at the time of the making the said writing obligatory, the above-mentioned parties were resident within the United States of America, that the defendant was bound only as a surety for the said Richard and Lewis Morris, that the defendant, at the said time, &c. was resident in the State of New Jersey, then being one of the United States of America, and in possession of real and personal property, more than sufficient to pay the said sum of 4000l. and his other debts, that on the 2d of January 1779, being so possessed, &c. he was attainted according to the laws and statutes of the said State of New Jersey, of adhering to the enemies of the said State, and thereby all his real and personal estate, within the said State of New Jersey, was forfeited to, and vested in, the said State of New Jersey for ever; that it was provided by the said State of New Jersey, that the property of the defendant so forfeited to, and vested in the said State, was in the first place made liable to the payment of all his debts, and demands against him; that in consequence of his attainder, all his property was seized, which at the time of the seizure was more than sufficient to pay the said sum of 4000l. and all his other debts; that after his attainder, the plaintiff was at liberty to make, and might have made demand of the State of New Jersey, of the said sum of money due to him upon the said writing obligatory, against the real and personal estates of the defendant so forfeited, &c. and might have been paid thereout.

5th, To the same effect as the 4th, but reciting more particularly the several Acts of Attainder, and Confiscation, passed by [125] the State of New Jersey, against the defendant, and that the plaintiff might and ought to have demanded payment of the bond from that State, &c.

Replication.—Issue tendered on the 1st and 2d pleas. To the 3d plea, that at the time of making the said supposed law of the State of New York, in that plea mentioned, the said State was not one of the United States of America, but was one of His Majesty's colonies in America, then in open rebellion against His Majesty, &c. General demurrer to the 4th and 5th pleas.

Rejoinder.—Issue joined on the 1st and 2d pleas. To the 3d replication, that before the making of the said law of the State of New York, in the 3d plea mentioned, to wit, on the 4th of July, 1776, the several colonies in America (mentioning them all by name, and among them New York and New Jersey) separated themselves from the Government and Crown of Great Britain, and united themselves together, and were by the people of the said respective colonies in congress, declared and made free and independent States, by the name and style of the United States of America, and to have full power to do all acts and things which independent States of right may do; that on the 3d of September, 1783, by the definitive treaty of peace and friendship, made and signed at Paris on that day, between His Majesty and the said United States of America, His Majesty acknowledged the said United States of America to be free, sovereign, and independent, States, and treated with them as such; and by the said treaty, the several laws which had been made, and passed by the legislatures of the said respective states, after their declaration of independence, for the confiscation of the property of persons within the said respective States, were recognized and admitted to be valid; and that before the making of the said law of the State of New York, to wit, on the 4th of July, 1776, and from thence continually hitherto, the said United States became, and were divided from His Majesty's dominion and government, and absolutely independent thereof, and that long before, and at the time of making the said law of the said State of New York, and from thence hitherto, the people of the said State have exercised, and still do exercise, sovereignty, legislation, and government, within the said State of New York, separate and distinct from the legislation and government of Great Britain, and that the said law of the said State of

New [126] York, from the time of the making thereof, hitherto hath been and still is in full force and effect, &c.

Joinder in demurrer to the 4th and 5th pleas, &c.

Surrejoinder.—That by the treaty of peace, the said several laws, &c. were not recognized and admitted to be valid, &c.

Rebutter.—That by the first article of the treaty, his Britannic Majesty acknowledges the said United States to be free, sovereign and independent States, and treats with them as such: that by the 5th article of the treaty, it was agreed between His Majesty, and the United States of America, that the Congress should earnestly recommend it to the Legislatures of the respective States, to provide for the restitution of all estates, rights, and properties, which had been confiscated, belonging to real British subjects, and also the estates, rights, and properties, of persons resident in districts in the possession of His Majesty's arms, and who had not borne arms against the said United States; and that persons of any other description, should have free liberty to go to any part of any of the thirteen United States, and therein remain twelve months unmolested in their endeavours to obtain restitution of such of their estates, rights, and properties, as might have been confiscated; that Congress should also recommend to the several States a reconsideration and revision of Acts and laws, &c. and should also earnestly recommend to the States, that the several estates, rights, and properties, of such last-mentioned persons, should be restored to them, they refunding to any persons, who might be then, at the time of making the said treaty, in possession, the bona fide price (where any had been given) which such persons might have paid in purchasing the said estates, rights, or properties, since the confiscation, &c. and that no persons who then had any interest in confiscated lands, either by debts or otherwise, should meet with any impediment in the prosecution of their just rights, that the plaintiff, at the time of making the said law of the State of New York, and of the signing the definitive treaty, was resident in a district in the possession of His Majesty's arms, within the State of New York, and had not borne arms against the said United States; and also that by the 6th article of the treaty, it was agreed, that there should be no future confiscations made, nor any prosecutions commenced against any person by reason of the part which he might have taken in the then war, and that no person should suffer any fu-[127]-ture loss, either in his person, liberty, or property, and that those who might be in confinement on such charges, at the time of the ratification of the treaty, should be immediately set at liberty, and the prosecutions so commenced should be discontinued, &c.

General demurrer to the rebutter, and joinder in demurrer.

This cause was argued in Easter Term 1788, by Watson, Serjt., for the plaintiff, and Le Blanc, Serjt., for the defendant, and a second time in the present term, by Lawrence, Serjt., for the plaintiff, and Adair, Serjt., for the defendant. The arguments on the part of the plaintiff, were in substance as follow:—

The two material questions which arise on these pleadings are, 1. Whether under the circumstances of this case the plaintiff had a right to sue; 2. Whether under those circumstances, the defendant was liable to be sued in England on a bond made in America?

The first question may be resolved by considering the effect of the Act of Attainder and Confiscation passed against the plaintiff by the State of New York; the second, by considering the effect of the like Acts of the State of New Jersey, passed against the defendant. Now these Acts having been made by persons who, at the time of making them, were subjects in open rebellion, must have been at that time void. If they were allowed to be valid, it would follow that the Acts of rebels are binding, in proportion to the violence of their rebellion. Laws can only bind those who are subject to them; but no one can be legally subject to the Acts of rebels. Although in this country, the protectorship of Cromwell continued many years in possession of sovereign authority, yet it was necessary at the Restoration, to pass a law (12 Car. 2, c. 12) expressly to confirm such proceedings of the Commonwealth, as were thought proper to be confirmed, all others being void, having been made by rebels. An usurped power can make no valid laws, as long as efforts are made, to reduce those who usurp it, to obedience. Continued efforts were made by Great Britain to bring America to submission, long after the Acts in question were passed. It is laid down by Puffendorff (lib. 7, c. 7, s. 5), that "If the constitution of a state be altered by an unjust rebellion, the liberty thus usurped, continues so long unlawful, as the rightful prince shall

labour to reduce [128] the rebels to obedience, or at least, shall by solemn declaration protest, and preserve his right over them." The defendant does not indeed, in his rejoinder, insist on the sovereign authority of the State of New York, at the time of passing the law against the plaintiff, but relies on the subsequent treaty of peace to confirm that, together with the others laws of attainder and confiscation. But the treaty could not have this effect. It could not mean to ratify those acts which were done by the Americans in a state of rebellion, and at a time when this country was labouring to reduce them to obedience; it takes notice of such acts, but does not imply a retrospective confirmation of them. But supposing the design of the treaty had been to confirm them, yet the King had no such power. The Crown cannot ratify acts of violence, without the consent of the subject, expressed by passing a law for that purpose. The Sovereign of a State may abandon such of his subjects as he is unable to protect or govern, but he cannot deprive them of the legal rights of that society into which they originally entered: he cannot force them to submit to the authority of another State. Vatel, liv. 1, c. 18, s. 195. Puffendorff, lib. 8, c. 5, s. 9. So in the present case, the King had no power to confirm the attainder of loyal subjects of his Government, made while they were under the protection of Great Britain, to vest their property in the American States by ratifying the confiscation of it, nor to deprive them of the benefit of their personal remedies and engagements. If this bond therefore had been actually seized by the people of New York, it could not have been contended that the plaintiff's right of action was taken away by the seizure made, flagrante bello, and before any acknowledgment of the lawfulness of the power making it; but as the bond was not seized, as it was never divested out of him, and as he is still possessed of it, clearly no principle of law can prevent his suing upon it in England. He could not have brought an action in America, being there proscribed, and therefore had not his choice of a double remedy. But admitting the legality of the proceedings against the plaintiff, the defendant cannot take advantage of the criminal laws of a foreign country. A mere assignment of property might be acknowledged, but the vindictive Acts of one State cannot be enforced in another; it being a principle of the law of nations, that a criminal can only be punished by that State whose laws he has offended. [129] Vatel, liv. 1, c. 19, s. 232. But if this plea were allowed, of the disability of the plaintiff to bring the action, offences committed by him in America would be punished in England.

The second question may be answered, by examining whether the defendant can avoid the plaintiff's demand, by pleading his own attainder, and the confiscation of his property. At the time when the contract was made, the plaintiff had a right of action; this right was personal and transitory, it continued in him as long as the bond remained in his possession unsatisfied, and was not divested by any situation, in which the property of the defendant was placed. The plaintiff is not stated, in this plea, to have been guilty of any offence; the defendant relies on his own treason against the State of New Jersey. Now admitting his attainder and the confiscation of his effects to be legal, the object of those Acts was punishment, not reward, to distress, rather than to favour. They did not mean to prevent a creditor from bringing a personal action, or to destroy any contract made by him with the defendant. Care was taken, in the first place, that his debts should be paid, but if he be suffered to avail himself of this defence, the design of these laws of New Jersey will be inverted; the debtor will receive the benefit of them by avoiding the payment of a just debt, and the creditor will be deprived of a provision, expressly made in his favour. A proscribed American is not entitled to greater privileges than any other British subject. There is no ground in the law of England to exempt an attainted person from his engagements; though he be legally dead to every other purpose, he is alive to that of being sued, and may be served with process for debt while in prison, though his whole estate be confiscated; otherwise he would have a privilege which the law never intended. Hawk. P. C. b. 2, c. 36, s. 5. A bankrupt forfeits the whole of his property, but would be liable to be sued, if it were not for the provisions of a positive statute. But the defendant farther insists, that his forfeited property was more than sufficient to discharge this, with his other debts, and to that fund, the plaintiff might, and ought to have resorted. Supposing this to be true, it is not a bar to the present action; it shews only that the plaintiff had another remedy, but does not take away his right of choosing which remedy he would pursue: it can be no defence at law, whatever it may be in equity. *Bannister v. Trussell*, Cro. Eliz. 516. *Hornby v.*

Houl-[130]-ditch, Andr. 40. *Houlditch v. Mist*, 1 P. Wms. 695. *Kempe v. Antill*, 2 Browne, 11. *Wright v. Nutt*, in Canc. Jan. 23, 1788 (vide post. 136). But in fact, the fund set apart for the payment of the defendant's debts, was not solvent to the plaintiff, who was proscribed. He brings his action here, to obtain that satisfaction of which he was deprived in America. All circumstances of hardship must be laid out of the case. Both parties have been unfortunate, neither delinquent. But if a question could be made, whether in a situation equally distressful, a person who had lent money should lose it, or one who had been a surety for the repayment, should recede from his engagement, it must clearly be decided in favour of the lender; every principle of justice requiring that the rights of contract should be preserved free from violation.

Lord Loughborough mentioned the case of *Ramsey v. Macdonald*, Foster's Rep. 61, as having determined the point, that an attainted person is liable to be sued in a civil action.

On behalf of the defendant, it was contended, that the several Acts of Attainder and Confiscation passed in America, were the Acts of Sovereign, independent States, and ought to be esteemed valid when brought judicially before the Court. The argument drawn from the previous rebellion of those States, and the passage cited from Puffendorff on that head, is only applicable to that sort of rebellion, in which the people take arms against the Sovereign for a redress of grievances, but do not separate from the State, and cause a dissolution of Government. Admitting the authority of Vatel, that citizens of a free State may withdraw themselves, and of Puffendorff, that a Sovereign cannot bind his subjects by giving up part of his dominions, yet in this case the record expressly states, that both the plaintiff and defendant remained inhabitants of the respective States of New York, and New Jersey: by this they acquiesced in, and were amenable to the laws of those States. So when the native of any foreign country, owing allegiance to another Sovereign, resides in England, he acknowledges, by his residence, a submission to English laws. It is said by Vatel (liv. 3, c. 18, s. 295) that, "when a nation becomes divided into two parties absolutely independent, and no longer acknowledging a common superior, the State is dissolved, and the war between the two parties in every respect is the same with a public [131] war between two nations." By the Acts of this country, the Americans were de facto acknowledged to be independent, long before the treaty of peace. In the year 1776, commissioners were sent out to treat with them, and persons taken in arms were considered as prisoners of war. To put the matter beyond all doubt, the definitive treaty begins with an acknowledgment of antecedent independence. That independence must be dated from the declaration of the Congress; no other period can be fixed for its commencement. The State of America then being independent, had a right to affect by their laws, all persons resident within them. The States of New York exerted that right, by inflicting pains and penalties on the plaintiff, by which they deprived him of his civil capacity, and rendered him unable to bring any action. One effect, among others, of an Act of Attainder, is to create a personal disability to sue in Courts of Justice. But admitting that the plaintiff was under no personal incapacity to bring an action in England, by the penal laws of a foreign State, yet the subject-matter of this suit was divested out of him, and absolutely vested in the people of New York. All his property was taken from him by the Act of Confiscation. Mere possession of the bond without the right, is not sufficient to support an action. If a bankrupt possessed of a bond, brings an action upon it, possession is not sufficient evidence of right; it is a common plea in bar, that the right of action was divested. The system of bankrupt laws savours of a penal nature, and in no country more than in Holland; but the bankrupt laws of Holland are allowed to take effect here, as divesting all property out of the bankrupt, and vesting debts due to him in England in the curators or assignees in that country (a): they have been often admitted in the Court of the Mayor of London, in cases of foreign attachment, and were recognized in Chancery, in the case of *Solomons v. Ross*, 1764 (b).

(a) [See *Smith v. Buchanan*, 1 East, 6. *Sill v. Worswick*, post. 665.]

(b) *Solomons v. Ross*, in Canc. 26 January, 1764, before Mr. Justice Bathurst, who sat for Lord Chancellor Northington.*

[Not applied, *Galbraith v. Grimshaw*, [1910] A. C. 511.]

Messrs. Deneufvilles merchants and partners at Amsterdam, corresponded with

* [See the comments on this case post, 691, vol. ii. p. 407.]

[132] [Lord Loughborough said, in this part of the argument, that he was counsel in the case of *Solomons v. Ross*, which was de-[133]-cided solely on the principle that the assignment of the bankrupts' effects to the curators of desolate estates in Holland, was an assignment for a valuable consideration, and therefore acknowledged in this country, agreeable to *Captain Wilson's case* in the House of Lords.]

But supposing the plaintiff not to be disabled from suing either in respect of his person or his property, yet the defendant is not liable to be sued in the present action.

Michael Solomons and Hugh Ross, merchants in London. On the 18th of December 1759, the Deneufvilles stopped payment; on the 1st of January 1760, the chamber of desolate estates in Amsterdam took cognizance thereof, and on the next day they were declared bankrupts, and curators or assignees appointed of their estates and effects. On the 20th of December 1759, Ross, who was a creditor of the bankrupts to the amount of near 3000l. made an affidavit of his debt in the Mayor's Court of London, and attached their monies in the hands of Michael Solomons, who was their debtor to the amount of 1200l. On the 8th of March 1760, Ross obtained judgment by default on the attachment, and thereupon a writ of execution issued against Michael Solomons, who was taken in execution, but being unable to pay the 1200l. gave Ross his note payable in a month; on which Ross caused satisfaction to be entered on the record of the judgment.

A few days after, one Israel Solomons, who had a power of attorney from the curators to act for them in England, filed a bill, making himself and the curators plaintiffs, praying that the defendant Michael Solomons might account with them for the effects of the bankrupts which were in his hands, might pay and deliver the same over to Israel Solomons for the use of the curators, and be restrained from paying or delivering them over to Ross.

Michael Solomons then filed a bill by way of interpleader, praying an injunction, and that he might be at liberty to bring the 1200l. into Court. This money was accordingly paid into the bank, in the name of the accountant-general, pursuant to an order of the Court.

The decree directed, inter alia, "That the stock purchased with the money paid into the bank, should be transferred to Israel Solomons, for the benefit of the creditors of the bankrupts, and that Ross should deliver up the note given by Michael Solomons for 1200l. to be cancelled."

Jollet and Reitveld v. Deponthieu and Baril, in Canc. November 23, 1769,
before Lord Chancellor Camden.*

The Deneufvilles, merchants, at Amsterdam (but not the same as those mentioned in the preceding case), on the 30th of July 1763, stopped payment. On the 8th of October, the plaintiffs were appointed curators of their estate and effects. At the time when the Deneufvilles stopped, and were declared bankrupts, they were indebted to Messrs. Deponthieu and Co. merchants of London in 1600l. and Messrs. Baril and Texier were indebted to the Deneufvilles in 2131l. 18s. 11d. On the 5th of January 1764, the Deponthieus and Co. made an affidavit of their debt, and on the 12th of that month attached the monies of the Deneufvilles in the hands of Baril and Texier. Pending the attachment, the curators filed their bill against Deponthieu and Co. and Baril (Texier being absent) praying, "that an account might be taken of all dealings and transactions between the bankrupts and Baril and Texier, that the balance might be liquidated, and paid to the plaintiffs, and that the other defendant might be restrained by injunction, from any further proceedings against Baril and Texier in respect of the foreign attachment, or any security given in consequence thereof."

It was decreed, "that the plaintiffs were entitled to recover from Baril and Texier the sum of 2131l. 18s. 11d. being the balance of an account current, transmitted to the Deneufvilles on the 24th of October 1764," (which the plaintiffs consented to accept as the real balance due, and to waive all further account, and therefore) "that it should be referred to one of the masters to compute interest on the principal sum of 2131l. 18s. 11d. at 4 per cent. from the 26th of October 1764, and that a perpetual injunction should issue against Deponthieu and Co. to restrain them from proceeding on the foreign attachment."

It appeared from the proofs taken in the cause, that a bankrupt's effects, by the

*[See the comments on this case post, 691, vol. ii. p. 407.]

Both parties were resident citizens of America, the contract between them was made with a view to be executed in that country, not in this. By a subsisting law of the State, in which the contract was made, the whole property of the defendant was forfeited to that State, subject in the first place to the payment of his debts. An ample and solvent fund was provided for that purpose, to which the plaintiff might and ought to have resorted for satisfaction of his demand. This stands on the record admitted by the demurrer. The people of New Jersey were trustees for the plaintiff with other creditors; this was an equitable payment to him; in equity an assignment to trustees for payment of debts being quasi payment. The plaintiff having neglected to make use of the provision offered him in America, is precluded by his negligence from having an action in England. Besides, the co-obligors are resident in America and amenable to its laws; as they could not plead a recovery had, nor sue on [134] an assignment made, in this country, neither could the defendant have any action over, against them. Though the plaintiff therefore should recover in this action, the defendant will be deprived of his remedy over. But as the contract was made in a foreign State, the laws of that State must be the measure of justice between the parties. The reason why a bankrupt would be liable to be sued, if not protected by a positive statute, is, that the fund arising from his effects is not sufficient for the payment of all his debts; it is not an ample, solvent fund, like that raised out of the forfeiture of the defendant's property; if the creditors be satisfied in toto, the commission is set aside. In the case of *Bannister v. Trussell* it was holden that a mere attainder of felony was no bar to an action; neither is it contended to be in the present case. An attainder at common law does not prevent the attainted person from being served with civil process, because no fund is set apart for the payment of his debts; but where the attainder is by an Act of Parliament, a fund is usually provided for that purpose. In the case of *Hornby v. Houlditch*, the whole of the defendant's property was not divested by the stat. 7 Geo. 1, c. 28; there was a remaining fund to which the plaintiff might have applied. So also in *Houlditch v. Mist*, the property was only partially taken away; the authority indeed of that case is shaken by the Lord Chancellor in *Wright v. Nutt*, where his Lordship also held, that this country was bound to take notice of the American laws, as Acts of inde-

laws of Holland vest in the curators only from the time of their being appointed, and not by relation to the time of the committing the act of bankruptcy.

Neale and Another, Assignees of Grattan v. Cottingham and Houghton,
in Canc. in Ireland, November 16, 1764.*

Grattan a merchant in London was indebted to Cottingham a merchant in Dublin in 862l. 4s. 1d., and the Houghtons were indebted to Grattan in 600l. On the 27th of October 1763, Cottingham made an affidavit of his debt, and commenced an action in the Tholsel Court of Dublin against Grattan, and on the 31st of that month attached the monies due to him from the Houghtons, in their hands. On the 21st of November, judgment was signed by default, and on the 9th of January 1764, the Houghtons were taken in execution on a ca. sa. who in order to procure their discharge, paid Cottingham 600l. the money due from them, and 1l. 19s. 11d. costs.

On the 28th of October 1763, a commission of bankrupt issued against Grattan in England, who on that day was declared a bankrupt. On the 10th of November 1763, his effects were assigned to the plaintiffs' assignees. On the 16th of November 1764, they filed a bill in the Court of Chancery in Ireland, against Cottingham and the Houghtons, praying, that an account might be taken of all such sums of money as had been received by Cottingham from the Houghtons, for any debt due by them to Grattan before his bankruptcy, and that interest might be computed thereon from the times when he received the same respectively, and that he might be decreed to pay what should be found due to the assignees.

As this was the first cause of this kind ever decided in Ireland, the Lord Chancellor called in the assistance of several of the Judges, and after great consideration, with the approbation of the Judges whom he consulted, pronounced a decree in favour of the plaintiffs, and ordered Cottingham to pay them the money which he had received of the Houghtons.

But see *Cooke's Bankrupt Law*, 243 and 244.

* [Vide post, vol. ii. p. 407.]

pendent States; that where a sufficient fund was provided, and the creditor guilty of laches in not resorting to that fund, and having the means of possession, had not made use of those means, that he ought upon principles of justice and equity, to be prevented from pursuing the debtor to harass him with another action. Here the means of possession are admitted on the record. The same answer may be given to the case of *Kempe v. Antill*, in which the Chancellor delivered a similar opinion. Upon the whole therefore, on the face of the pleadings, the plaintiff is reduced to this dilemma; he is either disabled to sue by the matters contained in the third plea, and there is an end of the action; or his capacity to sue remaining, it appears from the 4th and 5th pleas, that an ample fund was provided, to which he might, and ought to have resorted for payment of his debt, but to do which he of his own laches neglected. In either case, the Court will pronounce judgment for the defendant.

On this day, the following judgment of the Court was delivered by LORD LOUGHBOROUGH.

[135] It is unnecessary for me to state the pleadings in this case at length, as the only two material questions arise on the third and 4th pleas. The third plea in substance is, that the plaintiff was attainted by the State of New York, that all his estate and effects were confiscated, and forfeited to the people of that State, and that in consequence, the bond in question and all the money due upon it was forfeited to and vested in them. Now there is no occasion to enter into a discussion of the matters contained in the replication, rejoinder, sur-rejoinder, or rebutter, for admitting this Act of the State of New York, to be of as full validity as the Act of any independent State, which the defendant contends, and which it certainly was, still it cannot operate as a bar to the plaintiff's demand in this action (a). If it were a bar, it must either be in respect of his person, as disabled to sue, or in respect of the subject-matter of the suit. It was admitted in the argument, that by the criminal sentence of attainder of one sovereign, independent State, no personal disability to sue in another was created; but it was contended, that the property of this bond was divested out of the plaintiff by Act of the law of that country, to which both he and his property were subject. But if the penal laws of a foreign country do not in themselves import a personal disability to sue in this, neither do they by divesting the property of a person in that country, take away his right of action in England. The subject-matter of this action being a bond, it could only be sued for according to the laws of England relating to bonds; supposing therefore the right of the plaintiff to be gone, that could not be set up in bar of the action, which must be brought in the name of the present plaintiff, whoever might be in possession of the bond, since a chose in action is not assignable at law, and the defendant could not plead that the obligee had assigned it. I would even go farther, and say, a right to recover any other specific property, such as plate or jewels, in this country, would not be taken away by the criminal laws of another. The penal laws of foreign countries are strictly local, and affect nothing more than they can reach and can be seized by virtue of their authority; a fugitive who passes hither, comes with all his transitory rights; he may recover money held for his use, stock, obligations and the like; and cannot be affected in this country, by proceedings against him in that which he has left, beyond the limits of which such proceedings do not extend.

The other question arises on the 4th plea, which states, that [136] the defendant was attainted by the State of New Jersey, that all his estate and effects were confiscated, and vested in the people of that State, and in the first place made liable to the payment of all his debts; that a fund was raised more than sufficient to pay them, to which the plaintiff might and ought to have resorted. This plea has the same tendency with the 3d, to prevent the plaintiff from recovering; but the whole amount of it is a ground in equity for relief against a creditor, who would make an oppressive use of one security in preference to another; for I perfectly agree with the doctrine of the case of *Wright v. Nutt*, and think that if the plaintiff in this action might have recovered his debt out of the fund appropriated to that purpose in New Jersey, and has wilfully omitted so to do, there would be a good reason for equity to interfere: if he might have recovered the whole, this action might on equitable grounds be entirely stopped; if only a part, equity would relieve pro tanto. This is every thing except what it ought to be, and comes as near as it could to a plea of payment; but

(a) [See Lord Kenyon's opinion, *contra*, on this part of the case, 3 T. R. 731.]

in a Court of Law nothing short of actual payment is good. Upon the whole therefore, as the case stands, there is nothing to prevent this Court from giving Judgment for the plaintiff.

[The reporter was favoured with the following case, cited in that preceding, of *Folliott v. Ogden.*]

WRIGHT *against* NUTT AND ANOTHER. [3 Br. C. C. 326, S. C.]
In Chancery. January 23, 1788.

In circumstances resembling those of the preceding case, it was a good ground of relief in equity, that an ample fund was provided out of the effects of the attainted debtor in America, for the payment of his debts, to which the creditor might have resorted, and out of which he might have been paid. Accordingly an injunction was granted by the Court of Chancery to prevent execution from being taken out on a judgment obtained in an action at law by such a creditor (b).

This was a motion for an injunction, upon the coming in of the answer of one of the defendants, to restrain them from taking out execution on a judgment obtained in an action at law. The case made by the bill, was as follows:—

That Sir James Wright, deceased, was for many years before and in the year 1774, and from thence to the acknowledgment of the Independence of the United States of America, governor of the then province of Georgia, in North America, and constantly resided there, till the troubles in that country commenced; in the course of which residence, he acquired very considerable property in the said province, consisting of plantations, negroes, cattle, and other effects on his [137] said plantations; that in the course of managing and cultivating the said plantation, Sir James Wright purchased of Miles Brewton, of South Carolina, certain negro slaves, at the price of 8802l. 5s. current money of South Carolina, being of the value of 1300l. sterling or thereabouts, for which he gave the said Miles Brewton, his promissory note payable at a future day.

That the disturbances in America having soon after commenced, and the persons who opposed the British authority having assumed to themselves the government of the said province of Georgia, Sir James Wright, and the other persons who remained loyal to Great Britain, were obliged to fly from the said province; that Sir James Wright left behind him the whole of his property to a considerable amount, and amongst the rest, the several slaves which he had purchased as aforesaid; that the persons who on that occasion assumed the government, and established themselves in the province of Georgia, in the month of March, 1776, passed an Act of Assembly in the State of Georgia, entituled, “An Act for Attainting such Persons as are therein mentioned of High Treason, and for Confiscating their Estates both real and personal, to the use of that State, for establishing Boards of Commissioners for the Sale of such Estates, and for other Purposes therein mentioned,” and it was thereby enacted, that Sir James Wright, and 115 other persons should be attainted, and adjudged guilty of high treason, and should be liable to the several penalties therein mentioned, and that all the land and heritages, debts, goods, and chattels, whatsoever, of such persons within that State, should according to the several estates and interests, which the persons so attainted had therein, be deemed, and were thereby enacted, and declared to be in the real and actual possession of the Government thereof, without any office of inquisition; and to the end that all the estates of the persons thereby attainted, and the incumbrances thereon, might be the better discovered and ascertained, and that the same might be applied to the uses of the State, it was enacted, that five persons should be appointed in manner therein mentioned, to act as a board of commissioners, for each county within the said State, who were to sell all the real and personal estate of the several persons named in the said Act, and the monies arising by such sales were to be paid into the treasury of the said State, and that all persons having any [138] demands on the forfeited estates, were to lay their claims before the board of commissioners; and after liquidating all such claims on the said forfeited estates, the said board of commissioners was to empower the sheriff of the county, or

(b) [*Vide Cottin v. Blane*, 2 Anstr. 544. *Wright v. Simpson*, 6 Vesey, 728. And see the case of *Odwin v. Forbes*, reported by J. Henry, Esq. p. 160.]

any person they might appoint, to sell the estates of the attainted persons, both real and personal, after giving thirty days at least public notice; and then to sell by public auction, for the money of that State only, and to the inhabitants being actually citizens, and residents of and within the same; and the persons having any claims or demands on the estates of the attainted persons, were to make the same before the expiration of 60 days after the passing of that Act, or to lose their claims; that possession of all the effects of Sir James Wright was taken under, and by authority of the said Act; that Miles Brewton, being a citizen or inhabitant of the said province of South Carolina, and a friend to the United States of America, and inimical to the Government of Great Britain, became entitled to claim, and he paid out of the confiscated estates and property of Sir James Wright, the money due to him upon the said promissory note, and that he actually made some claim in respect thereof, but before any thing had been done towards liquidating the same, and in or about the month of December, 1778, possession was taken of the said province of Georgia by the King's troops, and the province was reduced under the British Government: whereupon Sir James Wright was ordered to return to the said province, and resume his government there, which he accordingly did; that upon his return to the said province, he regained possession of his plantations and hereditaments within the said State, but some parts of his property upon the said plantation, had been sold under the authority of the said Act of Assembly; that Sir James Wright continued in possession of his government until the month of June, 1782, during which time he continued to cultivate, and greatly improved his said plantation; that His Majesty's troops evacuated the said province of Georgia, in the month of July, 1782, and in consequence thereof, Sir James Wright and the other persons, who had adhered to the British interest in the said province, were again compelled to fly from it, and leave all their landed property and most of their effects: that some time before the evacuation of the province, the inhabitants in the American interest declared the province of Georgia to be an independent State, and chose from time to time a House of Assembly [139] of their own, as the legislative body for the said State, and by an Act passed by the House of Assembly, on the 4th day of May 1782, intitled, "An Act for Inflicting Penalties on, and Confiscating the Estate of such Persons as are therein declared guilty of Treason, and for other Purposes therein mentioned, reciting the Former Act, and that it was necessary to carry the same into full Execution," it was enacted that Sir James Wright, and many other persons therein named, should be and were thereby banished from that State for ever, and if they returned to that State, should be guilty of felony without benefit of clergy, and that all the estates both real and personal, of all the said persons, with all debts, dues, and demands whatsoever due to them, should be confiscated to the use and benefit of that State; and the monies to arise from the sales which should take place by virtue and in pursuance of that Act, should be applied to such uses as that Legislature should direct; and that all debts, dues and demands, due or owing to merchants, or others residing in Great Britain, were thereby sequestered, and the commissioners appointed by the said Act were thereby empowered to recover, receive, and deposit the same in the treasury of the said State in the same manner as debts confiscated, there to remain for the use of the said State; and reciting, that there were several just claims and demands, which might be made by the good and faithful citizens of that State, and others of the United States of America, against the estates confiscated by that Act, it was enacted that any persons well affected to the independence of the United States, having debts owing to them, from the persons named in that Act, or who had any just claim in law or equity, against any of such confiscated estates, should bring his claim or enter his action, within the space of 12 months from passing of that Act, and in default thereof, every such person should be for ever debarred from deriving any benefit from the same; that the Act then proceeded to direct the mode in which such creditors were to proceed, at their option, either by claim before the commissioners, to the end that the Legislature might direct, with respect to such creditors, what to justice should appertain; or by action at law, in which case, the sum recovered by verdict was to be paid by a certificate to be issued by the governor or commander in chief, which certificate was to be taken in payment for any purchase made at the sales of the confiscated estates; that by other Acts of the said State of Georgia, and of the General Congress, the said Sir James [140] Wright was rendered incapable of suing any person in Georgia, or any other of the United States: that under the Acts

of confiscation, the American Government of the State of Georgia, seized and took possession of all the effects of Sir James Wright, to the amount of 80,000*l.* which were sold for the use of the State; that some time before the month of June 1782, the said Miles Brewton made his will, and thereby appointed Charles Pinkney and others executors; that the said Charles Pinkney soon afterwards died, having made a will, and thereby appointed his son Charles Pinkney, of South Carolina, and a member of the American Congress, and others executors; that the said Miles Brewton in his life-time, or his executors after his death, not having (as was alleged) got any satisfaction under the first mentioned Act of Assembly, for the said promissory note of 8802*l.* 5*s.* out of the estate and effects of Sir James Wright, confiscated under that Act, the said Charles Pinkney the son, as personal representative of Miles Brewton, made a claim of the said sum of 8802*l.* 5*s.* with interest under the authority of the last mentioned Act, against the estate and effects of Sir James Wright, confiscated thereby, and procured himself to be admitted creditor for the same; that the defendant Joseph Nutt, acted as attorney for the said Charles Pinkney, under a power of attorney for that purpose, and afterwards obtained letters of administration from the Prerogative Court of Canterbury, of the goods and chattels of Miles Brewton, limited until his original will should be brought in; and in that character commenced an action at law against Sir James Wright, upon the said promissory note, and got judgment in such action by default, and proceeded to execute a writ of inquiry of damages, but before the said Joseph Nutt entered up final judgment, in the said action, that is to say, on the 19th day of November, 1785, Sir James Wright died, having made his will, and appointed the plaintiffs executors thereof; that thereupon the said Joseph Nutt proceeded to revive the said action against the plaintiffs by *seire facias*, to which the plaintiffs pleaded, and the said Joseph Nutt replied, and issue was taken thereupon; the cause was tried on the 4th day of July, 1786, and that the said Joseph Nutt recovered a verdict against the plaintiffs. The bill then proceeded to charge several facts to shew, that, if Miles Brewton, or the said Charles Pinkney, had not obtained satisfaction for the said debt out of the confiscated effects of Sir James [141] Wright, in Georgia, it was by their wilful default, that they had not obtained such satisfaction: and the said Charles Pinkney ought to resort to that fund, more especially as Sir James Wright in his life-time, was, and the plaintiffs since his death were, totally unable to recover any of such confiscated effects; the bill therefore prayed that the defendants Joseph Nutt and Charles Pinkney, might deliver up the said promissory note to be cancelled, or discharge the plaintiffs from payment of the contents thereof, as not being liable in equity under the circumstances of this case to the payment thereof: but in case the Court should be of opinion that the plaintiffs were still liable in equity to payment of any part of the contents of such note, then that it might be decreed that the said defendants, or the said defendant Charles Pinkney, ought in the first place to seek satisfaction for the contents of the said note, out of the confiscated estates and effects of the said Sir James Wright; and that the plaintiffs might answer only so much thereof as could not then be, or could not before have been obtained, out of such confiscated estates and effects, and that an account might be taken for that purpose, and the note be delivered up upon payment of what should appear coming on that account, and that an injunction might issue in the mean time.

To this bill the defendant Joseph Nutt put in his answer; thereby admitted the several Acts of Assembly, and proceedings towards the confiscation of the estates and effects of Sir James Wright, in Georgia, and then stated, that the said Charles Pinkney, the Younger, claiming to be the personal representative of the said Miles Brewton, made a claim of the said sum of 8802*l.* 5*s.* South Carolina currency, with interest under the authority of the last mentioned Act of Assembly, against the estates and effects of Sir James Wright, which were seized and confiscated under the authority of the said Act, but that he did not, as was believed, procure himself to be admitted a creditor of the said Sir James Wright, or upon his said estate and effects, or obtained any order for the payment of the said 8802*l.* 5*s.* currency, or had obtained any satisfaction whatsoever, for the same or any part thereof; but on the contrary, that such claim of the said Charles Pinkney was rejected by the commissioners of claims against confiscated estates, and that the commissioners entered minutes of their refusing such claim, in their books in the following words: "At a board of commissioners of claims against the [142] confiscated estates, held at Savannah, in the State

of Georgia, on the 19th day of December, 1783, present, the Honourable Brigadier General McIntosh, president; the board having taken into their consideration an account preferred by Charles Pinkney, Esq.: one of the executors of Miles Brewton, Esq.; deceased, by his attorney James Mossman, against the estates of Sir James Wright, for 13,200l. South Carolina currency, and also an account against the estates of John Graham, &c. are of opinion, that as the late Charles Pinkney became a British subject and resided with them above two years, while the British Courts and laws were open in this State, the accounts due some years before the Revolution, and the persons against whom they are brought, able to pay them, those accounts appear in their consequence of too important a nature for this board to determine upon, and therefore they must refer them to the Legislature, and especially as it appears the delay can be no injury to the claimant, who acknowledges he may not be sufficiently informed yet of the true state of some of the accounts, and therefore this board cannot think themselves at liberty to make any provision for the same." He admitted that he and Robert Norris, of London, were the joint and several attorneys of the said Charles Pinkney, and that they acted for him, under a power of attorney, dated the 26th day of May, 1784, whereby the said Charles Pinkney, constituted the defendant and the said Robert Norris his attorneys jointly and severally for him, and in his name, and to and for the proper use and benefit of the said Miles Brewton's estates, to sue for and recover from the said Sir James Wright all such sum and sums of money as were due and owing from him to the estate of the said Miles Brewton: that he had obtained such letters of administration of the goods and chattels of the said Miles Brewton, as in the said bill mentioned, but that he had obtained the same, as being necessary to enable him to recover the said demand against the said Sir James Wright, for the benefit of the estate of the said Miles Brewton, and apply the money made payable thereby, in discharge of a debt, due from such estates of the said Miles Brewton, to him the defendant; and that when the said Charles Pinkney remitted the said promissory note to the defendant, he directed the defendant to obtain payment thereof from Sir James Wright [143] and to retain thereof, in respect of the debt due from the estate of the said Miles Brewton to the defendant, the sum of 1400l. sterling; that in October, 1784, he applied to Sir James Wright for payment of the money due on the said note, amounting to 13,263l. 2s. 9d. currency, or 1894l. 14s. 8d. sterling; that in the course of three following months, he had several conferences with the said Sir James Wright, on the subject of the said demand, who did not deny the same to be justly due, but requested to have time to advise with his friends on the subject of the said debt, concerning which he informed the defendant he intended to apply to Parliament for relief, and that the defendant accordingly indulged Sir James Wright with time, until the 9th of January, 1785, when the defendant received a letter from Sir James Wright of that date, wherein he informed the defendant, that after having maturely considered the subject, he had resolved on applying to Parliament, and if the defendant thought proper, he might commence an action against him for the recovery of the same: that the defendant as administrator of Brewton, accordingly commenced an action against Sir James Wright, in April, 1785, to which in June following, Sir James Wright pleaded a sham plea, but in the month of November, 1785, the defendant obtained judgment in the action for 1982l. 6s. 2d. sterling; that then Sir James Wright died; and proceedings being commenced to revive the judgment against the plaintiffs as his executors, to which they pleaded, the cause came on to be tried, and the defendant recovered a verdict, and judgment was entered on the 19th day of July 1786; that then the plaintiffs brought a writ of error, which was ordered to be non-prossed, it appearing that on the defendant's agreeing not to proceed by original in the action against Sir James Wright, his attorney had undertaken to bring no writ of error: after which the defendant applied to the plaintiffs, to know whether they would pay the debt, and on their refusal, commenced an action on the said judgment, which action was still depending. He admitted that the confiscated property of Sir James Wright had been sold, and that by the Act of the Assembly of Georgia, directions had been given for applying the produce, in the first place, in payment of such debts as should be proved against such effects, to the satisfaction of the commissioners, but he did not know of any steps taken towards proving this particular debt, subsequent to the beforementioned [144] entry of the board of commissioners. He admitted that Charles Pinkney was a member of the American Congress, but insisted that he ought, notwithstanding, to be

at liberty to resort to the plaintiffs as executors of Sir James Wright for payment of the debt, more especially as Sir James Wright in his life-time, received considerable sums of money from the British Government, in part satisfaction for the loss which he sustained by the confiscation of his property in America.

The Attorney General, Solicitor General, and Richards on behalf of the plaintiffs.

The plaintiffs are entitled to an injunction, at least till the coming in of Pinkney's answer: till then, it cannot appear that this demand has not been actually satisfied in America. It is stated, that when a claim was made on the confiscated estate, the commissioners did not give a peremptory refusal, but doubting whether they were at liberty to allow the debt, referred the claimants to another tribunal. Until the Court therefore can see, whether resort was made to that tribunal, and if it were, what was the event of it, it is impossible to say whether part of the debt has not, or might not have been recovered. In order to the full discussion of this question, it may be necessary to know what the situations and conduct of Brewton and Pinkney were, as to which, Nutt being resident here can give no distinct account, but out of which, when explained by Pinkney's answer, many points may arise, material in the case. If a person by fraud, has been prevailed upon to give a promissory note, and the payee indorses it over to another, merely for the purpose of bringing an action upon it, but is himself abroad; if the indorsee brings an action, and a bill for an injunction is filed against him, and it should appear from his answer, that the note was indorsed to him merely to enable him to bring an action, in that case the Court would grant an injunction till the answer of the real defendant came in. So here, Pinkney is the real defendant, and it is possible that he may by his answer admit that he has received all the money, the claim having never been absolutely rejected by the board of commissioners. It is probable that Pinkney would have resorted to an ample fund for payment, rather than pursue an insolvent debtor. Supposing Sir James Wright had been alive, and taken in execution here, this would have been a satisfaction for the debt, at the moment perhaps when [145] Pinkney might have been receiving the money in Georgia. Though the Court should be of opinion, that Sir James Wright was liable to the payment of the debt, yet if he were alive, he ought to be capable of being put in the situation in which Pinkney was, with regard to the debt, before the confiscation and attainder: so also ought the executors of Sir James Wright; Pinkney ought to be able to entitle them to recover a share of the confiscated effects, in his stead. But in this case, neither Sir James Wright, if he were alive, nor his executors since his death, could be enabled so to do by Pinkney. The Court will insist on Pinkney's recovering all he could out of those effects, before he sues the plaintiffs, because if he does not recover himself, he cannot enable them to recover from that fund in America. It is necessary therefore to grant an injunction, at least till the answer of Pinkney comes in. But assuming the case to be, that a person resident in and subject to the United States of America, has had an opportunity of access to an estate for the payment of his debt, taken from the debtor by the Legislature of that State to which he is subject, the question is, whether such person shall be permitted to bring an action in this country against the debtor whose whole property is so taken away, and refuse to take that remedy which the country to which he was subject, thought proper to grant him. In the case of a bankrupt, if a creditor does not come in under the commission, and the certificate is obtained, he cannot sue the bankrupt in another country. Pinkney was the real plaintiff at law, a subject of America well affected to the American States, who was not disabled from seeking his remedy in that country: this case therefore is different from that of *Kempe v. Antill* (2 Browne, 11), where an action at law was brought against Kempe on similar circumstances, and an injunction refused, on the ground of Antill being a loyalist, unable to sue in America. It is incumbent on Pinkney, to shew that he used all due diligence to recover the whole debt in America, since it would be grossly unjust that a creditor who had it in his power to be satisfied in that country, should pursue the unfortunate debtor in this, whose only fault was his loyalty to Great Britain. Though in this particular case, Nutt made himself the personal representative of Brewton, yet in truth he is only attorney for Pinkney; when he took out letters of administration, [146] he did it as attorney, and acted as such. Nutt could not sue in this country, without letters of administration, which he took out under the authority of Pinkney. The right of executing in one country a contract made in another, is founded on the law of nations: but the principle of the law of nations is mutuality; each country allows to the other

the advantages it receives. But if any one country should declare that personal contracts made by foreigners should not be executed within its dominion, though the parties making the contract should there reside, that part of the law of nations would cease with respect to the country so declaring. The maritime law is adopted by all civilized nations who have any use for it; but some there are who refuse to admit it. The Algerines could not demand in Spain or Portugal the justice of the country respecting captives at sea, not having themselves received the maritime law, which if not mutually binding is not binding on either party. So in the present case, the State of Georgia seizes all the property of Sir James Wright both real and personal, and though they incapacitate him from suing for any debt, yet they declare that they will sue for all debts due to him, and vest them in the public stock. The creditors therefore of Sir James Wright in this country could not recover their debts in Georgia, that State having declared that they would apply those debts which were owing to persons here, to the public service. Every person resident in Great Britain is proscribed, and deprived of all chance of recovering a debt due to him in Georgia. A creditor in Georgia would have the land to resort to there, and the person of the debtor here, as incident to a transitory contract; but a creditor in England could only betake himself to the effects in England; he could not make a claim on the land in Georgia, he has not a double remedy. If this debt should be recovered from the personal effects of Sir James Wright in this country, payment could not be enforced against his estates in Georgia. If therefore mutuality be the true principle on which contracts are transitory, the State of Georgia has by its own Act rendered contracts there made, no longer transitory, but has fixed them in that country. Whether Brewton or Pinkney shall or shall not turn out to have been themselves instrumental to this particular confiscation, yet every person in the State of Georgia has bound himself by the act of those whom he has chosen and thought [147] fit to represent him: the assent of every person so choosing, is implied to every act of the persons chosen. Every man therefore claiming by a right which accrues in that State, must submit to the consequences which follow, from the Legislature of that State having rendered it impossible that a claim should be effectually made on the part of any of the persons comprehended in the Acts of Attainder and Confiscation.

Mansfield and Scott, *contrâ*. Whatever may be the hardship of this case, whatever may be the policy of permitting actions of this kind to be maintained, no ground has been shewn for a Court of Equity to interfere. If there be any ground to prevent this action from proceeding, it is of a legal, rather than an equitable nature. If the effect of the Act of Confiscation in Georgia be, as it is contended, to exempt persons, whose fortunes were confiscated, from being sued in England, it is a subject for the cognizance of a Court of Law. But in truth it is neither a defence at law, or in equity. There is no analogy between this case, and that of a certificated bankrupt, in which the law expressly declares that the bankrupt shall be free; the mere depriving him of all his property would not of itself prevent him from being sued. The States of America have indeed confiscated property, but they have not said that those persons to whom the property belonged should not be sued, nor is there any reason to suppose that such was their meaning. It has been said, that it would be hard to sue a person whose whole property is taken from him; but the taking the property does not import an exemption from being sued. An attainted person, though all his property is confiscated, is capable of being sued. Supposing the Act of Confiscation had expressly said, that it should operate as a discharge of English creditors, yet if Sir James Wright had gone to France, and been sued by a French creditor, there is no principle in the law of nations to prevent such creditor from recovering. Unless it can be shewn that the contract was undone in America, it may be enforced in England. When the justice of this country required the property of the South Sea directors to be taken from them, it also required that from that property their debts should be paid: a creditor sued one of them, who applied to this Court to interpose, on the ground that his property was taken from him, and therefore he was discharged; but the Court held that this was no discharge, and refused an injunction. *Houlditch v. Mist*, [148] 1 P. Wms. 695. The argument drawn from the reciprocal benefit of executing contracts in one country, which are made in another, is not applicable to the present case, which is not that of a general prohibition of the subjects of Great Britain to sue in America, but only of certain attainted persons, and does not prevent the operation of the general principle, that personal contracts may be sued in any country. The

plaintiff ought to have shewn, according to his own argument, that Sir James Wright was in fact deprived of all his property, which has not been done. Where there are many sureties for a debt, if one of them should lose all his property, it could be no reason to induce this Court to prevent the creditor from having his choice to which of them he would resort for payment: the surety who had been deprived of his property would still remain liable. As to the argument that this debt might have been satisfied in Georgia, it is not to be conceived that for the sake of gratifying private pique or malignity, Pinkney should purposely omit to receive payment of a large debt. Neither is it probable that the representative of Sir James Wright in this country is ignorant, or at least that he has not had the means of knowing, whether this debt has been really paid in America, or not. There is no ground therefore in equity to delay the creditor any longer, in respect of Pinkney's answer, after the delays already put in practice, in the course of the action at law. Whatever may be the case with Pinkney, Nutt sues here in his own right, and in the usual way of compelling payment of a debt due to him. But if an injunction should be thought proper to be granted till Pinkney's answer shall come in, it must be, in reason, on condition of bringing the money into Court.

LORD CHANCELLOR.—I am glad this application happens to be made when I have his honour's assistance, because there are circumstances in the case somewhat particular, though I do not take the general principle upon which it must be decided to be altogether new. Great part of the argument has spent itself in this question, whether the laws of the country to which the creditor belongs, have or have not disabled him from suing in this country?—I think the first answer which was given to that, was the shortest and the best, that is to say, if he be disabled from suing, this is not the Court to say so; but that it ought to have been argued before the Court in which the action depended, and there it would have been decided. I like-[149]-wise lay out of the case all observations that relate to hardship, either upon one side or the other. It may be a question for private speculation, whether such a law made in Georgia was a wise or an improvident one, whether a barbarous or civilized institution. But here we must take it as the law of an independent country, and the laws of every country must be equally regarded in Courts of Justice here, whether in private speculation they are wise or foolish. Nor does it at all apply in my judgment, whether Sir James Wright was or was not capable of paying; for the case would have stood before me precisely in the same situation, if he had been worth 100,000*l.* and had been sued in the way in which he is now sued; as a man I might feel differently about it, and compassion might interpose; but as a Judge it would be impossible for me to determine on that ground. Nor can I take into consideration, how very much it bears with it an approach to fraud. The circumstance of converting the charity of this country to individuals ruined in its service, to the purpose of paying the creditors of those individuals in the other country, is a consideration which should have belonged to those who thought proper to offer them that charity, and the terms upon which it was afforded should have been regulated accordingly. It is nothing to me, in short, what the situation of the parties is, but I must consider the plaintiff as competent to bring this action at law, and the defendant as coming here to state, if he can, some equitable ground, upon which such action ought not to be permitted to proceed. The equitable ground which he has stated differs from all others that I know of, that have yet come before the Court, unless there be more similitude between this and the case of *Houlditch v. Mist*, than the short state of the latter case affords.—The circumstances upon which this case comes before the Court, are these: that Sir James Wright, a banished man, disabled to act or to sue in America, had all his property taken away from him; and the terms upon which it was taken away were, that it should be applicable in the first place to the payment of his debts contracted in that country; no doubt has been made on either side that the debts sued for at law here was of that description, and capable of being made the subject of a claim upon his estate in that country: under that circumstance, instead of a claim being made there, (as is suggested by the bill,) an action is brought here. There is no doubt in the world, but that according to the general princi-[150]ples of a Court of Equity, where a man who has not actual possession of his debt, (for if he had actual possession, I should conceive, that it would be payment even that might be available in a Court of Law, but if not so at law, it would at least in a Court of Equity, be considered as actual payment, and that a man was vexed twice for the

same demand upon some formal difficulty of making the fact of payment available at law,) but has the power of paying the debt depending upon his own act, whether he will resort to a particular fund or not, if, instead of making use of that power, he will pursue the debtor, it would be too much for a Court of Equity to permit him to sue the person, and relinquish the exercise of that power which he has at the time in his own hands. This case is attended with a circumstance, still more peculiar; which is, that it is totally impossible for him to assign over that right to the party debtor here, in order for him to make it available; it is clear, that neither the hazard, the difficulty, nor the expence of making the demand, ought to be thrown upon the creditor: in point of natural justice, they ought to be upon the debtor, provided the creditor can put the debtor into a situation to make it as effectual for him, as it would be for the creditor himself. But here the creditor cannot clothe the debtor with the same remedy as he himself is in possession of; and therefore the question is, whether, while he holds that remedy in his hands, the Court does not proceed upon principles of natural justice (applied by fair analogy to other cases, or if such other cases had not existed, applied by the reason of the thing, and the force of those principles of natural justice, to this case) when it says to a creditor, who makes such a demand in a Court of law, "You shall not proceed upon that demand, till you have satisfied me, that you have taken all the pains you can, to make that other pledge you have thus in your hands, (I call it a pledge by metaphor, for I do not mean to state it effectually as a pledge) as effectual and available to yourself, as you possibly can." Under circumstances so stated, this Court would proceed according to the clearest notions of distributive justice, and the fairest principles of natural equity, if it said to a creditor so circumstanced, you shall proceed to make that available, and you shall demonstrate to me, that you have proceeded to make it available *bonâ fide*, and that you have neither for the fraudulent purpose of obtaining double satisfaction, nor the malignant purpose of plaguing your debtor, made your claim in this country. I wish to be understood clearly upon this point, that this is the utmost extent, to which my judgment goes upon the subject. When this subject was introduced into the House of Lords, I had occasion to give my opinion upon it there, but more particularly in private, to those who brought in the bill, with the clearest motives in the world, with a great deal of public spirit and public wisdom: although other motives arose, which rendered that project indiscreet and impolitic, and consequently it was not carried into execution as a legislative Act, yet then and at all times it has constantly struck me with wonder, that principles such as I have just stated, should not have been regarded, from the moment the question arose as fit to be tried in Courts of Justice, for the purpose of bringing these demands to what I think is their proper test. I am therefore clearly of opinion, that provided a case is made, by which it appears, that there is in the hands of a creditor either possession of the estate in fact, or the clear means of effecting that possession, he ought to be called on so to do, or at least the Court should interpose. When I have stated that to be my opinion, I confess that thinking much of the case of *Houlditch v. Mist*, I do not know exactly, how to reconcile the decision of that case with the principles I have now laid down. The only way I have to deal with it, is to avoid it. From the book nothing more appears, but that a bill was filed by the debtor, stating that he had been one of the directors of the South Sea Company; that by an Act of Parliament, his whole fortune had been confiscated, and therefore an absolute disability of paying his debts had been incurred; that it was contrary to reason, and natural justice, that he should be called on to pay his debts, under the circumstances of such an Act of Parliament. No more is stated upon the subject, yet it is clear, that the debts of these directors were capable of being paid out of the fund: it also appears, by a memorandum which is added to the bottom of that case, that by compromise, the debt was directed to be paid, out of that part of the fund, which by some regulation of the Act, appears to have been given to the private persons of the directors themselves. If there were a doubt about that, or if my opinion turned upon it, it should be a little more inquired into: but I collect, that beyond the payment of the debts, and [152] the confiscation, there was a personal allowance made to those who suffered. Stating the case in that manner, thus much seems fairly to be inferred from it, namely, that it did not occur at that time to insist, that the debt should not be paid out of the fund, which was the personal fund of the delinquent; and which, according to my principles, ought to have been the last fund appropriated to the payment of the

debts. I wonder much at that, and it brings the case less to apply, because under such an Act passed in this country, an Act of partial confiscation, qualified in the manner in which it was, Houlditch had as good a right to insist upon being relieved of that debt, out of the fund, as any other man: he did not lose all his rights as a citizen: all he lost, was the fund that was confiscated. There must therefore have been a great deal more in that cause, than appears upon the report; for it seems impossible to imagine, that the debt was not to be forthcoming in some manner, or other, out of the fund, and if there were allowances made, to say that the justice of the case was satisfied, by making those allowances liable to those debts. Houlditch was not in the miserable situation in which these people are, deprived of all their rights. I do not therefore know how to apply that case to the present; but I retain the opinion I gave before, namely, that a creditor will be bound by an application to this Court, to use fair *bonâ fide* diligence, in order to make the most of his debtor's estate, in the place where the law of the country has applied that estate to the payment of his debts. I do not think that this law of Georgia meant any mercy to the debtors; the provision was that of pure policy. But whatever the object, and intent of the law might be, I am clearly of opinion, that natural justice requires, we should see the utmost made that can be made of that matter. Now what does this case amount to? This is a debt, as it comes before us, sued by the administrator of Brewton, who has claimed and obtained letters of administration, upon a double right. He has stated, and it is recorded in the letters of administration that he is a creditor of Brewton's to the amount of 1400*l.*; he is also stated to be the attorney of the executor of Brewton, and in that right entitled to the probate; he could not gain the probate as a creditor, without the renunciation of the executor, he was therefore obliged to take it up, as a temporary administration, subject to the general right of the exe-[153]-cutor to come in for a general representation of all the effects of the testator. That executor, therefore, is the person who is generally interested in, and entitled to all the testator's effects; the administrator is only entitled to the temporary interest. In this situation, he brings his action at law. The bill has been filed against him, and also against the executor himself, in whom the principal representation of the testator's estate is vested: (it cannot indeed so be in our contemplation, till the probate of the will is effectually granted to him, but substantially it resides with him). This bill is therefore brought against them, 1st, in respect of the formal title of the plaintiff at law: 2dly, in respect of the substantial title of the executor, who has a right to make it available, whenever he thinks proper. In the course of this action all the passages have intervened which have been mentioned, and which, whether they arose from the uncertainty that belonged to a new case, from the difficulty the parties had, in procuring advice, in proceeding upon certain advice, or in their choice of remedies which the speculations of those they consulted, thought proper to offer them, have been attended with these positive mischiefs; that a man who has a clear demand, has been delayed for three or four years together, by various shifts in the Courts of Law; and at length a bill in equity is filed, to restrain his proceeding there at all. In order to make a good and effectual bar in equity to a demand at law, it will be necessary to shew, that the estate of Sir James Wright confiscated in America, was of greater value, not only than the sum now in question, but than all sums claimed upon that estate, consequently that there was a fund sufficient to have paid the whole; for if it should turn out to be a defective fund, and capable of satisfying the debt but in part, it can only operate as a discharge *pro tanto*. In the second place, it must be shewn, that by the justice to be obtained in that country, this demand was competently made; for let what will be the faults of their judicature, I can hear no complaints of them: I must understand them to be deciding according to the laws of that country, whatever my private opinion may be: and therefore if a formal and final decision had been obtained, by which it became impossible to have obtained a shilling of the whole of that demand, that would likewise be a sufficient answer; for the bill proceeds upon the idea, that the fund was complete, and that it is still available; or, if not so, that it has been owing [154] to the conduct of the other party. I agree that as this case is circumstanced, if you had come recently, you might have stated all the actual circumstances of Sir James Wright, all that you know of the proceedings that have obtained in America, and the probable evidence of them: upon that, it would have been competent for the Court to have taken the step now demanded, which is an injunction; till the answer of Pinkney came in. But I

confess after making all allowances for the circumstances that have been pleaded, I think it tends to a dangerous example, to say that a party who is sued in 1784, or 1785, should come in 1788, to ask for the answer from the party abroad, instead of applying for it before, which he ought to have done. He should have made a proper application by affidavit, and then the action would have been stopped, till the answer of the party abroad came in. But considering he has staid so long before any application was made, I have great doubts about stopping this action upon any other terms, than upon bringing the debt into Court.

Master of the Rolls, SIR LLOYD KENYON.—Upon the general points of the case, I cannot hope to add to what my Lord Chancellor has said; I can only express my full concurrence with every part of what has fallen from his Lordship. The great point will be discussed, when the whole is before the Court upon the coming in of Pinkney's answer. It is in vain to say, the cause does not stand precisely upon the grounds, upon which it would do, if Pinkney were the plaintiff in the action at law. Some argument has been used, to shew that Nutt stands in his own independent situation, suing for his own debt, having a right to retain if recovered, this money from debtors of an inferior nature. He comes here clothed merely (in the view of this Court) with the character of the agent of Pinkney, in order that he may put in force the authority with which Pinkney armed him. He has obtained another formal, legal, character, namely, that of an administrator here, because otherwise, he could not have proceeded to recover the debt; but in effect he is still to be considered as the person litigating on the part of Pinkney: when assets get into his hands he will be considered as having them, in the character, not of the administrator of Brewton, but of the attorney of Pinkney: Nutt would not be entitled to retain, as Pinkney would, in case of a creditor of equal degree; then is it not essential to the interest of justice, that the parties should know from Pinkney, whether he [155] has proceeded bona fide, as far as he can, to receive payment of this demand out of that fund, which ought to be the primary fund to discharge it, or indeed, whether he has not actually obtained payment? For the bill suggests, that he has, or might have obtained payment; now it is essential that these facts should be known from the only person who knows what they are. I am therefore clearly of opinion, that the injunction ought to be granted; whether upon the condition of bringing in the money, or not, depends upon the circumstances of the argument which impute laches to Sir James Wright's executors. They ought to have taken the earliest methods, in order to repel this demand; but as they have kept the party at arm's length, by using delays, I think the terms my Lord Chancellor has imposed, are fit to be imposed upon them; namely that they should bring the money into Court (a)¹.

KILGOUR *against* FINLYSON, GALBREATH, AND HARPER. Wednesday,
Feb. 11th, 1789.

[Referred to, *Watson v. Woodman*, 1875, L. R. 20 Eq. 731.]

On the dissolution of a partnership between A. B. and C. a power given to A. to receive all debts owing to, and pay those owing from the late partnership, does not authorize him to indorse a bill of exchange in the name of the partnership, though drawn by him in that name, and accepted by a debtor of the partnership, after the dissolution: so that the indorsee cannot maintain an action on the bill against A. B. and C. as partners (a)². Neither can such indorsee maintain an action against them for money paid to the use of the partnership, though in point of fact the money raised by discounting a note which he had given (in discounting the bill,) be applied by A. to the payment of a debt due from the partnership (b).

Indorsee against the ostensible indorsers, who also appeared to be the drawers of

(a)¹ Pinkney's answer afterwards came in, but contained nothing to induce the Court to order the injunction to be dissolved.

(a)² [*Wrightson v. Pullan*, 1 Stark, N. P. C. 375. *Henderson v. Wild*, 2 Camp. N. P. C. 561. *Lord Galway v. Mathew*, 10 East, 264.]

(b) [*Emly v. Lye*, 15 East, 7.]

a bill of exchange. Money paid, money had and received, account stated. Verdict for the plaintiff.

The circumstances of this case were as follow :

The plaintiff was a warehouseman and factor, the defendants were also warehousemen and factors in partnership from Midsummer 1785, to the 28th of July 1787, when the partnership was dissolved, and notice of the dissolution given in the *Gazette* as under :

"Notice is hereby given, that the copartnership between Thomas Finlyson, Thomas Galbreath, and Henry William Harper, of Bow Church-Yard, warehousemen, under the firm of Finlyson, Galbreath and Harper, and also at Glasgow under the firm of Henry William Harper and Company, was by mutual consent dissolved this day ; all demands upon the [156] above firm will be paid by Thomas Finlyson of Bow Church-Yard, who is impowered to receive and discharge all debts due to the said copartnership.

"Witness our hands, this 28th day of July 1787.

"THOMAS FINLYSON.

"THOMAS GALBREATH.

"HENRY WILLIAM HARPER."

At the time of the above dissolution, one Scott was indebted to the partnership in 758l. and the partnership indebted to Sterling Douglas and Co. in 890l. On the 21st of September 1787 Finlyson drew the bill in question in the name of the late partnership on Scott, payable on the 23d of November following, for 304l. 2s. which Scott accepted. On the 9th of October, Finlyson indorsed it, in the name of the partnership, to the plaintiff, who discounted it, by giving his own promissory note, for 304l. 3s. 6d. payable on the 25th of November, (the difference of 1s. 6d. being on account of the note being due two days later than the bill). This note of the plaintiff's was indorsed by Finlyson to Sterling Douglas and Co. who discounted it, and received the money had and advanced by so discounting the note, back again from Finlyson, in part of payment of the debt owing to them from the partnership. When the note became due, the plaintiff paid it to Sterling Douglas and Co. Two days before Scott's bill became due, Finlyson took it up, and gave in lieu of it another bill to the plaintiff, accepted by Lee, Strachan and Co. but did not take back Scott's bill. Afterwards Lee, Strachan and Co.'s bill not being paid, and Finlyson having become a bankrupt, the plaintiff brought this action against all the partners, on Scott's bill, which remained in his hands, and obtained a verdict.

A rule being granted to shew cause why this verdict should not be set aside, and a new trial granted,

Adair and Bond, Serjts., shewed cause. They acknowledged that the action on the bill could not be supported, but contended that the plaintiff was intitled to retain his verdict, having paid money to the use of the defendants, at the special instance and request of a person authorized by them to receive and pay their debts.

Le Blanc and Lawrence, Serjts., for the rule argued, that it ought to have been shewn, that the money was actually paid, [157] in discharge of a partnership debt ; if it were paid, when Finlyson had no right to pledge the credit of the partnership, it was not paid to the use of the partnership. But admitting that it was paid for a partnership debt, yet being paid without the knowledge and request of the defendants it could not be sufficient to raise an assumpsit. Finlyson had no authority to borrow money to pay their debt, or to contract for them without their consent. This case must be considered as already decided by Lord Kenyon in the King's Bench (*a*).

Adair replied, that in the case cited, it was only holden that an action could not be maintained on the bill of exchange. The reason of which was, that the bill being negotiable, and going into the hands of persons who might not know the consideration for which it was given, must be binding when given, or not at all. The authority of the drawer must be independent of any application of the money. But no such inconvenience could arise from the action for money paid. It is admitted that

(*a*) In a case between the Bank of England plaintiffs and the same defendants, in which the circumstances were the same as the present : there was a demurrer to the evidence, which was not argued in Court, but Lord Kenyon at the trial gave it as his opinion, that the action on the bill could not be maintained.

Finlyson paid the money of the plaintiff in discharge of a partnership debt; he had full authority from the other defendants to receive and pay; he therefore applied to the plaintiff for his note, at their special instance and request.

LORD LOUGHBOROUGH.—I was of opinion at the trial, that there was an equity in favour of the plaintiff, the money arising from his note being de facto applied for the benefit of the partnership, and the authority from the other partners giving him power to discharge their debts. But I am now convinced that I was mistaken. Consider the nature of this transaction: Finlyson applies to Kilgour to discount the bill accepted by Scott, and in part of the discount takes a promissory note from him; Kilgour, before Scott's bill became due, changes it with Finlyson for another, accepted by Lee, Strachan and Co., returns that, and takes Scott's bill back again. Now all this was carried on without any idea of the former partners being bound by it. On the 10th of October, long before the plaintiff's note was due, the defendant applied to Sterling Douglas and Co. to discount it, who accordingly did discount it, but received the [158] money back again in part payment of their debt owing from the partnership. When this note became due, the plaintiff paid it to Sterling Douglas and Co. but at that time no debt was owing to them from the partnership; the payment therefore of the plaintiff was not a payment to the use of the partnership. Though the money raised by discounting his note before it was due, was in fact paid in discharge of a partnership debt, yet he cannot follow the money through all the applications of it made by Finlyson.

HEATH and WILSON (Mr. Justice Gould being absent), Justices, of the same opinion. Rule absolute for a new trial.

SHIELLS AND THORNE, Assignees of Goodwin, a Bankrupt, *against* BLACKBURNE.
Thursday, Feb. 12th, 1789.

A. a general merchant undertakes voluntarily and without reward, to enter a parcel of goods of B. together with a parcel of his own of the same sort, at the Custom-House for exportation, but makes the entry under a wrong denomination, whereby both parcels are seized. A. (having taken the same care of the goods of B. as of his own, not having received any reward, and not being of a profession or employment which necessarily implied skill in what he had undertaken) is not liable to an action for the loss occasioned to B.(a).

The material facts of this case were as follow. The defendant who was a general merchant, in London, having received orders from his correspondent in Madeira to send thither a quantity of leather cut out for shoes and boots, employed Goodwin the bankrupt, who was a shoemaker, to execute the order. Goodwin accordingly prepared the leather for the defendant, packed it in a case for exportation, and at the same time prepared another parcel of the same kind of leather, on his own account, which he packed in a separate case, to be sent to Madeira on a venture, requesting the recommendation of the defendant to his correspondents in the sale of it. The two cases were sent to the defendant's house, with bills of parcels, and he, in order to save the expense and trouble of a separate entry at the Custom-House, voluntarily and without any compensation, by agreement with Goodwin, made one entry of both the cases, but did it under the denomination of wrought leather, instead of dressed leather, which it ought to have been. In consequence of this mistake in the entry, the two cases were seized, and this action was brought by the assignees of Goodwin to recover the value of the leather, which he had prepared to export on his own account. The declaration stated, that the bankrupt before his bankruptcy was possessed of a quantity of leather, which he [159] designed to export to the island of Madeira, for

(a) [As to the degree of negligence which will render a gratuitous bailee liable, see *Rooth v. Wilson*, 1 B. & A. 59. *Nelson v. Mackintosh*, 1 Stark, N. P. C. 237. *Dartnell v. Howard*, 4 B. & C. 350, in which latter case it was held that a retainer to lay out a sum of money in the purchase of an annuity without a reward, will not render the defendant liable for taking an insufficient security: see *Whitehead v. Greetham*, 2 Bingh. 464. Where it is stated that the defendant was retained as an attorney a reward need not be alleged "for the Court will take judicial notice that he will not act without reward." *Bourne v. Diggles*, 2 Chitty's Rep. 311.]

which purpose it was necessary that a proper entry of it should be made at the Custom-House; that the defendant in consideration that the bankrupt would permit him to enter the said leather at the Custom-House, undertook to enter it under a right denomination; that the bankrupt confiding in the undertaking of the defendant, did permit him to enter it at the Custom-House for exportation: that the defendant did not enter it under a right denomination, but, on the contrary, made an entry of it under a wrong denomination, of wrought leather, in order improperly to obtain a bounty (a) thereon; by means of which wrong entry, the leather became liable to be seized, and was seized and forfeited to the King. 2d. Count goods sold and delivered. 3d. Quantum meruit. Plea general issue, verdict for the plaintiff.

A rule was obtained to shew cause why the verdict should not be set aside, and a new trial granted, on the ground that the defendant not professing the business of entering goods at the Custom-House, having undertaken to enter those in question without reward, and having taken the same care of them as of his own, was not liable for the loss.

Adair, Serjt., shewed cause, contending, that as the bills of parcels were left at the defendant's house, he must have known the proper denomination of the goods. It was no excuse for him, that he lost some of his own goods by the same mistake in the entry; for though a bailee of goods may, if he pleases, throw away his own, yet he has no right to do so with those of another. Having, by gross negligence, lost the property of another, committed to his care, he is not exculpated by having lost his own property by the same negligence. Though in this case perhaps there was no intention to cheat the revenue, yet the tendency of it was to gain a drawback on exportation; whatever might be the intent, the effect was the same. The defendant was not a mere depository, but undertook to perform a specific act. Though an action might not lie for nonfeasance, it clearly would for a misfeasance. This is agreeable to Lord Holt's doctrine in the case of *Coggs v. Bernard* (2 Lord Raym. 909), and answers [160] to the mandatum of the Roman law, recognized in the sixth division of bailments, though somewhat improperly termed a commission, which in common acceptation implies hire or reward. Admitting that a bailor is not entitled to recover for a loss, occasioned by his own folly in employing an unskilful person, where technical knowledge is required, yet here the defendant was a general merchant, used to exportation, and was to be presumed to know the proper duties payable at the Custom-House. In Jones' Law of Bailments, 120, it is said conformably to Lord Holt's rule, that "a mandatary to perform a work, is bound to use a degree of diligence adequate to the performance of it."

Lawrence, Serjt., contra. The question is, how far the undertaking of the defendant extended? Goodwin, the bankrupt, having goods to export, the defendant voluntarily offered to enter them at the Custom-House. Here the implied contract was the point to be considered. In *Coggs v. Bernard*, special care was required in removing a cask of brandy; in that case Mr. Justice Powell held that the special undertaking of the party was the gist of the action. Here the undertaking of the defendant was only to take the same care of the plaintiff's goods as of his own: no more can be implied. Jones, in his Essay on Bailments (page 10) says, "If the bailor only receive benefit, or convenience from the bailment, it would be hard and unjust to require any particular trouble from the bailee, who ought not to be molested unnecessarily for his obliging conduct. If more, therefore, than good faith, were exacted from such a person, that is, if he were to be made answerable for less than gross neglect, few men, after one or two examples, would accept goods on such terms, and social comfort would be proportionably impaired." It is said in Paley's Principles of Moral and Political Philosophy (page 144), that "whoever undertakes another man's business, makes it his own, that is, promises to employ upon it the same care, attention and diligence, that he would do if it were actually his own, for he knows that the business was committed to him with that expectation, and with no more than this." Lord Holt's reasons in *Coggs v. Bernard*, for making a mandatary liable, do not apply to this case; those are, that "in such a case a neglect is a deceit to the bailor; for [161] when he trusts the bailee upon his undertaking to be careful, he has put a fraud upon the plaintiff by being

(a) By stat. 12 Ann. stat. 2, c. 9, s. 64, a drawback is allowed of three half-pence on every pound weight of leather exported, which shall be manufactured and actually made into goods and wares. Made perpetual by 3 Geo. 1, c. 7.

negligent, his pretence of care being the persuasion that induced the plaintiff to trust him; and a breach of trust undertaken voluntarily will be good ground of an action." Where a person professes himself to be of a certain business, trade or profession, and undertakes to perform an act which relates to his particular employment, there an extraordinary degree of skill and diligence is required from him; but where his undertaking is merely to take the same care of the concerns of another as of his own, no more can be expected from him. Puff. lib. 5, c. 4, s. 3, *Moore v. Morgue*, Cowp. 480, (a)¹ in which Lord Mansfield's direction to the jury is in favour of the present defendant.

Adair replied, that Lord Mansfield's doctrine in *Moore v. Morgue*, was not applicable to the present case, because the entering goods under a false denomination was gross negligence.

HEATH, J. (Mr. Justice Gould was absent).—The defendant in this case was not guilty either of gross negligence or fraud; he acted *bonâ fide*. If a man applies to a surgeon to attend him in a disorder, for a reward, and the surgeon treats him improperly, there is gross negligence, and the surgeon is liable to an action (c); the surgeon would also be liable for such negligence, if he undertook gratis to attend a sick person, because his situation implies skill in surgery; but if the patient applies to a man of a different employment or occupation for his gratuitous assistance, who either does not exert all his skill, or administers improper remedies to the best of his ability, such person is not liable. It would be attended with injurious consequences, if a gratuitous undertaking of this sort should subject the person who made it, and who acted to the best of his knowledge, to an action.

WILSON, J.—Where money has been paid for the performance of certain acts, the person receiving it is, by law, answerable for any degree of neglect on his part; the payment of money being a sort of insurance for the due performing of what he has undertaken; and this rule has few exceptions. But where the undertaking is gratuitous, and the party has acted *bonâ fide*, it is not consistent either with the spirit or policy of the law to make him liable to an action. Here Goodwin wanted to dis[162]-pose of his goods, which the defendant entered together with his own, without any reward. Could he be understood to be answerable for more care than he took of his own goods? There was no suspicion of any fraudulent design. A wrong entry at the Custom-House cannot be considered as gross negligence, when, from the variety of laws relating to the Customs, reliance must be placed on the clerks in the offices. It happened, indeed, not long since, that a man, designing to export wool under the late Act (28 Geo. 3, c. 38), applied to a clerk in the Custom-House to make a proper entry of it, who, not understanding the Act of Parliament, entered it wrong, and the goods were seized: when therefore such cases happen, it is too much to infer gross negligence from the mistake which the defendant committed.

LORD LOUGHBOROUGH.—I agree with Sir William Jones, that where a bailee undertakes to perform a gratuitous act, from which the bailor alone is to receive benefit, there the bailee is only liable for gross negligence; but if a man gratuitously undertakes to do a thing to the best of his skill, where his situation or profession is such as to imply skill, an omission of that skill is imputable to him as gross negligence. If in this case a ship-broker, or a clerk in the Custom House, had undertaken to enter the goods, a wrong entry would in them be gross negligence, because their situation and employment necessarily imply a competent degree of knowledge in making such entries; but when an application, under the circumstances of this case, is made to a general merchant to make an entry at the Custom-House, such a mistake as this is not to be imputed to him as gross negligence.

Rule absolute for a new trial.

WYVILL, Clerk, *against* SHEPHERD. Thursday, Feb. 12th, 1789.

In an action for an amercement in a court leet, if the declaration state the court to have been holden before the steward of the manor, and the evidence proves it to have been holden before the deputy steward, it is a material variance (a)².

Debt for an amercement of a court leet. The declaration stated the amercement

(a)¹ This case was mentioned by Mr. Justice Wilson, when the rule to shew cause was granted.

(b) [*Searc v. Prentice*, 8 East, 348.] (a)² [But see *Draper v. Garrett*, 2 B. & C. 2.]

to have been affeered at a court holden before the steward of the manor; but it appeared in evidence that the court was really holden before the deputy steward, who was appointed by letter of attorney from the steward.

MR. JUSTICE GROSE, who tried the cause, thought this was a fatal variance, and therefore nonsuited the plaintiff.

[163] A rule was obtained to shew cause why the nonsuit should not be set aside, and a new trial granted, against which in Michaelmas term last

Lawrence, Serjt., shewed cause. He allowed that a trifling variance would not vitiate where the substance of the allegation was proved; as where a declaration (b)¹ was for maliciously indicting at the General Quarter Sessions, and it was proved to have been at the General Sessions, the word quarter was held to be surplusage. But he contended that this was a material variance; a custom for a lord to hold courts before his steward not extending to the steward's appointing a deputy. The office of steward of a leet was judicial; by the ancient common law (a), he had jurisdiction of felonies: a deputy then could not be appointed without either an established usage or special authority for that purpose, such as corporations and others exercise by virtue of particular grants. 4 Inst. 88. If the declaration had stated the court to have been holden before a deputy, without shewing an authority to appoint such deputy, it would have been bad on demurrer. The case of *Gery v. Wheatly* (b)² proves that the Courts consider variances of this kind to be material.

Cockell, Serjt., in behalf of the rule, urged, that the court leet might be holden either before the principal or deputy. Though the deputy was not the same to every purpose as the principal, yet he was so in law as to holding courts. 12 Mod. 470 & 590. 1 Ld. Raym. 660. Salk. 95. The substance of the question was, whether the court were legally holden. The matter of appointment was not in dispute; it was sufficient if the person before whom the court was holden was competent to hold it, and the court itself competent to amerce. If therefore it were a variance, it was not a material one. Cro. Jac. 32. Yelv. 46. 2 Blackst. 840-1050. Term Rep. B. R. 235, *King v. Pippet*, and the cases there cited.

The Court seemed to have but little doubt of the variance being fatal, but said, as the point was of consequence to lords [164] of manors, if the counsel for the plaintiff could produce any farther authorities in support of the rule, he should be heard.

On this day Cockell said, that he had not been able to find any other case in his favour, and therefore the

Rule was discharged.

BRYMER, NEWTON, AND THOMPSON, *against* ATKINS AND WHITE.
Tuesday, Feb. 12th, 1789.

By the 14th section of the stat. 16 Geo. 3, c. 5, (made to prohibit all trade and intercourse with the then American colonies, and since repealed) it was provided, where ships, &c. had been taken from the Americans, and condemned as lawful prize in a Court of Admiralty, and the sentence of condemnation appealed from "execution of any sentence so appealed from as aforesaid should not be suspended by reason of such appeal, in case the party or parties appellate should give sufficient security, to be approved of by the Court in which such sentence should be given, to restore the ship, &c. concerning which such sentence should be pronounced, or the full value

(b)¹ 2 Black. 1050.

(a) See Mag. Ch. c. 17.—13 Ed. 1, c. 13.—1 Ed. 3, c. 17.—1 Ed. 4, c. 2.—11 Hen. 7, c. 17.—2 Inst. 387.—3 Burr. 1860.

(b)² *Gery v. Wheatly*, tried before Lord Mansfield at Westminster, at the sittings after Michaelmas term, 1777.

Debt for an amercement. The declaration stated that the defendant was summoned to serve on the jury of the court leet and court baron, but the summons was to serve on the jury of the court leet only.

Lord Mansfield said, this was a matter of strict law, it being an action for a penalty. The plaintiff having stated in his declaration that the defendant was summoned to serve on the jury of the court leet and court baron, was bound to prove that averment, and as the summons did not prove it, must be nonsuited.

thereof, to the appellant or appellants, in case the sentence so appealed from should be reversed." Though the security taken by virtue of this section, in a Court of Vice-Admiralty, was in the form of an acknowledgement of a debt to the King, yet being taken in a Court not of record was not a strict recognizance, but operated as a stipulation by the parties to abide the decision of the Court of Appeals. Neither was the Court of Appeals bound by this section to interpret the words "full value" by any definite measure, but had a discretionary power of declaring what was the "full value," and also a power of enforcing from the sureties payment of what it had declared to be the "full value." [Affirmed in K. B. on a writ of error. Mich. 30 Geo. 3.]

Prohibition to the Court of Lords Commissioners of Appeals from the Admiralty in prize causes.

The declaration stated, that all and all manner of pleas of and concerning the validity, explanation, interpretation, construction, or exposition of the laws and statutes of this realm, and the cognizance of such pleas, belong and appertain to the lord the King and his Royal Crown, and by the common law, in the Courts of our said lord the King of Record, ought and have always been accustomed to be tried and discussed, and not in any Court proceeding by any law differing from the common law of this realm.

That the said lord the King did, in the second year of his reign, by his commission nominate, constitute, ordain, and appoint, all and every of his Privy Counsellors for the time being, and others therein named, or any three or more of them, to be his commissioners for receiving, hearing, and determining of appeals from the said lord the King's Courts of Admiralty in matters of prize.

That the said Courts of Admiralty, and the said Commissioners of Appeals proceed by some law differing from the common law of this realm, and therefore have no power or authority, to try or discuss the validity, explanation, interpretation, construction, or exposition of any Act or Acts of Parliament, nor to expound them otherwise than is warranted and allowed by the common law aforesaid.

[165] That a statute was made in the sixteenth year of the reign of His present Majesty, to prohibit all trade and intercourse with the then American colonies (reciting the Act particularly).

That in the said statute it was, among other things, enacted, that the execution of any sentence so appealed from, as in and by the said Act is directed, should not be suspended by reason of such appeal, in case the party or parties appellate should give sufficient security, to be approved of by the Court in which such sentence should be given, to restore the ship, vessel, goods, or effects, concerning which such sentence should be pronounced, or the full value thereof, to the appellant or appellants, in case the sentence so appealed from should be reversed.

That Hugh Bromedge, Esq. commander of the said lord the King's sloop of war, the "Savage," in obedience to the orders of Samuel Craves, Esq. Commander in Chief of His Majesty's ships and vessels at the time hereinafter mentioned, employed in the river St. Lawrence and along the coast of Nova Scotia, the islands of St. John and Cape Breton, and thence to Cape Florida and the Bahama Islands, being then and there subject to, and under the command of the said Samuel Graves, as such commander in chief, did, on the 17th of January, 1776, seize as prize, in the harbour of Halifax, in the province of Nova Scotia aforesaid, a certain ship or vessel called the "Nicholas," Nathaniel Atkins, master, the property of certain persons inhabitants of the said colony of Massachusetts Bay.

That William Nesbitt, Esq. His Majesty's Attorney-General for the said province of Nova Scotia, for and on behalf of the said lord the King and of the said Hugh Bromedge, did, on or about the 12th day of April in the said year 1776, institute a suit in His Majesty's Court of Vice-Admiralty, at Halifax aforesaid, before the worshipful James Brenton, Esq. Surrogate, and Deputy of the worshipful Jonathan Sewell, Judge, Deputy, and Surrogate of the Court of Vice-Admiralty of the province of Nova Scotia and the maritime parts thereof; and by the libel by him exhibited in the said suit among other things, did propound, allege, and declare, that notwithstanding the said Act of Parliament of the sixteenth year of the reign of the said lord the King, the said Nathaniel Atkins, master of the said ship called the "Nicholas" (Thomas Boylston, of Boston, in the province of Massachusetts Bay, merchant, afore-

said, or others [166] residing in the said province, owners, being one of the rebellious colonies mentioned in the said Act) had been trading to Russia and other parts, and there loaded hemp, iron, and Russia linen, being partly naval stores, and proceeded from thence to Great Britain, and cleared out for Halifax in the said province, under pretence of carrying the said naval stores and other goods to some of the said rebellious colonies, where the owners of the said ship "Nicholas" and goods resided; and the said master, with the said ship "Nicholas," with her cargo, having arrived at Halifax in the said month of January, 1776, the said ship "Nicholas" was there with her cargo seized and detained by the said Hugh Bromedge, commander of the ship of war aforesaid, as being the property of persons in the said rebellious colonies; and did thereby for the said lord the King and the said Hugh Bromedge, pray the said Court to take the premises in the said libel alleged, into consideration, and on due proof to proceed to adjudication, and that the said ship and cargo might be condemned as forfeited to the said lord the King, and that the same might be delivered over to the captor, pursuant and according to the directions of the said Act of Parliament.

That the said Nathaniel Atkins and John White were afterwards duly admitted in the said Court of Vice-Admiralty, for and on behalf of themselves and other claimants of the said ship and cargo; and the said James Brenton, being surrogate and deputy as aforesaid, having deliberately and maturely heard the parties to the said suit, by their advocates and proctors, and their arguments and proofs, and having inquired into and duly considered of the whole proceedings in the said business, did, on the 8th day of May, in the said year 1776, pronounce, decree, and declare, that the said ship "Nicholas," her tackle, apparel, furniture, and her cargo therein laden, were rightly and duly seized and taken by the said Hugh Bromedge; and that the said ship, her tackle, apparel, furniture, and cargo, were, at the time of the capture and seizure aforesaid as far as appeared to him, in violation of the said statute of the sixteenth year of the reign of the said lord the King, and as such ought to be accounted liable and subject to confiscation, and to be adjudged and condemned as and for good and lawful prize, and did adjudge and condemn the same ship, her tackle, apparel, and furniture, and the cargo therein laden, as and for good and lawful prize, as being guilty of a breach and violation of the Act aforesaid.

[167] That the said ship or vessel, and the cargo therein laden, were, after the said sentence of condemnation, on the 15th day of May, in the year aforesaid, sold by the public vendue master, at public auction, to the best bidders, for the sum of 4897l. 18s. 10d. current money of Halifax in Nova Scotia aforesaid, amounting to the sum of 4408l. 3s. lawful money of Great Britain, free and clear of all charges, being the utmost value of the same, at Halifax aforesaid.

That the said Nathaniel Atkins and John White, in behalf of themselves and of Thomas Boylston and other claimants of the said ship or vessel, and the cargo therein laden, did interpose an appeal from the sentence of the said Court of Vice-Admiralty to the said Commissioners of Appeals in matters of prize, whereupon the said Alexander Brymer, Henry Newton, and Alexander Thompson, did afterwards, to wit, on the 6th day of August, 1776, personally appear before the said James Brenton, Surrogate and Deputy as aforesaid, and acknowledged jointly, and severally, that they owed to our Sovereign Lord the King the sum of 9795l. 17s. 8d. of the current money of Halifax aforesaid, that is to say, exactly double the amount of the clear monies arising by the public sale as aforesaid, upon condition that the said Hugh Bromedge, the party appellate, his agent or attorney, should restore the said ship and her cargo, or the value thereof, to the said appellant or appellants in case the sentence so appealed from should be reversed.

That the said appeal was heard before the said commissioners upon the 18th of March, 1780, when the said commissioners were pleased to reverse the sentence of the said Court of Vice-Admiralty, and decreed the said ship and cargo, or the value thereof, to be restored to the said appellants.

That the said Alexander Brymer, Henry Newton, and Alexander Thompson, afterwards, on the 15th day of March, 1781, for and in behalf of the said Hugh Bromedge, paid into the registry of the said commissioners the said sum of 4897l. 18s. 10d. of the said current money, amounting to the said sum of 4408l. 3s. of lawful money of Great Britain, being the full value, and clear amount, of the monies arising from the public sale of the said ship and cargo as aforesaid.

That the said Nathaniel Atkins and John White, on behalf of themselves and the

said other appellants, did receive and take out of the said registry, the said sum so paid into the said registry as aforesaid, but did refuse to receive the same in satisfaction of their said claim, as the full value of the said [168] ship and cargo; and did afterwards petition the said commissioners to order certain invoices and accounts, of the said ship and cargo to be referred to the registrar of the said commissioners, for the purpose of finding, adjusting, settling, and liquidating, the value of the said ship and cargo.

That the said commissioners did according to the petition of the said Nathaniel Atkins, and John White, refer to Maurice Swabey Esq., one of their deputy registrars, the said invoices and accounts, and also the accounts of the sales of the said ship and cargo, signed by the said public vendue master, and certified under the hand of the deputy registrar of the Court of Vice-Admiralty at Halifax aforesaid.

That the deputy registrar of the said commissioners did report, that the sum of 7708l. 17s. 3d. of lawful money of Great Britain, ought to be allowed, and paid to the said Nathaniel Atkins and John White, in behalf of themselves, and the other claimants of the said ship the "Nicholas," and the said cargo; which report the said commissioners were pleased on the 31st day of January 1782, to confirm.

That monitions and other process having been sued out against the said Hugh Bromedge, to compel payment of the sum of 3455l. 3s. 6d. lawful money as aforesaid, over and besides the sum of 4408l. 3s. 6d. (a) paid into the registry of the said commissioners as aforesaid, the proper officers to the said commissioners returned, that the said Hugh Bromedge was not to be found.

That monitions having been thereupon prayed, and sued out against the said Alexander Brymer, Henry Newton and Alexander Thompson, the sureties of the said Hugh Bromedge, as aforesaid, an appearance was given to them by the said commissioners, to shew cause against the payment of the said sum of 3455l. 3s. 6d.

That on the 27th day of July 1785, the right honourable Charles Earl Camden Lord President of the Council, of the said lord the King, Thomas Earl of Effingham, and Richard Lord Viscount Howe, three of the said Commissioners of Appeals, for receiving, hearing, and determining, appeals in prize causes, having heard informations by counsel, as well in behalf of the said Alexander Brymer, Henry Newton, and Alexander Thompson, the parties cited and intimated in that behalf, as on the part of the said Thomas Boylston, the owner and proprietor of [169] the said ship and cargo, decreed to be restored by the interlocutory decree of the said commissioners, pronounced the recognizance, dated the 6th day of August 1776, and entered into by them the said Alexander Brymer, Henry Newton, and Alexander Thompson, in the said Court of Vice-Admiralty, as sureties to answer the said appeal in the penal sum of 9795l. 17s. 8d. currency, to be forfeited, by reason that the aforesaid sentence appealed from, had been reversed, and that Hugh Bromedge, Esq. the party appellate, his agent, or attorney, had not restored the said ship or cargo, or the value thereof, agreeably to the said decree of restitution, and the condition of the said recognizance; and decreed a monition against the said Alexander Brymer, Henry Newton, and Alexander Thompson, to pay the sum of 3455l. 3s. 6d. being the remainder of the value of the ship and cargo in question, according to the registrar's report, to the said Thomas Boylston, or his lawful attorney.

That the said Court of Vice-Admiralty had not any authority by the laws or statutes of this realm, to take any security of the nature, and of the terms thereinbefore mentioned to have been entered into by the said Alexander Brymer, Henry Newton, and Alexander Thompson, nor had the said commissioners by the laws and statutes aforesaid, any authority to enforce the same.

That the said commissioners have no power or authority whatsoever, under the statutes aforesaid, or any other statute or law of this realm, by reference of invoices and accounts, to registrars, or otherwise, to open, re-examine, set aside, or in any manner to alter the valuation of any ship, or vessel, or goods and effects, so fixed, settled, adjusted, and liquidated, by public sale, after sentence of condemnation duly pronounced, where no fraud or collusion is alleged and proved.

That the said ship "Nicholas," and the goods and effects on board the same, were

(a) Quære whether the excess of these two sums of 3455l. 3s. 6d. and 4408l. 3s. 6d. together, above the sum of 7708l. 17s. 3d. (reported by the deputy registrar as proper to be allowed,) did not arise from the costs awarded by the Court of Appeals?

condemned as lawful prize, by the said Court of Vice-Admiralty, at Halifax, as aforesaid; and sold by public auction, by the vendue master aforesaid, to the highest bidder, without any fraud or collusion having been alleged or proved.

That the practice of opening, re-examining, setting aside, and altering, the valuation of ships or vessels, or goods and effects so fixed, settled, adjusted, and liquidated, as aforesaid, is attended with great oppression, vexation, and expense, to the parties, and is contrary to the true meaning, intention, form, [170] and effect, of the said statute, and other the statutes and laws of the realm; yet the said Right Honourable Charles Earl Camden, Lord President of the Council of the said lord the King, Thomas Earl of Effingham, and Richard Lord Viscount Howe, three of the said commissioners for receiving, hearing and determining appeals in prize causes, not weighing the said laws and statutes of this realm, but contriving the said Alexander Brymer, Henry Newton, and Alexander Thompson, to aggrieve and oppress, did as aforesaid decree the said Alexander Brymer, Henry Newton, and Alexander Thompson, to pay the said Thomas Boylston, or his lawful attorney, the aforesaid sum of 3445l. 3s. 6d. over and besides the monies arising by the said public sale, paid into the said registry, as aforesaid, as the supposed remainder of the value of the said ship and cargo, according to the registrar's report; to the great contempt of the said lord the King, and his laws, to the great and manifest damage, prejudice, and injury, of the said Alexander Brymer, Henry Newton, and Alexander Thompson, and against the form and effect of the said statute, and also against the laws and customs of this realm.

That although the said Alexander Brymer, Henry Newton, and Alexander Thompson, afterwards, to wit, on the 27th day of June in the year of our Lord 1787, at Westminster aforesaid, delivered to the said Nathaniel Atkins and John White, the King's writ of prohibition, to the contrary; nevertheless the said Nathaniel and John have not ceased to prosecute their said suit, before the said commissioners, but have since prosecuted, and still do prosecute the same there, against the said Alexander Brymer, Henry Newton, and Alexander Thompson to compel payment of the said 3455l. 3s. 6d. according to the said monition of the said Charles Earl Camden, Thomas Earl of Effingham, and Richard Lord Viscount Howe against them the said Alexander Brymer, Henry Newton, and Alexander Thompson, notwithstanding the said writ of prohibition, to the contrary so delivered to them as aforesaid; in contempt of His said Majesty, and to the great damage of the said Alexander Brymer, Henry Newton, and Alexander Thompson, and against the prohibition aforesaid. Whereupon the said Alexander Brymer, Henry Newton, and Alexander Thompson, who as well, &c. say that they are injured, and have damage to the value of 100l. and therefore as well for the said lord the King as for themselves they bring suit, &c.—Demurrer, and joinder.

[171] This cause was argued in Trinity term last, by Le Blanc, Serjt., for the defendants, and Lawrence, Serjt., for the plaintiffs; a second time in Michaelmas term, by Bond, Serjt., for the defendants, and Adair, Serjt., for the plaintiffs, and in this term, Bond replied to Adair. The arguments on behalf of the defendants in support of the demurrer, were in substance as follow.

The first ground of prohibition, stated in the declaration, is that the interpretation and construction of all statutes and Acts of Parliament, belong to the Courts of Common Law, and not to Courts proceeding by different rules; that the Court of Appeals is a Court proceeding by rules different from those of a Court of Common Law, and has put a construction on the Act in question, different from that which a Court of Common Law would put upon it. Supposing this to be a good ground of prohibition, the first question is, whether such a construction has been really put upon the Act, or not? In order to prove the affirmative of this question, the plaintiffs are obliged to couple the fifth section with the fourteenth (a): whether those two sections ought to be joined, will be seen by considering their respective objects. The fifth section provides for a case, where, before condemnation of the ship, it shall appear necessary to the Judge to delay the determination of the question, whether prize or no prize; in which case it directs that the capture shall be appraised by persons named by the parties, and appointed by the Court; and such of the goods as are perishable, (and therefore cannot without a manifest injury to both parties, be kept till the question of prize or no prize be determined,) shall be sold, and the rest put in proper

(a) Vide post, the material clauses of the several statutes cited in this case.

custody to abide the event. After this is done, the first offer is to be made to the claimants, that if they will give sufficient security to the captors, according to that appraised value, they shall have the ship and cargo delivered to them. The reason of this is apparent, the captor having taken the ship and cargo, and brought them into a given place, cannot be intitled to a greater value than the amount of the sale at that place.

The fourteenth clause relates to a different subject; after the question of prize or no prize shall be determined, the party who may think himself aggrieved, may, if he pleases, appeal; but his appeal shall not prevent the sentence from being carried into [172] execution, provided the other party gives sufficient security to restore the ship and cargo or the full value thereof, in case the sentence shall prove to be improper. Now it clearly appears that the Legislature were aware of the difference between the "full value," generally speaking, and the "full value according to appraisement," and have accordingly expressed it in the sixth section, which is similar to the fifth, and directs that in case the claimant shall refuse, then the captor is to give security to restore the full value "according to the appraisement." Where therefore the Legislature meant to limit the value to the appraisement at the port into which the ship might be carried, they have expressly stated such intention; but in the fourteenth section, when they come to speak of the value after sentence is passed, and that sentence appealed from, they direct that execution shall not be delayed, if a security be given to restore the full value, generally. It is obvious, that there might be a material difference between the value in one case and in the other. At common law, where goods have been wrongfully taken, the owner has a right to recover the true value, which a jury will not estimate according to the price for which the taker shall think fit to sell them. Nothing done by a person who has taken goods illegally, can be the measure of value to him from whom they were taken. So in the present case, after it has been determined that the capture was illegal, the claimant, perhaps the subject of a neutral power, has a right to be fully restored to his property; he is not to be restrained to the value at the place to which the captor shall think proper to carry it: it was carried there against his will, he was proceeding to another market, he had paid a great price for it; in justice therefore he ought to be restored to the real value of it, and not be forced to take less than the real value, because it was sold for less at a place to which it was carried without his consent. Conformable to this, many cases have been decided in the Courts of Admiralty: such as that of the "*Bona Viaggia*," December 5th, 1780, in which the Court of Appeals decreed the ship and cargo to be restored, or the full value to be paid by the captor; it appearing that he had sold the goods for a price greater than their original value, which the claimant demanded, and was decreed to be paid him: the "*Enigheit*," *Schutz* master, a Dutch ship taken during the late war, in which the Lords Commissioners of Appeals, on the 3d of May 1781, di-[173]-rected restitution to be made according to the original invoices: the "*Jacomb*," *Janson* master, the 20th of July 1781, in which the Court of Appeals directed the value of the cargo according to the invoice and account of sales, to be referred to the registrar, taking to his assistance two merchants: the "*Tiger*," *Prince* master, the 26th of July 1782, where the Lords of Appeals decreed the value of the ship and cargo to be paid according to the special agreement between the parties, and a monition and attachment against the sureties: the "*Charming Peggy*," the 8th of November 1782, in which also restitution of the value of the ship and goods was decreed. All these cases shew, that the Commissioners of Appeals have inquired into the real value of captures, to estimate the compensation to be given; they have not been confined to any limits, but have gone into the general circumstances of the case, to determine the quantum of injury. There is no hardship in the 5th section, which orders that before sentence the goods shall be appraised at the place to which they are carried, and the claimant, upon giving security to restore the appraised value, shall have his property back again, and proceed upon his voyage; because, if it be ultimately decided against him, the captor would receive the value at the place to which he chooses to carry the prize, and which is as much as a captor can have any right to expect. But it is not necessary to contend whether this would be just or unjust, since the Act has made a positive provision that a security shall be taken to restore the full value, and has used this expression, where the Legislature was perfectly aware of the distinction, between full value, generally speaking, and value according to a limited appraisement. This being the case, there is no pretence to

say, that the Lords of Appeals, after having determined the general question, namely, that this was not a legal capture, have construed the Act in a manner different from the rules of the common law. They had a right to inquire what was the full value, by reference to the registrar, or by any other means they should think proper: whether the registrar has gone too far in estimating the value or not, is a question which this Court cannot determine, since the Lords of Appeals had a right to make a reference to him, the subject matter being within their jurisdiction. The expenses also of the capture and sale, if the act of the captor be declared illegal, ought to fall on him, and not on the claimant; allowance therefore should be made [174] for those expenses in estimating the value. Supposing then for a moment, that a construction different from the rules of the common law were a ground of prohibition, yet in this instance it does not appear that the construction put by the Commissioners of Appeals on the Act in question, was contrary to those rules.

The next ground of prohibition stated, is, that the Court of Vice-Admiralty at Halifax has taken a security which it had no right to take. Now though a strict common law recognizance, upon which a *scire facias*, an action of debt, or an extent might be founded, could not be taken by a Court not of Record, yet such a security as the present was well warranted by the 14th section of the Act, which requires sufficient security to be given. Those only are strict recognizances, to which the plea of *nul tiel record* may be pleaded: but others of a similar nature may be proceeded upon, to which that plea cannot be applied. Dougl. 1.—Supposing antecedent to this statute, the Courts of Admiralty had never taken such a security, yet the statute has given full licence to the discretion of those Courts to determine what species of security they would take, best adapted to the purpose of compensation to the party injured. If this form of security be not good, what other could be taken? It could not be a Statute Merchant, Statute Staple, or judgment; if it had been a bond, it could not have been put in suit in the Court of Admiralty, as that Court is prevented from holding plea of contracts under seal, by the statute 15 Ric. 2, c. 3, but it must have been enforced in a Common Law Court; a jury must have decided on the quantum of damages, and the probable cause of seizure; by which means the question of prize would have been drawn from its proper jurisdiction, and determined before a wrong tribunal. But no such inconvenience can arise from the security which has been taken, which is only to be enforced in that Court which has jurisdiction of the merits, and comes nearest to the intention of the Legislature. Neither can it be improper as taken to the King, though not in a Court of Record. In the disputes between the Temporal Courts and the Courts of Admiralty in the year 1612 (a)¹, the twelve Judges agreed, that as the Court of Admiralty was the King's Court, the proceedings there ought to be in his name. It appears from the earliest accounts in the Admiralty, that the security in cases of prize has been taken to the Sovereign; in 1628, letters of marque were granted to merchants, who gave security "to the King;" in 1651, [175] to the "Keepers of the Liberties of England;" in 1653, to "His Highness the Lord Protector;" in 1666, to "James Duke of York, Lord High Admiral," from 1689 to 1697, to the "King (William 3)," in 1702, to "Prince George of Denmark, Lord High Admiral," in 1718, to the "King (George 1)," in 1739, 1744 and 1756, to the "King (George 2)," but in the late war, by mere mistake of the officers in the Admiralty here, no name was mentioned to whom the parties should be bound, though in the Vice-Admiralty Courts of Halifax and New York, the security continued to be taken to the King. This was the antient form, and no possible inconvenience can arise from it. The term recognizance means, in its true signification, nothing more than an acknowledgment; applied to a Court of Record, it means an acknowledgment of a debt on record; in the present case, though an acknowledgment of a debt to the Crown, it means no more in effect than a stipulation, which a Court of Admiralty may clearly take, and corresponds with the description given by Vinnius (a)² of a stipulation.

(a)¹ Vide 4 Inst. 134.

(a)² Lib. 3, c. 16. De verborum obligationibus.

In hac olim talia verba tradita fuerunt. Spondes? Spondeo: Promittis? Promitto: Fide jubes? Fide jubeo: Dabis? Dabo: Facies? Faciam. Utrum autem Latinâ, an Græcâ, vel quâlibet aliâ linguâ, stipulatio concipiatur, nihil interest, si uterque stipulantium intellectum ejus linguæ habeat. Nec necesse est eâdem linguâ utrumque uti, sed sufficit congruenter ad interrogata respondere. Quinetiam duo

There is no substantial difference between an agreement to pay a sum of money and an acknowledgment of a sum of money being due; they differ only in name. It would be quibbling on words to say that a Court shall be at liberty to take a stipulation, but not a recognizance, when in effect they are the same. There are many cases in which this question has come before the Courts of Common Law, upon suits instituted by the several part-owners of a ship, where they could not agree in sending it out; in which case, application has been made to the Court of Admiralty, that the ship might be permitted to go out, notwithstanding the dissent of some of the owners, the party sending it out giving security to those part-owners who were dissentient, to be answerable, in the event of a loss, for their respective shares. In these cases it has been a question, whether the Courts of Ad-[176]-miralty being governed by the rules of the civil law, could take and enforce such securities. Though doubts were formerly entertained on this subject, in Courts of Common Law, yet the later cases have determined that the Courts of Admiralty might compel such securities to be given, and enforce them, by whatever names they might be called; they have in some cases been termed stipulations, in other recognizances, though the Judges have been aware a strict technical recognizance could not be taken by a Court not of Record. 1 *Ld. Raym.* 223, *Lambert v. Aeretree*.—1 *Ld. Raym.* 235, *Blackett v. Ansley*.—2 *Ld. Raym.* 1285, *Degrave v. Hedges*.—2 *Stra.* 890, & 2 *Siderf.* 197, *Dimock v. Chandler*. *Cro. Eliz.* 685. *Anonym.* 2 *Siderf.* 152. *Becks v. Chelscock*.—*Fitz. Nat. Brev.* 976.—3 *Black. Com.* 108 & 291. The original security taken on granting letters of marque was an acknowledgment of a debt to the King, but has been often proceeded upon in the Courts of Admiralty, and no instance can be found of a prohibition being granted to prevent those Courts from enforcing them.

This is an application to prohibit the Court of Lords Commissioners of Appeals, which is totally distinct from the ordinary Court of Admiralty, and has alone jurisdiction of the subject-matter. They are sole judges of the question, prize or no prize; this depends on the *jus belli*; upon which no other Court can proceed: even after they have determined the question of prize in the negative, a Court of Common Law cannot entertain an action of trespass on it: *Le Caux v. Eden*, *Dougl.* 594, in which case the opinions of Mr. Justice Buller and Mr. Justice Ashhurst shew that Courts of Admiralty may give full compensation to parties injured.

The only remaining question is, whether supposing the construction to be different from that which a Court of Common Law would put upon the act, there is a good ground for a prohibition. Now unless an Inferior Court is proceeding to enlarge its jurisdiction, by the construction of an Act of Parliament, a prohibition ought not to issue on that ground; here there was no encroachment of jurisdiction, the subject-matter being peculiarly within it; and where there is cognizance of the principal, there is also cognizance of every incident. Upon the whole therefore it appears,

1st, That the statute in question has not been misconstrued, but that the construction put upon it is agreeable to the rules of the common law.

[177] 2dly, That if the Commissioners of Appeals have differed in their interpretation of this statute from the common law, they have differed upon a subject which belongs exclusively to their cognizance, and in so doing have not encroached on the jurisdiction of any other Court.

3dly, That the Court of Vice-Admiralty have taken such a security as they were by law enabled to take, and therefore the Lords Commissioners of Appeals are not to be prohibited by this Court from enforcing it.

The following were the arguments used on the part of the plaintiffs.

In this case there are three questions. 1st. Whether the produce of the ship and cargo sold without fraud, at the port into which the prize was carried, be not the full value within the meaning of the 14th section of the Act? 2d. Whether the Court of Vice-Admiralty could take such a security as the present? 3d. Whether, supposing the Act to have been misconstrued, a prohibition will not issue?

With respect to the construction of the Act, it is to be observed, that the plaintiffs in prohibition are not the captors, but sureties, who have entered into a security to

Græci linguâ Latinâ obligationem contrahere possunt. Sed hæc solennia verba olim quidem in usu fuerunt; postea Leoniana constitutio lata est, quæ solennitate verborum sublatâ, sensum et intellectum ab utrâque parte solum desiderat, quibuscunque tandem verbis expressum.

restore only what ought to be restored within the terms of the Act, in case the sentence should be reversed. They are like bail at common law, who are not liable beyond the extent of their recognizance, whatever may be the damages. The principal design of the 5th section was, to prevent the detention of goods taken from the Americans, till proper evidence could be procured to enable the Court to give final sentence; it therefore directs that such as would not be injured by keeping, should be appraised and locked up, and such as could not well be kept, should be sold by public sale; for the clear amount of which alone the captor should be answerable. Now in this case, as well as that of a reversal of the sentence, justice requires that the claimant should be put as near as possible into that state in which he was before the capture; to ascertain this, the Legislature considered appraisement at the port to which the ship might be carried, as the best measure with respect to such goods as could be kept; and public sale with respect to such as could not. They also considered the captor, in case sentence should be given in his favour, so likely to be in the right, that a provision is made by the 14th section, that the execution of the sentence shall not be suspended by means of an appeal. By the 5th section, before [178] sentence, the goods are to be delivered in the first instance to the claimant, and on his refusal, by the 6th section, to the captor; but by the 14th, after sentence, the claimant is looked upon so little likely to be in the right, that the goods are to be delivered to the captor, upon giving security to restore the "full value" in case the sentence shall be reversed. Now it is not to be conceived, that the Legislature could mean to require security for a greater sum from the captor who had so far succeeded in establishing his right, as to have a sentence in his favour, than he would have been obliged to give, if no such sentence had been passed: to put him in a worse situation after the Court of Vice-Admiralty had decided in his favour than he would be in before such decision; to consider it more probable, that he should be wrong, when a Court of Justice had determined him to be right, than when it had not; to make the lesser probability outweigh the greater. It has been said on the part of the defendants, that where goods are wrongfully taken, the jury are to measure the value of them; the owner is not to be bound by the sale of a wrong doer, because there would be a manifest injury if he were obliged to receive no more than their produce at a bad market. But the same injury may happen to a claimant in the case provided for by the 5th section: the goods may be carried to a port, where there may be an improper market for them, and upon inquiry there may be no ground for a sentence of condemnation; yet the claimant, upon the Court of Admiralty's deciding that his ship was not lawful prize, could recover back no more than the amount of the previous sale of such commodities as were of a perishable nature; he would then be in a more meritorious situation than if his ship and cargo had been condemned, and yet would be liable to the same hardship, which furnishes the argument used by the defendants, to prove that the words "full value," in the 14th section, cannot mean the value for which the goods might be sold at the port into which they might be carried. But in fact there is no complaint of injury on the libel, it is simply a question, whether prize or not. By the 1st section of this Act (*a*), all the ships, &c. of the rebellious colonies trading in America, are declared to be forfeited to the King as if they belonged to open enemies; the object of it was to put the Americans in the light of open enemies; [179] other prize Acts therefore relating to open enemies are *in pari materia*, and may be called in to explain the Act in question; if the opinions of eminent lawyers be allowed to have weight in questions of construction, much more shall the voice of the Legislature itself. In the 6th of Anne, c. 37, s. 4 & 5, from which Act the others were copied, the same measure of value is adopted: the 8th section of that Act is so much in favour of the captor that in case of an appeal it makes no security necessary to be given for the restitution of the value of the capture, but entitles him to execution, without any security. This being thought too great a latitude, the 13 Geo. 2, c. 4, s. 8, introduced a security for the "full value," in the same manner as the Act in dispute; which was also adopted the 17 Geo. 2, c. 34, s. 9, and the 29 Geo. 2, c. 4, s. 9. And it is extremely material to observe, that the 32 Geo. 2, c. 25, which was made expressly to amend and explain the 29 Geo. 2, c. 34, entirely omits the sections of the former Acts subsequent to the 6th of Anne, corresponding with the 5th, 6th and 14th of the 16 Geo. 3, c. 5, on which the question

(*a*) Vide post, extracts from the several statutes referred to in the argument.

arises; but adds a provision for the case of an appeal, in the 24th section (which is also inserted in the 27th section of the 19 Geo. 3, c. 67), and declares, that there shall be an appraisement, and that according to that appraisement the value shall be estimated and the security given: this is a direct legislative exposition of what was meant by the former statute 29 Geo. 2, c. 34, s. 9, being contained in the only clause which mentions an appeal; and the 9th section of the 29 Geo. 2, c. 34, thus explained, is verbatim the same as the 14th section of the 16 Geo. 3, c. 5.

But independent of this analogy between the several Prize Acts the clause in dispute directs that execution of the sentence shall not be suspended by reason of an appeal; the sentence therefore is meant to be carried into immediate execution, and of course security is to be immediately given. That security must be measured, either by the produce of a sale at that place where the ship is carried, and the security taken, or by the invoice price. There can be no medium. The invoice price will ascertain the value at the time when the ship left the port from whence it came; and the produce of a fair sale will determine the value at the place at which it arrives. But the invoice price cannot be the true measure, from the manifest injustice [180] which would ensue from it. For if the goods should be carried to a port, where the value of them would be infinitely greater than the invoice price, and security to be taken for no more than that price, the consequence would be that the captor would gain, and the owner lose the difference: on the other hand, if the value at the place of sale should be less than the invoice price, the captor who meant to do his duty, who had a probable cause of seizure, (which must be intended from the sentence of a Court of Admiralty in his favour,) would be obliged to pay a considerable sum of money, for having done what his duty required him to do. This is not the case of a captor wantonly seizing ships, and carrying them to that port which would be most for his interest. The Act was not made for the encouragement of privateers, but to vest the property of American prizes in the King's Navy; the officers of which were bound to take such ships as belonged to the Americans, and carry them into that port to which they were ordered to go by their superiors. But even if they had a power of making choice of the port to which they would go, it is not to be supposed that the officers of the King's ships are to enter into all the speculations of adventuring merchants. The produce therefore at the port to which the prize is carried, must be the full value, according to the true construction of the Act.

This construction receives additional weight, from referring to the practice of the common law, in cases where the value of a thing seized is to be ascertained before the legality of the seizure is determined. In Gilbert's History of the Exchequer (page 112), it is said, by analogy to the process of seizing lands, that the process on seizures of goods is, "When the officer has seized, if the port be 100 miles distant from town, he is to take out the writ of appraisement returnable in 14 days, and on this writ of appraisement they return the value of the goods as it is found by the jury; but upon the return of the writ of appraisement, the goods are set up to cant, lest they should not be appraised according to their true value; and if any claim were put in, and the goods perishable, the claimer was permitted to have writ of delivery upon giving security to answer the value of the goods;" it appears from hence, that even where there is a writ of appraisement, the Court of Exchequer consider the putting up the goods to public cant or auction, as the most efficacious method of ascertaining their [181] real value. So also where judgment has been obtained and execution issued, if afterwards the judgment should be set aside, the value only for which the goods were sold is to be restored, provided the sale were without fraud. In Moore, 573, it was determined, that where a sheriff had sold a term under a *fi. fa.* and afterwards judgment was reversed, the money should be restored, which arose from the sale, and not the term itself. To the same effect is 5 Co. 90 b. In the present case it is admitted by the pleadings, that the sale at Halifax was without fraud, under a judgment, which judgment has been reversed. In the case of the "Victoria," a Dutch ship taken by His Majesty's ship the "Portland," the ship and cargo were condemned, and on an appeal, restitution of the value was decreed; the claimants insisted that under the term value they were entitled to the invoice price, the goods having been sold to disadvantage at Barbadoes, to which place they were carried; but the Court of Appeals, on the 12th of July 1784, decreed restitution to be made according to the account of sales. So in the case of the "Santissima Annunciata," a Ragusan ship, taken and carried into Gibraltar by His Majesty's

ship the "Brilliant," restitution of the cargo, or the value thereof, was decreed upon an appeal: the claimants urged, that the value was the prime cost or invoice price, which they proved, and was allowed by the registrar, to be 2185l. 1s. 2d.; the captors insisted, that they were liable to no more than the produce of the sale, which was only 1480l.: the Lords decreed restitution to be made according to the account of sales. With respect to the argument, that the expense of the condemnation and sale ought not to fall upon the claimant, it is to be observed that the Lords of Appeals do not consider themselves at all bound by the value at the place of sale, but refer it to the registrar to take an account of the full value, without regard to the sale.

The next question is, whether this security were such as the Court of Vice-Admiralty could lawfully take. Now the form (a) of it is exactly similar to that of a common law recognizance. The Lords of Appeals call it a recognizance, as appears by the declaration. But it is a settled rule of law, that no Court can take a recognizance, which is an acknowledgment of a debt on record, except a Court of Record. Bro. Abridg. tit. Recognizance, pl. 14. 2 Roll. Abr. 393, pl. 1, Noy, 25. 1 Keb. 552, [182] and it is expressly said by Lord Coke, 4 Inst. 135, that a Court of Admiralty cannot take such a recognizance as a Court of Record may take. The description of a stipulation cited from Vinnius, is no more than that of a contract made in the form of question and answer; but such a contract is not a recognizance. As to the cases cited from Lord Raymond, confirmed, as they are, by that of *Dimmock v. Chandler*, 2 Str. 890, they prove only, that such a security as the Courts of Admiralty could take (whether called by the name of recognizance or stipulation, both of which are used indiscriminately by the reporters) might be there proceeded upon: but they by no means prove that such a recognizance as a Court of Common Law would take, could be proceeded upon in the Admiralty. As to the authority of Cro. Eliz. 685, if the obligation there mentioned were an obligation at common law under seal, it could not be enforced in the Courts of Admiralty, though it might if it were a mere stipulation. The case in 2 Siderfin, 152, of *Becks v. Chelscock*, is too loosely reported to be relied on: it was this, "One having taken a ship as prize containing goods prohibited, entered into a recognizance with sureties, before the Judges Delegates, to bring the money he should gain by the sale of the goods into the Admiralty Court before a certain day, if they, upon a plea there pending, did not adjudge the ship and goods to be lawful prize." It then goes on to state, that "they after many times cite the owner before the Judges of the Admiralty, and for his not coming and bringing in the money at the day, they threaten to sue execution against the sureties who were merchants of London; and then Wild prayed to have a prohibition, because by the first judgment or sentence the recognizance was discharged." So that Wild contended, that by the first judgment the recognizance was discharged, whereas the case stated no second judgment. But the case probably was, that the ship was adjudged lawful prize in the Court of Admiralty; that an appeal was made to the Delegates, who determined it was not lawful prize, and then proceeded upon the recognizance. On this ground a prohibition was moved for, Wild contending, that as this security was taken in the Inferior Court, and that Court had decided in favour of the persons entering into it, by that decree, the security was discharged: though the Delegates reversed the sentence, yet the [183] condition of the recognizance was performed, when the Court below decreed in favour of the capture, and upon this ground was the decision: there was no question in dispute, whether the recognizance was such as a Court of Admiralty could take or proceed upon: that case therefore is not applicable to the present. The authority cited from Fitz. N. B. is, that "if a man acknowledge in the Spiritual Court that he ought to pay such a sum on such a day, a prohibition will not lie," but this is only saying, that some sort of security may be there taken (a). The form of security given, on taking out letters of marque, is not an acknowledgment to the King, as was contended; nor that used in the Court of Admiralty here, in cases exactly similar with the present. These securities derive their whole force and effect from the submission and consent of the parties, without which no process could issue; and are like rules of Court at common law to which parties mutually agree to submit: but a recognizance is an acknowledgement on record of a prior existing debt, on which process may immediately issue without any consent of the parties. In the present case there is an absurdity on the face of the security taken: in the suit

(a) Vide post, these forms.

in the Vice Admiralty Court of Halifax, the King and the captor were the prosecutors, and defendants in the appeal; the security is taken from the captor to the King, that is from one defendant to another. Another objection to it is, that being an acknowledgement of a debt to the King, it would bind the lands of the debtor: even the assignment of a debt to the King has that effect, 4 Inst. 115, and would not be discharged by a commission of bankrupt. Either way therefore this security is bad; if it be an acknowledgment of a debt on record, (which it ought to be as it is to the King, Gilb. Exc. 165,) it is void, being taken in a Court not of Record; if it be not void, it will enable the Court of Admiralty to affect lands.

With respect to the remaining question, whether a prohibition will not lie, if the Court of Appeals has misconstrued the Act of Parliament, it is clear that where an Inferior Court exceeds its jurisdiction, it is liable to be restrained by a Court of Common Law. In 1 Salk. 550, a prohibition was granted to a Duchy Court; in 2 Lord Raymond, 1408, to a Court of Great Sessions in Wales; and in 4 Inst. 322, it is laid down that a prohibition will go to the Convocation. In the present case, an [184] Act of Parliament having made persons liable to a certain amount, as the Court of Prize before which the question came, interpreted the Act to make them liable beyond that amount, that Court exceeded its jurisdiction, and ought to be prohibited. It is not universally true, that a Court which has cognizance of the principal, has also cognizance of every incident. Ecclesiastical Courts have jurisdiction of tithes, but cannot try a modus. But admitting this position to be true, yet if in the determination of the principal, an incident arises, which ought to be decided according to the rules of the common law, and is in fact decided contrary to those rules, the Inferior Court so deciding is liable to a prohibition, 2 Roll. Abr. 302, pl. 19. Id. 303, pl. 27. Id. 306, pl. 40. Id. 307, pl. 13. Godbolt, 218, *Wheeler's case*.

It was replied,

That if the argument drawn from the French Prize Act 19 Geo. 3, c. 67, had any weight, it was in favour of the defendants in prohibition, rather than the plaintiffs; as it appeared from thence, that the Legislature being aware that in the 16 Geo. 3, c. 5, there was no clause to limit the obvious meaning of the words "full value," had supplied that deficiency by adding in the 19 Geo. 3, c. 67, other words to explain them. But that Act, being subsequent to the Act in dispute cannot affect it. As to the other Acts which have been cited, it appears from them, that subsequent to the 6th of Anne, when the first law was passed on the subject, from which the present Act was copied, alterations were made by the Legislature, with a view to the proceedings in the several Courts of Prize; but those alterations, though some of them are adopted in the 16 Geo. 3, c. 5, do not make that Act in *pari materiâ*, with those intermediate Acts; it is formed from the 6th of Anne, c. 37, and is to be explained by reference to that Act; but there the direction is, that good security shall be taken to answer the condemnation. Neither is the 19 Geo. 3, c. 67, in *pari materiâ* with the Act in question: the 27th section of the 19 Geo. 3, c. 67, so much relied on by the plaintiffs in prohibition, was copied from the 24th section of the 32 Geo. 2, c. 25, and made solely in favour of other powers having a right to carry on trade with the enemies of this country, in time of war, by virtue of subsisting treaties: but no nation could have a right to trade with the Americans while they were in rebellion against Great Britain; this clause was therefore purposely omitted in the 16 Geo. 3, c. 5. But supposing the French [185] Prize Act could be called in to aid the construction of the American Act, yet in the present case, neither the regulations prescribed in the 5th section of the American, or in the 27th of the French Act have been complied with; those clauses therefore cannot in this instance be resorted to. As to the objection, that it would be unreasonable to require a larger security from the captor, after sentence in his favour, than before, when the legality of the capture was doubtful; it is to be observed, that in the former case, the claimant is to have the first choice of the goods, which are to be restored to him, if he thinks proper to give security for the appraised value; but in the latter, the captor is to have them entirely in his power, to do what he pleases with them, without any right or choice on the part of the claimant: there is therefore a clear distinction between the two cases. What shall be deemed the full value, must be left to the discretion of the Court of Prize: it has been determined differently in different instances; sometimes the invoice price has been the measure, at others the account of sales. In the cases cited on the part of the plaintiffs, of the "*Victoria*," and "*Santissima Annunciata*," the Lords of Appeals merely construed the meaning of the

term "full value" as used in their own decrees, not as it was used in the Act of Parliament. The question in Moore, 573, probably was, whether a bona fide purchaser of a term, should be obliged to restore it; but he certainly could not protect himself under a judgment which was reversed. If a sheriff, under an execution against A. takes the goods of B. he shall restore the real value of them to be estimated by a jury, not the mere amount of a sale. In the passage adduced from Gilbert, 112, where appraisement and sale are said to be the measure of value, the party claiming relies, in the first instance, on appraisement, and the provision there made is only to remedy a defect in that appraisement. The cases cited to shew that this security was such as the Court of Vice Admiralty could not take, prove only, that a Court of Admiralty cannot take a common law recognizance, by which land might be affected, or upon which an action of debt might be brought. Admitting the authority of Gilbert, that the King can only take a matter of record, yet he does not mean that all debts to the King are specialty debts; they may be by inquest of office. But in some instances, the King takes in the Admiralty by matter of record; as where he is intitled to the droits of Admiralty, [186] there is a debt due to him appearing on the rolls of the Court, which are quasi records, though it is not estreated into the Exchequer, but is followed by the process of the civil law, adopted in the Courts of Admiralty. No Court can fine and imprison, except it be a Court of Record; but the Court of Admiralty may fine and imprison, 1 Vent. 1 Com. Dig. tit. Imprisonment. (H. 3). It is clear therefore that the Court of Admiralty is in the nature of a Court of Record, of an anomalous kind, being the King's Court and a Court Maritime. The parties who entered into the security, by which they admitted the jurisdiction of the Court, and obtained restitution of the ship and cargo, shall not be permitted to deny the effect of that engagement, of which they receive the fruits. It was contended on the part of the plaintiffs in prohibition, that being only sureties, they were not liable for more than the value of the goods at the place of sale. But it is of the essence of the contract, into which bail enter, that they will be liable to the full extent of the security, as far as the Court shall think justice requires; within which limits, the principal and bail are as one and the same person. This principle has been lately recognized in this Court (*Mitchell v. Gibbons*, ante, 75), and agreeable to this, is the practice of the Court of Admiralty; where in the case of the "Phoenix," December 13, 1753, a monition was issued against both the captor and sureties, to make restitution of the ship and goods; and the same in many other cases before cited.

The securities taken in the Admiralty, on issuing letters of marque, have been sometimes taken to the King, and sometimes generally, without mentioning any person to whom the parties acknowledge the debt; but the greater part have been to the King, and it may from thence fairly be concluded, that the proper form is to the King (b). The objection, that this security would give the King a priority of debt, which could not be discharged under a commission of bankrupt, arises from construing it to be a common law recognizance, but would be avoided, by considering it to be, what it really is, a stipulation. In 4 Inst. 322, a prohibition was granted to the Convocation, because they were inquiring into matters not within their jurisdiction. The reason why an Ecclesiastical Court cannot try a modus is, that the rules of evidence respecting it are different [187] in a Court of Common Law; a greater length of time being required to establish it in the latter Court, than in the former. The cases in Rolle's Abridgment, 306 and 307, were upon the construction of deeds under seal; in which, if the deeds were construed differently in the Ecclesiastical Court, and in a Court of Common Law, a prohibition would lie, to prevent the inconvenience which would arise, if a deed which had been construed one way in an Ecclesiastical Court, should, when brought before a Common Law Court, receive a different interpretation. But in the present case, the meaning of the term "full value" could never come before a Court of Common Law, except on a motion for a prohibition; there is no room therefore for clashing interpretations of the statute. The authority in 2 Rolle's Abridgment, 302, is founded on the circumstance of an action at common law being given by the Statute 2 and 3 Ed. 6, for not setting out tithes; in such case therefore a variance of construction by the Ecclesiastical Court, would be a good ground of prohibition. In the case of Godbolt, 218, the Spiritual Court was proceeding to punish a man, contrary to the express direction of a statute, and on that account was

(b) Vide post, the modern forms.

prohibited. Lastly, the question in dispute concerns the Court of Prize, and not the ordinary Court of Admiralty, or Instance Court. In the cases cited, the prohibitions were granted to the Instance Court, but not to the Court of Prize. These Courts are in their constitution, process, and subject-matter of their jurisdiction, totally distinct and independent, as fully appears from Lord Mansfield's able and elaborate judgment, in the case of *Lindo v. Rodney*, in the notes of *Le Caux v. Eden*, Dougl. 591.

On this day, judgment was pronounced by

LORD LOUGHBOROUGH, who after stating the declaration at length, (and observing, that though the sale of the ship and cargo was said to have been made by the public vendue master, by public auction, with an averment that the produce was the utmost value of the same at Halifax, yet that in fact in such cases, the vendue master did not sell under the immediate authority of the Court of Vice-Admiralty, but as an auctioneer employed by the parties,) proceeded as follows.

On this declaration are alleged two different gravamina: the first, that the Court of Appeals has misconstrued the Act of Parliament, by which its jurisdiction is regulated; the second, that it is using process which it has no authority to enforce. Either of these points, clearly made [188] out, would be a good ground of prohibition: the first, on an antient and essential maxim of the common law, that all Courts of special jurisdiction created by Act of Parliament, must be limited, in the exercise of that jurisdiction, by such construction as the Courts of Common Law may give to the statutes; because, if they had a latitude to construe at their discretion the law by which they act, they would set themselves above the common law (*a*): the second, on a maxim equally well established, that these Courts of special jurisdiction cannot assume to themselves the authority of Courts of Record, and bind the estates of the subjects of the realm.

Two questions, therefore, present themselves to be considered:

1. Whether the security taken by the Vice-Admiralty Court of Halifax, be such as that Court was competent to take?

2. Whether, supposing such security to be good, the Lords Commissioners of Appeals have misconstrued the Act of Parliament, which having, as is contended, fixed a defined value on prizes, has left them no discretion to estimate the value?

The first question may be disposed of without any difficulty. It has been truly said, that a strict recognizance being an acknowledgment of a debt to the King on record, cannot be taken in a Court not of Record. But this security, though bearing the form of a recognizance, is improperly so called, not being a recognizance in reality. It has none of the attributes of a recognizance; it could not be proceeded upon as such, nor in its consequences is it like a legal recognizance. It seems to have been taken in this form in the Court of Vice-Admiralty at Halifax, from the inexperience of the officers, being different from that hitherto used in our Courts of Admiralty in England; in which the parties merely enter into an undertaking to submit to the order of the Court, according to the event of the appeal. To call it therefore what it is not, merely from its accidental form, would be evidently absurd. The authorities cited from Lord Raymond, sufficiently prove that the Courts of Admiralty may take stipulations from parties, to perform what shall be awarded them to do. The Acts of Parliament relating to this subject do not point out the form of the security, but direct generally that such security shall be taken as the Court of Admiralty is enabled to take. Upon the just construction, therefore, of the security in question, we are of opinion that it is no [189] more than an undertaking to submit to the directions of the Court; for we should act upon very narrow and illiberal principles, if we were to construe this to be a strict legal recognizance, only because it has a resemblance to what the Court of Vice-Admiralty had no authority to take. Operating therefore as a stipulation, execution upon it belongs to that Court, and that jurisdiction, to which the parties have agreed to submit.

The second question, though somewhat more extensive, is not more difficult than the first. It has been contended, that the security is limited to a certain defined value, and cannot be taken for any other: that defined value is said to be the produce according to the appraisement or sale at the place of condemnation. If this be true, the argument is well founded, that the proceeding to enforce payment of a security

(a) [*Acc. Gould v. Gapper*, 5 East, 345, and see *Home v. Lord Camden*, post, 476, vol. ii. p. 533.]

taken for a larger sum is without authority. But this proposition is not supported by the express words of that section of the Act of the 16 Geo. 3, on which the question arises, namely, the 14th, which only directs security to be taken to restore the ship and cargo, "or the full value thereof." No mode of ascertaining that value is prescribed; yet it is said, that by reference to other parts of the same Act, and to similar clauses of other Acts in *pari materia*, the words "full value" received a fixed meaning, and denote the value arising on appraisement or sale of the prize at the place of condemnation. Whether this be the true construction, will be seen upon the several Prize Acts being fairly produced and examined.

Before the sixth year of the reign of Queen Anne, there were no laws made on this subject. Previous to that time, all prizes taken in war were of right vested in the Crown, and questions concerning the property of such prizes, were not the subject of discussion in Courts of Law. But in order to do justice to claimants, from the first year after the restoration of Charles the Second, special commissions were issued to enable the Courts of Admiralty to condemn such captures as appeared to be lawful prizes, to give relief where there was no colour for the taking, and generally to make satisfaction to parties injured. By the Act of the 13 Car. 2, c. 9 (a), indeed, some regulations were made concerning the treatment of ships taken, but no provisions enacted respecting any security to be given on delivery; the sole interest in the thing condemned being in the Crown, it [190] was in public custody, and the disposition of it a mere matter of prerogative; no such provisions therefore were necessary. But in the sixth year of Queen Anne, it was thought proper, for the encouragement of seamen, to vest in them the prizes they should take; and for that purpose the statutes 6 Anne, c. 13 and c. 37, were passed. The first of these Acts only respects proceedings in the Courts of Admiralty in England, but contains no particular directions to them, the practice of those Courts being already settled: the second, 6 Anne, c. 37, is particularly intended for the regulation of the Courts of Vice-Admiralty in America; and the operation of it is confined to captures and condemnations there made. One object of that Act was, that the Judge should proceed to sentence with all possible expedition: in the fourth section, therefore, this case is provided for; namely, that if on the preparatory examinations there should arise a doubt in the breast of the Judge, whether the capture were prize or not, and further proof should appear to be necessary, the ship and cargo should be appraised by persons named on the part of the captor, and be delivered up to the claimants, on their giving good and sufficient security to pay to the captor the full value thereof according to such appraisement, if the ship should be adjudged lawful prize by the same Judge: by this provision, the claimant is entitled to the immediate possession of the subject in dispute, which the captor cannot obtain, but on the refusal of the claimant to give security for the appraised value. After a sentence of condemnation, the captor has a right to the possession; no appraisement is to be made in case of an appeal, nor is there any provision for a sale by authority of the Court, in order to ascertain the value; but (by the 8th section of the Act) the appeal is to be allowed in like manner as appeals from the Courts of Admiralty in England, with a special direction, that the appellant shall enter into a security to prosecute the appeal, answer the condemnation, and pay treble costs, if the sentence shall be affirmed: no direction is given as to any security to be taken from the party appellate, but by reference to the practice of the Court of Admiralty in England on appeals to the Sovereign; and it is added, that the execution of the sentence shall not be suspended by reason of any appeal.

[191] Upon the breaking out of the war with Spain, in the year 1740, the 13 Geo. 2, c. 4, was passed, the 3d section of which Act contains the same provision as the 4th section of 6 Anne, c. 37, with this addition, that goods on board captured ships should be unladen simply for the purpose of appraisement. The 8th sections also of these two Acts are similar, except that in the latter an express provision is made, with respect to appeals, that the parties appellate shall give sufficient security to restore the ship and cargo, or the full value thereof, in case the sentence shall be reversed: this is annexed to the direction, that the execution of the sentence shall not be suspended by an appeal. Under this clause, the party appellate has his option, either to take possession, giving security for the full value, or to let the execution of the sentence remain suspended; but there is no direction for any appraisement to be

made, or any sale by public authority, to ascertain the extent of the security. To the same effect, and nearly in the same words as the 13 Geo. 2, c. 4, are the Acts 17 Geo. 2, c. 34, s. 8 & 9, and the 29 Geo. 2, c. 34, s. 3 & 9, which last was made on the commencement of hostilities with France, without any express declaration of war. But during the prosecution of the war which ensued, in the year 1758, great complaints were made by neutral powers of the misconduct of English privateers in the Channel, in seizing their merchantmen; and a question had also arisen between the subjects of Holland and the officers of the British Navy, upon the extent of the treaties of commerce between this country and the Dutch republic; the Dutch claiming a right to carry to the French all such goods as were not specifically enumerated under the title of contraband; while, on the part of the British Navy, it was contended, that free ships only made free goods, as to such course of trade as was carried on in time of peace; that the Dutch being excluded from the French Islands in the West Indies in the time of peace, and only admitted in time of war, to cover their trade, their ships ought to be considered as adopted French, and were therefore lawful prize. The agitation of this question led other neutral powers to make similar claims, according to their different interests and connections with Great Britain. It was owing to these transactions that the 32 Geo. 2, c. 25, was made, to explain and amend the 29 Geo. 2, c. 34, and contained a provision in the 24th section, in favour of neutral powers claiming [192] certain rights of trade under the privilege of treaties. By this section a choice is given to the neutral claimant, either to have the ship condemned, delivered up, on appraisement made and security given by him, and a pass granted him to depart with the ship wherever he pleases; or to have a sale of the ship and cargo, and the produce vested in certain funds to abide the event.

Next came the Act 16 Geo. 3, c. 5, on which the present question arises, and which was made on the war with the then American colonies. In this Act, the clause respecting neutral powers was purposely omitted; for no other power could have any right or privilege, by treaty or otherwise, to trade with those colonies, then part of the British dominions, and in open rebellion to the British Government. But when subsequent hostilities took place with France, Spain, and the United Provinces, this provision became again necessary, because similar questions might arise with respect to neutral powers. It was accordingly inserted in the French (19 Geo. 3, c. 67), Spanish (20 Geo. 3, c. 23), and Dutch (21 Geo. 3, c. 15), Prize Acts.

I have taken this general view of the several Acts made on the subject before us, in order to shew that the 16 Geo. 3, c. 5, and the 19 Geo. 3, c. 67, are not in *pari materiâ*, and consequently there can be no reasoning drawn from the one to the other.

It remains then to be considered, whether on the context of the 16 Geo. 3, c. 5, we can say that the Court of Appeals did wrong in ordering a larger sum to be paid than the amount of the sale at the place of condemnation. It was argued with a degree of plausibility, that made some impression on my mind, that by the 5th and 6th sections, when there were doubts entertained of the legality of capture, the value was to be estimated by appraisement; but that, by allowing an indefinite meaning to the words "full value" in the 14th, the captor, with a sentence in his favour, would be in a worse situation than when the legality of the capture was doubtful. But if this be attended to, there will appear neither injustice or hardship on the captor. In the case provided for by the 5th and 6th sections, the claimant is to have immediate possession on giving security for the appraised value; and it is only on the event of his refusal that the captor is to have it. The fairness of the [193] appraisement must be presumed from his not choosing to take possession and give security; and it is the act of the claimant which forces the possession on the captor; but by the 14th section, the captor, having obtained a sentence, has an absolute right to the possession of the prize, to dispose of it where and how he pleases on the terms of giving security; but he is not obliged to assume the possession if he does not choose to give the security; the claimant cannot, as in the former case, force the possession upon him. The 14th section, therefore, which respects a proceeding after sentence, and the 5th, which provides against a delay before sentence, refer to cases so distinct that there is no analogy between them. In order to introduce the interpretation contended for of the 14th section, we must be obliged to add to the description of the security to restore the ship and cargo, or the "full value thereof," words to the following effect, "at the place of sale, such sale being made without fraud, by persons authorised, &c." which would be an extraordinary latitude of construction; especially, when no

sale is directed, no persons appointed to make it, and no captor obliged to sell at the place of condemnation.

We are therefore of opinion, upon the second question, that the Lords Commissioners of Appeals were not tied down to any definite measure of value to be given in lieu of the ship and cargo. Whether it ought to be the invoice value, the value at the port to which the ship was carried, or at the port to which she would have gone if the voyage had not been interrupted, are questions which will admit of much argument and doubt. But even if we thought that the Court of Appeals had given an erroneous judgement as to the value, if we sitting in a Court of Prize should have ourselves determined differently; or could such a question have come before a Court of Common Law, and it should have been proper to direct the jury to find the value at the place of sale, still there is no ground for a prohibition. I would not be understood to say that the Commissioners of Appeals have, in fact, made an improper estimate of the value; but be that estimate right or wrong, it is our province to say whether they have misconstrued the law, misconception of law being a ground of prohibition. But as we are all of opinion, that the Act in dispute gives them authority to decide upon the [194] measure of value, we have no right to prohibit them from enforcing their sentence, and therefore must direct a

Consultation to issue.

The following is the Modern Form of the Security entered into by the Sureties, on an Appeal from a Sentence of the High Court of Admiralty in England.

[After stating the proceedings in the Court of Admiralty]

Then the said A. B. (the proctor) produced for sureties C. D. of ——— and E. F. of ——— who submitting themselves to the jurisdiction of this Court, bound themselves, their heirs, executors and administrators for G. H. the ——— (captor or claimant, as the case may be) of the said ship and cargo, in the sum of ——— l. of lawful money of Great Britain being double the amount of the value of the said cargo, as before alleged, unto the said I. K. the ——— (captor or claimant) to abide the event of the appeal, and to pay what may be decreed to be restored, together with expences; and unless they shall so do, they do hereby severally consent, that execution shall issue forth against them, their heirs, executors, and administrators, goods and chattels, wheresoever the same shall be found, to the value of the sum of ——— l. afore-mentioned.

The security taken from the plaintiffs in the above case, of *Brymer v. Atkins*, in the Court of Vice-Admiralty of Halifax, stated that they "in their own proper persons, jointly and severally acknowledged to owe to our Sovereign Lord the King, the sum of 9765l. 17s. 8d. currency."

The condition of that recognizance was, to restore the said ship and cargo or the "value thereof," in case the sentence appealed from should be reversed; and then that "recognizance" to be void, &c.

The Modern Form of the Security, entered into on Granting Letters of Marque or Reprisals.

[After mentioning the time, place, names of the parties, &c. goes on thus:]

Who submitting themselves to the jurisdiction of the High Court of Admiralty of England, obliged themselves, their heirs, executors, administrators, in the sum of ——— l. of lawful money of Great Britain to this effect; that is to say, whereas A. B. is duly authorized by letters of marque and reprisals, with the ship called the "C. D." of the burthen of about ——— tons, whereof he the said A. B. goeth master, by force of arms, to attack, surprize, seize, and take, all ships and vessels, goods, wares, and merchandize, chattels, and effects, belonging to the French King, or to any of his vassals, and subjects, or others inhabiting within any of his countries, territories, or dominions whatsoever (excepting only within the harbours, or roads, within shot of the cannon of princes, and States, in amity with His Majesty): and whereas he the said A. B. hath a copy of certain instructions approved of, and passed by His Majesty in Council, as by the tenor of the said letter of marque, and reprisals, and instructions, thereto relating, more at large appeareth: if therefore nothing be done by the said A. B. or any of his officers, mariners, or company, contrary to the true meaning of the said instructions, and of all other instructions, which may be issued in like manner

hereafter, and whereof due notice shall be given him ; but that the letters of marque and reprisals aforesaid, and the said instructions shall, in all particulars, be well and duly observed and performed, as far as they shall the said ship, master and company, any way concern ; and if they shall give full satisfaction for any damage or injury, which shall be done by them, or any of them, to any of His Majesty's subjects, or foreign States in amity with His Majesty, and also shall duly and truly pay or cause to be paid to His Majesty, or the customers or officers appointed to receive the same for His Majesty the usual customs due to His Majesty, of and for all ships, and goods, so as aforesaid taken and adjudged for prize ; and moreover, if the said A. B. shall not take any ship or vessel, or any goods, or merchandizes, belonging to the enemy or otherwise liable to confiscation, [195] through consent, or clandestinely, or by collusion, by virtue, colour, or pretence, of his said letters of marque and reprisals, that then this bail shall be void, and of none effect ; and unless they shall so do, they do all hereby severally consent that execution shall issue forth against them, their heirs, executors and administrators, goods and chattels, wheresoever the same shall be found to the value of the sum of ——— l. before mentioned, and in testimony of the truth thereof they have hereunto subscribed their names, &c.

End of Hilary term.

The following are the Material Sections of the several Prize Acts cited in the preceding Case of *BRYMER against ATKINS*.

6 Anne, c. 37, s. 2. And for the better encouragement also of such ships and vessels of war, which are or shall be in Her Majesty's pay or service, be it further enacted by the authority aforesaid, that the flag officers, commanders, and other officers and seamen of every such ship or vessel of war, shall have the sole interest and property, of and in all and every ship, vessel, goods and merchandize they shall take in any part of America, (being first adjudged lawful prize in any of Her Majesties Courts of Admiralty, and subject to the customs and duties payable to Her Majesty, as if the same had been first imported to any part of Great Britain, and from thence exported, for and in respect of all such goods and merchandize) to be divided in such proportions, and after such manner, as Her Majesty, her heirs and successors, shall think fit to order and direct.

Section 4. And for the more speedy proceeding to condemnation or other determination of any prize ship or vessel, goods and merchandizes taken by any such privateer ship, or by any of Her Majesty's ships of war in such Courts of Admiralty, as aforesaid, and for lessening the expences that have been usual in those cases ; be it further enacted by the authority aforesaid, that the Judge or Judges of such Court of Admiralty, or other person or persons thereto authorized, shall within the space of five days after request to him or them for that purpose made, finish the usual preparatory examination of the persons commonly examined in such cases, in order to prove the capture to be lawful prize, or to enquire whether the same be lawful prize or not ; and that the proper monition usual in such cases shall be issued by the person or persons proper to issue the same, and shall be executed in the usual manner by the person or persons proper to execute the same, within the space of three days after request in that behalf made ; and in case no claim of such capture, ship, vessel or goods shall be duly entered or made in the usual form, and attested upon oath, giving twenty days notice after the execu-[197]-tion of such monition, or if there be such claim, and the claimant or claimants shall not within five days give sufficient security (to be approved by such Court of Admiralty) to pay double costs to the captor or captors of such ship, vessel or goods, in case the same so claimed shall be adjudged lawful prize, that then the Judge or Judges of such Court of Admiralty shall, upon producing to him or them the said examinations or copies thereof, and upon producing to him or them, upon oath, all papers and writings which shall have been found taken in or with such capture (or upon oath made that no such papers were found) immediately, and without further delay proceed to sentence, either to discharge and acquit such capture, or to adjudge or condemn the same as lawful prize, according as the case shall appear to him or them, upon perusal of such preparatory examinations, and also of the writings found taken in or with such capture (if any such writing shall be found) ; and in case such claim shall be duly entered or made, and security given thereupon, according to the tenor and true meaning of this Act, and there shall appear

no occasion to examine any witnesses, other than what shall be then near to such Court of Admiralty, that then such Judge or Judges shall forthwith cause such witnesses to be examined, and (within the space of ten days after such claim made, and security given) proceed to such sentence, as aforesaid, touching such capture; but in case upon making or entering such claim, and the allegation and oath thereupon, or the producing such writings as shall have been found taken in or with such capture, or upon the said preparatory examinations it shall appear doubtful to the Judge or Judges of such Court of Admiralty, whether such capture be lawful prize or not; and it shall appear necessary according to the circumstances of the case, for the clearing and determining such doubt, to have an examination of witnesses that are remote from such Court of Admiralty, and such examination shall be desired, and that it be still insisted on on the captor's part that the said capture is lawful prize, and that the contrary be still persisted in on the claimant's behalf, that then the said Judge or Judges shall forthwith cause such capture to be appraised by persons named on the part of the captor, and sworn truly to appraise the same according to the best of their skill and knowledge, and shall after such appraisement made, and within the space of fourteen days after the making of such claim, proceed to take good and sufficient security from the claimants, to pay [198] to the captors the full value thereof, according to such appraisement, in case the same shall be adjudged lawful prize, and after such security duly given, the said Judge or Judges shall make an interlocutory order for releasing or delivering the same to such claimant or claimants, or his or their agents; and the same shall be actually released or delivered accordingly.

Section 5. And it is further enacted by the authority aforesaid, that if any claimant or claimants shall refuse to give such security, the Judge or Judges shall cause the captor or captors in like manner to give good and sufficient security to be approved of by the claimant or claimants, to pay to the said claimant or claimants the full value according to the appraisement, in case any such capture or captures shall be adjudged not to be lawful prize; and the said Judge or Judges shall thereupon proceed to make an interlocutory order for the releasing and delivering of the same to the said captor or captors, or their agents.

Section 7. Provided nevertheless, and it is hereby further enacted by the authority aforesaid, that if any captor or captors, claimant or claimants, shall not rest satisfied with the sentence given in such Court of Admiralty, it shall and may be lawful to the party or parties thereby aggrieved, to appeal from the said Court of Admiralty to Her Majesty in her Privy Council, such appeal to be allowed in the like manner as appeals to Her Majesty are now allowed from the Court of Admiralty within this kingdom, so as the same be made within fourteen days after sentence, and good security be likewise given by the appellant or appellants, that he or they will effectually prosecute such appeal, and answer the condemnation, as also pay treble costs as shall be awarded by Her Majesty in case the sentence of such Court of Admiralty be affirmed, and so as execution be not suspended by reason of any such appeal; any thing in this Act before contained to the contrary hereof in any wise notwithstanding.

13 Geo. 2, c. 4, s. 3. And for the more speedy proceeding to condemnation, or other determination of any prize, ship or vessel, goods or merchandizes, taken as aforesaid, and for lessening of the expences that have been usual in the like cases, be it further enacted by the authority aforesaid, that the Judge or Judges of such Court of Admiralty or other person or persons thereto authorised, shall, within the space of five days after request to him or them for that purpose made, finish the usual preparatory examination [199] of the persons commonly examined in such cases, in order to prove the capture to be lawful prize, or to enquire whether the same be lawful prize or not, and that the proper monition usual in such cases shall be issued by the person or persons proper to issue the same, and shall be executed in the usual manner, by the person or persons proper to execute the same within the space of three days after request in that behalf made; and in case no claim of such capture, ship, vessel, or goods, shall be duly entered or made in the usual form, and attested upon oath, giving twenty days' notice after the execution of such monition; or if there be such claim, and the claimant or claimants shall not within five days give sufficient security (to be approved by such Court of Admiralty) to pay double costs to the captor or captors of such ship, vessel, or goods, in case the same so claimed shall be adjudged lawful prize, that then the Judge or Judges of such Court of Admiralty shall, upon

producing to him or them the said examinations or copies thereof; and upon producing to him or them, upon oath, all papers and writings which shall have been found taken in or with such capture, or upon oath made that no such papers were found, immediately and without further delay proceed to sentence, either to discharge and acquit such capture, or to adjudge and condemn the same as lawful prize according as the case shall appear to him or them upon perusal of such preparatory examinations, and also of the writings found taken in or with such capture, if any such writing shall be found; and in case such claim shall be duly entered or made and security given thereupon according to the tenor and true meaning of this Act, and there shall appear no occasion to examine any witnesses, other than what shall be then near to such Court of Admiralty, that then such Judge or Judges shall forthwith cause such witnesses to be examined, and within the space of ten days after such claim made and security given, proceed to such sentence as aforesaid touching such capture; but in case upon making or entering such claim and the allegation and oath thereupon, or the producing such writings as shall have been found taken in or with such capture, or upon the said preparatory examinations it shall appear doubtful to the Judge or Judges of such Court of Admiralty, whether such capture be lawful prize or not; and it shall appear necessary, according to the circumstances of the case for the clearing and determining such doubt, to have an examination of witnesses [200] that are remote from such Court of Admiralty, and such examination shall be desired, and that it be still insisted on, on behalf of the captors, that the said capture is lawful prize, and that the contrary be still persisted in on the claimant's behalf, that then the said Judge or Judges shall forthwith cause such capture to be appraised by persons named on the part of the captor, and sworn truly to appraise the same according to the best of their skill and knowledge; for which purpose the said Judge or Judges shall cause the goods found on board to be unladen, and put into proper warehouses, with separate locks of the collector and comptroller of the Customs; and, where there is no comptroller, of the naval officer, and the agents or persons employed by the captors and claimants at the charge of the party or parties desiring the same, and shall, after such appraisement made, and within the space of fourteen days after the making of such claim, proceed to take good and sufficient security from the claimants to pay the captors the full value thereof, according to such appraisement in case the same shall be adjudged lawful prize; and after such security duly given the said Judge or Judges shall make an interlocutory order for releasing or delivering the same to such claimant or claimants or his or their agents, and the same shall be actually released or delivered accordingly.

Section 4. And it is further enacted by the authority aforesaid, that if any claimant or claimants shall refuse to give such security, the Judge or Judges shall cause the captor or captors in like manner to give good and sufficient security to be approved of by the claimant or claimants to pay the said claimant or claimants the full value thereof according to the appraisement, in case any such capture or captures shall be adjudged not to be lawful prize; and the said Judge or Judges shall thereupon proceed to make an interlocutory order for the releasing and delivering of the same to the said captor or captors or their agents.

Section 8. Provided nevertheless, and it is hereby further enacted by the authority aforesaid, that if any captor or captors, claimant or claimants shall not rest satisfied with the sentence given in such Court of Admiralty in any of His Majesty's plantations or dominions abroad, it shall and may be lawful for the party or parties thereby aggrieved to appeal from the said Court of Admiralty to the commissioners appointed, or to be appointed under the Great Seal of Great Britain, for receiving, hearing and [201] determining appeals in causes of prizes; such appeal to be allowed in the like manner as appeals to such commissioners are now allowed from the Court of Admiralty within this kingdom; so as the same be made within fourteen days after sentence, and a good security be likewise given by the appellant or appellants, that he or they will effectually prosecute such appeal, and answer the condemnation, as also pay treble costs, as shall be awarded, in case the sentence of such Court of Admiralty be affirmed; any thing in this Act before to the contrary hereof in any wise notwithstanding. Provided always, that the execution of any sentence so appealed from as aforesaid, shall not be suspended by reason of such appeal, in case the party or parties appellate shall give sufficient security, to be approved of by the Court in which such sentence shall be given, to restore the ship, vessel, goods, or effects, concerning which such sentence shall be pronounced, or the

full value thereof, to the appellant or appellants, in case the sentence so appealed from shall be reversed.

The 17 Geo. 2, c. 34, sections 3, 4, 8 & 9, and the 29 Geo. 2, c. 34, sections 3, 4, 8 & 9, are the same as the above sections of the 13 Geo. 2, c. 4.

32 Geo. 2, c. 25, s. 24. And be it further enacted by the authority aforesaid, that in case any appeal shall be interposed from a sentence given in any Admiralty Court, concerning any goods and effects which may hereafter be seized or taken as prize, in pursuance of the aforesaid Act of Parliament of the twenty-ninth year of His Majesty's reign, or of this Act; that then, and in such case, the Judge of such Court of Admiralty shall and may, at the request, costs, and charges, either of the captor or claimant, or of the claimant only, in cases where the privilege is reserved in favour of the claimant by any treaty or treaties subsisting between His Majesty and foreign powers, make an order to have such capture appraised, unless the parties shall otherwise agree upon the value thereof, and an inventory taken, and then take security for the full value thereof, and thereupon cause such capture to be delivered to the party giving such security, in like manner as, by the said former Act, such judge ought or could have done, before sentence given, notwithstanding such appeal: and if there shall be any difficulty or objection to the giving or taking of [202] security, the said Judge shall, at the request of either of the parties, order such goods and effects to be entered, landed, and sold by public auction, as prize goods now are, under the care and custody of the proper officers of the Customs, and under the direction and inspection of such persons as shall be appointed by the claimants and captors; and the monies arising by such sale shall be deposited in the Bank of England, or in some public securities, and in the names of such trustees as the captors and claimants shall jointly appoint, and the Court shall approve, for the use and benefit of the parties who shall be adjudged to be intitled thereto: and if such security shall be given by the claimants, then it is hereby also enacted, that such Judge shall give such captor a pass, to prevent its being taken again by His Majesty's subjects in its destined voyage.

16 Geo. 3, c. 5, on the construction of which the question arose, s. 5. And, for the more speedy proceeding to condemnation or other determination of any prize, ship, or vessel, goods or merchandizes, to be taken as aforesaid, and for lessening the expences that have been usual in the like cases, be it further enacted by the authority aforesaid, that the Judge or Judges of such Court of Admiralty, or other person or persons thereto authorised, shall, within the space of five days after request to him or them for that purpose made, finish the usual preparatory examinations of the persons commonly examined in such cases, in order to prove the capture to be lawful prize, or to enquire whether the same be lawful prize or not; and that the proper monition usual in such cases shall be issued by the person or persons proper to issue the same, and shall be executed in the usual manner by the person or persons proper to execute the same, within the space of three days after request in that behalf made; and in case no claim of such capture, ship, vessel, or goods, shall be duly entered or made in the usual form, and attested upon oath, giving twenty days' notice after the execution of such monition: or if there be such claim, and the claimant or claimants shall not within five days give sufficient security (to be approved of by such Court of Admiralty) to pay double costs to the captor or captors of such ship, vessel, or goods, in case the same so claimed shall be adjudged lawful prize, that then the Judge or Judges of such Court of Admiralty shall (upon producing to him or them the said examinations or copies thereof, and upon producing to him or them, upon oath, all papers and [203] writings which shall have been found taken in or with such capture, or upon oath made that no such papers or writings were found) immediately, and without further delay, proceed to sentence, either to discharge and acquit such capture, or to adjudge and condemn the same as lawful prize, according as the case shall appear to him or them upon perusal of such preparatory examinations, and also of the other last-mentioned papers and writings found taken in or with such capture, if any such papers or writings shall be found; and in case such claims shall be duly entered or made, and security given thereupon according to the tenor and true meaning of this Act, and there shall appear no occasion to examine any witnesses other than what shall be then near to such Court of Admiralty, that then such Judge or Judges shall forthwith cause such witnesses to be examined within the space of ten days after such claim made and security given, and proceed to such sentence, as

aforesaid, touching such capture: but in case, upon making or entering such claim and the allegations and oath thereupon, or the producing such papers or writings as shall have been found or taken in or with such capture, or, upon the said preparatory examinations, it shall appear doubtful to the Judge or Judges of such Court of Admiralty, whether such capture be lawful prize or not, and it shall appear necessary, according to the circumstances of the case, for the clearing and determining such doubt, to have an examination, upon pleadings given in by the parties and admitted by the Judge, of witnesses that are remote from such Court of Admiralty, and such examinations shall be desired, and that it be still insisted on, on behalf of the captors, that the said capture is lawful prize, and the contrary be still persisted in on the claimants' behalf; that then the said Judge or Judges shall forthwith cause such capture to be appraised by persons to be named by the parties and appointed by the Court, and sworn truly to appraise the same according to the best of their skill and knowledge; for which purpose the said Judge or Judges shall cause the goods found on board to be unladen, and, an inventory thereof being first taken by the marshal of the Admiralty or his deputy, shall cause all such parts of the goods and merchandize as are perishable commodities to be sold by public sale, for the clear amount of which only the captors shall be answerable to the claimants, and the remainder of them to be [204] put into proper warehouses, with separate locks, of the collector and comptroller of the Customs, and, where there is no comptroller, of the naval officer, and the agents or persons employed by the captors and claimants, at the charge of the party or parties desiring the same; and shall, after such appraisement made, and within the space of fourteen days after the making of such claim, proceed to take good and sufficient security from the claimants to pay the captors the full value thereof, according to such appraisement, in case the same shall be adjudged lawful prize; and shall also proceed to take good and sufficient security from the captors to pay such costs as the Court shall think proper, in case such ship shall not be condemned as lawful prize; and, after such securities duly given, the said Judge or Judges shall make an interlocutory order for releasing or delivering the same to such claimant or claimants, or his or their agents, and the same shall be actually released or delivered accordingly.

Section 6. And it is hereby further enacted by the authority aforesaid, that if any claimant or claimants shall refuse to give such security, the Judge or Judges shall cause the captor or captors in like manner to give good and sufficient security to pay the said claimant or claimants the full value thereof according to the appraisement, in case any such capture or captures shall be adjudged not to be lawful prize; and the said Judge or Judges shall thereupon proceed to make an interlocutory order for the releasing and delivering the same to the said captor or captors, or their agents.

Section 13. Provided nevertheless, and it is hereby further enacted by the authority aforesaid, that if any captor or captors, claimant or claimants, shall not rest satisfied with the sentence given in such Court of Vice-Admiralty in any of His Majesty's dominions, it shall and may be lawful for the party or parties thereby aggrieved to appeal from the said Court of Vice-Admiralty to commissioners appointed, or to be appointed, under the Great Seal of Great Britain, for receiving, hearing, and determining appeals in causes of prizes, so as the same be made within fourteen days after sentence, and good security be likewise given by the appellant or appellants, that he or they will effectually prosecute such appeal, and answer the condemnation, and also pay treble costs, as shall be awarded in case the sentence of such Court of Vice-Admiralty be affirmed; provided that the said captor or captors, claimant or claimants, do, within six months after sentence passed, give notice to the said Court of Vice-Ad-[205]miralty that they have appealed from such decree to the said commissioners.

Provided always, and it is hereby further enacted by the authority aforesaid, that the execution of any sentence so appealed from as aforesaid, shall not be suspended by reason of such appeal, in case the party or parties appellate shall give sufficient security, to be approved of by the Court in which such sentence shall be given, to restore the ship, vessel, goods, or effects, concerning which such sentence shall be pronounced, or the full value thereof, to the appellant or appellants, in case the sentence so appealed from shall be reversed.

The 19 Geo. 3, c. 67, is similar to the 16 Geo. 3, c. 5, but contains in the 27th section the same provision as is made in the 32 Geo. 2, c. 25, s. 24.

[206] CASES ARGUED AND DETERMINED IN THE COURT OF COMMON PLEAS, IN EASTER TERM, IN THE TWENTY-NINTH YEAR OF THE REIGN OF GEORGE III.

THE MAYOR, COMMONALTY, AND CITIZENS OF THE CITY OF LONDON *against* THE MAYOR AND BURGESSES OF THE BOROUGH OF LENNE REGIS, COMMONLY CALLED KING'S LYNN, IN THE COUNTY OF NORFOLK (a). Wednesday, May 6th, 1789.

The writ *de essendo quietum de theolonio*, is not merely prohibitory, but remedial, on which the parties may plead to issue on a question of right. A corporation to whom it is directed cannot be attached for contempt in their corporate capacity for not returning it; but an attachment in the nature of a *pone* is the proper remedy to compel them to appear. The Court will not grant a trial at Bar, in an issuable term. In an action by one corporation against another, each may inspect so much of the books and records of the other as relates to the subject in dispute (c). Freemen of the City of London have a right to be exempt from the payment of all tolls and port duties throughout England (except the prizes of wines), in whatever place they reside, and though they have obtained their freedom by purchase.

[S. C. 4 T. R. 130; 1 Bos. & P. 487. Referred to, *London Joint Stock Bank v. Mayor of London*, 1875-81, 1 C. P. D. 11; 5 C. P. D. 494; 6 App. Cas. 393.]

This was an action on a writ (b) *de essendo quietum de theolonio*, of which the following is a copy, with the *aliàs* and *pluriès*.

"George the Third by the grace of God, &c. To the Mayor and Burgesses of the Borough of Lenne Regis, commonly called King's Lynn, in the county of Norfolk, greeting:

"Whereas our City of London is, and from time whereof the memory of man is not to the contrary, hath been an antient city, and the citizens of the said city, during all the time aforesaid, have been a body corporate and politic, in deed, fact and [207] name, by divers names of incorporation; and for divers, to wit, fifty years last past, have been a body politic and corporate, by the name of the Mayor and Commonalty and Citizens of the City of London: and whereas also, amongst other the liberties, free customs, and privileges, from time immemorial used and enjoyed by the said citizens, they the said citizens, from time whereof the memory of man is not to the

(a) [The judgment of this Court was reversed on error in K. B. upon the ground that the writ *de essendo quietum de theolonio* was not a writ of prevention or *quia timet*, and would not lie upon a mere claim of toll. Mr. J. Buller was also of opinion that the exemption did not extend to non-resident citizens, see 4 T. R. 130. Upon this reversal a writ of error was brought in Dom. Proc. The reasons of the plaintiffs in error were drawn up by Mr. Hargreave. *Jurid. Arg.* vol. ii. The opinion of the Judges delivered to the House by the Lord Chief Justice Eyre, decided the following points:—1. That this was not merely a mandatory writ, but that proceedings might be maintained upon it to determine the rights of the parties. 2. That the citizens of London, in their corporate capacities, were the proper parties to sustain the proceedings. 3. That a claim of tolls was sufficient without further damage to support the writ. The question whether non-resident freemen were entitled to the exemption was not decided, the Judges considering that it could not be raised upon the record, see 1 Bos. & Pul. 487. 7 Bro. Parl. Cas. 120, 2d edit.; but in the subsequent case of *The Corporation of Liverpool*, which was tried at the Bar of the Court of Exchequer in Easter term 1799, the jury, under the direction of the Court, found that a freeman of London is not exempt from toll unless he be resident inhabitant, and in scot and lot. 1 Bos. & Pul. 522 (n).]

(c) [But see *The Mayor of Southampton v. Graves*, 8 T. R. 590, where the Court of King's Bench refused a similar application. A party however within the operation of a by-law though not a member of the corporation, is entitled to an inspection of the by-law in the corporation books. *Harrison v. Williams*, 3 B. & C. 162.]

(b) So denominated in Regist. Brev. 258 b. As this writ is not in common practice, it is stated at length. So also are the declaration and pleas.

contrary, have been used and accustomed to have and enjoy a certain antient liberty and privilege; that is to say, that the citizens of the said city, and all their goods, should be quit and free of and from all toll and passage, and lastage (a) and other customs, throughout the whole kingdom of England, and the ports of the seas (except only our due and antient custom, and prizes of wines), all which said liberties and privileges have been confirmed by divers charters of our progenitors, and also by divers Acts of Parliament. Nevertheless you require the said citizens, as it is said, to yield toll, passage, lastage, and other customs to you, of their goods and things within the said borough and the port thereof, and do many ways unjustly disquiet them on that occasion, to the great damage of the said citizens as we have received information from their complaints: we willing that no injury should be done to the said citizens, command you, that if it be so, then desisting for the time to come from bringing such disquietudes on the said citizens, you permit them to be quit of yielding such toll, passage, lastage, and other customs as aforesaid, to you of their goods and things in the same borough and the port thereof. Witness ourself at Westminster, the 19th day of July, in the 27th year of our reign."

The aliàs was the same as the original writ, except that after the words, "We willing, &c. command you," were added, "as formerly we commanded you," &c. "or signify to us the cause, wherefore you would not, or could not, execute our command, formerly directed to you therein. Witness ourself at Westminster, the 23d day of July, in the 27th year of our reign."

The pluriès was also the same as the original, except that after the words "command you," were added, "as we have often commanded you," &c. "or signify to us the cause, wherefore you would not, or could not, execute our command formerly directed to you therein. And you slighting our said commands, as we are informed, have neglected hitherto to permit the said citizens to be quit of yielding such toll, passage, lastage, and [208] other customs as aforesaid, to you of their goods and things in the said borough and the port thereof, according to the liberty, free custom, and privilege aforesaid; or leastwise to signify to us the cause wherefore you would not, or could not do it; in manifest contempt of us and of our said commands, and to the great damage and grievance of them the said citizens; to our great surprise and displeasure. We again command you, strictly enjoining that you permit the said citizens to be quit of yielding toll, passage, lastage, and other customs to you, of their goods and things within the said borough, and the port thereof, according to the tenor of our said commands, formerly directed to you therein, or that you be before our justices at Westminster, on the morrow of All Souls, to shew wherefore you have contemned to execute our commands so often directed to you therein, and have you there then this writ. Witness ourself at Westminster, the 26th day of July, in the 27th year of our reign."

In Michaelmas term 1787, November 6th, a rule was granted to shew cause why the defendants should not have a fortnight's time to return the writ; which

November 8, was made absolute by consent.

November 17. A rule was granted to shew cause why the writ should not be quashed, and all the proceedings on it staid, chiefly on the grounds, that it was merely a prohibitory process issuing from the Crown to its bailiffs, to whom, or to the collectors of the toll, it ought to be directed; that it was returnable in Chancery and not in this Court; and that it was not calculated to bring the question of right between the parties fairly to issue on the record.

November 26. Cause was shewn, and in answer to the objections made on the part of the defendants, Fitz. Nat. Brev. 31, 33, 34, 518. Year Book, 21 Hen. 7, 31. 2 Inst. 654. Registr. Brev. 258 b. Bro. Abr. tit. Contempt, pl. 7, were cited.

November 27. LORD LOUGHBOROUGH declared the opinion of the Court that it was a remedial writ, on which the parties might plead to issue, on the authority of Madox's Firma Burgi, c. 7, s. 10, p. 138, and therefore the rule was discharged.

In the ensuing vacation a peremptory rule was granted, as of the last day of the preceding term, for the defendants to return the writ on the first day of the next term. But no return being made,

In Hilary term 1788, January 28, a rule was granted to shew cause, why an

(a) Lastage was a duty of one penny for every quarter of corn, i.e. tenpence for every last exported from Lynn.

attachment of contempt should not issue [209] against the defendants, by the title of the Mayor and Burgesses of Lynn, &c.

February 6. Cause was shewn, that a corporation could not be attached in their corporate capacity. In support of the rule it was urged, that process of contempt would issue against the acting part of a corporation, for disobeying a mandamus, &c. on which point were cited the stat. 9 Anne, c. 20, and the case of *The King v. The Mayor of Truro* (B. R. Mich. 25 Geo. 3), where the mayor being reported in contempt for disobeying a mandamus, to elect a burgess, the Court imprisoned him three months, and ordered him to pay all costs.

February 8. LORD LOUGHBOROUGH said, that upon consideration, the Court were clearly of opinion that the rule must be discharged. The very form in which it was drawn up, was a decisive reason against it. For supposing an attachment of contempt would issue, it must be against the individual members of the corporation, and not against the defendants in their corporate character. But the proper remedy to be pursued, was an attachment in the nature of a pone, the same as was mentioned in Fitz. N. B. 518, Registr. Brev. 258, and the Year Book, 21 H. 7, 31. This process was used in the writ of monstraverunt for tenants in antient demesne de non ponendis in assisis et juratis, de corrodio habendo, and others of a similar kind. His Lordship observed, that it appeared from a note in Fitzherbert, that in a writ de corrodio habendo, which contained a clause "vel causam nobis significes" if the abbot returned cause at the "sicut aliàs," and no one came to counterplead the cause on the part of the King, the abbot was discharged. But if any one came for the King and counterpleaded the cause, they could not interplead thereon, but a pluriès and attachment issued, and on the attachment they pleaded. So that even where obedience was paid to the King's writ by returning the cause, the plea between the parties could not proceed without an attachment to give day in Court as the commencement of the suit. It was clear therefore that the attachment mentioned in the books, was not a process of contempt in not returning the writ, but issued merely to compel an appearance. Consequently the rule was discharged (a).

At length an appearance being entered, the following declaration was delivered :

[210] Norfolk, to wit. The Mayor and Burgesses of the Borough of Lenne Regis commonly called King's Lynn in the county of Norfolk, were summoned to answer the Mayor, Commonalty, and Citizens of the City of London, of a plea, wherefore they require the citizens of the said city to yield toll, passage and lastage, of their goods and things within the said borough and the port thereof; and thereupon the said mayor, commonalty and citizens of the said city, by Rowland Lickbarrow, their attorney, complain, for that whereas the City of London is, and from time whereof the memory of man is not to the contrary, hath been an antient city; and the citizens of the said city, during all the time aforesaid, have been a body corporate and politic, in deed, fact, and name, by divers names of incorporation; and for divers, to wit, fifty years, last past, have been a body politic and corporate, by the name of the Mayor, Commonalty and Citizens of the City of London: And whereas also amongst others the liberties, free customs and privileges, from time immemorial used and enjoyed by the said citizens, they the said citizens, from time whereof the memory of man is not to the contrary, have been used and been accustomed to have and enjoy, and still of right ought to have and enjoy a certain antient liberty and privilege, that is to say, that the citizens of the said city, and all their goods, should be quit and free of and from all toll, passage and lastage, and other customs throughout the whole kingdom of England, and the ports of the lord the King, except only his due and antient custom, and prizes of wines; all which said liberties and privileges have been confirmed by divers Acts of Parliament. And whereas our said lord the King, did by his certain writ under his Great Seal of Eogland, command the said mayor, and burgesses, that they should permit the said citizens, to be quit of yielding such toll, passage, lastage, and other customs as aforesaid, of their goods and things in the said borough and the port thereof; or on a certain day now passed, signify to him cause wherefore they had not executed his commands to them for the

(a) After this determination, the next effective step taken by the plaintiffs was the suing out a distringas, on which 40s. issues were levied, which (the writ being neither returned, nor an appearance entered) were on motion increased to 40l., in consequence of which the defendants appeared.

said purpose before then directed; yet the said mayor and burgesses, not regarding the said writ of our said lord the King, have not signified to him as by the said writ was commanded; and since the time of the aforesaid writ of our said lord the King to them directed, to wit, on the first day of December, in the year of our Lord 1787, at the borough aforesaid, in the county aforesaid, did disquiet the said citizens on the occasion [211] aforesaid, and did then and there require of Osbert Denton, James Denton, Thomas Carr, Thomas Turner and Samuel Baker, citizens of the said city, and of other citizens of the said city, toll, passage and lastage, other than the custom and prizes of wines (above excepted), of their goods and things within the said borough and the port thereof; in contempt of our said lord the King, and to the damage of the said mayor, commonalty and citizens of one hundred pounds, and therefore they bring their suit and so forth.

Plea.—And the said mayor and burgesses, by Joseph Lyon, their attorney, come and say, that they the said citizens from time whereof the memory of man is not to the contrary, have not been used and accustomed to have and enjoy, and still of right ought not to have and enjoy the said antient liberty and privilege, that is to say, that the said citizens of the said city, and all their goods should be quit and free of and from all toll, passage and lastage, and other customs throughout the whole kingdom of England and the ports of the lord the King (except only his due and antient custom and prizes of wines), as the said mayor, commonalty and citizens, have in their said declaration above alleged; and of this they the said mayor and burgesses put themselves upon the country, &c. And the said mayor and burgesses for further plea in this behalf, by leave of the Court here, for this purpose first had and obtained, according to the form of the statute in such case made and provided, say, that the said Osbett Denton, James Denton, Thomas Carr, Thomas Turner and Samuel Baker are not citizens of the said City of London, as the said mayor, commonalty and citizens, have above in their declaration alleged, and of this, they the said mayor and burgesses put themselves upon the country, &c.

On these pleas, issues were joined.

In Michaelmas term 1788, November 26th, it was moved to try the cause at bar in the next term; which was refused, that term being an issuable one.

In Hilary term 1789, January 23d, a rule was granted to shew cause why the trial should not be had at Bar in Easter term following: which

February 10, was made absolute.

February 12. Rules were made absolute for each corporation to inspect so much of the books and records of the other as related to the subject in dispute. Vid. 1 Term Rep. B. R. 689, and 3 Term Rep. B. R. 103 (vid. ante, p. 207, note (c)).

[212] On Wednesday, May 6, in the present term, the cause came on to be tried at bar (b).

The counsel for the plaintiffs were Serjeants Adair, Rooke, and Lawrence (c); for the defendants, Serjeants Bond, Le Blanc, and Runnington.

The evidence on the part of the plaintiffs was in substance as follows:

It was first proved, that the persons (d) named in the declaration were citizens and freemen of London, by the book in which their freedom was entered, and that in February 1786, they had obtained their freedom by purchase (e). An inspeximus charter of Car. 2 was then produced, reciting and confirming various others; the most ancient of which was in the reign of Henry 1st, and which contained these words (f), “omnes homines London erint quieti et liberi, et omnes eorum res, per totam Angliam, et per portus maris, de theolonio, et passagio, et lastagio, et omnibus aliis consuetudinibus, &c.

(b) Only ten of the jury impanelled having appeared, two tales men were added. The junior secondary opened the pleadings, by reading the record, and delivered the following charge to the jury. “Your charge is now to enquire upon each of the issues joined between the parties, and if you find a verdict for the plaintiffs, you will assess their damages and costs; if for the defendants, you will declare accordingly.”

(c) Mr. Rose, Mr. Gibbs, and Mr. Blofield also held briefs for the plaintiffs.

(d) These persons were inhabitants of Lynn.

(e) The expence of which was 30l. 12s.

(f) It was agreed, that the word *concessimus*, or *concessisse*, was used in these charters as well to signify a recognition, as an original grant of privileges, &c.

"Et si quis theolonium vel consuetudinem, à civibus meis London, ceperit, cives London in civitate capiant be burgo, vel de villâ, ubi theolonium vel consuetudo capta fuerit, quantum homo London, pro thelonio dedit, et proinde de damno receperit" (a)¹.

The other charters (b)¹ were to the same effect, and nearly in the same words as that of Henry the 1st. Most of them excepted the King's right of prisage of wines; and used the word cives, as synonymous with homines.

There were also extracts read from other documents, and from the patent rolls in the Tower, recognizing this right of the citizens of London. Amongst these, was a charter of the 5th of King John, to the Bishop of Norwich, empowering him to hold a fair at Lynn, and to take customs, rights, &c. "salvâ libertate civitatis London, &c." and another in the same year of the same King (c)¹ to the burgesses of Lynn, that the borough should be free, and that they should be free from toll, lastage, passage, &c. "salvâ libertate civitatis London," likewise giving a [213] power of distress to the Mayor of Lynn, if any one should take toll, &c. in any part of England, from the burgesses "exceptâ, ut superius, civitate London." In this head of evidence was a petition to Parliament from Thomas Chaucer (d), the King's chief butler in the 11th year of H. 4, complaining that residents at the out-ports had purchased the freedom of the City of London, to intitle them to an exemption from prisage of wines, and other customs and duties, and praying that Parliament would intreat the King to send for the mayor and aldermen of the city, and command them to cease from granting to any foreigners (e) the freedom of the said city in future, on peril of forfeiting their franchise; and also to repeal the freedoms already granted to foreigners, that the King and his successors might not be deprived of his prisage of wines, by the franchises of the City of London. The answer of the King was, that he would send for the mayor and aldermen. It was then declared by the advice of the Lords in Parliament that no one should have or enjoy such franchise unless he were a citizen resiant and dwelling within the said city: and "que toutz autres demeurantz en autres citees, burghs ou villes, aient, et enjouient leur franchises à eux grantez, sauvant tout jourz, à notre Seigneur le Roy, son enheritance en ce cas."

It was also proved by parol evidence, that non-resident freemen of London had been nominated to the office of sberiff, that they paid the fine for not serving it, that they had been aldermen and had a right to vote for the election of members of Parliament for the city. Also, that they were exempted at Exeter from the payment of tolls and port duties; at which place an action was brought by the corporation against a freeman of London there resident to compel such payment, but the record being withdrawn, the defendant obtained judgment as in case of a nonsuit; and afterwards himself brought an action against the corporation for the taking his goods on the same account, in which the corporation suffered judgment by default.

It was likewise proved by parol evidence, that the same exemption was allowed at Plympton Fair, Exmouth, Bristol, Newcastle, Dartmouth, and other ports, to freemen of London, resident at those places (a)².

[214] Also, that they were exempt at the port of London, whether resident or not, from paying toll on corn, and at Smithfield Market on the sale of cattle.

On the part of the defendants, there was first produced the record (b)² of a fine levied in the 2d year of Hen. 3, by Henry de Hammell of lastage, in the counties of Norfolk, Suffolk and Lincoln. Next, an inquisitio post mortem (c)² taken on his death, whereby it appeared that he was seised of lastage in Lynn, holden of the Crown by the service of keeping the King's falcons; that he died so seised, that his son held

(a)¹ See Hargrave's Tracts, "De portubus maris," and "concerning the customs."

(b)¹ Which were granted by John, Hen. 2, Hen. 3, Ed. 1, & Ed. 3.

(c)¹ Within the time of legal memory, i.e. since the reign of Ric. 1.

(d) Vide Hargrave's Tracts, 128.

(e) By foreigners were meant persons not inhabitants.

(a)² It appeared from the testimony of one of the witnesses, that a non-resident freeman of London being in partnership with a non-freeman, and having a certain share in the trade, such share was exempted from the payment of the port duties at Dartmouth; but that those duties were paid by the non-freeman partner for his share.

(b)² Taken from the Chapter House of Westminster.

(c)² From the Rolls in the Tower.

it by the same service after his death, and that his wife had an interest in it by way of settlement.

In the 52d year of Hen. 3 Thomas de Hammell was entered on the roll, in the Tower, as holding in capite, by the service of falconry, a custom or duty in the port of Lynn, of all merchandize, &c. passing that port. It also appeared from that roll, that an action had been brought by Thomas de Hammell, against certain persons who had exported goods from Lynn, without paying the duty, but in which no determination was to be found. In the 12th year of Ed. 2, the then heir of Thomas de Hammell obtained the King's licence to alienate in mortmain, and accordingly conveyed the right of lastage in Lynn, to the Bishop of Norwich, in whose successors it continued without interruption, till the 15th year of Hen. 8, when a quo warranto issued against the then bishop, requiring him to shew his title to the duty in question. The bishop set forth the conveyance to his predecessor from the heir of Thomas de Hammell, reciting the right to have been from time immemorial in the family of De Hammell. In this suit the right of the bishop was admitted, and confirmed by the Attorney-General. In the 27th year of Hen. 8 a private Act of Parliament passed, to vest it in the King, who afterwards, in the 29th year of his reign, granted it to the corporation of Lynn, in whom it continued to the present time. This part of the evidence was founded on the respective records and documents, which were produced duly authenticated.

Several witnesses (a) were then called, who proved that they had for many years paid the duty of lastage of the port of Lynn, (viz. one penny on the exportation of every quarter of corn) [215] and that they had never heard of any exemption, except for the freemen of Lynn, and some persons of the borough of Cambridge (b). The exemption in favour of Cambridge was by virtue of special agreement entered into in 1664 between Cambridge and Lynn, which was read. A lease of tolls made by the corporation of Lynn was last produced (in pursuance of notice from the plaintiffs), by which it appeared, that an exemption was also allowed to certain persons in the Cinque Ports.

LORD LOUGHBOROUGH (c) after distinctly recapitulating the evidence, observed to the jury, that as, on the part of the defendants, the right to the duty of lastage had been traced up to the family of De Hammell early in the reign of Hen. 3, and was at that time so established in them as to be the subject of a family settlement, it was fair to presume (as the counsel for the defendants had contended) that it was vested in them before the time of legal memory. But allowing that presumption, the general right of the Corporation of Lynn did not destroy the particular exemption proved by the City of London, as it had not been shewn that the citizens of London ever in fact paid the duty at Lynn. The two rights therefore, not being inconsistent, might exist together; the Corporation of Lynn might have the same right to lastage as the De Hammells had enjoyed, but that right might be with an exception in favour of the citizens of London, which exception had been clearly proved on the part of the plaintiffs, and not contradicted by the defendants.

His Lordship said, that the other part of the case was resolved into a question, whether the persons mentioned on the record, not being resident citizens of London, but in fact residing at Lynn, and having lately purchased their freedom for the express purpose of being exempt from lastage at the port of Lynn, were entitled to

(a) The defendants were not permitted to give in evidence their corporation books, to prove their own rights. On their counsel citing the case of *The Mayor of Hull v. Horner*, Cowp. 102, (where such evidence was admitted) Mr. Justice Wilson said he was counsel in that case, and that the books of the corporation were there produced by consent.

(b) But there was no proof, that any freeman of London had ever actually paid it at Lynn.

(c) The evidence being closed, much conversation ensued how far non-resident freemen of London, and those who had purchased their freedom, were to be considered as citizens within the true meaning of the second issue. On these points the cases of *Hanger v. Waller*, 3 Bulst. 1, and *The City of Oxford's case*, 2 Vent. 106, were cited. But as in the form in which the issue stood upon the record, the question was, whether in point of fact, the persons named were citizens or not, it was at length agreed, that the matter was proper to be left to the jury.

the privilege they claimed. As to this, he stated that the counsel for the plaintiffs had insisted strongly on the Parliamentary declaration in the reign of Hen. 4, that the freemen of London must be there resident to entitle them to an exemption from prisage of wines, but that residence in London was not necessary with respect to other franchises. This, [216] he said, was of considerable weight; and as the non-resident freemen were liable to serve offices, and bear other burdens in consequence of their freedom, there seemed to be no reason why they should be deprived of the beneficial rights of that freedom: or why the term citizens of London or men of London should be confined to such citizens or men who were resident in London, as the counsel for the defendants contended: that in point of fact this distinction was not made at Bristol, Newcastle, or the other places where non-resident freemen of London were exempted; that the point was given up by the City of Exeter, the only place where it had been contested, and the defendant a non-resident citizen of London left in the enjoyment of his right.

Upon the whole, therefore, his Lordship saw no reason to say, if the jury thought upon the evidence that the right claimed by the citizens of London, and which had been proved to be enjoyed by those who were non-resident, was the same right which the plaintiffs had made out in evidence, that there was any legal ground, which, by a legal conclusion, could deprive them of that right.

Verdict for the plaintiffs on both the issues and 1s. damages (a)¹.

FRENCH *against* COPINGER AND ANOTHER. Friday, May 8th, 1789.

An affidavit of the plaintiff that the cause of action arose where the venue is laid; is not sufficient cause for him to shew against changing the venue. But he must also undertake to give material evidence in that place (a)².

A rule having been granted to shew cause why the venue should not be changed from London to Cornwall, on the usual affidavit, Adair, Serjt., shewed cause, by producing an affidavit of the plaintiff, stating positively that the action was for money lent in London. Kerby, Serjt., insisted that this was not sufficient cause, without an undertaking to give material evidence in London. Adair said, that as the affidavit of the defendant was falsified, the rule could not be made absolute. But

The Court held, that the plaintiff ought to undertake to give material evidence in London. On which, Adair undertook to give such evidence in London, and

The rule was discharged.

[217] NUNEZ, Administrator of Nunez, *against* MODIGLIANI AND MODIGLIANI.
Friday, May 8th, 1789.

Several actions brought on two policies of insurance, underwritten by the same parties (among whom are A. and B.) are respectively consolidated; but in one of the causes which goes to trial, A. is defendant, in the other B. The plaintiff becomes entitled to costs in one action, and the defendant in the other. The costs taxed and allowed to the defendant, may be set off against those taxed and allowed to the plaintiff (a)³.

In Easter Term 1788, the plaintiff brought several actions against the defendant and other under-writers, on two policies of insurance; the first effected in the year 1784, on a homeward bound ship of the intestate's, the second in 1785, on the same ship outward bound. The same parties underwrote both the policies. The actions on each, being respectively consolidated, Nathan Modigliani was made defendant in

(a)¹ [These damages were afterwards remitted. 4 T. R. 145. The judgment was "that the citizens of the said city, and all their goods be quit of yielding such toll-passage, lastage and other customs as aforesaid, of their goods and things in the said borough and port thereof, and the said mayor and burgesses of the said borough in mercy, &c." Ibid. 131.]

(a)² [Vide *Emery v. Emery*, 6 Price, 336. *Bowden v. Glasson*, 5 Price, 359.]

(a)³ [Vide ante, p. 23, note.]

the former, and Hannamel Modigliani in the latter. The first came on to be tried at Guildhall at the sittings in Hilary Term last, when, on application from the defendant's attorney, the cause was put off to a future time, on his consenting to pay the plaintiff the costs of the day; and an order of *Nisi Prius* for that purpose was afterwards made a rule of Court.

The action on the second policy, was to have been tried at the sittings after Hilary term, but the plaintiff withdrew the record, and thereby became, though an administrator (a)¹, liable to pay the costs of the action.

The costs of the first action having been taxed and allowed to the plaintiff, a rule was granted to shew cause why the prothonotary should not review his taxation, and why the costs which should be taxed and allowed to the defendant in the second action, should not be set off against those taxed and allowed to the plaintiff in the first.

Against which, Bond and Le Blanc, Serjts., shewed cause. They urged, that the costs in one action could not be set off against those in another, where there were different defendants. If the defendant had been the same in both, it would alter the case; but costs due from A. to B. shall not be set off against those due to A. from C. This would not be authorized by the Statutes of Set Off; and the Court will not interfere and create a set off which those statutes do not allow: especially as it would tend to take away the attorney's lien.

Lawrence, Serjt., was stopped by the Court, who said, that it had been decided in the case of *Schoole v. Noble and Others* (ante, 23), in this Court, that an attorney had only such a lien on the [218] costs, as were subject to the equitable claims of the parties in the cause. In this case, it was consistent with justice to allow the set off, as the defendant Nathan Modigliani, was a party to both actions; in one, being made defendant on the record, in the other, being within the rule to consolidate.

Rule absolute.

HUBBARD against PACHECO. Friday, May 8th, 1789.

An affidavit to hold to bail, stating that the defendant was "indebted to the plaintiff in trover" is bad (a)².

A rule was granted to shew cause why the defendant should not be discharged on entering a common appearance, and the bail bond given up to be cancelled, on the insufficiency of the affidavit to hold to bail, which stated that the defendant was "indebted to the plaintiff in 23l. and upwards in trover." This, Runnington, Serjt., who obtained the rule, said was not sufficiently positive, according to the statute (12 Geo. 1, c. 29).

Le Blanc, Serjt., shewed cause, arguing that the affidavit would clearly have been good, if it had stated the defendant to have been indebted "for goods converted," &c. and trover necessarily implied a conversion. This case differed from that of an affidavit stating a defendant being indebted "upon promises," because promises may be of various kinds, and therefore the general expression "upon promises" was not sufficiently certain. But

The Court said, that in an affidavit to hold to bail, a word so technical as trover ought not to be used.

Rule absolute.

DOWSON against SCRIVEN. Monday, May 18th, 1789.

Where by the terms of a horse-race, the entrance-money is to be given to the second best horse, and it is doubtful on the construction of those terms, whether all the money paid at the entering each horse is to be considered as entrance-money; the

(a)¹ Contra 2 Crompt. Pract. 476. Qu. Therefore? [It seems that an administrator is liable to pay costs for not proceeding to trial according to notice. Barnes, 133. Tidd's Prac. 1015, 8th edit.]

(a)² [By rule of H. 48 Geo. 3, no person can be held to bail in an action of trover without a Judge's order.]

Court will put such a construction on the terms as will include the whole in the description of entrance-money to be given to the second best horse, being most agreeable to the stat. 13 Geo. 2, c. 19, s. 2 and 7.

This was an action for money had and received, tried at Northampton, before Mr. Justice Wilson, at the Summer Assizes, 1788, when a verdict was found for the plaintiff, subject to the opinion of the Court on the following case :

On the 17th of August, 1786, an advertisement appeared in the *Racing Calendar*, giving notice, that on the 29th of that month, "a gentlemen's subscription purse of 50*l.* would be [219] run for in Northampton Field, by any horse, &c. to pay 5*s.* entrance, and if a subscriber, to pay one guinea, or a non-subscriber to pay three guineas into the hands of the clerk of the course, (the defendant,) or double at the post, &c."

"The entrance-money each day to the second best horse, and to run according to such articles as shall be produced at the time of entrance."

"No less than three reputed running horses to start each day ; if but one horse enter for the gentlemen's purse, to have 10*l.* ; if two, eight guineas each. If but one enter for the town purse, to have 10 guineas, if two, five guineas each, and their entrance-money again. The winner each day to pay two guineas to the clerk of the course, &c."

In consequence of this advertisement, the plaintiff sent a horse to be entered. At the time of the entrance, the articles for the regulation of the course were referred to, which amongst other things directed, the horses "to carry weights, and observe every article expressed in the advertisement ; the second best horse to have the stakes, being the crowns paid for entrance."

Three other horses were entered besides that of the plaintiff, and the owner of each paid at the entrance 5*s.*, and three guineas into the hands of the defendant as clerk of the course. The race was run, and the plaintiff's horse was second best ; whereupon the defendant tendered him 1*l.* as the entrance-money, being 5*s.* for each horse. But the plaintiff insisted that he was intitled to the 12 guineas paid into the hands of the defendant, i.e. three guineas for each horse.

Cockell, Serjt., for the plaintiff. This case depends on the construction of the articles for the regulation of the course, as applied to the stat. 13 Geo. 2, c. 19, which in the second section enacts that "no plate, &c. shall be run for by any horse, &c. unless such plate, &c. shall be of the full, real, and intrinsic value of fifty pounds or upwards," and in the 7th section, "that all and every sum or sums of money to be paid for entering of any horse, &c. to start or run for any plate, &c. shall go and be paid to the second best horse, &c. which shall start or run for such plate, &c."

The object of this statute was first, to prevent races from being run for small sums which had become a national grievance ; 2dly, to encourage the breed of horses. The Court therefore will endeavour to advance the remedy, by giving full operation to the statute. The question then is, whether the [220] three guineas paid by each horse were necessary to enable them to start ; since, if they were, they must be paid to the second best horse, the 7th section of the statute being directory that the money shall be paid.

If the money were given for the purpose of qualifying the horses to start, and without payment no horse were permitted to start, it is immaterial by what denomination it is called : the amount of all and every such sums of money is directed by the statute to be paid to the second best horse. If the Act be not construed in this manner, it might be altogether evaded by making payment for this purpose under a different name. Taking the advertisement and articles together, the plaintiff is intitled to the whole money. The advertisement is, "to pay 5*s.* entrance, and if a subscriber, one guinea, or a non-subscriber three guineas, into the hands of the clerk of the course, or double at the post." By fair construction of this sentence the whole is to be considered as entrance-money, the words cannot in any way be transposed to vary the meaning. The paying double at the post, shews it must be to enable the horses to start. For what other purpose could it be paid ? It was not for the clerk of the course, for the winner was to pay two guineas to him. It is said, that "the entrance-money shall be paid to the second best horse," but not that the entrance-money was the 5*s.* The horses were also "to run according to articles to be produced." This expression can only refer to such regulations as respect time, place, distance, and the conduct of

the riders, but was not designed to counteract the terms of the advertisement. The articles indeed recognize the advertisement, when they direct that the horses shall "carry weights, and observe every article expressed in the advertisement." If only two horses appear to start, the entrance-money is to be returned; does this mean only the 5s., or the whole they paid at the time of entering? If the articles be explained differently from the advertisement, it would occasion a fraud on those who send their horses to enter, on the faith of the advertisement. Although it is said that "the second best horse shall have the stakes, being the crowns paid for entrance," yet there are no words to restrain the second best horse from having the guineas. The crowns are given by the words of the articles, and the law appropriates the remainder.

But though the words should be equivocal, the Court will give them a construction most agreeable to the rules of law. Then the Act of Parliament must decide which is to be taken [221] strictly, being made for the public benefit. If the 12 guineas be deducted, it will not be a race within the statute, but for less than the bona fide sum of 50l. and will therefore be void, and a penalty incurred.

Lawrence, Serjt., for the defendant, argued that the articles and advertisement made but one contract, the one being to be explained by reference to the other. By the articles the second best horse was to have the stakes, being the crowns for entrance; this proves that the crowns were considered as the only entrance-money. The advertisement was ambiguous till thus explained by the articles. The plaintiff entered his horse with a view only to the 5s., as entrance-money, and took his chance for the whole 50l. As to the Act, though it was passed to produce beneficial effects to the public, yet it was also meant for the benefit of the "party, and quisque potest renunciare jure pro se introducto."

LORD LOUGHBOROUGH.—The plaintiff in this case founds his right to recover on the advertisement, by the terms of which each horse was to pay 5s. entrance, and one guinea if a subscriber, if a non-subscriber three guineas. This advertisement refers to certain articles which are called in to explain it. But the validity of them depends on the Act of Parliament; the parties cannot put a sense on the articles repugnant to the law. I do not think it a question of grammatical construction; by whatever name the money is called, it was in fact entrance-money, since it was necessary to be paid in order to enable the horse to start. Now the Act directs that the entrance-money shall be paid to the second best horse; but the Act would be evaded if this were holden not to be entrance money, and the articles were to give a different sense to the advertisement.

GOULD, J., of the same opinion.

HEATH, J., of the same opinion. If the three guineas in the advertisement were explained by the articles not to be entrance-money, there would be a fraud on the Act, which has been construed so strictly, that where a cup of 50l. value was to be run for, it was holden that the value must be exclusive of the workmanship. Besides, the second best horse was to have a prize; but if this were not entrance-money, the prize would be, that he would pay three guineas and win only twenty shillings.

WILSON, J.—If we construe these articles to mean, that the three guineas for each horse were to be deducted from the subscription to make up the 50l. plate, we should make the parties [222] liable to penalties to the amount of 200l.; we must therefore take it, that they intended to do what the law allowed.

Postea to the plaintiff.

IFIELD *against* WEEKS AND ANOTHER. Monday, May 18th, 1789.

Although the plaintiff has undertaken peremptorily to proceed to trial at the next assizes, yet the defendant is not bound to attend and be prepared with witnesses, counsel, &c. without having had notice of trial. Neither will the prothonotary allow him the costs of such attendance and preparation, though he obtain judgment as in case of a nonsuit on account of the plaintiff's not proceeding to trial (a).

Rooke, Serjt., moved for a rule to shew cause why the prothonotary should not review his taxation of costs, on the following circumstances.

(a) [But where a cause is made a remanet, no new notice of trial need be given, *Jacks v. Mayer*, 8 T. R. 245.]

In Michaelmas term last, a rule for judgment as in case of a nonsuit was obtained by the defendant, the plaintiff not having proceeded to trial at the assizes at Gloucester, according to a peremptory undertaking. On taxing the costs, the prothonotary refused to allow the expences which the defendant had incurred in attending at the assizes, subpœnaing witness, feeing counsel, &c. in expectation that the plaintiff would try the cause; and the reason of his refusal was, that no notice of trial had been given.

In support of the motion, Rooke cited 2 Barnes, 252, and said, that as the plaintiff had peremptorily undertaken to proceed to trial at the assizes, the defendant was under the necessity of attending and being ready prepared with his witnesses and counsel. But,

The Court refused the rule, saying it was the settled practice that notwithstanding a peremptory undertaking to try, it was necessary to give notice of trial; without which the defendant was not bound to take the steps which he had taken in this case.

WHALE *against* FULLER. Monday, May 18th, 1789.

It is irregular if a *capias* be served after the date of the return, and if there be not 15 days between the teste and return (a)¹. But if the defendant take the declaration out of the office, he thereby waives all preceding irregularity.

Cockell, Serjt., obtained a rule to shew cause why the *capias* should not be set aside, together with all the subsequent proceedings, for the following irregularities, viz.: that the service of the writ was after the date of the return, and that there were not fifteen days between the teste and return. These were holden to be irregularities.

But Marshall, Serjt., shewed for cause, that the defendant had taken the declaration out of the office; which he contended was a waiver of all preceding irregularity.

[223] The Court, being of this opinion, discharged the rule with costs.

BROWNE *against* MARSDEN AND OTHERS. Monday, May 18th, 1789.

An award of "costs sustained in the action" does not include the costs of the reference (a)².

This cause being at issue, the parties submitted to arbitration. The arbitrator awarded to the plaintiff 24l. damages, and the "costs by him sustained in the said action to be taxed by the proper officer."

The prothonotary having refused to allow the costs of the reference, or any other, except those of the action, as between party and party, Cockell, Serjt., moved for a rule to shew cause why he should not tax and allow the costs of the reference, together with the costs of the action as between attorney and client.

But the Court said there was no precedent for the costs of the reference to be included in an award of costs of the action; and having examined the award, the words of which were as above stated, held that those words were confined to the costs of the action, and therefore

Refused the rule.

DOE ON THE SEVERAL DEMISES OF BURKITT AND UX. AND OTHERS *against* CHAPMAN. Friday, May 22d, 1789.

A devise of "all the rest and residue of my estate of what nature or kind soever," includes real as well as personal property, though accompanied with limitations peculiarly applicable, and usually applied to personal property alone (a)³.

This was an ejectment tried at Kingston at the last assizes, when a verdict

(a)¹ [See *Bourchier v. Whittle*, post, 291.]

(a)² [*Candler v. Fuller*, Willes, 62. *Bradley v. Tunstow*, 1 Bos. & Pul. 34. *Strutt v. Rogers*, 7 Taunt. 213, 2 Marsh. 524, S. C. See also *Wood v. O'Kelly*, 9 East, 456. *Bell v. Belson*, 2 Chitty's R. 157.]

(a)³ [See *Dally v. King*, ante, p. 1. *Smith v. Coffin*, post, vol. ii. p. 444. So the C. P. IV.—5

was found for the plaintiff, subject to the opinion of the Court, on the following case:—

Mary Chapman, spinster, on the 29th of June 1778, made her will, duly executed for passing real estates, and thereby gave, devised, and bequeathed, all and every the real estate or estates, which she was any ways seised of, interested in, or entitled unto, late the estate of William Newsen, to Charles Darby and John Warner, for and during their natural lives, and the life of the longer liver of them, and after the death of the survivor of them, she gave and devised the same unto William Dobson, his heirs and assigns for ever.

[224] She also gave, devised, and bequeathed, a messuage at Chertsey unto her cousins Anthony Chapman and Richard Chapman, their heirs and assigns for ever, to hold as tenants in common, and not as joint-tenants.

She also gave and devised unto Catherine Chapman, for and during the term of her natural life, another messuage in Chertsey, and after her decease, she gave and devised the same unto the said Anthony Chapman, for his life, and after his decease, she gave and devised the same to her cousin George Eves, his heirs and assigns for ever.

She then gave several pecuniary and specific legacies, and afterwards devised and bequeathed as follows:—

All the rest and residue of my estate, of what nature or kind soever, I give, devise, and bequeath, unto my aunt Catherine Chapman, for and during the term of her natural life, and after her decease, my mind and will is, and I do hereby direct that the same and every part thereof be equally divided between my said cousins Catherine Burkitt, Ann Hodgson, Elizabeth Hobson, and Rebecca Maynard, and the child of my late cousin Sarah Hodgson, share and share alike; and in case either of them, my said cousins, shall happen to die before he, she or they shall be entitled to have and receive his, her or their said share, the child or children of either of my said cousins so dying shall stand in the place of his, her or their parent, and have such share as his, her or their parent would have been entitled to; and I direct that the share which the child of my late cousin Sarah Hodgson, and also the share or shares of the children of either of them my said cousins so dying as aforesaid, shall be paid to the guardian of such child or children, and the receipt of such guardian shall be a sufficient discharge for the same.

The testatrix then gave to John Thody Hodgson, the child of her cousin Sarah Hodgson, the sum of 50l. over and above what he might be entitled to; and appointed Anthony Chapman executor of her will.

She died soon after making the said will, seised of eight acres of freehold, and four of copyhold, lands of inheritance, in the parish of Chertsey, which were the lands in question, and not particularly devised by the will. She duly surrendered the copyhold to the use of her will.

Anthony Chapman named in the will, the defendant in the present action, was her heir at law.

[225] The testatrix's aunt Catherine died after the testatrix, and during her life enjoyed the land in question.

Thomas Burkitt and Catherine his wife, Anne Hodgson, widow, William Hobson and Elizabeth his wife, Elizabeth Maynard an infant, the only child of Rebecca Maynard deceased, and who died after the testatrix (which said Catherine, Anne, Elizabeth Hobson, and Rebecca, were the cousins of the testatrix, named in the residuary clause), and John Thody Hodgson an infant, the only child of the testatrix's late cousin Sarah Hodgson (also named in the residuary clause), were the lessors of the plaintiff.

The question was, whether they were entitled to recover the above-mentioned eight acres of freehold, and four of copyhold, lands of inheritance?

Runnington, Serjt., on behalf of the lessor of the plaintiff, made two questions:—1. Whether it was not the intention of the testatrix to pass all her property? 2. Whether lands not specifically devised should not pass under the

words "personal estate" will pass real property where it is manifest from the whole of the will that such was the devisor's intention. *Doe d. Tofield v. Tofield*, 11 East, 246. See also *Doe v. Bucknor*, 6 T. R. 610. *Doe d. Hurrell v. Hurrell*, 5 B. & A. 18. *Roe d. Helling v. Yeud*, 2 Bos. & Pul. N. R. 214.]

residuary clause? The affirmative of both these questions was clear. The testatrix takes notice of all her relations. She gives an estate for life to Charles Darby and John Warner, with remainder to William Dobson in fee. She also gives a messuage at Chertsey to her cousin Anthony Chapman and Richard Chapman as tenants in common. Here were two instances of her particular bounty. The only lands not specifically devised were about eight acres, which must be taken to pass by the words "all the rest and residue of my estate of what kind soever," and be equally divided between her cousins; both because it was evidently her design not to die intestate as to any of her property, and because those words are so comprehensive as to include all of which she was possessed. That the word "estate" will pass a fee-simple is too well established to be disputed. 3 Mod. 45. 6 Mod. 106. 2 Vern. 564. Prec. Chan. 264. 2 P. Wms. 525. 1 Term Rep. B. R. 411. 2 Term Rep. B. R. 656 & *Tilly v. Simpson* there cited.

Lawrence, Serjt., for the defendant admitted the rule of law, that the word "estate" was sufficient to pass a fee-simple, unless restrained by other words; but contended that the intention of the testatrix was to give her personal estate only to her cousins by the residuary clause. The heir at law is not to be deprived of his inheritance, except by express words or necessary implication. Where words are used, which may be applied indifferently, either to real or personal property, they shall not [226] be applied to real, to the disherison of the heir. 12 Mod. 592. As to the argument that it was not the intent of the testatrix to die intestate as to any part of her property, there is no introductory clause from which so much is to be collected. Nor does it appear that her design was to divide all her property equally among her relations, because the value of it is not ascertained. When she meant to give a real estate, she used technical terms for that purpose. She devises the real estates of which she was seised, to Charles Darby and John Warner, for their lives; and after the death of the survivor of them, to John Dobson, his heirs and assigns for ever. She also gives a messuage at Chertsey to Anthony Chapman and Richard Chapman their heirs and assigns for ever to hold as tenants in common, and not as joint-tenants. These are phrases peculiarly applicable to real property. She then comes to dispose of her personalty, for which purpose the clause is introduced on which the question arises. If this clause had stopped at the words "estate, &c. to Catherine Chapman," it would certainly be a devise of real property, but it goes on to direct that the same shall be equally divided between her cousins, and that the child or children of such as should happen to die, should stand in the place of his, her or their parent, and have the parent's share. Now this could only respect personal property, since the children would inherit the parent's share of a real estate without any provision of this kind. These shares are likewise to be paid to the guardians of such children, and the receipt of such guardians to be a discharge. Now such payment and receipt are appropriated to personal estate. The words also "of what kind soever" may well be satisfied, by being applied to personal property, which consists of various species.

Runnington was going to reply, when he was stopped by

LORD LOUGHBOROUGH, who said, that as the testatrix had two kinds of estates, namely, real and personal, to which the words "all the rest of my estate of what kind soever" might be applied, the Court could not restrain the meaning of them to personal property, and negative the operation of them as to real estates, particularly as they were so general and comprehensive.

GOULD and HEATH, Js., of the same opinion.

WILSON, J. It was plainly the intention of the testatrix not to die intestate as to any part of her property, since it ap-[227]-pears, on the case, that she had surrendered her copyholds to the use of her will.

Postea to the plaintiff (a).

ORR against CHURCHILL. Saturday, May 23d, 1789.

A bond is given from A. B. and C. to D. reciting, that "A. having received from D. a certain sum of money in the East Indies, had drawn bills of exchange there payable to D. on a house in England, and that the obligors had agreed with D. if the

bills should not be accepted and paid, that they would pay the amount thereof, with interest from the day of their respective dates by way of penalty;" with a condition to be void if the bills should be accepted and paid according to the tenor thereof. On non-payment of the bills, D. is entitled to recover no more than the amount of them, with interest from the time of their becoming due (a).

Debt on bond, dated Fort William, Bengal, March 14th 1787, in the penalty of 4470l. 2s. 2d. of lawful money of Great Britain.

Plea, oyer of the bond, by which it appeared that the defendant Walter Cleland, and Daniel Stewart were jointly and severally bound to the plaintiff, John Orr captain in the military service of the United Company of Merchants of England trading to the East Indies, on their Madras establishment. Oyer also of the condition, which was as follows:

"Whereas the above bounden Walter Cleland hath received from the above named John Orr 6017 star pagodas of lawful money of Madras, for which he was to have obtained and given to the said John Orr, bills of exchange to be drawn by the Right Honourable the Governor in Council of Fort William in Bengal aforesaid, upon the Honourable Court of Directors of the said United Company of Merchants of England, which bills he hath not obtained or given, but instead thereof hath granted two sets of his own private bills upon Messrs. Baillie, Pocock, and Co. payable to the order of the said John Orr, in manner herein after mentioned; that is to say, one set in triplicate dated Calcutta, January 29th 1787, for 2044l. 3s. 4d. payable 365 days after sight thereof, and the other set in triplicate, bearing even date with these presents, for 190l. 18s. 9d. payable for four months after sight thereof; and to secure the due acceptance and payment of such bills respectively, they the said Henry Churchill and Daniel Stewart have proposed, and undertaken to become bound together with the said Walter Cleland; and that in the event of the said bills or either of them being protested for non-acceptance and non-payment, that they the said Walter Cleland, Henry Churchill, and Daniel Stewart, or one of them, their or one of their heirs, executors, or administrators, shall and will upon producing to them or either of them such bill with its protest, well and truly pay [228] to the said John Orr or his order, if demanded in England, the full amount of such bill or bills, which shall be so protested, together with interest thereupon, of 5l. per centum per annum, from the day of the date or dates of such bill or bills, up to the day of such payment 'by way of penalty;' and if demanded in India, then the full amount of such bill or bills in pagodas, at an exchange of seven shillings and four pence for each pagoda, with an interest thereupon of 10 per cent. per annum, from the date or dates of such bill or bills up to the day of such payment; and with which proposal and undertaking the said John Orr is satisfied. The condition therefore of this obligation is such, that if the aforesaid bills of exchange so drawn by the said Walter Cleland, upon Messrs. Baillie, Pocock, and Company, merchants in London, shall be duly and faithfully accepted and paid according to the tenor thereof respectively, then this obligation shall be void and of no effect, otherwise the same shall be, and remain in full force and virtue." Which being read and heard, the said Henry said, that the said John ought not to have or maintain his aforesaid action against him, because he saith, that he the said Henry, before the suing forth of the original writ of the said John on this behalf, to wit, on the 16th day of October, in the year of our Lord 1788, at London aforesaid, in the parish and ward aforesaid, (one, to wit, the third of the said set of bills of exchange in the said condition mentioned to be granted in triplicate for 190l. 18s. 9d. being then and before that time protested for non-acceptance and non-payment thereof,) did upon producing to him such bill with its protest, well and truly pay to the said John, (the same being then and there demanded in England,) the full amount of such bill so protested, together with interest thereupon, of 5 per cent. per annum, from the day of the date of such bill, up to the day of such payment "by way of penalty," according to the tenor, form, and effect of the said condition; and that the said set of bills of exchange, in the said condition mentioned to have been granted as aforesaid, in triplicate, for the said sum of 2044l. 3s. 4d. were not, nor

(a) [The drawer of a bill is only liable for interest from the day on which he receives notice of dishonour. *Walker v. Barnes*, 5 Taunt. 240. As to Indian interest, see *Auriol v. Thomas*, 2 T. R. 52.]

were, nor was, any or either of that set of bills of exchange presented to the said Messrs. Baillie, Pocock, and Company, in the said condition mentioned, for their acceptance thereof, and the said Messrs. Baillie, Pocock, and Company, never had sight of the same, or any, or either of those last mentioned bills, and this, &c. 2d. That the said Henry, before the suing forth of the original writ of the said John in this behalf, to wit, on the 16th day of October, in the year of our Lord [229] 1788, at London aforesaid, in the parish and ward aforesaid, (one, to wit, the third of the said set of bills of exchange, in the said condition mentioned, to be granted in triplicate, for 190l. 18s. 9d. being then, and there, and before that time protested for non-acceptance and non-payment thereof,) did upon producing to him such bill, with its protest, well and truly pay to the said John, (the same being then and there demanded in England,) the full amount of such bill so protested, together with interest thereupon, at 5 per cent. per annum, from the day of the date of such bill up to the day of such payment, "by way of penalty," according to the tenor, form, and effect of the said condition; and that the said set of bills of exchange in the said condition mentioned to have been granted as aforesaid, in triplicate, for the said sum of 2044l. 3s. 4d. were not, nor were, nor was, any or either of that set of bills of exchange, protested for non-acceptance, or non-payment thereof, according to the tenor, form, and effect of the said condition, and this the said Henry is ready to verify, wherefore he prays judgment, &c.

Replication, 1st. That the third of the said set of bills of exchange in triplicate, for the sum of 2044l. 3s. 4d. on the 29th of November 1787, was presented to Messrs. Baillie, Pocock, and Co. for acceptance, &c. on which issue was joined. 2d. That the same, on the 29th of September 1788, was duly protested for non-payment thereof, &c. on which also issue was joined. After which the following suggestion was entered.

"And the said John for breach of the condition of the said writing obligatory, suggests to the Court here, according to the form of the statute in such case made and provided, that the said several bills of exchange so drawn by the said Walter Cleland, upon the said Messrs. Baillie, Pocock, and Co. merchants in London, were not, nor was any or either of them duly paid according to the tenor and effect thereof; and that the third of each set of the said several bills of exchange was duly presented for payment to the said Messrs. Baillie, Pocock, and Co., and being protested for non-payment thereof, was afterwards produced to the said Henry, who then and from thenceforth hath refused to pay the said bills, any or either of them, and that the said bills still remain wholly unpaid and unsatisfied." Therefore as well to try the truth of the issues above joined, as to inquire the truth of the premises above suggested by the said John, and to assess what damages [230] he hath sustained, by reason of the breach of the said condition above assigned, according to the form of the statute in such case made and provided, the sheriffs are commanded that they cause to come, &c.

At the trial a verdict was found for the plaintiff, on both the issues; an order of Nisi Prius being made, "that with the consent of all parties, a verdict should be found for the plaintiff, for the sum of 1459l. 13s. and 40s. costs; subject to the opinion of the Court, whether he ought to recover that sum, or only the sum of 1275l. 16s. 3d." &c.

On behalf of the plaintiff, Runnington and Lawrence, Serjts., stated the question in this case to be, whether interest on the bills was to be charged from the day of the date, or from the day when they became due?

The Court will give every legal effect to the agreement as a security for the plaintiff. By that agreement, if the bills were protested in England, whether it were for non-payment, or non-acceptance, 5 per cent. was to be paid from the day of their respective dates. This undertaking is express, which the Court will not interfere to set aside. So if two parties enter into an agreement to build a house under a penalty or the like for non-performance, in strict law the whole penalty may be recovered. If this were an action on the case the Court might measure the damages, but being debt on bond they have no such power at common law. Though without an express agreement interest would only run from the time of the bills being due, yet this agreement came in expressly to give interest from the date. The damages were thereby liquidated. There was nothing illegal or usurious in the transaction, and where there have been no symptoms of usury, agreements of this kind have been

carried into effect by Courts of Law. 2 Burr. 1094. Dougl. 376 (last edition). 2 Term Rep. B. R. 52. But it was doubted at the trial whether the words "by way of penalty" did not bring the case within the statute, 8 & 9 W. 3, c. 11. Now that statute gives a Court of Law the power of a Court of Equity in this respect, namely, to proportion the damages. The question therefore is, what a Court of Equity would do on the circumstances of this case. Orr supplies Cleland with money in order to have bills on the East-India Company. Those bills are not procured, but others given on a private house. If Orr had remained in Bengal, he might have required payment of his [231] money from Cleland. It must be considered as a loan advanced, or that Cleland was guilty of a breach of trust in not performing what he undertook. In either case in point of conscience, Orr would be entitled to interest from the time he parted with his money. Then he agrees to give up this interest, if the bills were paid when they became due: but if they were not paid, he is, in that event, to have the same interest which he would have had if he had not paid the money to Cleland. This is the meaning of the agreement, and is perfectly fair and conscionable. The mere insertion therefore of the words "by way of penalty" would not be a ground for a Court of Equity to interfere, for if those words were left out the plaintiff would in conscience be intitled. 1 Vern. 210. 2 Vern. 316. 3 Blac. Com. 432.

Cockell, Serjt., for the defendant. The situation of the parties is to be considered. Orr and Cleland were both coming to England, Orr was desirous to remit money from India; his only object was the security of his property; provided the bills were good, it was immaterial to him on what persons they were drawn. Neither would Cleland have given the bills, unless he had received the money. The advantage therefore was equal to both parties; one had a safe way of bringing home his property, and the other had the money advanced to him. All arguments then drawn from the circumstance of the money being advanced to Cleland must be laid out of the case.

When the bills could not be procured on the East-India Company, those on Baillie and Co. were offered by Cleland, but which were not received by Orr, without an additional security. The only intent of the parties was that Orr's money should be safe. The condition is, that the bond shall be void on the payment of the bills according to the "tenor thereof respectively," all the rest is mere recital. The words "by way of penalty" were added in terrorem (a)¹. If it were meant as a satisfaction, or in the nature of liquidated damages, the penalty would have been proportioned to the delay of payment. If it were strictly construed by the delay of one day only, it would be forfeited as much as if the delay had been for any longer time. It was not the design of the agreement that Orr should have any extraordinary advantage: he was only to have his money when it was due; but not to receive interest in the mean time. The intent of the parties therefore must prevail; the money being paid to the plaintiff, the for-[232]-feiture is saved, the only object of which was to secure that payment.

The Court took time to consider till this day, when judgment was delivered as follows, by

LORD LOUGHBOROUGH.—We are all agreed in this case in which the question is, whether the verdict shall be entered for the whole sum at which the damages are assessed by the consent of the parties, namely, 1459l. or 1275l. 16s. 3d. the difference of the two sums being owing to the computation of interest from the date of the bills of exchange. It was argued that the verdict ought to go to the full extent, because by agreement of the parties the damages were liquidated, and that this was not in the nature of a common penalty, but the damages being ascertained, neither a Court of Law nor of Equity would relieve.

But I do not go on the denomination given by the instrument, for whatever that may be, in this case there could not by any possibility have been an agreement for liquidated damages; which can only be where there is an engagement for the performance of certain acts, the not doing of which would be an injury to one of the parties; or to guard against the performance of acts, which if done would also be injurious. In such cases an estimate of the damages may be made by a jury, or by a previous agreement between the parties who may foresee the consequences of a breach of the engagement, and stipulate accordingly (a)². But where the question is concerning

(a)¹ Vide 2 Term Rep. B. R. 32.

(a)² [In what cases the Courts will consider a penalty to be in the nature of

the non-payment of money in circumstances like the present, the law, having by positive rules fixed the rate of interest, has bounded the measure of damages: otherwise the law might be eluded by the parties. It may often indeed happen that the damages sustained by a party contracting, by the non-payment of money at the time agreed on, may by the particular arrangement of his affairs, be greater than the compensation recovered by computing the interest: but where money has a real rate of interest and value, the other party is not to be compelled to pay more than the law has declared to be such rate and value. In this transaction, the money was not a loan to the defendant to remain in his hands in India, and be re-paid to the plaintiff at certain stated times; but it was paid merely for the purpose of being remitted to Europe. That it was so paid, clearly appears from that part of the agreement, which provides, that if the bills were sent back unpaid to India, the amount of them should be paid to the plaintiff in pagodas, at an exchange of 7s. 4d. for each pagoda, and 10l. [233] per cent. interest; which must be on account of the difference of exchange. When the plaintiff could not procure bills on the East-India Company, he had others on a private house, and as a security took a bond from the defendant with two other persons, to answer the value of them. But for the reasons I have stated, we think that value must be calculated from the times when the bills became due; that the verdict must therefore be reduced, and entered for the lesser sum.

FOWLDS *against* MACKINTOSH. Monday, May 25th, 1789.

The Court will not discharge an attachment against the sheriff for not bringing in the body, except upon payment of the whole debt due and costs, beyond the sum sworn to and indorsed on the writ (*a*).

The defendant being arrested on a *capias* for "50l. and upwards," found bail, who joined with him in the usual bond in the penalty of 100l. No bail above being put in, an attachment was granted against the Sheriff of Middlesex, for not bringing in the body pursuant to a rule of Court. Upon which a rule was obtained to shew cause why the attachment should not be set aside on the payment of 50l. 19s. together with costs; it appearing from the affidavit of the sheriff's officer, that he had tendered that sum and the costs to the attorney for the plaintiff who refused to take less than 68l. 2s. 6d. the real amount of the debt.

Against the rule Marshall, Serjt., shewed cause. The question is, to what extent the sheriff is answerable for not bringing in the body? This must be the same as that to which bail are answerable. Before the stat. 23 Hen. 6, c. 9, the sheriff was not bound to take bail, unless the party sued out a writ of main-prize. He might indeed have taken bail, but he was obliged at his peril to produce the body at the return of the writ; otherwise he was guilty of a contempt, for which he was amerced. Since that statute, the sheriff is bound to let the party to bail, if good bail be tendered; but he is not obliged to take bad bail, and is therefore still required to have the body in Court at the return of the writ, as at common law. If the defendant be arrested and admitted to bail, the plaintiff has his option either to have an assignment of the bail-bond, or if he dislikes the sureties taken, he may proceed against the sheriff to compel him to bring in the body; or rather, to put in and justify good bail to the action, which is equivalent to bringing in the body. If the plaintiff accepts an assignment of the bail-bond, he admits the sufficiency of the sureties, and waives his remedy against [234] the sheriff. If the plaintiff chooses to proceed against the sheriff, he obtains an order upon him to return the writ, who may then either refuse to return it, or return *non est inventus*, or *cepi corpus*. If he refuse to return the writ, the Court will grant an attachment against him, and amerce him for his disobedience. If he return *non est inventus*, the plaintiff may bring an action against him for a false return, and recover the whole debt. If he return *cepi corpus*, the writ and return being filed of record, the plaintiff may serve him with a rule to bring

liquidated damages, see *Astley v. Weldon*, 2 Bos. & Pul. 346. *Smith v. Dickenson*, 3 Bos. & Pul. 630. *Harrison v. Wright*, 13 East, 343. *Welbeam v. Ashton*, 1 Campb. N. P. C. 78. *Barton v. Glover*, Holt's N. P. C. 43. *Baker v. Webb*, Manning N. P. 230. *Reilly v. Jones*, 1 Bingh. 302.]

(*a*) [*Stevenson v. Cameron*, 8 T. R. 29. *S. P. Heppel v. King*, 7 T. R. 370.]

in the body, at the expiration of which, if good bail be not put in and justified, (which is equivalent to bringing in the body) it will then appear that the sheriff has not only disobeyed the writ, but also the order of the Court; and accordingly the Court will attach him, and amerce him at their discretion for his disobedience of the writ and contempt of the Court. But in such case, the object is that the plaintiff shall be satisfied; this is the measure of the punishment. The question then is, what ought to be deemed a sufficient satisfaction to the plaintiff? It seems, that the sheriff ought to be liable to the same extent as the bail, because as he is bound to take good and sufficient bail, he is answerable for their insufficiency. It would be also absurd to say, that the plaintiff has his option either to proceed on the bail bond or against the sheriff, if the latter remedy were not as extensive as the former. But it has lately been decided in this Court (*Mitchell v. Gibbons*, ante, 76, 1 Barn. 74), that the bail are liable to the full extent of the penalty of the bail-bond, to satisfy the debt really owing to the plaintiff. If the sheriff had done his duty, good bail would have been put in and justified, from whom the plaintiff would have recovered his whole debt and costs. But the sheriff has taken upon himself to compromise the plaintiff's cause, and say what sum he ought to recover. It would hold out a great temptation to perjury if the plaintiff were to lose a part of his just demand, by his moderation and caution in swearing to it. If the sheriff has taken sufficient bail he is secure, they being answerable to him: if they be insufficient, he ought to be answerable to the plaintiff for their insufficiency. In this case, the sheriff's officer had notice how much was really due; but the sheriff was liable without such notice. The officer adds 19s. to the sum sworn to, in order to satisfy the word "upwards," but he had no right to decide how much above 50l. was due.

[235] Bond, Serjt., on the part of the sheriff, said that there was no authority decided on this point, which was new. The case of *Mitchell v. Gibbons* proves only to what extent bail are liable, but does not affect the sheriff. In this case the sum sworn to had been tendered with the costs, which ought to be deemed satisfactory. By the statute 12 Geo. 1, c. 29, the sheriff is prohibited from taking bail for more than the sum sworn to.

LORD LOUGHBOROUGH.—It would be strange if the sheriff should be allowed to put himself in a better situation than the bail. The case of *Mitchell v. Gibbons* was determined on consideration, and on the practice established for a length of time. I do not see how the situation of the sheriff in this respect is to be distinguished from that of the bail.

GOULD, J.—By the course of this Court, where a party comes himself, and enters into a recognizance with the bail, he is bound in double the sum, and each of the bail in the single sum; then each is liable to the full extent (a)¹; and the same rule should prevail in bail-bonds taken to the sheriff.

HEATH, J.—Of the same opinion.

WILSON, J.—The sheriff may if he pleases bring in the body; he ought to put the plaintiff in the same situation as if good bail were put in and justified. If he does not return the writ, and is attached for contempt, he shall not put the plaintiff in a worse situation. Nor can the plaintiff otherwise recover the remainder of his debt.

The Court then ordered, that the rule for setting aside the attachment should not be discharged except on payment of the whole debt and costs, together with the costs of the application.

CLARK *against* NORRIS AND HIS WIFE. Monday, May 25th, 1789.

Where the defendant is joined with his wife in the writ, he may enter an appearance for himself only; and in such case the plaintiff cannot sign judgment for want of a plea, without demanding a plea (a)².

Both the defendants being joined in the writ, the husband entered an appearance for himself only. The plaintiff afterwards signed judgment for want of a plea, with-

(a)¹ [Bail to the action are liable only to the amount of the sum sworn to and costs, *Clarke v. Bradshaw*, 1 East, 86.]

(a)² [*Russell v. Buchanan & Ux.* 6 Price, 139.]

out making a demand of a plea. For which irregularity Lawrence, Serjt., moved to set aside the judgment.

Marshall, Serjt., contended that the judgment was regular, because the husband not having appeared for himself and his wife, as required by the notice affixed to the process, it was the same as if no appearance had been entered, and therefore no demand of a plea was necessary.

[236] But the Court held the judgment to be irregular, and therefore made the rule absolute to set it aside.

BYERS, Widow, *against* DOBEY. Monday, May 25th, 1789.

[Distinguished, *Fell v. Goslin*, 1852, 7 Ex. 187.]

A contract made by two partners to pay a certain sum of money to a third person equally out of their own private cash, is a joint contract, and they must be jointly sued upon it (*a*).

Assumpsit for the use and occupation of a shop, counting-house and chambers, part of a messuage, with the appurtenances, &c. quantum meruit, money paid, laid out, and expended, money lent and advanced, money had and received. Damages 200l.

Plea in abatement, "That the promises, &c. if any, were made by the defendant and one George Bethell jointly, and not by the defendant only," &c.

Replication, that they were made by the defendant only, and not by him and the said George jointly, &c. on which issue was joined, and a verdict found for the defendant.

The material facts of the case were these.

By articles of partnership entered into in 1774, between David Humphries of the one part, and Richard Byers (husband of the plaintiff), John Dobey (the defendant), and George Bethell of the other part; it was agreed amongst other things that Byers, Dobey and Bethell, should carry on in partnership the trade of a hosier for 14 years, and purchase the stock in trade, utensils and fixtures of Humphries: that Humphries should grant to Byers a lease of the house, &c. where the business was carried on for 21 years, at the rent of 50l. clear of all taxes, payable quarterly, by and out of the private cash of Byers; in which lease a room should be reserved for the use of Humphries during his life, and after his death for the use of Byers; that the business should be carried on by Byers, Dobey and Bethell, in the shop and other parts of the house, as it had before been done by Humphries: that Byers and his family should live in the house: that Byers should, during the partnership, as a compensation for the use of the shop and premises, be paid equally by Dobey and Bethell out of their own private cash 25l. yearly by quarterly payments, and that they should pay Byers a moiety of all taxes whatsoever, for or on account of such house and premises: that if either of the partners should die and leave a widow, she should if she chose, be taken into the partnership for the remainder of the term; that if Byers should leave a widow, and she should continue in the business with the surviving part-[237] ners, then she should hold the said house upon the same terms and conditions as he would have holden it, if he had been living, &c.

Byers died in 1778, his widow the plaintiff, continued in the partnership with the defendant and Bethell, till the expiration of it, when she brought this action to recover 12l. 10s. half of the annual rent of 25l. (for the use of the house, &c. which was to be paid equally out of the private cash of the defendant and Bethell, according to the articles), together with the rent for part of a year preceding the expiration of the partnership, and half of one moiety of the taxes as the defendant's share under the articles.

A rule having been granted to shew cause why the verdict should not be set aside, and a new trial granted;

Bond, Serjt., shewed cause, and contended the words "to be paid equally" made Dobey and Bethell joint-tenants, and not tenants in common. This construction would be put on the like words in a deed; and if words of grant be thus construed, so also ought words of render. Although in wills and deeds of conveyance under the

(*a*) [See *Brand v. Boulcott*, 3 B's. & Pal. 235. *Osborne v. Harper*, 5 East, 226.]

Statute of Uses, these words would make a tenancy in common, yet in deeds at common law, they make a joint-tenancy. 1 Salk. 390, *Ward v Everard*.

Watson, Serjt., for the plaintiff, argued that as the money was agreed to be paid "out of the private cash" of Dobey and Bethell, it was to be paid by them separately, and not out of the joint stock. There could be no joint private cash. The expression "to be paid equally," could only mean that each should pay a moiety of 25l. and the words "private cash" shew that they were individually answerable.

LORD LOUGHBOROUGH.—If one of them had died, would Byers have been intitled only to 12l. 10s.? The interest in the trade would have survived, yet according to the argument of the plaintiff, though that interest would have survived to the partnership, Byers would have been reduced to 12l. 10s. It was in its nature, a joint undertaking.

GOULD and HEATH, J.—Of the same opinion.

WILSON, J.—The words private cash could only mean, that the rent should not be paid out of the partnership stock: but the contract was joint between Dobey and Bethell as relating to a third person.

Rule discharged.

[238] SKUTT *against* WOODWARD, Executrix of Woodward. Monday, May 25th, 1789.

Where in a plea by an executor of a former judgment recovered, by mistake a less sum is stated than the judgment was really for, if it clearly appear that a greater sum was recovered, the Court will permit the defendant to amend the record, by inserting the real sum in the plea, though the application be not made for such amendment till a considerable time (ex. gr. near three years) after the record has been made up: and they will in such case allow the plaintiff to reply per fraudem.

To this action which was brought in Michaelmas term 1786, for money had and received by the testator, the defendant pleaded,

1. The general issue. 2. Plene administravit. 3. That one Catharine Simmons in that time recovered judgment against her as executrix for six pounds, and plene administravit except 50s. which were not sufficient to satisfy that judgment, &c.

Replication. Issue joined on the 1st plea. As to the 2d and last pleas, inasmuch as the plaintiff cannot deny the several matters therein contained, and inasmuch as the defendant hath not in and by her said last mentioned pleas, &c. denied the action of the plaintiff, &c. the said plaintiff prays judgment of assets, which after satisfying the said judgment, shall come to the hands of the defendants, &c. therefore it is considered, &c. But because it is unknown what damages, &c. and because it is convenient and necessary, that there should be but one taxation of damages in this behalf, therefore let such taxation be staid until the trial of the issue above joined between the parties aforesaid, &c. Verdict for the plaintiff, 72l. damages and 40s. costs, and 25l. 10s. increased costs, which damages in the whole amount to 99l. 10s. Judgment of assets quando acciderint, after satisfying the aforesaid judgment in form aforesaid recovered; and if the said defendant hath not so much in her hands to be administered, the aforesaid 40s. and 25l. 10s. amounting together to the sum of 27l. 10s. to be levied of the proper goods and chattels of the said defendant, and the said defendant in mercy, &c.

In this term, a rule was obtained to shew cause why, upon payment of costs, the defendant should not have leave to amend the record by inserting in the 3d plea, "two hundred and four pounds" instead of "six pounds;" affidavits having been previously filed, of Catharine Simmons, the defendant, and her present attorney, stating that the former judgment, was in fact for 198l. 15s. and 6l. costs, that by mere mistake of her former attorney, the sum of 198l. 15s. the amount of the damages recovered, was omitted in the plea, and 6l. alone stated, which was in truth only the sum at which the costs were taxed: and that it appeared from a search in the office, that the judgment [239] was entered in the docket book for 198l. 15s. by confession. There were also affidavits on the part of the plaintiff tending to induce a suspicion that the judgment was obtained by collusion.

Adair, Serjt, now shewed cause, urging that it would afford a dangerous precedent, if at this distance of time a record regularly made up, without any error on

the face of it, should be altered : such a proceeding, he said, would tend to shake the credit of all judgment securities.

The Court seemed to doubt about the propriety of allowing the amendment proposed ; but as the substantial justice of the case was in favour of the defendant, leave was given to her to amend the plea, and to the plaintiff to reply per fraudem.

On these terms the rule was
Made absolute.

ISRAEL *against* DOUGLAS AND ANOTHER. Monday, May 25th, 1789.

[Disapproved, *Taylor v. Higgins*, 1802, 3 East, 171. Questioned, *Wharton v. Walker*, 1825, 4 B. & C. 165 ; *Liversidge v. Broadbent*, 1859, 4 H. & N. 614.]

A. being indebted to B. for brokerage, and B. indebted to C. for money lent, B. gives an order to A. to pay C. the sum due from A. to B. as a security, on which C. lends B. a farther sum ; and the order is accepted by A. On the refusal of A. to comply with the order, C. may maintain an action for money had and received against him (a).

The material facts of this case were as follow.

The defendants, who were partners, were indebted to one Delvallè, a broker, in 64l. 9s. for brokerage, and Delvallè was indebted to the plaintiff in 40l. on a promissory note. Delvallè afterwards applied to the plaintiff, to lend him a further [240] sum, which the plaintiff refused to advance without security ; whereupon Delvallè gave him an order on the defendants, for the sum in which they were indebted to him (Delvallè) for brokerage. This order was sent by the plaintiff to the defendants, in November 1787, with a request that they would acknowledge their having given him credit for it. The defendant Douglas answered, that they would pay the money which they owed to Delvallè to no other person but the plaintiff, but objected to the amount of the sum contained in the order, which they desired to have rectified. Another order was then sent to them, which Douglas again objected to do, promising at the same time to pay the plaintiff what they really owed to Delvallè, and requesting an order to pay or give credit to the plaintiff, for so much in their hands as was in fact due to Delvallè. An order in this form was accordingly sent them, which they accepted : in consequence of which, the plaintiff advanced 70l. to Delvallè ; who afterwards becoming a bankrupt, the defendants refused to pay the money to the plaintiff according [240] to the order. On which refusal this action was brought, The declaration contained four counts. 1. Money had and received. 2. Money paid, &c. 3. Money lent, &c. 4. An account stated. Verdict for the plaintiff ; which on a former day Lawrence, Serjt., contended, was not supported by evidence under the form of action which the plaintiff had chosen, and therefore obtained a rule to shew cause why it should not be set aside, and a new trial granted.

(a) [The authority of this case though recognized by Lord Ellenborough, in *Williams v. Everett*, 14 East, 587, note, was doubted by Lawrence, J., in *Taylor v. Higgins*, 3 East, 171, and it can now only be considered law with certain qualifications. Where A. is indebted to B., and B. to C. in the same sum, and it is agreed amongst all the parties that A. shall pay C., C. cannot sue A. unless by the agreement he relinquishes his action against B., for should he still retain his right of suing B. there would be no consideration for A.'s promise to pay him (C.,) since there would be no loss to the plaintiff, or benefit to the defendant. See *Cuxon v. Chadley*, 3 B. & C. 591. *Warton v. Walker*, 4 B. & C. 163, which appear to qualify *Wilson v. Coupland*, 5 B. & A. 228. It seems also that unless the demand of B. upon A., was for money had and received, C. cannot recover against A. in that form of action, nor upon an account stated, for the account stated would not appear to be of money due and owing to C., *ibid*. It seems that the declaration in such a case should be special ; but where money is paid into the hands of the defendant with a special direction to pay it to the use of a third person, it is properly recoverable under the count for money had and received to the use of such third person. *De Bernalis v. Fuller*, 14 East, 590, (n). 2 Campb. N. P. C. 426. *Baker v. Birch*, 3 Campb. N. P. C. 107. Upon the points of the principal case, see also *Surtees v. Hubbard*, 4 Esp. N. P. C. 204. *Tatlock v. Harris*, 3 T. R. 180.]

On this day, Mr. Justice Heath, who tried the cause, stated the evidence, to the same effect as above, and cited the case of *Fenner v. Mears*, 111. 19 Geo. 3, C. B. 2 Blac. 1269.

Adair, Serjt., shewed cause, arguing that as substantial justice had been done, the Court would not set aside the verdict, and favour an objection drawn from the strictness summi juris. The case of *Fenner v. Mears* must decide the present; there is no difference between them, except that in one the money was secured by bond, in the other it was a book-debt. That was an action for money had and received. But clearly the verdict may be supported on the count on the insimul computassent. The evidence proved, that the defendants agreed to pay the balance of the account to the plaintiff, the only doubt was, as to the quantum of the sum. They were indebted to Delvallè, and promised to pay the debt to Israel. This promise was made on a good consideration.

(Heath, J., here mentioned the case of *Moultsdale v. Birchall*, 2 Blac. 820, and observed that the question there was, whether an uncertain chose in action could be assigned, not whether the consideration was a good one.)

But whatever might be the effect of the assignment of Delvallè's debt to Israel, yet the defendants had made themselves liable by an express promise, in consideration of money advanced by Israel. The case therefore stood clear of the original effect of an assignment of a chose in action. They undertake to pay the amount of unliquidated damages; they consent to account with the plaintiff instead of Delvallè, the count therefore on the insimul computassent was strictly supported by evidence. There was also evidence of money paid to the use of the defendants. Israel actually advanced money to Delvallè, for which the debt owing by the defendants was assigned to him: they were therefore discharged, as far as Delvallè was concerned.

Lawrence, Serjt., on behalf of the defendants contended, that as the original debt to Delvallè was for brokerage, he ought to [241] have brought the action for work and labour, and not for money had and received. If so, Israel could not maintain any action which Delvallè himself could not. In the case of *Fenner v. Mears*, Cox had actually paid money to Mears, there was therefore good evidence of money had and received by him. Here there was no money paid by the original parties; the contract between them was for work and labour: if Delvallè had ever paid money to the defendants, it would be a different case. As to the count on the insimul computassent, the form of that count is "that the defendants accounted with the plaintiff of money "before that time due and owing from them to the plaintiff," but in this case, there was no money due and owing from them to the plaintiff; it was owing to another person, namely to Delvallè. As to any objection which may be made, on account of Delvallè having become a bankrupt, to his bringing the action; the case of *Winch v. Keeley*, 1 Term Rep. B. R. 619, is an authority to shew, that he might have brought it, and if the bankruptcy had been pleaded, he might have replied that before the bankruptcy the debt was assigned, and that he brought the action on behalf of the assignee.

LORD LOUGHBOROUGH.—The point made at the trial was, that the plaintiff had misconceived his action. Now where a party has not the substantial justice of the case on his side, the Court will not favour any action which he may bring. But where justice is clearly with him, they will, if possible, allow him to maintain the action he has brought; because the only effect of a refusal would be to make him adopt another form of action. In the present case it is admitted that the plaintiff has the law with him in some action. But it has been argued that Delvallè ought to have brought the action. Yet I cannot conceive why that should prevent the plaintiff from having his remedy. It was also said, that Delvallè's action should have been for work and labour. But to admit this, we must strain a point, and suppose that Delvallè had really performed work and labour for the defendants. For in general, the demand which a broker has upon his employer, is for the difference of money on account between them for premiums, &c.; so that if he were to rest solely on a count in his declaration for work and labour, without the common money counts, he would be in danger of a nonsuit. It was farther contended, that the money was in point of fact owing by the defendants to Delvallè, that their undertaking was to him, that in reality no money was had or [242] received by them to the use of the plaintiff. But Delvallè had paid for premiums on account of the defendants, which created a debt from them, and which he might have set off against any similar demand

of theirs against him. This debt is, with the consent of the parties, assigned to the plaintiff. Douglas has due notice of it, and assents; by which assent he becomes with his partner, liable to the plaintiff. He makes no objection to an order from Delvallè to pay his money to the plaintiff, but only to the amount of the sum to be paid. He insists that the whole demanded by Delvallè was not due, and therefore requires a looser order, on the faith that he would pay the balance: on his failure to pay, his promise attached, so as to make the defendants liable to an action.

Then the question is, whether, when Israel brings an action in his own name against the defendants, this shall not be considered as money had and received by them to his use? Now, when Douglas had admitted the money to be due, he was that moment estopped, as it were, from saying that it was not due. I also think the action might be maintained on the account stated. Delvallè gives an order to pay to the plaintiff a liquidated balance: the only dispute is concerning the amount of that balance. Douglas says "I will pay you according to the sum which shall appear to be due." He is here again estopped from denying the effect of his promise. I am therefore of opinion that the verdict is right, and ought not to be set aside.

GOULD, J.—This case is like that of a man having money due to me in his hands, which I order him to pay to another. Now if I pay money to you for another person, it is money had and received by you to his use (a). But where is the real and substantial difference, whether I in fact pay money to you for a third person, or whether I give you an order to pay so much money, to which you expressly assent? In reason and sound law, it is money had and received to the use of such third person. If my debtor tenders me money, which I give back to him, and tell him to pay to another, he then in point of fact receives money to the use of the other. But is there any real difference between such a case and the present? As to the account stated, I think that count also, all the circumstances considered, comes within the fair compass of the case; but I have not the least doubt as to the count for money had and received.

HEATH, J.—I think, in mercantile transactions of this sort, such an undertaking may be construed to make a man liable for money had and received.

[243] WILSON, J.—It is highly necessary that the forms of actions should be kept distinct. Courts of Justice have, in my opinion, already gone quite far enough in extending the favourite count for money had and received. But I know of no case where they have gone so far as to allow that count to be maintained where no money has in fact been received by the defendant. Here it by no means appears that money was had or received by the defendants. I am also of opinion that this demand between the parties being for brokerage was, from the nature of it, the subject of an action for work and labour. Now, though it be true, that where a man is my debtor he holds my money, yet I cannot accede to this as a general proposition, that whenever a man is my debtor I am entitled to bring an action against him for money had and received. A tailor might, according to this rule, bring an action for money had and received against a man who had not paid him for a suit of clothes. For my idea is that where no money has been actually had and received, no action for money had and received can be supported. In the case of *Fenner v. Mears*, money was in fact received by the defendant; there the action might clearly be maintained. So here it would have been proper if it could be shewn that money was received by Douglas to the use of Delvallè.

I thought it necessary to say thus much because my brother Gould, whose opinion I very highly respect, and whose very dictum would at all times make me doubtful of my own judgment, has expressed his sentiments decidedly in favour of this count for money had and received. I do not indeed mean to say positively that the action will not lie, particularly as I agree in opinion with the rest of the Court as to the count on the *insimul computassent*; but I very much doubt the position, which has been so strongly laid down, that the acknowledgment of the defendant Douglas, of the money being due to Delvallè, was evidence of money actually had and received by him; for I am not inclined to favour an implication which is contrary to fact.

Rule discharged.

End of Easter term.

(a) [Vide ante, p. 239, note. See also *Grant v. Austen*, 3 Price, 58. *R. v. Hunter*, 4 Price, 258.]

[244] CASES ARGUED AND DETERMINED IN THE COURT OF COMMON PLEAS, IN TRINITY TERM, IN THE TWENTY-NINTH YEAR OF THE REIGN OF GEORGE III.

COLLINS AND ANOTHER *against* MORGAN AND ANOTHER.
Saturday, June 13th, 1789.

Where in an action against officers of the Excise for seizing goods they do not tender amends before action brought, but pay money into Court, and afterwards gain a verdict (the jury finding that the sum paid in was sufficient) they are entitled only to single costs under the stat. 23 Geo. 3, c. 70, s. 31. Q. Whether they are entitled to treble costs under the 34th section of that statute, if they tender amends?

In Michaelmas term last an action of trespass was brought against the defendants, as officers of the Excise, for seizing a quantity of tea and other goods not exciseable, of the plaintiff; previous to which, a month's notice had been given them pursuant to the statute 23 Geo. 3, c. 70, s. 30. They made no tender of amends before the action was brought, but pleaded the general issue, and paid 16l. into Court as allowed by the 33d section of the statute. Mr. Baron Perryn, who tried the cause at the last assises at Reading, left it to the jury to consider whether this sum was sufficient for the damages of the plaintiff, and if so, they should find a verdict for the defendants; which they accordingly did.

On taxing costs, the prothonotary allowed treble costs to the defendants, but did not sign the allocatur, leaving it to the plaintiffs to apply to the Court if they thought proper for a rule on him to review his taxation.

A rule was accordingly granted in the last term to shew cause why the taxation should not be reviewed by one of the prothonotaries, and why the costs should not be considered and taxed as single instead of treble.

Against this rule Runnington, Serjt., now shewed cause; he contended that by the 34th section of the stat. 23 Geo. 3, c. 70, [245] the defendants were entitled to treble costs. The only doubt was on the 33d section, but that was explained by the 34th.

Cockell, Serjt., for the plaintiff, argued that by the 33d section, where the defendants had neglected to tender amends before action brought, they were enabled to pay money into Court at any time before issue joined, whereupon such proceedings, orders and judgments should be had and made in and by such Court as in other actions where the defendant is allowed to pay money into Court. Here the defendants had not tendered amends before action brought. They were therefore to be considered as any other defendants who had paid money into Court, and the remedy was not to be enlarged beyond the case.

The Court said that it seemed, on the true construction of the statute, that where the Excise officers were originally in the wrong (as was admitted here by paying money into court), unless they tendered amends in time, namely, before action brought, they were not entitled to treble costs; and as there was no tender of amends in this case, they ought not to have more than single costs.

But the Court also said that though at all events the officers of the Excise had no right to treble costs under this statute without having tendered amends, yet whether the tender of amends could give them that right, was a question not involved in the present decision, and which it would be time enough to determine when it actually arose.

Rule absolute without costs.

HOESON AND ANOTHER *against* CAMPBELL. Saturday, June 13th, 1789.

[Referred to, *Vinall v. De Pass*, [1892] A. C. 93.]

A bond was given conditioned for the payment of bills of exchange drawn in England, on A. in the East Indies, in case such bills should be returned to England, protested for non-payment. The affidavit to hold the obligor to bail, after stating "that he was indebted to the deponent in a certain sum," stated also the condition of the bond, and "that the said bills were not paid to his knowledge or belief, in India or elsewhere, but that they were protested for non-acceptance in India, and were still

unpaid." It was no objection to this affidavit, that it was stated that the bills were unpaid to the knowledge or belief of the plaintiff. But it was bad, because it introduced a new term not mentioned in the condition of the bond ([vide post, vol. ii. p. 163]). But to remedy this the plaintiff might have filed a supplemental affidavit ([ante, p. 10, note]).

On a motion of Hooke, Serjt., a rule was granted in the last term, to shew cause why a common appearance should not be entered for the defendant, and the bail-bond given up to be cancelled. The ground of the motion was the insufficiency of the affidavit to hold to bail; which stated

That "Alexander Campbell was indebted to the deponent, Hobson, and to Andrew French, in the sum of 17,600*l.* and upwards, for principal and interest upon three several bonds [246] or writings obligatory, under the respective hands and seals of Sir James Cockburn, Bart. Henry Douglas, Esq. Lauchlan Maclean, and the said Alexander Campbell; the first of which said bonds bears date the 17th day of July 1776, and in the penal sum of 12,104*l.* the second, the 23d of September 1776, in the penal sum of 6104*l.* and the third, the 23d of September 1776, in the penal sum of 6000*l.*

"That at the foot of the said bond, dated the 17th of July, 1776, is the following condition, or to the effect thereof.

"Whereas the above bounden Sir James Cockburn hath delivered to the above named Andrew French and Daniel Hobson, for value received, a certain set of bills of exchange, four in the set, bearing even date herewith, drawn by the said Sir James Cockburn on Lieutenant Colonel Cockburn, in Bombay, in the East Indies, for 12,104*l.* and one third star pagodas, payable at 60 days sight, to the order of the said Douglas and Cockburn, and by them indorsed, as also by the said Lauchlan Maclean, Alexander Campbell, a true copy of which said set of bills of exchange is hereunder written.

"The condition of the above written obligation is such, that if the said set of bills of exchange, or any of them, shall be duly paid at Bombay aforesaid, according to the true meaning thereof, or if the said set of bills of exchange or any of them shall be returned and come back to England, duly protested for want of payment, (no one of them having been acquitted as aforesaid,) and the said Sir James Cockburn, Henry Douglas, Lauchlan Maclean, and Alexander Campbell, any or either of them, their or either of their heirs, executors, or administrators, shall and do well and truly pay or cause to be paid unto the said Andrew French and Daniel Hobson, their executors, administrators or assigns, within 30 days next after any of the said set of bills of exchange returned with protest duly made for want of payment thereof, (no one of them having been acquitted as aforesaid,) shall be produced, or legal notice thereof given to the said Sir James Cockburn, Henry Douglas, Lauchlan Maclean, and Alexander Campbell, or any of them, their, any or either of their heirs, executors, or administrators, the full amount of such bills of exchange as shall be so returned, at and after the rate of 10*s.* sterling per pagoda; then the above written obligation to be void, else to be and remain in full force and virtue."

The conditions annexed to the other bonds were to the same effect.

[247] The deponent then proceeds to state,

"That none of the said bills of exchange were to his knowledge or belief paid, either at Fort St. George, Bombay, or elsewhere in India, in the conditions of the said respective bonds named, but that such bills were respectively protested in India for non acceptance, and that the same are now unpaid, &c."

In the last term, Adair, Le Blanc, and Lawrence, Serjts., shewed cause, contending that on the face of the affidavit which was sufficiently certain there was no ground for the application. The deponent swears positively in the beginning of the affidavit, that the defendant is indebted to him and the other plaintiff in a sum certain, on three bonds which made the cause of action. This is a substantive independent sentence, and if it stood by itself would be clearly sufficient. The affidavit then goes on to state how the cause of action arose; but as this was not necessary, it was surplusage, and surplusage shall not vitiate.

This case differs from that of the cause of action being insufficiently stated, as in the case of *Mackenzie v. Mackenzie* (1 Term Rep B. R. 716) Where the cause of action is a bond, it is not necessary to look to the condition, in making an affidavit

to hold to bail. If it were a single bond, it must necessarily be sufficient to hold to bail. The condition can only be taken advantage of by oyer and pleading. The plaintiff was not obliged to set it out. But it even appears from the condition as stated, that the bonds were given for value received. The defendant also, by the practice of this Court might have filed a cross affidavit, and shewn the insufficiency of that made by the plaintiff. The only doubt which can be reasonably entertained, as to the positiveness of this affidavit is, that it states that none of the bills of exchange were paid to the "knowledge or belief" of the plaintiff. But on many occasions, the belief of the party is sufficient. 4 Burr. 1992.

Then the material question is, whether non-acceptance be not equivalent to non-payment, so at least as to give the plaintiff a right to recover. But it has been decided in the King's Bench (Doug. 55, last edition, Buller N. P. 269), that non-acceptance gives a right of action against the drawer of a bill without waiting for the day of payment.

Rooke and Bond, Serjts., *contrâ*. An affidavit to hold to bail is insufficient, if it be conceived in terms of reference. 2 Stra. 1157.—1 Term Rep. B. R. 716. Here the conditions of the several bonds were referred to, and yet the deponent does not afterwards shew that those conditions were not com-[248]-plied with. By the conditions, the bills were to be returned protested for non-payment, but the affidavit states only that they were protested in India for non-acceptance, and are now unpaid; and this but on the knowledge or belief of the plaintiff. But in 2 Stra. 1226, "belief" was holden not sufficient. In transactions of this kind in India, where bills are drawn payable a great length of time after sight, effects are frequently sent to the hands of the drawee during that time. The bonds were therefore designed to guard against the non-payment of the bills, and not merely their non-acceptance. The conditions accordingly were that they should be returned protested for non-payment. There are no merits therefore disclosed on the affidavits. Neither is there at the conclusion a positive allegation of a debt being owing. It is stated that to the knowledge or belief of the deponent the bills were not paid: but this might be true, and still no debt arise, as the laches of the holder might discharge the drawee after a certain period. Though the former part of the affidavit were sufficiently positive if it were unconnected with the latter; yet by being so connected, it becomes uncertain and defective. A general affidavit of debt, referring to special causes of the debt, which are insufficient, is vitiated by such reference. So where a man says to another "you are a thief," for you have stolen such a thing (Cro. Jac. 114. Buller's N. P. 5), the stealing of which is not a felony, the words are not actionable, because the reason is given for calling the person a thief, but which is not sufficient to support the allegation. The Act of Parliament which requires the cause of action to be explicitly stated, was made for the protection of the liberty of the subject, and is strictly to be observed.

Cur. adv. vult.

On a subsequent day in the last term, LORD LOUGHBOROUGH said, that the Court felt no difficulty in declaring their opinion on one part of the case, namely, that the affidavit was sufficiently positive as far as it stated the knowledge or belief of the deponent that the bills were unpaid; there being authorities enough to prove that a more positive statement was not required, where, from the nature of the question, the party could only have a ground of belief, and could not make a direct assertion. But here the conditions of the bonds being set out, it appeared that the affidavit introduced another term into them, namely, that of the bills being returned protested for non-acceptance, which was material, and rendered the affidavit [249] bad. But his Lordship said, that the plaintiffs might be permitted to file a supplemental affidavit, if they chose it, according to the practice of this Court.

On this day the counsel for the defendant stated that the plaintiffs had been apprized of the opinion of the Court, delivered as above, but that they had no intention to file a supplemental affidavit. Therefore

The rule was made absolute.

M'QUILLIN *against* COX. Friday, June 19th, 1789.

In an action of debt on simple contract, the declaration is good though it specify by the several counts a less sum than appears to be demanded by the recital of the writ, and yet assigns as a breach the non-payment of the sum demanded in the writ.

In such an action, the plaintiff may prove and recover a less sum than is stated to be due (a).

This was an action of debt on simple contract. The declaration, after reciting that the defendant was summoned to answer the plaintiff in a plea that he render to him 500l., &c., contained five counts. 1st. That the defendant was indebted to the plaintiff in 100l. for goods sold and delivered. 2d. 100l. on a quantum meruit. 3d. 100l. on a mutuatus. 4th. 50l. for money had and received. 5th. 100l. on an account stated. Each count ended in the usual form, with stating, "that an action had accrued, to demand and have the said last mentioned sum of money, part and parcel of the said sum of 500l. above demanded." The breach was assigned in the following words "yet the said James (although often requested, &c.) hath not as yet rendered the said sum of 500l. above demanded, or any part thereof to the said John, but to render the same or any part thereof to the said John, hath hitherto wholly refused, &c." damages 20l.

Special demurrer, "for that the said John by his declaration hath demanded of the said James, to render to him the said John, 500l., and yet the several sums of money, claimed to be due and owing to the said John by the said James, upon the several counts of the said declaration, do not amount in the whole to 500l. so demanded by the said declaration, but only to the sum of 450l., and for that it does not appear, from or by the said declaration, that the said John hath any pretence or ground in law, whereby to demand the said sum of 500l. &c."

Bond, Serjt., in support of the demurrer. The action of debt was originally brought on simple contracts, but gradually gave way to assumpsit, partly because the defendant might wage his law, and partly because it was necessary that the specific sum demanded should be recovered. But the nature of the action remains the same, and the plaintiff must state in [250] his count the same sum as was demanded by the writ, or shew some act done by which the whole is not due, as demanded. In the present case there appeared, on the face of the declaration, to be 50l. short of the original demand, and which was unaccounted for. Even supposing that the plaintiff may recover a verdict for a less sum than he demands, yet this question arises on a special demurrer, on account of the declaration being contrary to the rules of law, and is not affected by the sum which a jury may give in a subsequent stage of the proceedings. Moore, 298. *Smith v. Vowe*.—Yelv. 5. *Crompton v. Smith*.—2 Lev. 4.

Marshall, Serjt., on behalf of the plaintiff, contended that the only grounds of the demurrer must be, either a mis-recital of the writ, or a variance between the writ and the declaration.

If it be taken to be a mis-recital, it does not vitiate, because upon oyer the writ would appear to support the declaration. 2 Salk. 701. But it has been holden that the recital is unnecessary, 2 Keb. 544. It has been also holden that the recital of a writ cannot be argued from, but the writ itself must be brought before the Court upon oyer. 1 Str. 225. This Court held in a late case on special demurrer, that a mis-recital by stating the defendant to have been attached instead of summoned, did not vitiate the declaration. *Barnard v. Moss*, C. B. Hil. 1788. In which case that of *Warren v. Ward* was cited, C. B. Tr. 1787, where this Court held, that as the recital of the writ was unnecessary, no objection could be made to a mis-recital of it.

But if this should be considered as a variance, and not a mis-recital, yet it is such a variance as is not material. The amount of the sums specified by the different counts ought certainly not to exceed the sum demanded in the writ: because the original writ issuing out of Chancery, is the ground and foundation of the proceedings of that Court into which it is returnable; and such proceedings ought to be conformable to the authority given; at least the authority ought not to be exceeded.

But no such objection can be made against declaring for less than the writ demands. Comb. 260.—Litt. s. 67.—Co. Litt. 54 b.—Moore, 862.—Hob. 38. If the several sums mentioned in the declaration amount to more than the sum in the writ, it is a matter of abatement. In the case of *Crumpton v. Smith*, Yelv. 5, more was demanded

(a) [In the King's Bench, in an action by bill, it is immaterial whether the sums in the several counts amount to a greater or less sum than that demanded in the queritur, for the queritur may be wholly rejected. *Lord v. Houstoun*, 11 East, 62, and see 1 Saund. 288 e. new notes, 5th edit.]

in the declaration than was warranted by the writ: but that case shews that where less is demanded, the Court may give judgment for that sum. Another distinction which the Courts have adopted is, that when the action is [251] grounded on a record, specialty, or statute giving a sum certain, as a penalty, the precise sum must be set forth in the count conformable to the writ, because there ought not to be a variance from the record, specialty, or statute, on which the action is brought. 3 Mod. 41. But where the action is founded on a contract or a statute which gives no certain penalty, a variance is not material, because the plaintiff does not recover according to his demand, but according to the verdict of the jury. Cro. Jac. 128, 498, 629. But supposing this to be a material variance between the writ and declaration, it cannot be taken advantage of without oyer; and after oyer, it must be pleaded in abatement. As the Court will not decide upon the recital of the writ, the declaration must be taken to be good on the face of it. The demurrer is meant as a bar to the action. But as this variance, supposing it to be one, can at most only abate the writ, it cannot be a bar to the action, and therefore is not a ground of demurrer. Com. Dig. tit. Abatement (G, 8).

Bond, in reply, allowed the authority of *Barnard v. Moss*, and that no objection was to be made on account of a mis-recital of the writ; but urged that in the present case, there was a demand of 500l. in the body of the declaration, and only 450l. specified to be due. Each count mentioned the "residue of the 500l. above demanded," and the breach stated that the defendant had not rendered the said sum of 500l. above demanded." The cases cited from Moore and Hobart, only shew that in an action of waste the count may contain less than the writ, but do not affect an action of debt, in which the strictness of the ancient rule ought to be preserved.

The Court were clearly of opinion that the demurrer could not be maintained, because the plaintiff might, in an action of debt on a simple contract, prove and recover a less sum than he demanded in the writ.

Judgment for the plaintiff.

GEHEGAN against HARPER. Saturday, June 13th, 1789.

If a declaration be delivered against a prisoner as such, after he has obtained a supersedeas, it is irregular. But he cannot take advantage of the irregularity, unless he apply to the Court in due time.

The defendant being in the custody of the warden of the Fleet at the suit of the plaintiff, and an appearance being regularly entered, obtained a supersedeas on account of the plaintiff's not having declared in time. After this the plaintiff delivered a declaration against him as a prisoner, and on judgment [252] by default, proceeded to execute a writ of inquiry. Upon which a rule was granted in the last term to shew cause why all proceedings subsequent to the writ of supersedeas should not be set aside.

Rooke, Serjt., in shewing cause against the rule, allowed that the proceedings were irregular, but contended that the defendant was not in this instance intitled to relief, as it appeared that he was superseded on the 12th of April, had notice of interlocutory judgment early in May, but did not make application to the Court before the middle of that month. This delay was merely for the purpose of causing unnecessary expence to the plaintiff, and was a waiver of the advantage which might otherwise be taken of the irregularity. 1 Barnes, 162. 2 Barnes, 211.

Runnington, Serjt., in support of the rule said, that the defendant had applied to the Court in due time; that the next step of which he was bound to take notice after the delivery of the declaration, was the writ of inquiry.

But the Court said, that the defendant could not take advantage of the irregularity, unless he applied in due time; and here he had made an unnecessary delay.

Rule discharged.

GOULD, J., referred to the case of *Hutchins v. Kenrick*, 2 Burr. 1048.

RASHLEIGH *against* SALMON. Saturday, June 13th, 1789.

Where there is judgment by default in an action on a promissory note, the Court will refer it to the prothonotary to ascertain the damages and costs, and calculate interest, without a writ of inquiry (a)¹.

In this action which was on a promissory note, the defendant suffered judgment to go by default. In the last term, Lawrence, Serjt., moved for a rule to shew cause why it should not be referred to one of the prothonotaries to ascertain the damages and costs, and calculate interest on the note without a writ of inquiry. On behalf of the motion he had cited Bayley's Treatise (on the law of bills of exchange, cash bills, and promissory notes 1789), 67. 2 Saund. 106 (last ed.). Dougl. 315. 3 Wils. 61.

A rule to shew cause was accordingly granted, which on this day was made absolute, no cause being shewn.

[253] HAYS AND ANOTHER *against* BRYANT. Monday, June 15th, 1789.

Where a bastard child is born in a parish for whose sustenance the parents neglect to provide necessaries, the parish officers are obliged to do it, without an order of justices for that purpose (a)².

Debt on bond dated January 16, 1782, in the penalty of 50l. brought by the surviving churchwarden and overseer of the poor of the parish of Ridgwell in Essex :

Plea, after oyer of the bond and condition, which was to indemnify the churchwardens and overseers of the poor, and the inhabitants and parishioners of Ridgwell, against the charges which should arise or be imposed upon them, on account of the maintenance and bringing up of such child or children, as one Elizabeth Winch then went with, and should be delivered of ;

Non est factum. 2. Non damnificati.

Replication, issue on the first plea. To the second, that Elizabeth Winch was delivered of two children, and that neither the defendant nor any person in his behalf provided any food and nourishment for them : by reason whereof the inhabitants, &c. of Ridgwell, lest the children should perish for want of necessary food and nourishment were forced and obliged to expend, and did necessarily expend 3l. in providing, &c. and so were damnified, &c.

Rejoinder, that no justice's order was ever made upon the inhabitants, &c. of Ridgwell, for the maintenance and bringing up of the said children, or for the payment or allowance of the money, &c. and so if they did expend, &c. it was of their own voluntary act and wrong, and if they were damnified, it was of their own act and wrong, &c. (a)³.

Sur-rejoinder, that they were damnified on account of the maintenance and bringing up of the said children, within the true intent and meaning of the condition of the bond, &c. and not by their own voluntary act and wrong : on which issue was joined.

It was proved at the trial, that the defendant had agreed to pay 2s. 6d. per week for the maintenance of the children, and in fact paid it up to Michaelmas 1787, and then refused to pay any farther, alleging that the sum was too great. The counsel for

(a)¹ [Vide *Andrews v. Blake*, post, 529. *Longman v. Ferm*, post, 541. *Gould v. Hammersley*, 4 Taunt. 148. But a rule will not be granted to compute what is due upon a bill of exchange for foreign money. *Maunsell v. Massarene*, 5 T. R. 87. See also 1 Chitty's Rep. 621 (n). 2 Saund. 107, 107 a. notes. 5th edit.]

(a)² [Vide *Simpson v. Johnson*, Dougl. 7. As to securities given and money paid for maintenance of bastard children, see *Cole v. Gower*, 6 East, 110. *Watkins v. Hewlett*, 1 Brod. & Bing. 1. *Overseers of St. Martin v. Warren*, 1 B. & A. 491. *Middleham v. Bellerby*, 1 M. & S. 310. *Strangeways v. Robinson*, 4 Taunt. 498. *Adley v. Woolley*, 3 B. Moore, 21. 2 Saund. 84 a. 5th edit.]

(a)³ [This rejoinder is a departure from the plea, and demurrable, see 2 Saund. 84 a. (n) 5th edit.]

the defendant objected, that the plaintiffs or parishioners were not obliged to maintain the children, without a justice's order for that purpose. But Mr. Justice Wilson who tried the cause over-ruled the objection, and a verdict was found for the plaintiffs.

A rule having been granted to shew cause why the verdict should not be set aside, and a nonsuit entered; Bond, Serjt., re-[254]-peated the objection which he made at the trial; and cited the case of *Simpson v. Johnson*, Dougl. 7.

Cockell, Serjt., was going to shew cause, but was stopped by the Court, who held clearly that an order of justices was not necessary to make the officers of the parish liable to do what they were otherwise under a legal obligation of doing, namely, to provide necessaries for the children, and therefore

Discharged the rule.

BOONE *against* EYRE. Monday, June 22d, 1789.

The plaintiff having added the similiter to the replication, and delivered the issue to the defendant, who accepts it but does not pay the issue money, judgment may be signed by the plaintiff without giving a rule to rejoin (a)¹.

The plaintiff's attorney, in this cause, added the similiter to the end of his replication, and delivered the issue with notice of trial to the defendant's attorney, who received it, but did not pay the issue money. In consequence of which, the plaintiff's attorney signed judgment without giving rule to rejoin.

A rule was obtained to shew cause why the judgment and all the subsequent proceedings should not be set aside for irregularity, on the ground that a rule to rejoin ought to have been given.

Against which Lawrence, Serjt., shewed cause, contending that by the practice of the Court, the plaintiff was at liberty to sign judgment without giving a rule to rejoin, where the defendant had accepted the issue, and not paid for it.

Runnington, Serjt., in support of the rule, cited Impy's New Instructor Clericalis (second edition) of this Court, 292, to shew that a rule to rejoin was necessary. But

The Court (after consulting the prothonotary, who said that the practice was, not to give a rule to rejoin where the defendant had received the issue with the similiter added by the plaintiff, and not struck it out)

Discharged the rule with costs.

ROUTLEDGE Executrix of Routledge *against* BURRELL, BART. AND ANOTHER.
Tuesday, June 23d, 1789.

A deed poll containing an insurance against fire may refer to conditions in a printed paper without stamp, seal or signature: and it may be a part of those conditions that the insured shall procure a certificate of his character, and that the loss happened without fraud (a)².

This was an action of covenant on a policy of insurance against fire.

[255] The first count of the declaration stated, "that by a certain deed poll or policy of assurance made, &c. June 18th, 1776, between the testator and the defendants (which said deed poll was casually burnt and destroyed by the fire thereafter mentioned), reciting that the testator had paid a certain sum of money, &c. to the Society of the Sun Fire Office in London, and other particulars of the insurance, the defendants covenanted, &c. that the stock and fund of the said society should be subject and liable to pay to the said testator, &c. all such his damage and loss which he the said testator should suffer by fire, not exceeding the sum of 1000l. according to the exact tenor of their printed proposals, dated July 6, 1775; and the plaintiff further

(a)¹ [But by rule H. 35 G. 3 (post, vol. ii. p. 386. 1 Bos. & Pul. 292 (b)) no judgment shall be signed for non-payment of the issue-money, but it shall remain to be taxed as part of the costs in the cause. So judgment cannot be signed for refusing to pay for half of the paper books delivered to the Judge. *Fulham v. Bagshaw*, *ibid.*]

(a)² [Acc. *Oldman v. Bewicke*, post, vol. ii. p. 577 (n). *Worsley v. Wool*, 6 T. R. 710, post, vol. ii. p. 574 (n).]

said that the printed proposals in and by the said deed mentioned and alluded to, were in substance, and to the effect following, &c. Those proposals were then set out at length, the 10th article of which provided, that "persons insured sustaining any loss or damage by fire were to give notice thereof at the office, and as soon as possible afterwards, and deliver in as particular an account of their loss and damage as the nature of the case would admit of, and make proof of the same by their oath or affirmation according to the form practised in the said office, and by their books of accounts, or other proper vouchers as should reasonably be required; and procure a certificate under the hands of the minister and churchwardens, together with some other reputable inhabitants of the parish, not concerned in such loss, importing that they were well acquainted with the character and circumstances of the person or persons insured, and did know or verily believe, that he, she or they, really and by misfortune, without any fraud or evil practice, had sustained by such fire the loss and damage as his, her or their, loss to the value therein mentioned; but till such affidavit and certificate of such the insured's loss should be made and produced, the loss money should not be payable; and if there appeared any fraud, or false swearing, such sufferers should be excluded from all benefit by their policies; and in case any difference should arise between the office and the insured touching any loss or damage, such difference should be submitted to the judgment and determination of arbitrators indifferently chosen, whose award in writing should be conclusive and binding to all parties; and when any loss or damage was settled and adjusted, the insured were to receive immediate satisfaction for the same, deducting only the usual allowance of 3l. per cent."

[256] It was then averred that the testator was interested in the goods, &c. insured; that they were burnt without fraud, &c.; that the society had notice; that the testator delivered in as particular an account, &c. of his loss on affidavit; that he applied to the minister and churchwardens, and to many reputable inhabitants, &c. to procure a certificate, as in the said 10th article of the said proposals was mentioned, according to the tenor and effect of the said proposals, &c. that he was entitled to such certificate, &c. but that the defendants by false insinuations and promises of indemnity prevailed upon the minister, &c. to refuse to sign it; and that he was ready and willing to submit all matters in difference to arbitration, &c.

The 2d count was similar, but stated the printed proposals to have been destroyed by the fire, &c.

Plea.—As to the supposed breach of covenant in the 1st count, &c. 1. That the testator had not any interest in the goods, &c. 2. Protesting that he was not entitled to a certificate, &c. the defendants did not prevail upon, or persuade the minister, &c. to refuse to sign or make such certificate, &c.: and as to the supposed breach in the 2d count, 1st, no interest, &c. 2ndly, After stating at length the printed proposals, with the 10th article, "that neither the testator, in his life-time, nor the plaintiff, since his death, procured such certificate, &c. as is mentioned and required in that behalf, in and by the said 10th article of the said last-mentioned printed proposals," &c.

Replication.—Issue joined on the three first pleas, general demurrer to the last, and joinder in demurrer.

In support of the demurrer, Marshall, Serjt., argued in the following manner:—

Before the grounds of the demurrer are stated it will be proper to premise, that this being a deed-poll to which the testator was not a party, it is competent to his executor to make exceptions to any condition or restriction attempted to be annexed to it tending to narrow or lessen the protection which it was meant to afford against the calamity of fire.

A deed-poll differs materially from an indenture. An indenture bars either party from excepting to any thing contained in it. Each is estopped from disputing the validity of any part. But it is otherwise of a deed-poll, which is only of one part, and the sole deed of the grantor. The words are his, bind him only, and are to be taken most strongly against him, and in favour of the grantee. It is peculiarly necessary to give this construction to policies of insurance against fire, which are entered into without examination, and without any previous negotiation to settle and adjust the terms of them; and in which the Court will not favour any restriction which does not appear on the face of the policy itself. The plaintiff may therefore make every fair exception to the plea which sets forth those restrictions, both as to

the mode of introducing them into the contract, and the validity of them, supposing them properly introduced. The objections are two:—1. That a condition or restriction cannot be annexed to and made part of a deed by words of mere reference to a printed paper, distinguished only by the date of the year in which it was printed, without any signature, seal or stamp, to give it authenticity. 2. That the restriction in question, though properly annexed to the deed, is in itself bad.

It would be attended with mischievous consequences if parties were permitted to introduce into contracts under seal, by words of uncertain reference, conditions or restrictions in nowise authenticated by signing or sealing. It is a strong proof against such a practice, that there is no authority in the books to warrant it. In them three methods only are pointed out of annexing a condition to a grant. 1. It may be contained in the same deed. 2. It may be indorsed, before sealing, on the same deed. 3. It may be contained in another deed executed on the same day. 1 Roll. Abr. 413, 414. But it cannot be on a subsequent day. Thus if a disseisee release his right, and the disseisor at a subsequent day grant that the release shall be upon such a condition, the condition is void; but it may well be created at the same time as the release, although it be by another deed. 2 Saund. 48. Neither can it be made before the grant. 1 Rol. Abr. 413. If by words of reference a mere printed paper may be made part of a deed, the Revenue would be defrauded of the stamp duties. The same stamp might be used for several deeds. Leases might be drawn on one stamp, referring to a printed form for the usual covenants.

2. If the condition of an obligation, recognizance, &c. be impossible, repugnant, or contrary to law, it does not vitiate the whole instrument, which remains single and freed from the condition. Co. Litt. 206. 1 Roll. Abr. 420. 3 Lev. 74. So if the condition be void for its uncertainty. Now the 10th article of the printed proposals requires that the oath of the loss, &c. shall be “according to the form practised in the office.” But [258] as the practice of the office is always at the discretion of those who conduct it, this clause puts it in their power to impose such an oath as no honest or conscientious man could take. The next clause which requires “a certificate from the minister and churchwardens together with some other reputable inhabitants of the parish, &c.” is equally objectionable. If a fire were to happen in an extra-parochial place, it would be impossible to comply with this condition. It might also be impossible for a stranger, lately come into a parish, to procure a certificate of his good character from persons to whom he is unknown. But supposing him to be of such a character that no one will certify for him, yet he may not be even suspected of setting fire to his house; and then it ought not to be endured, that the directors of the insurance office should evade their contract made for a valuable consideration, under pretence that the sufferer is an immoral person.

Lawrence, Serjt., on the part of the defendants, after saying that the point was clearly decided by the many actions brought against the Sun Fire-Office, in which it was necessary to comply with the terms of the printed proposals, was stopped by

The Court, who said the matter was too clear to admit of a doubt, and accordingly gave

Judgment for the defendants.

FITZHERBERT against SHAW. Saturday, June 27th, 1789.

[Considered, *Elwes v. Maw*, 1802, 3 East, 55. Applied, *Leschallas v. Woolf*, [1908] 1 Ch. 652.]

The purchaser of lands, &c. having brought an ejectment against the tenant from year to year, the parties enter into an agreement that judgment shall be signed for the plaintiff, with a stay of execution, till a given period. The tenant cannot in the interval remove buildings, &c. from the premises which he had himself erected during his term, and before the action was brought.

This was an action on the case in the nature of waste, tried before Mr. Justice Gould at the last Surrey Assizes, in which a verdict was found for the plaintiff; the following circumstances of which appeared from the report of the Judge.

From the year 1765, the defendant was tenant from year to year of the premises in question, which in 1787 were purchased by the plaintiff, who soon after having

given notice to quit, brought an ejectment against him to obtain possession. In March 1788 the parties entered into an agreement, among other things, that judgment should be signed for the plaintiff in the ejectment, with a stay of execution till the Michaelmas following, till which time the defendant was to continue in possession. In this agreement, no mention was made of any buildings or fixtures.

[259] Between the time of entering into the agreement and the ensuing Michaelmas, the defendant took away several things from the premises, among which were a wooden stable which stood on blocks or rollers which he had before removed from an estate of his own adjoining to the premises in question, a shed which he had himself built on brick-work, and some posts and rails which he had also erected. For this, the action was brought. The declaration was in the usual form, and the plea the general issue.

Mr. Justice Gould was of opinion at the trial, that the defendant would clearly have been intitled to take away the above-mentioned articles, if he had done it during the continuance of his term from year to year; but that by the agreement the parties had made a new contract, which put an end to the term (a). According to this opinion, the jury found for the plaintiff.

In the last term a rule was granted to shew cause why the verdict should not be set aside, and a new trial granted.

On this day Bond, Serjt., in support of the rule contended that the defendant had a right to take away the buildings and things which he had himself erected on the premises, the strictness of the ancient rule which allows nothing annexed to the freehold to be removed, being relaxed by modern decisions. 1 Atk. 477, *Ex parte Quincy*. —3 Atk. 13, *Lawton v. Lawton*, and *Law*[260]-*ton v. Salmon*, B. R. East. 22 Geo. 3 (b).

(a) [But see *Penton v. Robart*, 2 East, 88, where it was held that a tenant may remove the articles after the expiration of the term, if he still remains in possession. But if he quits the premises he cannot recover the value of the articles in trover. *Horn v. Baker*, 9 East, 219. *Davis v. Jones*, 2 B. & A. 168. *Colegrave v. Dias Santos*, 2 B. & C. 76.]

(b) *Lawton, Executor of Lawton, v. Salmon*, East. 22 Geo. 3, B. R.

[See *Sanders v. Davis*, 1885, 15 Q. B. D. 220; *In re Hulse*, [1905] 1 Ch. 410.]

In this action of trover brought by the executor against the tenant of the heir at law of the testator, to recover certain vessels used in salt works, called Salt Pans, a case was reserved by consent, which stated,

That the testator some years before his death placed the salt-pans in the works; that they were made of hammered iron, and rivetted together; that they were brought in pieces, and might be again removed in pieces; that they were not joined to the walls, but were fixed with mortar to a brick floor; that there were furnaces under them; that there was a space for the workmen to go round them; that there were no rooms over them; but that there were lodgings at the end of the wych-houses; that they might be removed without injuring the buildings, though the salt-works would be of no value without them, which with them were let for 8l. per week.

The question was, whether the executor or the heir at law were entitled to them?

Mingay, for the plaintiff, said it was stated in the case that the pans were not affixed to the freehold, but might be removed; they ought therefore clearly to go to the executor. He cited *Lawton v. Lawton*, 3 Atk. 13, and the case of the cider-mill there mentioned.

Davenport, for the defendant, argued that the salt-pans were so annexed to the freehold as to pass to the heir at law both in respect to the strict rule of law and the nature of the property itself; although they were not fixed to the wall, yet they were to the floor, which is part of the freehold. Co. Litt. 53 a. 4 Co. 62. *Herlakenden's case*, Moore 177. Owen 70. 2 Vern. 508 (a). As to the case relied on *à contra* in that of *Lawton v. Lawton*, 3 Atk. the question was between a tenant for life and a remainderman, and the distinction between such parties and the heir and executor is recognized by Lord Hardwicke in 1 Atk. 477. Besides, a fire-engine is merely an accessory and not a principal in a colliery, but the wych-houses are of no value without the salt-pans. If they were taken away, the houses would go useless to the heir, and the executor

(a) See also 1 P. Wms. 94, *Beck v. Rebow*.

He also said that under the circumstances of this case, there was an implied contract between the parties to continue the tenancy from year to year, and if so, all the rights which the defendant had under that tenancy must continue. *Beavan v. Delahay*, ante, 5.

[261] Adair, Serjt., was going to shew cause against the rule, but was stopped by the Court, who said it was not necessary to go into the general question, as to the

gain nothing but old iron. On the principles of trade and public convenience which operated with Lord Hardwicke in *Lawton v. Lawton*, the defendant is intitled. The case of the cider-mill is not reported, and was only a *Nisi Prius* determination of Comyns, who in 1 Dig. 594, lays it down that mill-stones go to the heir. It was the opinion of Mr. Wilbraham soon after the case of the fire-engine was decided, that the heir was intitled to fixtures of this kind, and his opinion has ever since been acquiesced in. Though the pans may be removed, yet from their nature and on the rule that the principal shall not be destroyed by removing the accessory, they ought to remain to the heir. This is not a contest between a tenant for years or life and the remainder-man, but between the different representatives of the same person.

Cur. advis. vult.

On a subsequent day Lord Mansfield after stating the case, said,

All the old cases, some of which agree in the Year Books and Brooke's Abridgment, agree, that whatever is connected with the freehold, as wainscot, furnaces, pictures fixed to the wainscot, even though put up by the tenant, belong to the heir. But there has been a relaxation of the strict rule in that species of cases for the benefit of trade between landlord and tenant, that many things may now be taken away which could not be formerly, such as erections for carrying on any trade, marble chimney-pieces, and the like, when put up by the tenant. This is no injury to the landlord, for the tenant leaves the premises in the same state in which he found them, and the tenant is benefitted. There has been also a relaxation in another species of cases between tenant for life and remainder-man, if the former has been at any expence for the benefit of the estate as by erecting a fire-engine, or any thing else by which it may be improved; in such a case it has been determined that the fire-engine should go to the executor, on a principle of public convenience, being an encouragement to lay out money in improving the estate, which the tenant would not otherwise be disposed to do. The same argument may be applied to the case of tenant for life and remainder-man, as that of landlord and tenant, namely, that the remainder-man is not injured, but takes the estate in the same condition as if the thing in question had never been raised.

But I cannot find that between heir and executor there has been any relaxation of this sort, except in the case of the cider-mills, which is not printed at large (a). The present case is very strong. The salt spring is a valuable inheritance, but no profit arises from it, unless there is a salt work; which consists of a building, &c. for the purpose of containing the pans, &c. which are fixed to the ground. The inheritance cannot be enjoyed without them. They are accessories necessary to the enjoyment and use of the principal. The owner erected them for the benefit of the inheritance; he could never mean to give them to the executor, and put him to the expence of taking them away without any advantage to him, who could only have the old materials or a contribution from the heir in lieu of them. But the heir gains 8l. per week by them. On the reason of the thing therefore, and the intention of the testator, they must go to the heir. It would have been a different question if the springs had been let, and the tenant had been at the expence of erecting these salt works: he might very well have said, "I leave the estate no worse than I found it." That, as I stated before, would be for the encouragement and convenience of trade, and the benefit of the estate. Mr. Wilbraham in his opinion, takes the distinction between executor and tenant. For these reasons we are all of opinion, that the salt-pans must go to the heir.

Postea to the defendant.

(a) ["Between heir and executor the rule obtains with the most rigour in favour of the inheritance, and against the right to disannex therefrom, and to consider as a personal chattel any thing which has been affixed thereto," per Lord Ellenborough, *Elwes v. Mawe*, 3 East, 28.]

right of a tenant to remove buildings, &c. since the fair interpretation of the agreement was, that as the defendant was to remain in possession for a certain time after that agreement was entered into, and judgment signed in the ejectment, he should do no act in the mean time to alter the premises, but should deliver them up in the same situation as they were in when the agreement was made and the judgment signed.

Rule discharged.

JOHNSTONE Executor of Johnstone against MARGETSON.

Monday, June 29th, 1789.

During the late war, a flag-officer on a certain station gave orders to a ship under his command to sail on a cruise; after the orders were given, but before a prize was taken he accepted another command; but no other flag-officer was appointed to succeed him on his former station. He was not intitled to one eighth of a prize taken by the ship which sailed in consequence of his orders, under the proclamation for the distribution of prizes (a).

This was an action brought by the executor of the late Commodore Johnstone against the prize agent, to recover 914l. being one-eighth part of the money arising from the sale of a Spanish ship under the King's proclamation, dated the 25th of June, 1779, for granting the distribution of prizes during the then hostilities with Spain.

The declaration was for money had and received, with the usual counts.

The cause was tried at the sittings after Hilary term 1788, before Lord Loughborough, when a verdict was found for the plaintiff, subject to the opinion of the Court on the following case.

On the 16th of December, 1780, the deceased being then at Spithead, and a flag-officer and commodore on the Lisbon station, wrote an order to Capt. Mann, who was then commander of the "Cerberus" frigate, one of the squadron under the command of the deceased on the said station, to sail on a cruise: which order was received by Capt. Mann at Lisbon, on the 17th of January, 1781, who in consequence of it sailed on the 28th of January, 1781, and on the 25th of February, 1781, took as prize the "Grana," a Spanish frigate.

On the 3d of March, 1781, Captain Mann arrived at Plymouth with the prize, and wrote to the deceased then at Spithead, informing him of his arrival.

[262] On the 19th January 1781, a commission had been made out from the Admiralty, appointing the deceased to another command with certain other ships among which the "Cerberus" was not included; which commission he received on the 3d of February 1781.

After the 19th of January 1781, no orders were addressed by the Admiralty to the deceased as commander on the Lisbon station, nor was any other flag-officer appointed to that station.

This was argued in Trinity term 1788, by Adair, Serjt., for the plaintiff, and Lawrence, Serjt., for the defendant; and a second time in Easter term last, by Le Blanc, Serjt., for the plaintiff, and Bond, Serjt., for the defendant. On the part of the plaintiff it was contended in substance as follows.

The first clause of the proclamation material to the present question, is that which directs, that after the produce of any prize shall be divided into eight equal parts, "the captain and captains of any of our said ships and vessels of war, who shall be actually on board at the taking of any prize, shall have three-eighth parts; but in case any such prize shall be taken by any of our ships or vessels of war under the command of a flag or flags, the flag-officer or officers, being actually on board, or directing and assisting in the capture, shall have one of the said three-eighth parts, the said one-eighth part to be paid to such flag or flag-officers in such proportions, and subject to such regulations as are hereinafter mentioned."

(a) [As to the right of flag-officers to prize-money under various proclamations, see *Lord Nelson v. Tucker*, 3 Bos. & Pul. 257, S. C. in error, 4 East, 238. *Drury v. Lady Gardner*, 2 M. & S. 150. *Lord Duncan v. Mitchell*, 4 M. & S. 105. *Lord Keith v. Pringle*, 4 East, 262. *Harvey v. Cooke*, 6 East, 220. *Holmes v. Rainier*, 8 East, 502. *Lady Gardner v. Lyne*, 13 East, 574. *Donelley v. Popham*, 1 Taunt. 1. *Duckworth v. Tucker*, 2 Taunt. 7.]

Under this clause, the deceased commodore was entitled to one eighth of the prize in dispute, since the giving orders is a direction and assistance. Having given the order, he was entitled to all the beneficial consequences of it. His personal presence was not necessary. Captains by this clause must be actually on board at the time of the capture, otherwise they have no right to share in the prize; but the direction as to flag-officers is in the disjunctive; they must be either on board, or assisting and directing, and the only way of assisting and directing where the flag-officer is not on board, is by giving orders.

The next clause to be considered is that which is in the following terms, "We do hereby will and direct, that the following regulations shall be observed concerning the one-eighth part herein before mentioned to be granted to the flag, or flag-officers who shall actually be on board at the taking of any prize, or shall be directing or assisting therein; first, that a flag-officer commander-in-chief, when there is but one flag-[263]-officer upon service, shall have to his own use the said one-eighth part of the prizes taken by ships and vessels under his command: secondly, that a flag-officer sent to command at Jamaica, or elsewhere, shall have no right to any share of prizes taken by ships or vessels employed there, before he arrives at the place to which he is sent, and has actually taken upon him the command: thirdly, that when an inferior flag-officer is sent out to re-inforce a superior flag-officer at Jamaica or elsewhere, the superior flag-officer shall have no right to any share of prizes taken by the inferior flag-officer, before the inferior flag-officer shall arrive within the limits of the command of the superior flag-officer, and actually receive some order from him. Fourthly, that a chief flag-officer returning home from Jamaica or elsewhere, shall have no share of the prizes taken by the ships or vessels left behind to act under another command." Now these clauses were evidently designed to prevent disputes between two flag-officers, respecting the one-eighth part; but the present question is between a flag-officer and a captain, whether the captain shall receive three-eighths, or only two, and the flag-officer the remaining third. But by the usage of the Navy, and the fair construction of the former part of the proclamation, a captain is only to have the whole three-eighths, when he does not act under the command of a flag-officer, but receives his orders immediately from the Admiralty, or when he takes a prize in pursuance of a plan formed by himself. But allowing the latter clauses of the proclamation to be applicable to the present case, they are clearly in favour of the plaintiff. A flag-officer coming new on a station has no right to any share of prizes taken by ships on that station, before he actually arrives and takes upon him the command. The reason of this exclusion must be, that he has not been assisting or directing, by giving orders. In other cases the right is vested from the time of giving the orders. By the fourth regulation a flag-officer returning home, is to have no share in prizes taken by ships left behind under another command. But when he does not leave the ship under another command, (as in the present case,) then his right is not taken away: unless he were entitled by the other clauses, this restriction would be superfluous. If the right of the flag-officer were divested merely by quitting his station, it would be absurd to specify the case of leaving ships behind under another command. By the course of the Navy, a captain once under the command [264] of a flag-officer continues so till another is appointed. Here the words "another command" must be taken to mean the command of another flag-officer.

But in truth these clauses relate only to questions between two flag-officers. It appears from a search made in the offices, that before the year 1744 the proclamations in time of war contained no particular regulations respecting the share of flag-officers, which then stood upon the general rule. In that year, regulations were inserted. The first was the same as that in the present proclamation: the second, that no flag-officer sent out should have any share, &c. "before he arrived within the limits of his command:" the third, similar to the second, with regard to an inferior flag-officer sent out to reinforce a superior: the fourth, that a chief flag-officer returning home should have no share in prizes taken "by ships, &c. left behind at Jamaica or elsewhere after he was got out of the limits of his command." In the year 1756, these regulations were altered pursuant to a representation from the Lords of the Admiralty, to whom the matter was referred by an order of the King in Council, to the form in which they stand at present. In the second article, instead of the words "before he arrives within the limits of his command," were inserted "before he arrives at the place to which he is sent, and actually takes upon him the command." To the third

article, were added "before they (the inferior flag-officers) "actually receive some order from him" (the superior). In the fourth article, instead of the words "ships left at Jamaica or elsewhere, after he is got out of the limits of his command," were inserted, "ships left behind to act under another command." This comparative view clearly shews, that these regulations were designed merely to prevent disputes between flag-officers, where one was going out, and the other coming home, respecting the limits of their respective commands, when they were in such and such latitudes, and that in the year 1756, a more pointed description was given to the regulations, as they stood in 1744, which was adopted in the present proclamation, but which does not include the present case, there being no other commander on the Lisbon station, after Commodore Johnstone had quitted it. In the case of *Taylor v. Lord H. Paulett* (a)¹, it was decided that the plaintiff, [265] who was in similar circumstances with Captain Mann, could not recover. In the case of *Pigot v. White* (a)²,

(a)¹ *Taylor v. Lord H. Paulett*, at Nisi Prius 1759.

This was an action for money had and received by the defendant, as the admiral's share of a prize, taken by the plaintiff's ship, which sailed from the Downs on a cruise under orders from defendant, who commanded as admiral on that station. The ground of the action was, that, before the prize was taken, the defendant's command was determined, he being superseded by Admiral Smith.

Admirals Boscawen and Knowles were called as witnesses to prove the discipline of the Navy, in regard to the determination of an officer's command.—They both agreed, that where an admiral detaches a ship from his squadron, upon intelligence which he had himself received, and to execute a plan not prescribed to him by the Admiralty, but formed by himself, though he should be superseded before that ship had finished her cruise, he continues answerable for her, and she does not become under the charge of the admiral who succeeded him, till she has rejoined the squadron : and in such a case they both seemed to think that the admiral who was accountable for the ship, was entitled to the prize money. But if the ship was detached by an admiral, in consequence of particular orders to him from the Admiralty to send one to such a station, or on a particular service named, the admiral had no further charge of the ship, than while he was actually in command, but when he was superseded, transferred it, as he did his standing orders, to the admiral who succeeded : and that the admiral upon the command at the time of the capture, was entitled to the prize-money, notwithstanding the captain taking the prize had received no order from him.

Lord Mansfield had no doubt upon the words of the proclamation for the distribution of prizes, that the plaintiff could have no title to recover, because there never was an interval in which his ship was not under the command of an admiral ; and therefore, though it might be a question, whether the share of an admiral belonged to Admiral Smith, or to the defendant, yet without doubt the plaintiff was not entitled to it. His counsel did not accept Lord Mansfield's offer of a case made for the opinion of the Court, but rather permitted him to be nonsuited.

(a)² *Pigot v. White*, Easter 25 Geo. 3, B. R.

This was an action of assumpsit for money had and received, to the use of the plaintiff. At the trial a case was reserved, which was in substance as follows : that Admiral Digby was in July 1782, commander on the North American station ; that on the 7th September, Admiral Pigot superseded Admiral Digby, and took him under command ; before which time Admiral Digby had sent out cruisers, which after that date took several prizes. The question was, whether Admiral Pigot was entitled to a share of these prizes as commander-in-chief ?

Lord Mansfield. I certainly at the trial did not hint which way my opinion was, out of respect to the contending parties, and the value of the thing. I told them I would, if they pleased, make a case of it. I have not a particle of doubt. In many cases of prize, the value of the prize in question, and the hardship, have occasioned authoritative explanations by the King. But in a case like the present, there was no doubt from the beginning, but that the admiral in command was always entitled to a share. Formerly indeed, the moment an admiral was appointed to a command, he shared in all prizes taken on that station, even before he joined. But that is altered, for they cannot now have a share of prizes till they come within the limits of their command. It is no matter who gave the orders or who sent them out. The plaintiff

the prize was taken after Admiral Pigot had arrived within the limits of his command in America, and actually superseded Admiral Digby. That case was therefore within the letter of the proclamation, and cannot be applied to the present.

It was argued, on the part of the defendant, that the commodore could only be entitled, if at all, under the general clause which gave one of three-eighths to a flag-officer, where the prize was taken by a ship under the command of a flag-officer; there was nothing in the subsequent clauses which could give it him; [266] that his command on the Lisbon station could not be understood to have continued till the time of the capture, as he had accepted another, and the duties of both together were incompatible. Dyer, 159, 197. It was like an office by writ or patent, which ceases on the acceptance of another. If a sheriff issue his warrant to the bailiff to execute a writ, and before execution a new sheriff be appointed, the bailiff is under the direction of the latter. If the Judge of one Court be removed to another, and before his removal make an order, such order, though executed, is not considered as being under his particular direction. The object of the proclamation was to encourage the captors actually on board, by giving them the prizes. There must be either an actual or constructive presence to entitle an officer as a captor. But in the present case there could be neither, the commodore having no authority over Captain Mann, at the time of the capture. His command must have ceased, either on the 19th of January when his new commission was made out, or on the 3d of February when he received it. From that time Captain Mann acted as the immediate officer of the Admiralty, to whom he was amenable. The express words of the proclamation, are "under the command of a flag-officer," but if a flag-officer be entitled under this clause, after he has quitted the former command and taken another, he would with equal reason be entitled to the end of the war, or if he were disgraced; or his executor if he died after giving orders, but before the capture. The 4th clause does not imply that another flag-officer must be left in command: another command means a different command, that of the senior captain left behind, was sufficient to answer such a description. It was not necessary that another flag-officer should be appointed, to put an end to the command of the deceased on the Lisbon station; that was effected by his appointment to the expedition against the Cape of Good Hope. Where a flag-officer quits his station to return home, the command devolves on the senior captain; but if it be thus when he is returning from his station, it must be so when his command is actually determined. As to the case of *Taylor v. Lord H. Paulett*, if Commodore Johnstone had been suspended as Lord H. Paulett was, the officer succeeding him would have been entitled, but here there was no other appointed. That case therefore is not in point. The case of *Pigot v. White* proves that a flag-officer is not entitled to a prize merely by giving an order to cruize. There Admiral [267] Digby had given the order, but Admiral Pigot had a right to the flag officer's share of the capture.

It was replied,

That though the right of the deceased commodore depended on the former clause in the proclamation, yet the subsequent regulations might be called in to explain it. There are but two ways in which a command or office at common law once vested can determine: the first is, by direct revocation; the second, by the acceptance of another incompatible with it. In the present case, the two commands were not incompatible. A general has often the command of two divisions of an army at the same time. So the command of two fleets, though it may be inconvenient, is not in its nature repugnant. The command, then, of the commodore on his former station did not expire merely by his being appointed to another. If an officer dies, or is killed in battle after giving orders, he is considered as a captor with respect to a share in the prize, and his executors are intitled. In such case, the command is determined, and yet the right attaches. If Captain Mann, not having any other orders, had disobeyed those given by the commodore, he would have been amenable to a court-martial; but if the command was at an end, he could not be answerable for disobedience to an officer whose authority did not exist. Obedience and command are co-relative terms;

was commander-in-chief at the time the prizes were taken, and therefore he is certainly entitled to the prize-money.

The three other Judges were of the same opinion.

Postea to the plaintiff.

if the order affected Captain Mann, his obedience was to the commander who gave it. The words "other command" in the fourth clause cannot mean that of a senior captain, since if that were the construction, the clause would be absurd, as no case could exist where a ship would not be under another command; they must therefore mean the command of another flag-officer. In the case of *Pigot v. White* it was expressly stated that Admiral Pigot had taken Admiral Digby under his command before the prize was made: there Admiral Pigot was the other flag-officer. Here there was no other flag-officer appointed, therefore Captain Mann was not left to act under "another command."

On this day judgment was given by

LORD LOUGHBOROUGH, who, after stating the case reserved, proceeded as follows:

On the argument it was contended in behalf of the plaintiff, that the late Commodore Johnstone was intitled to one-eighth part of the prize taken by Captain Mann, under that clause of the proclamation which gives such share to the flag-officer who [268] should be actually on board, or directing and assisting in the capture. It was also contended that the regulation respecting a flag-officer returning home was applicable to this case, and in favour of the plaintiff. That regulation is, that where a flag-officer is sent out to command on any station, he shall have no share of any prize taken by ships employed there, before he arrives at the place to which he is sent, and actually takes upon him the command; and that a flag-officer returning home shall have no share of the prizes taken by the ships or vessels left behind to act under another command. But it was said, that as the order was given by Commodore Johnstone, and as the cruise began under his command, and no other flag-officer appointed to succeed him, his command must be understood to have continued while the capture was made, and therefore the plaintiff was entitled to recover. On the part of the defendant it was argued, that by the clause of the proclamation under which the right of Captain Mann attached, three-eighths of all prizes were given to the captain on board at the time of the capture, with an exception only of the case of a flag-officer being actually on board, or directing and assisting in the capture, who in such case was to have one of those three-eighths; and therefore to give a flag-officer any title to such share, it was necessary that the ship should be actually under his command at the time of the capture; but where he had quitted the command, he could not be intitled.

I am to declare the opinion of the Court, that under the proclamation Captain Mann had a right to the whole three-eighths. To intitle any other person, it was necessary that two things should concur, namely, that both the order should be given, and the capture made under the actual command of a flag-officer, though it need not be under the same flag. The question then is, whether the commission sent from the Admiralty on the 19th of January to Mr. Johnstone, appointing him to take another command, did not amount to a determination of his command on the Lisbon station? On this, our opinion is, that by fair and natural presumption, though it does not follow as a strict necessary consequence, when the Admiralty gives an order to an officer to go to the westward, who before commanded to the eastward, all his former duty ceases, unless there is some special reason to prove the contrary, from the time he accepts the other command. We therefore think, in the present case, that as the prize was taken when Commodore Johnstone was not commander on that station, there must be

Judgment for the defendant.

[269] DRIVER ON THE SEVERAL DEMISES OF BURTON *against* HUSSEY AND OTHERS.
Monday, June 29th, 1789.

In order to discontinue an estate-tail, it is necessary that the party discontinuing should be actually seized by force of the entail (a).

In ejectment, a case was reserved for the opinion of the Court, the material part of which stated, that

By a marriage-settlement, Mary Burton was tenant for life of the premises in question, remainder to Richard Williams (the intended husband,) for life, remainder

(a) [Accord. *Doe, dem. Jones v. Jones*, 1 B. & C. 238.]

to trustees to preserve contingent remainders, remainder to Sarah Bishop (the intended wife,) for life, in bar of dower, &c. remainder to the first and other sons of Richard Williams and Sarah Bishop, in tail male, remainder to their daughters as tenants in common in tail general, remainder to Mary Burton in fee.

The marriage took effect, and some time afterward, Henry Burton, the husband of Mary Burton, joined with her in levying a fine sur cognizance de droit tantum with release and warranty of her remainder in fee, to her use for life, remainder to the use of the heirs of her body by the said Henry Burton, or any future husband in tail general, remainder to Henry Burton in fee. Richard Williams died in the life-time of Sarah (Bishop) his wife, but left no issue. Henry Burton also died without leaving issue, having devised all his estates, &c. whatever, to Michael Burton, his brother and heir at law, under whom the lessor of the plaintiff claimed. Afterwards Mary Burton and Sarah Williams, (late Bishop,) joined in levying a fine sur cognizance de droit come ceo, &c. of the premises, to the use of certain persons in fee, under whom the defendant claimed.

On this case, a doubt was suggested, whether the estate tail, which Mary Burton took by the fine sur cognizance de droit tantum was not discontinued by the fine sur cognizance de droit come ceo, &c., and the remainder over to Henry Burton, divested and turned to a mere right, so as to take away the right of entry, and put the plaintiff to the necessity of bringing a real action.

But on a subsequent day, it was admitted by the counsel for defendants (Serjts. Adair and Runnington,) that as Mary Burton was tenant for life under the settlement, when she joined in levying the fine sur cognizance de droit come ceo, &c. there was no discontinuance of the estate-tail in remainder. On this point, it was stated at the Bar, and assented to by the Bench, as a settled rule of law, that in order to work a discontinuance of an estate-[270]-tail, it is necessary that the party discontinuing should be actually seised by force of the entail. Litt. s. 637.—*Bredon's case*, 1 Co. 76.—*Earl of Clanricard's case*, Hob. 273 (a)¹. *Stephens v. Britteridge*, 1 Lev. 34.—1 Roll. Abr. 634.—Gilb. Ten. 117.—*Cruise on Fines*, 254, 255.

THE DUKE OF ST. ALBAN'S *against* SHORE. Monday, June 29th, 1789.

[Commented on, *Martin v. Smith*, 1805, 6 East, 561. Considered, *Bastin v. Bidwell*, 1881, 18 Ch. D. 246.]

Where in articles of agreement under a penalty, there are mutual covenants between A. and B. to do certain acts, and also a covenant which goes to the whole consideration on each side; to an action of debt for the penalty, brought by A. against B. on account of the non-performance of his part, B. may plead in bar a breach by A. of the covenant which goes to the whole consideration. So that where in articles of agreement for the sale of lands, it was agreed that A. the seller should take in part of payment, a conveyance of other lands belonging to B. the buyer, and it was also agreed that all timber trees which were then upon any of the estates should be valued by appraisers, and paid for by the respective purchasers at a given time; to an action of debt by A. against B. for the penalty, on his refusal to complete the purchase, B. may plead, that A. before the time, cut down a certain number of trees, and thereby rendered himself unable to perform, and it was impossible for him to perform the agreement. To intitle himself to the penalty, the plaintiff must shew a strict performance on his part. Qu. A. having covenanted to make a good title to B. at his expence whether it be a good averment, that A. was capable, ready and willing to make a good title, if B. would have prepared the conveyances (a)²? Qu. Also whether a breach was well assigned, stating that B. did not, nor would accept the title; whether it ought not to have shewn, that A. tendered a good title to him, which he refused (b)?

Debt for 500l. the penalty of articles of agreement.

The declaration stated the agreement to have been made between the plaintiff and

(a)¹ S. C. 2 Danv. 577. Sir Thomas Raym. 36. 1 Siderf. 83.

(a)² [*Ferry v. Williams*, 8 Taunt. 62. 1 B. Moore, 498, S. C.]

(b) [*Phillips v. Fielding*, post, vol. ii. p. 123, and the note there.]

defendant on the 30th of March 1787, by which the defendant was to purchase of the plaintiff a certain farm with the appurtenances, together with an acre and half of boggy land, at the price of 2594l. which was to be paid at Lady-Day then next, in the following manner; the plaintiff was to accept of a conveyance and surrender of certain copyhold and leasehold premises of the defendant, at the price of 1820l. (to be deducted from the before-mentioned sum of 2594l.) the defendant to convey those premises at the expense of the plaintiff unless a fine should be necessary, the expense of which the defendant was to pay; and the plaintiff to make a good title to the defendant at his (the defendant's) expense, unless a fine or recovery should be necessary, for which the plaintiff was to pay, who, on executing the conveyances, was to receive the rest of the purchase-money. All timber trees, elms, and willow trees, which then were upon any of the above estates, to be fairly valued by two appraisers, and the prices and values thereof to be paid by the respective purchasers of the estates at the time before mentioned: the rents of the respective estates to be received by the owners till the 24th of March then next. It was also agreed, that in case the plaintiff should not be enabled to make a good title to the said estate before the said 24th of March, that agreement should be void. And although the plaintiff had done and performed every thing on his part, &c. yet protesting that the defendant had not done any thing on his part, &c. "in [271] fact, the said duke saith, that he the said duke always from the time of the making of the said articles of agreement, until and upon the said 24th day of March next ensuing the date thereof, and always since hath been and is capable, ready and willing to make a good title to the said William Shore, of the said farm and premises, and boggy land so agreed to be purchased by the said William Shore as aforesaid, and to execute and cause to be executed, necessary and proper conveyances, and assurances, of the said farm, and premises, and boggy lands, to the said William Shore, if the said William Shore would have drawn and prepared the same for execution, according to the form and effect of the said articles of agreement, to wit, at Hanworth aforesaid: and the said duke avers, that he the said duke, before the 25th day of March, being Lady-Day 1788, to wit, on the 22d day of March A.D. 1718, at Hanworth aforesaid, gave notice to the said William Shore, that he the said duke was ready and willing at any time, to make a good title to the said William Shore, of the said farm, and premises, and land, so agreed to be purchased by the said William Shore, and to execute and cause to be executed proper deeds, conveyances, and assurances, for that purpose, if the said William Shore would prepare the same, he the said duke then and there being, and still being enabled to make, and capable of making, a good title, to the said William Shore, of the said farm, and premises and land, according to the form and effect of the said articles: yet the said William Shore did not, nor would, on or before the said 24th day of March next ensuing the date of the said articles of agreement, nor hath he at any time hitherto drawn or prepared, or caused to be drawn or prepared to be executed any deed, conveyance or assurance whatsoever, of the said farm, and premises, and lands mentioned in the said articles of agreement, and so agreed to be purchased by the said William Shore as aforesaid, nor did, nor would pay the said purchase-money, or any part thereof, nor did, nor would accept, the said title, according to the said articles of agreement; but on the contrary thereof, the said William Shore hath wholly neglected and refused, and still doth neglect and refuse to draw or prepare any deed, conveyance, or assurance of the said farm, premises, and land, unto the said William Shore, or to pay the said purchase-money, or any part thereof, or in any wise to carry the said articles into execution, contrary, &c."

[272] Plea—"That the said duke was not capable, ready, and willing to make, nor could he the said duke make a good title to the said William of the said farm so agreed to be purchased, according to the tenor and effect of the said agreement, &c. And for further plea, &c. that after the making of the said agreement, and before Lady-Day then next following, to wit, on the 20th of March A.D. 1788, the said duke cut down divers, to wit, 500 of the said timber trees, 500 of the said elms, and 500 of the said willow trees, in the said declaration and agreement respectively mentioned, and by the said agreement agreed to be valued and paid for as in the said agreement is mentioned, whereby the said duke disabled himself from performing, and it became, and was impossible for him to perform and fulfil the said articles of agreement on his part, &c. for which reason, he the said William declined and refused to carry the said articles into execution on his part, as he lawfully might, &c."

Replication,—Issue on the first plea, and general demurrer to the second. Joinder in demurrer.

This was argued in Hilary term last, by Lawrence, Serjt., for the plaintiff, and Bond, Serjt., for the defendant, and a second time in Easter term, by Le Blanc, Serjt., for the plaintiff, and Marshall, Serjt., for the defendant.

The arguments in support of the demurrer were in substance as follow :

The articles of agreement in this case divide themselves into two branches. First, That the defendant was to purchase of the plaintiff a farm, &c. for 2594l. in part of payment for which the plaintiff was to accept a conveyance of other premises. Secondly, That the trees growing upon any of the estates should be valued and paid for by the respective purchasers. The object of the plea is, to shew that the plaintiff having cut down trees on his estate, was incapable of performing his part of the agreement, and therefore that the defendant was not bound to perform the other part. In order to support the plea, it must be proved that the matter contained in it was a precedent condition, for if it were not such a condition, the non-performance of it cannot be pleaded in bar. Where one part of an agreement is not the consideration of the other, non-performance of one part cannot be pleaded as an excuse for the non-performance of the other. In this case the agreement respecting the trees was no part of the consideration of the act which the defendant was to perform, namely, to convey his estate, and [273] pay the residue of the purchase-money. Where there are mutual remedies, it would be unjust that the breach of one covenant should be alleged as a reason for the breach of another, because the damages arising from the one might be unequal to those occasioned by the other. The case of *Boone v. Eyre* (a), was similar to the present : there the covenant was for well and truly performing, &c. the breach was non-payment, and the plea in bar, that the plaintiff was not legally possessed of the negroes on the plantation. There Lord Mansfield said, if the plea were allowed, any one negro not being the property of the plaintiff would bar the action : so here, if this plea were allowed, any one tree being cut down would be a bar to the plaintiff's demand. In *Hunlocke v. Blacklowe*, 2 Saund. 155, the terms of the agreement were as strong as the present, but there a similar plea was not allowed. To the same effect also is *Cole v. Shallet*, 3 Lev. 41. Though these were actions of covenant, yet the statute of 8 & 9 W. 3, c. 11, has put actions of covenant and debt for a penalty on

(a) *Boone v. Eyre*, B. R. East. 17 Geo. 3.*

[See S. C. 2 W. Bl. 1312 ; 96 E. R. 767 (with note), to which add *General Billposting Company v. Atkinson*, [1909] A. C. 121.]

Covenant on a deed, whereby the plaintiff conveyed to the defendant the equity of redemption of a plantation in the West Indies, together with the stock of negroes upon it, in consideration of 500l. and an annuity of 160l. per annum for his life ; and covenanted that he had a good title to the plantation, was lawfully possessed of the negroes, and that the defendant should quietly enjoy. The defendant covenanted, that the plaintiff well and truly performing all and every thing therein contained on his part to be performed, he the defendant would pay the annuity. The breach assigned was the non-payment of the annuity. Plea, that the plaintiff was not, at the time of making the deed, legally possessed of the negroes on the plantation, and so had not a good title to convey.

To which there was a general demurrer.

LORD MANSFIELD.—The distinction is very clear, where mutual covenants go to the whole of the consideration on both sides, they are mutual conditions, the one precedent to the other. But where they go only to a part, where a breach may be paid for in damages, there the defendant has a remedy on his covenant, and shall not plead it as a condition precedent. If this plea were to be allowed, any one negro not being the property of the plaintiff would bar the action.

Judgment for the plaintiff.†

* [2 W. Black. 1312, S. C.]

† [Accord. *Campbell v. Jones*, 6 T. R. 570. *Ritchie v. Atkinson*, 10 East, 295. *Harelock v. Geddes*, 10 East, 555. *Davidson v. Gwynn*, 12 East, 389. *Storer v. Gordon*, 3 M. & S. 308. *Fothergill v. Walton*, 8 Taunt. 576. 2 B. Moore, 630, S. C. 1 Saund. 320 c. notes. 5th edit.]

nearly the same footing, as in neither, more than the real damages sustained can be recovered.

On the part of the defendant three objections (a) were made to the declaration. 1st. That the plaintiff had not shewn a sufficient performance of his part of the agreement to intitle him to bring an action for the penalty. * The conditions in this case seem to be, what Lord Mansfield calls "dependent conditions," in which the performance of one depends on the prior performance of the other, and therefore till the prior condition be performed, the other party is not liable to an action for the non performance of his part. Dougl. 691 (last edition).—It is not enough for the [274] plaintiff to aver that he is ready and willing to perform his part; the defendant is not obliged to convey his estate to the plaintiff, before the plaintiff conveys to him. Even in covenant to recover damages for the non-performance of this agreement, the plaintiff must have shewn that he had actually done all in his power to perform his part; but this being debt for the penalty, an action of a more harsh nature, the plaintiff must shew a precise performance, which is made a condition precedent. A Court of Equity, on the same principle, will not decree a specific performance of an agreement unless the party applying for the decree has exactly performed his part. Wherever performance is necessary to be averred, it must be shewn with such certainty that the Court may judge whether the intent of the covenant be performed. 5 Com. Dig. 43. * To make a good title means to convey by a good title; and he who is bound to convey, is bound to prepare and tender such conveyances as are proper to make a good title to the grantee. 1 Roll. Abr. 465, l. 3. 2 Lev. 95. 1 Ventr. 255. 1 Mod. 104. * If it be said, that the defendant must prepare the conveyances, because he is to pay the expense of them, the answer is that the law is otherwise. * If nothing be said of the expense, it shall be defrayed by the grantor. 1 Roll. Abr. 422, l. 50. But where the grantee is to pay the costs, yet the grantor must prepare the conveyances. Cro. Eliz. 517. If he be bound to assure at the charge of the grantee, he must give notice what sort of conveyance he will make. *Halling's case*, 5 Co. 22 b. In the present case, as neither party has done any act towards conveying their respective estates, neither can bring an action for the penalty. But if it should be holden that the defendant was bound to prepare the conveyances because he was to pay the expence, yet the plaintiff has not shewn a sufficient performance, since, for any thing that appears, a *fine might be necessary; and as such fine was to be at the expence of the plaintiff, and he was bound to levy it if necessary, he ought to have shewn, either that he had levied it, or that it was not necessary. But supposing the defendant was bound to prepare the conveyance from the plaintiff, then must the plaintiff be bound to prepare the conveyance from the defendant. If so *the plaintiff ought to have stated, not only that he had offered to make a good title to the defendant, but also that he had prepared a conveyance from the defendant to him, had tendered it to the defendant to be executed, and demanded the difference in value; but that the defendant had [275] neither prepared a conveyance from the plaintiff to him, executed the conveyance from him to the plaintiff, nor paid the difference.

The 2d objection to the declaration is, that the plaintiff only states that he was ready and willing to make a good title, but does not shew *what title. If he in fact had no title, or could not make one to the defendant, the agreement was void by the terms of it, and it would be impossible for him to recover; this title is therefore an essential part of the case. But the validity of the title is a matter for the recognizance of the Court, and therefore it must appear on the record, that the Court may judge of it, and the defendant take issue on any of the facts which support it if untrue, or demur if it be insufficient. Here the performance is stated so generally that no precise issue *can be taken on it. In covenant the breach may be assigned as large as the covenant, because damages only are to be recovered; but in debt for a penalty a precise breach must be shewn, because a breach is a forfeiture of the whole bond. 1 Ld. Raym. 107. No issue can be taken on the word *patron or heir. 1 Ld. Raym. 202. But the word *title is of much more vague signification than either patron or heir. Where any thing is to be done as a precedent condition, an averment that the party was "ready and willing to do it," is insufficient, neither is an averment *paratus fuit et obtulit, sufficient, unless he states that he was hindered

(a) The objections made to the declaration by Mr. Serjeant Marshall, which were noticed by Lord Loughborough, in giving judgment, are distinguished by asterisks.

by the other party. 2 Saund. 350. 1 Roll. Abr. 465, l. 40; but paratus fuit et obtulit is sufficient, where nothing is to be done on his part before the other has done a prior act. Ibid. The plaintiff therefore ought here to have shewn that he had actually made a good title to the defendant, and what that title was. Hob. 69, 77. Cro. Jac. 315, 425, 503. Cro. Eliz. 919. Yelv. 49. Sid. 467. Dougl. 620 (last edition).

The 3d objection to the declaration is, that there are three breaches assigned in an action of debt, but it is not stated to be according to the form of the statute; for as before the stat. 8 & 9 W. 3, c. 11, only one breach could be assigned in an action of debt, if many be now assigned, notice must be taken of the statute in pleading. But the breaches themselves do not meet the covenant, not being breaches of the contract stated. They are:—1st. That the defendant did not draw or prepare any conveyance. 2d. That he did not pay the purchase-money. 3d. That he would not accept the title. Now a *breach should be assigned in the words of the covenant; or at least it must [276] contain the plain and obvious meaning of the covenant. But it has been proved that the defendant was not bound to prepare the conveyance. The agreement also was that he should satisfy the plaintiff, partly by conveying certain premises to him, and by paying him the remainder in money; not that he should pay the whole in money. This breach therefore ought to have been * "That the defendant did not convey to the plaintiff the premises which he agreed to convey, nor pay the difference." As to the 3d breach, it would have been proper, if the plaintiff had shewn a sufficient performance on his part; but the defendant could not accept till the plaintiff had actually executed the conveyances.

With respect to the plea, it is to be observed, that the agreement is not in two parts; the clause relating to the trees is not a new contract of sale, but the mode of valuation. It was understood that they were to go with the land. They were to be paid for by the respective purchasers; that is, by the purchasers of the land on which they grew, and were considered as part of the purchase. The value of land with timber growing on it can only be fairly estimated by an appraisement of the timber. But a grant of land passes all woods and timber growing on it; Co. Lit. 4 a.; the appraisement is only to ascertain the value. Small timber growing is of great value, which if cut, would be worth nothing. Thriving timber will pay 10 or 15 per cent. for the purchase-money, and without it the land may be of no value. If there be a covenant to leave all timber on the land, it is a breach for the party to cut them down, though he leave them. Sir Tho. Raym. 464. If the plaintiff has cut down any of the trees he is not entitled to the penalty, because he has deprived the estate of certain qualities which were an inducement to the defendant to contract. Admitting the authority of *Boone v. Eyre*, it is not applicable to the present case; there the value of the plantation was not altered by the loss of some of the negroes. No case has been adduced where the subject-matter of the contract was changed. This is one entire contract. The sale of the land is the sale of the timber. The defendant is called upon to pay for a thing different from that for which he agreed. Various cases might be put, where there may be an agreement for the purchase of one entire thing, and a particular mode in valuing a part of it.

It was replied,

That although it was objected that the plaintiff had not shewn a sufficient performance on his part, yet he had stated [277] that he was capable, ready and willing, to make a good title, and of which he had given notice to the defendant. This was sufficient. The plaintiff was not bound to execute the conveyances unless the defendant had drawn and paid for them. As to the cases cited, where it was holden insufficient to state that the party was ready and willing to perform his part, there some specific, certain act was to be done, in which case performance was necessary to be averred. But here the plaintiff was to make no conveyance without the consent of the defendant. The first class of cases only shews at whose expense conveyances were to be made, where there was no express agreement, but here by the covenant the defendant was to pay it. As to the objection that a fine might have been necessary, that is answered by stating that the plaintiff gave notice to the defendant that he was ready and willing at any time to make a good title. If a fine were necessary, the defendant ought to shew that it was necessary; the plaintiff agreed to levy it only if it were necessary. As to the case where the word "patron" was not sufficiently certain to take issue upon, it was in quare impedit, where the party

was obliged to make out a title to himself, and shew an actual presentation. In the other class of cases cited, where the words "ready and willing" were holden not sufficient, an absolute performance was necessary to be stated, because it was wholly in the power of the party to perform the act required. But where two things are to be done at the same time by different parties, it is enough for the party declaring to state that he was ready and willing to perform his part, especially where money is to be paid for the conveyance of an estate, in which case the party to whom the estate is to be conveyed, is not forced to pay, unless the other is ready and willing to convey. The ground of the decision in *Cro. Jac.* 315, was, that the plaintiff ought to have shewn by what title the plaintiff in ejectment recovered, since it might have been by his own conveyance, and then, though the facts alleged were true, still there might be no breach of covenant. On this principle the case of *Noble v. King* (ante, 34), was decided in this Court. So also in the other cases cited, where there were covenants for good title and quiet enjoyment, it was necessary to state the title of those by whom the parties were evicted or disturbed, because the facts alleged might be true, and yet the covenants might not be broken. The case cited from *Yelverton*, 49, was decided principally on [278] the ground that the declaration ought to have shewn that B., the person who was to become bound according to the agreement, was in fact bound.

As to the third objection to the declaration, namely that the breaches are not stated to be assigned by virtue of the statute; that is matter of form, and not to be taken advantage of on a general demurrer. As to the objection that they are not breaches of the agreement stated; it is to be observed that they are in substance and truth breaches of the agreement. It sufficiently appears from them, that the defendant did not do what he was bound to do, that he neither prepared the conveyances, paid the purchase-money, nor accepted the title of the plaintiff. He ought, by some act on his part, to have enabled the plaintiff to have done what he had agreed to do, namely to convey, &c. No answer has been given to the case of *Boone v. Eyre*, where the negroes were to pass with the land, as the trees in this case. There the damages for the loss of the negroes were unequal to those which would have accrued to the other party. There also a gross sum was stipulated for the negroes together with the plantation; here, there was only an agreement for a valuation. If any tree had been cut down, the defendant would have paid so much the less; and if there was any ideal value annexed to the growing timber, he ought to have stated it. The whole contract is not to be rescinded by an alteration in the trees on the land, which were to be the subject of a separate valuation.

Cur. advis. vult.

On this day, the following judgment of the Court was delivered by LORD LOUGHBOROUGH; who having stated the pleadings, said,

It is clear in this case, that unless the plaintiff has done all that was incumbent on him to do, in order to create a performance by the defendant, (if I may use the expression,) he is not entitled to maintain the action. If he has not set forth a sufficient title, judgment must be against him whatever the plea is, and if the plea be a good bar, the same consequence must follow. It was argued on the part of the plaintiff, that the agreement respecting the trees was not a condition precedent, and therefore a breach of that agreement could not be pleaded in bar of the action. In support of this argument, the case of *Boone v. Eyre* was cited; but in that case, though the Court of King's Bench held the plea insufficient, yet they laid down a clear and well founded distinction, that where a covenant went to [279] the whole of the consideration on both sides, there it was a condition precedent; but where it did not go to the whole, but only to a part, there it was not a condition precedent, and each party must resort to his separate remedy; and for this plain and obvious reason, because the damages might be unequal. The cases also of *Hunlocke v. Blacklowe*, 2 Saund. (p. 119), and *Cole v. Shallet*, 3 Lev. (p. 41) were cited as being in favour of the plaintiff. But it is unnecessary to enter into the discussion of those cases; though perhaps doubts may reasonably be entertained of the doctrine laid down in *Saunders*, and though the case cited by him in his argument may deserve full as much consideration as that which was the subject of the determination of the Court. For we found our opinion on the present case, on the ground of the distinction in *Boone v. Eyre*, which we think a fair and sound one. Then the question is, whether the covenant of the plaintiff goes to the whole consideration of that which was to be done by the

defendant? Now the duke clearly covenanted to convey an estate to the defendant, in which all the timber growing on the estate was necessarily included. The timber was not disjoined from the estate by the separate valuation of it. It was expressly agreed that all trees, &c. which then were upon any of the estates should be valued. But it is not to be permitted to a party contracting to convey land which includes the timber, by his own act to change the nature of it between the time of entering into the contract and that of performing it. There may be cases where the timber growing on an estate is the chief inducement to a purchase of that estate. But it is not necessary to inquire whether it be the chief inducement to a purchase or not; for if it may be in any sort of a consideration to the party purchasing to have the timber, the party selling ought not to be permitted to alter the estate by cutting down any of it. This is not an action of covenant where one party has performed his part, but is brought for a penalty on the other party refusing to execute a contract. But to entitle the party bringing the action to a penalty, he ought punctually, exactly, and literally, to complete his part. We are therefore of opinion that the plea is a good bar to the action, and on this we give our judgment. My brother Marshall (*a*)¹ made some exceptions to the declaration, which it is not necessary to go into, but which, speaking for myself, I think material. It is to be observed, that this is not a contract absolutely and at all events to convey. Where a man [280] undertakes to convey, he undertakes to convey by a good title. There are cases where a Court of Equity has holden, that a party so undertaking might make a title by procuring an Act of Parliament, and that he was bound to purchase in all outstanding terms to make a good title. But in this case if the plaintiff was not entitled to make a good title before a certain day, the agreement was to be at an end, he might be off, and was released from his engagement (*b*)¹. He therefore undertook to make a good title before a given time: the breach assigned is, that the defendant refused to accept the title. But what title? What exhibition of title? What title was tendered to him? (*a*)² What was there for him to accept? This perhaps is rather debors the question, though it might be material if it were necessary to take it into consideration. But the ground of our determination is, that the plea is good, as I before stated, within the distinction laid down by the Court of King's Bench in the case of *Boone v. Eyre*.

Judgment for the defendant.

GERARD *against* DE ROBECK AND ANOTHER. Wednesday, July 1st, 1789.

An undertaking of the plaintiff, to give material evidence where the venue is laid, may be supported by proof of the cause of action being in a foreign country (*a*)³.

Adair, Serjt., in Easter term, shewed cause against a rule to change the venue from London to Cornwall, by producing an affidavit that the cause of action arose at Port L'Orient, in France, which prevented him from undertaking to give material evidence at any place in England.

The Court suggested, whether an undertaking to give material evidence in London would not be fulfilled by proving the cause of action at Port L'Orient, by the same sort of fiction as is used in a declaration, in which the cause of action may be laid in a foreign country "to wit, at London in the parish and ward," &c.

Afterwards Adair said he was ready to enter into a special undertaking of this kind, suited to the circumstances of the case. In answer Kerby, Serjt., cited the case of *Woolnorch v. Boys* (*b*)², in which, on a motion to change the venue from London to Suffolk, an affidavit was made by the plaintiff, that the cause of action arose at Dunkirk,

(*a*)¹ Vide the argument.

(*b*)¹ [But where no time is fixed for completing the purchase, and no application is made by the vendee before the commencement of the action, it is sufficient if the vendor shew a complete title at the trial. *Thompson v. Miles*, 1 Esp. N. P. C. 184.]

(*a*)² [Where a conveyance is to be prepared at the expense of the purchaser, he is bound to tender it. *Seward v. Willock*, 5 East, 198. And so also, it seems, where there is no such stipulation, the purchaser is bound to tender the conveyance. *Sugd. Vend. & Purch.* 222, 6th edit.]

(*a*)³ [Recognized in *M'Cluse v. M'Keand*, 2 Taunt. 197; but see 2 Smith, 457.]

(*b*)² In this Court, Mich. 1785.

and not in Suffolk, and the Court after consulting all the officers, held that the cause shewn was not sufficient, unless the party had undertaken to give material evidence in London.

[281] Lord Loughborough said, that as the introducing a new method of practice might cause confusion, the plaintiff must undertake in the usual manner to give material evidence in London, and leave it to be considered at the trial, or afterwards by the Court, how far evidence of the cause of action at Port L'Orient, might, by fiction of law, support such an undertaking (c).

The rule was therefore discharged, on an undertaking to give material evidence in London.

The cause went to trial, and a verdict was found for the plaintiff, evidence being given, that the defendants, who were partners in trade at Port L'Orient, had, at a meeting of their creditors at that place, acknowledged a debt to the plaintiff of 3000l.

On this day Kerby moved to set aside the verdict, and enter a nonsuit, on the ground that the plaintiff had not fulfilled his undertaking. But,

The Court were unanimously and clearly of opinion, that the undertaking to give material evidence in London, was by fiction of law well supported by proof of the debt in France, and therefore

Refused to set aside the verdict.

JAMES *against* MOODY. Wednesday, July 1st, 1789.

The plaint in replevin being removed by defendant into this Court by re. fa. lo. which is filed on the appearance-day of the return, and a rule to declare being given, he may sign judgment of non pros. for want of declaring, without demanding a declaration (a).

The plaint in replevin being removed by the defendant into this Court from an inferior one by recordari facias loquelam, returnable in fifteen days of Easter (and which was filed on the 29th of April (b)), the defendant signed judgment of non pros. for want of a declaration after having given a rule to declare.

A rule was obtained to shew cause why the judgment should not be set aside, on the ground that no demand of a declaration was made. But

The Court held that such a demand was not necessary, and therefore Discharged the rule with costs.

Kerby, Serjt., for the plaintiff, and Adair, Serjt., for the defendant.

[282] Woulfe *against* SHOLLS. Wednesday, July 1st, 1789.

To support in the next term after that in which issue is joined, a rule for judgment as in case of a nonsuit for not proceeding to trial, the affidavit must state, that issue was joined early enough in the preceding term, for the plaintiff to have proceeded to trial in that term. But in the third term, a general affidavit stating that issue was joined in the former term, is sufficient.

A rule was obtained on a former day by Bond, Serjt., to shew cause why there should not be judgment as in case of a nonsuit for not proceeding to trial in due time after issue joined, on an affidavit which stated generally, "that issue was joined in the last term," &c.

Marshall, Serjt., shewed cause, insisting that according to the practice of this Court, the defendant was not entitled to the judgment for which he applied, without shewing, that issue had been joined early enough in the last term for the plaintiff to have tried his cause in that term. For any thing appearing on the affidavit, issue might have

(c) [But the practice of the Court is to discharge the rule for changing the venue, without any undertaking, where the cause of action arises abroad. *Hope v. Bennet*, 2 Bos. & Pul. N. R. 397. *Savory v. Spooner*, 2 Marsh. 280. 6 Taunt. 569. S. C. Tidd's Prac. 662, 8th edit.]

(a) [Tidd's Pr. 418, 8th edit.]

(b) I.e. the appearance day of the return.

been joined too late for that purpose, the defendant therefore had not stated precisely what was necessary to support the rule.

The Court were of this opinion, but said that in the next term, such a general affidavit would have been sufficient.

Rule discharged (a)¹.

Vide *Frampton v. Payne*, ante, 65—and *Baker v. Newman*, 123.

End of Trinity term.

[283] CASES ARGUED AND DETERMINED IN THE COURT OF COMMON PLEAS, IN MICHAELMAS TERM, IN THE THIRTIETH YEAR OF THE REIGN OF GEORGE III.

BARBE QUI TAM *against* PARKER. Saturday, Nov. 7th, 1789.

In an action for the penalty of the statute 12 Anne, c. 16, the declaration stated a specific sum of money to have been lent, (in which the usury consisted) but the evidence was that the loan was part in money, and the rest in goods of a known value, which the party receiving the loan agreed to take as cash: this was good evidence to support the declaration (a)².

This was an action for the penalty of the stat. 12 Anne, s. 2, c. 16, against usury, tried at Guildhall before Lord Loughborough in last Hilary term, in which a verdict was found for the plaintiff. The declaration stated, that on the 16th of May 1788, Stephen Romer drew two bills of exchange on William Keate, one for 46l. payable one month after date, the other for 45l. payable two months after date; and that the bills were accepted by Keate.

It then stated, that it was corruptly agreed between Romer and the defendant, that the defendant should discount for Romer the said two bills of exchange, "for gold, that is to say, that he should for such discounting thereof, have, receive, and take from the said Romer more than interest at and after the rate of 5l. for the forbearing and giving day of payment of 100l. for a year, that is to say, the same money as the profits of the said defendant would have been, if the said Romer had bought of the defendant gold to the amount of the said two bills of exchange, and immediately resold the same again to him, and that Romer should indorse the bills to him." It then stated, that the defendant discounted the two bills, and advanced and lent [284] to Romer the said sums of money therein mentioned, that is to say, the said sums of 46l. and 45l. respectively, and did forbear, &c.

And the plaintiff farther said, that the defendant by means of the said corrupt contract, took, accepted, and received of and from the said Romer, the sum of 4l. 11s. (as the profits which he the defendant would have made, if Romer had bought of him gold to the amount of the said bills, and immediately sold the same again to him) for the forbearance and giving day of payment, &c., which said sum of 4l. 11s. so taken, &c. exceeds the rate of 5l. for the forbearance and giving day of payment of 100l. for a year, &c.

The count on which the verdict was taken, was as follows: viz "That it was corruptly, and against the form of the statute in such case made and provided, agreed by, and between the said Romer and the defendant, that the defendant should lend to the said Romer, another sum of money, to wit, 86l. 9s. and should forbear, and give day of payment of the same from the time of lending thereof, until the money mentioned in two certain other bills of exchange, respectively bearing date the 16th of May in the year last aforesaid, before then drawn by the said Romer upon the said William, and by him severally accepted for payment, to the order of the said Romer for two certain sums of money therein expressed, to wit, the sum of 46l. at one month

(a)¹ Qu. Whether it does not appear from hence, that if issue be joined early enough in a term, the plaintiff must proceed to trial in the same term; if not, at all events in the next term? [See ante, p. 65, note (b).]

(a)² [Vide *Hawls v. Burton*, 9 East, 349. But where money is lent by a cheque upon a banker without a previous agreement to consider the cheque as cash, it is no loan so as to constitute usury till cash is actually received. *Brook q. t. v. Middleton*, 1 Campb. N. P. C. 445. *Borrodale q. t. v. Middleton*, 2 Campb. N. P. C. 53.]

after date of the said bills, and the sum of 45l. at two months after date, should become due and payable: and that the defendant for the forbearance and giving day of payment of the said 86l. 9s. for the said time last aforesaid, should have another sum of 4l. 11s. and that the said Romer for securing the payment as well of the said 86l. 9s. so lent as last aforesaid, as the said 4l. 11s. and for the forbearance and giving day of payment of the same as last aforesaid, should indorse the said two last mentioned bills of exchange, and deliver the same so indorsed to the defendant: and the plaintiff who sues as aforesaid further says, that in pursuance of the said last mentioned corrupt contract, the defendant after the making thereof, to wit, on the said 17th day of May 1788, at London, &c. did lend to the said Romer, the said last mentioned sum of 86l. 9s. and did then and there forbear and give time of payment of the same from thence, until the money mentioned in the said two last mentioned bills of exchange, severally became due and payable: and the said Romer, for securing to the defendant pay-[285]-ment as well of the said sum of 86l. 9s. so lent as last aforesaid, as the said 4l. 11s. for the forbearance and giving day of payment of the same as aforesaid, did then and there, to wit on said 17th day of May, in the year last aforesaid, at London, &c. indorse the said two last mentioned bills of exchange, and thereby appoint the contents thereof to be paid to the defendant: and then and there delivered the same, so indorsed, to the defendant; and the plaintiff who sues as aforesaid, further says, that the defendant under and by means of said last mentioned corrupt contract, so made as last aforesaid, after the making thereof, to wit, on 17th of May, in the year last aforesaid at London, &c. had, took, accepted, and received the said last mentioned sum of 4l. 11s. for the said forbearance and giving day of payment, of the said last mentioned sum of 86l. 9s. for the time last aforesaid and in manner aforesaid; which said sum of 4l. 11s. so had, taken, accepted and received by the defendant as last aforesaid, for the forbearance and giving day of payment of the said last mentioned sum of 86l. 9s. as last aforesaid for the respective times last aforesaid, exceeds the rate of 5l. for the forbearance of 100l. for a year, &c.

At the trial the usury was clearly proved, as it appeared that upon application to the defendant to discount the bills, he refused to do it unless it were done "as gold" (a), to which Romer, who had been a jeweller, consented, and received in discount 86l. 9s. which sum was paid in money, bills, and old gold, part of which was a gold toothpick case, which Romer said he believed was valued between him and the defendant at eight guineas, but whatever the sum was, he took the toothpick case as cash, and immediately melted it down.

In the last term, a rule was obtained to shew cause why the verdict should not be set aside, and a new trial granted, on the ground that there was a variance; the count being, that the defendant lent to Romer 86l. 9s. but the evidence proving that part of the sum was taken in goods.

Against which Adair and Bond, Serjts., now shewed cause.

The verdict must stand, if the evidence can be applied so as to support it. The usury in this case was fully proved, and it is sufficient if the allegation be substantially made out. The law does not require so strict a method of proving a charge of [286] usury in a declaration, on a penal statute, as in a plea; because in the latter case, the party pleading the plea has direct cognizance of the fact, but in the former, the transaction is presumed to be more secret, and the action brought by a stranger or common informer. 1 Hawk. P. C. b. 1, c. 82, s. 24. In *Floyer v. Edwards*, Cowp. 112, Lord Mansfield says, "In all questions, in whatever respect repugnant to the statute, we must get at the nature and substance of the transaction; the view of the parties must be ascertained, to satisfy the Court that there is a loan and borrowing; and that the substance was to borrow on the one part, and to lend on the other." So here it made no difference as to the usury, whether the loan was entirely in money, or partly in money and partly in goods. The question is, whether there was any evidence of the sum of 86l. 9s. stated in the count, being paid to Romer? But he expressly swore, that part was paid him in money, and the rest in gold which he took as cash. The gold or any other goods given as money, shall be holden to be so, especially as against the party committing

(a) This is explained in the first count of the declaration. The sum of 4l. 11s. is exactly the profit which the defendant would have gained by selling and repurchasing gold of the value of 91l. (the amount of the bills) at the accustomed rate among refiners.

the usury. Stra. 691; and it shall not lie in his mouth to deny it. It was the same as Portugal, or any other foreign coin, given in exchange, which would be as cash. In 1 Wils. 115, in an action on a promise to deliver up a bond pledged, on payment of the money borrowed, where the breach assigned was, that the defendant refused to deliver up the bond, though it was not stated that the money was paid or tendered, yet a tender and refusal being proved at the trial, the evidence was holden to agree with and support the declaration. It was a question for the jury, whether this was an usurious contract, and they by their verdict have determined it to be so.

Le Blanc and Lawrence, Serjts., in favour of the rule, contended that the count was not supported by evidence. The ground of the action is a contract by which Romer was to receive 86l. 9s. It is stated, that so much money was actually paid to him; this ought strictly to be proved. It appeared that he did not know, with certainty, how much the gold toothpick case was worth; but the statute annexes the penalty to the taking more than legal interest, "by way or means of any corrupt bargain, loan, exchange, chevisance, shift or interest of any wares, merchandizes or other thing, or things whatsoever," it ought therefore precisely to have been set forth in the count, how the usury was committed, whether by loan, exchange, wares, merchandize, &c. or otherwise. If the gold had [287] been sold for more than the estimated value, Romer would have paid less interest, and perhaps no usury would have been incurred; the interest might have been either less than five per cent. or exactly to that amount. But though the usury be proved, yet it is not the same usury, and not being the same, there is a variance. The principle to be collected from the cases on this point is, that where a contract is stated, whether it be the essential ground of the action, or whether it be matter of inducement, such contract must be specifically proved. *Cudlip v. Rundle*, Carth. 202.—*Bristow v. Wright*, Dougl. 665 (last edition).—*King v. Pippet*, 1 Term Rep. B. R. 235,—and in *Carlisle v. Trears*, Cowp. 671, it was determined, that where an usurious contract was not proved as laid in the declaration, it was a fatal variance. As to the case of *Floyer v. Edwards*, it is not stated what the declaration was in that case, neither was there any question of a variance: it goes only to shew, that an usurious contract shall not be covered by a sale of goods, and the statute evaded. What the contract was, must be collected from the whole transaction; but that proves it to be a contract both for a loan of money and of goods; yet the contract stated in the declaration is only for money; and the statute distinguishes a loan of money from a loan of goods. In an action in the common form for goods sold and delivered (*b*), tried before Mr. Justice Buller, the contract proved was, that the goods should be paid for, partly in money, and partly in buttons, and the plaintiff was nonsuited, not having declared on the special agreement.

Adair in reply.

The cases cited on the other side may be divided into two classes, the first, where it is necessary that a contract should be proved as laid; the second, which was last cited, where goods were not allowed to be considered as money. As to the first, the rule of law is not disputed; and it has been complied with in this case; the contract has been proved substantially as stated: it is laid that a certain sum of money was advanced, and proved that the sum was paid in cash, and what was equivalent to, and accepted as cash. As to the last case, it shews only, that where part of a contract for goods is to be paid for in other goods, the party shall not be permitted to recover the whole in money, by saying the other goods were money: but where there is a contract for the loan of money, and part of it is given in goods [288] which are taken as money, the party giving them shall not be permitted to deny that the contract was for money, or that it was proved by such evidence as was here given.

LORD LOUGHBOROUGH.—My opinion continues the same as it was at the trial. It has been truly argued by my brother Adair, that the contract was proved as laid; and that it was not originally a contract for the delivery of goods, but for a loan of money. Yet I agree with my brother Lawrence, in the case which he mentioned, where there was a contract partly for money and partly for goods, because there it is obvious that as the party had an interest that the contract should be performed specifically as laid, it was incumbent on him to enter into the transaction. But here,

(*b*) *Harris v. Fowle*, sittings at Guildhall after Mich. term 1787. [Vide *Campbell v. Sewell*, 1 Chitty's Rep. 611.]

both parties enter into a contract for a loan of 86l. 9s. in the execution of which, by mutual consent, a piece of gold is accepted as part of that sum. Suppose Parker had brought an action against Romer for 86l. 9s. as money lent, would it have been competent to Romer to have said, "You never lent me so much money, goods were part of it:" the answer to that would have been, "You have agreed to take it, not as goods, but as money, you may make the goods represent money, as well as money represent goods." Parker delivers this piece of goods not as a commodity to be sold, but as a thing of specific value, as an aliquot part of the money; and Romer so takes it; then with respect to him, this is to be taken as constituting so much of that common measure of the value of the commodity. It is making the commodity itself stand in the place of the thing which constitutes the value. I lay no stress on the commodity being gold. I think if any other commodity of less easy sale had been so estimated, the case would have been precisely the same. If my brothers therefore see no reason to differ from me, the verdict ought to stand.

HEATH, J. (Mr. Justice Gould was absent).—I am of the same opinion. The declaration seems to me to be well framed, and sufficiently proved. It would make a great difference, if the delivery of the goods were to be a part of the shift, and no part of the original contract. I do not see two contracts, as it was said; there appears to me to be but one; and a piece of bullion was substituted as coin.

[289] WILSON, J.—I am of the same opinion. There is no doubt but that if the goods had been part of the cover or shift, it should have been stated, as that would have been in the description of the offence. Though I am not inclined to dispute those cases which my brother Le Blanc has cited, where the contract which is the first substantial part, differs from that which is stated; yet in this case, as I understand the evidence, they took it clear that the contract was for a loan of money. The first communication with the defendant was not for a loan of money, but simply to have two bills discounted; that is, to have them discounted on the common terms of five per cent. The answer to that by the defendant is not "if you will take a toothpick case, or part of it in goods, I will discount the bills." I confess I at first understood it so, and so understanding it, I had a decided opinion on it; I was misled by his saying, "It is not worth my while to discount the bills unless you will do it as gold," for taking the toothpick case as gold, I thought he was to take it for eight guineas, which perhaps was not worth five; if so, I should be of opinion that it ought to have been stated in the declaration. But the contract was, "I must have 4l. 11s. for the forbearance of 86l. 9s. only for two months;" that is the contract, and when Romer comes to take the money, he says, "I received a toothpick case, and I received some bills, I cannot tell what, but I took it all as cash; I took it as cash, and I immediately converted it into cash, by putting it into a crucible; I converted it into that which, if carried to the Mint, would have been made into guineas." This neither increased nor lessened the usury.

Rule discharged.

GUNNIS AND OTHERS *against* ERHART. Monday, Nov. 9th, 1789.

The verbal declarations of an auctioneer at the time of the sale are not admissible evidence to contradict the printed conditions (a).

The plaintiffs were trustees for the sale of a copyhold estate which was sold by auction. In the printed conditions of the sale, the premises were stated to be free from all incumbrances; the defendant bid for them, and they were knocked down to him; but on discovering that there was a charge on the estate of 17l. per annum, he refused to complete the purchase. In consequence of which this action on the case was brought.

[290] At the trial (which came on at Guildhall at the sittings after last term), the counsel for the plaintiffs offered to give in evidence, that the auctioneer had publicly declared from his pulpit in the auction room, when the estate was put up, that it was charged in the manner above specified.

(a) [Acc. *Powell v. Edwards*, 12 East, 6. See also *Jones v. Edney*, 3 Campb. N. P. C. 285. *Wilson v. Hart*, 7 Taunt. 295. 1 B. Moore, 45, S. C., and see the cases in equity cited 1 Phill. Evid. 541, 6th edit.]

This evidence Lord Loughborough refused to admit, and the plaintiffs were nonsuited.

On this day, Bond, Serjt., moved for a rule to shew cause why the nonsuit should not be set aside, and a new trial granted, on the ground that the above evidence ought to have been admitted. But

The Court were clearly of opinion, that the evidence was not admissible, as it would open a door to fraud and inconvenience if an auctioneer were permitted to make verbal declarations in the auction room, contrary to the printed conditions of sale; and no proof was offered that the defendant had any particular personal information given him of the incumbrance in question.

Rule refused.

BROOKS, ONE, &C. *against* MASON. Wednesday, Nov. 11th, 1789.

[See *Browne v. Black*, [1912] 1 K. B. 327.]

Before an attorney can bring an action for his fees he must leave the bill with his client according to 2 Geo. 2, c. 23 (a)¹.

The plaintiff brought an action, in the usual form, against the defendant for business done as an attorney, but was nonsuited at the trial, having failed to prove a proper delivery of his bill previous to the action, in compliance with stat. 2 Geo. 2, c. 23, s. 23 (a)².

The circumstances were, that the plaintiff had delivered the bill in due time to the defendant, who acknowledged the debt, said he would pay it, but that he did not know what to do with the bill. Upon which the plaintiff took it back again (there was no proof offered, that the defendant desired him to take it back).

Bond, Serjt., now moved for a rule to shew cause why the nonsuit should not be set aside and a new trial granted, contending that the bill, under the above circumstances, was properly delivered according to the statute. But

[291] The Court were of a different opinion, saying that the bill ought to have been left with the defendant, as it was the intention of the statute that the client should have due time to examine the charges made by the attorney, and take advice upon them if necessary; and therefore

Refused the rule.

COLLIER *against* GODFREY. Monday, Nov. 16th, 1789.

Bail must actually have become so before notice of justification is given.

The additional bail in this cause were going to justify themselves in Court, when it was objected by Bond, Serjt., that it appeared from the notice of justification, that they had not actually become bail before that notice was given, according to a rule of this Court (a)³, Mic. 18 Geo. 3. This was holden to be a sufficient objection, and

The bail were rejected.

BOURCHIER *against* WITTLE. Monday, Nov. 16th, 1789.

If there be not 15 days between the teste and return of a *capias*, the Court will allow the teste to be amended (a)⁴.

Cockell, Serjt., moved to set aside the proceedings on a common *capias* for irregu-

(a)¹ [Vide *Warren v. Cunningham*, Gow's N. P. C. 72.]

(a)² Which enacts "That no attorney or solicitor, shall commence or maintain any action or suit for the recovery of any fees, charges or disbursements, at law or in equity, until the expiration of one month or more after such attorney or solicitor respectively shall have delivered unto the party or parties to be charged therewith, or left for him, her or them, at his, her or their, dwelling house, or last place of abode, a bill of such fees, charges and disbursements," &c.

(a)³ See *Impey's New Inst. Cler. C. P.* 153.

(a)⁴ [Acc. *Davis v. Owen*, 1 Bos. & Pul. 342. But see the cases cited *ibid.* note (a).]

larity, because there were not fifteen days between the teste and return. But the Court said the practice was to allow the teste to be amended, and therefore Cockell took nothing by his motion (b).

MEARS against GREENAWAY. Tuesday, Nov. 17th, 1789.

Where in trespass for assault and battery, the count after stating the battery goes on, "and the said defendant then and there tore, &c. the clothes, &c. of the plaintiff (specifying them) wherewith he was then and there clothed, and which he then and there had on, &c. and the damages are found under 40s. and the Judge does not certify, the plaintiff is not entitled to more costs than damages (a).

In this action of trespass for an assault and battery, the first count of the declaration, after having stated in the usual way that the defendant assaulted the plaintiff and beat and bruised him, &c. went on in the following words: "And the said John (the defendant) then and there tore, rent, spoiled, damaged and destroyed, the clothes and wearing apparel of the said Francis (the plaintiff), to wit, two coats, two [292] waistcoats, one pair of breeches, one hat, one wig, one shirt, one stock, one neckcloth, two handkerchiefs, one pair of shoes, and two pair of stockings, wherewith he was then and there clothed, and which he then and there had on, of the value of 20l. so that they became of no use or value to him the said Francis." There were two other counts, but they did not state the spoiling of the clothes.

The defendant pleaded the general issue, and a verdict was found for the plaintiff, with five shillings damages, but the Judge did not certify. The prothonotary allowed full costs to the plaintiff; in consequence of which, a rule was obtained to shew cause why he should not review his taxation; against which

Le Blanc, Serjt., now shewed cause. The statute 22 & 23 Car. 2. st. 2, c. 5, directs that in all actions of trespass, assault and battery, and other personal actions, where the damages are under 40s. the plaintiff shall not recover more costs than damages, except where the Judge shall certify that the assault and battery was sufficiently proved, or that the freehold or title of the land mentioned in the declaration was chiefly in question. Now this cannot be extended by fair construction, except to cases where the Judge has it in his power to certify, namely, where the question only relates to an assault and battery, or to the title of land; but in the present case, an injury is charged to be done to the personal chattels of the plaintiff, who having obtained a verdict is entitled to his full costs, whether the damages amount to 40s. or not. The defendant might have had a finding, which would negative that charge; the plaintiff could only have a general verdict; it must now therefore be taken, that the defendant was proved to have done the injury with which he was charged. It is a distinct substantive allegation, though not contained in separate counts. In *Thompson v. Berry*, Strange, 551, the trespass was stated in one count, and in *Arnold v. Thompson*, 1 Barnes, 91, two distinct charges were also contained in one count. In *Carruthers v. Lamb*, 1 Barnes, 91, the plaintiff in similar circumstances with the present, recovered full costs; and the opinion of Mr. Justice Buller, in *Cotterill v. Tolly* (1 Term Rep. B. R. 655), goes to establish the right in this case. In *Hamson v. Aulsehead* (Sayer's Costs, 52, and Bull. N. P. 329), though the plaintiff had no more costs than damages, because the injury to the clothes was laid as a consequence of the assault, yet it clearly appears from that case that he would have been entitled to full costs, if the wetting [293] the clothes had been charged as a distinct fact. It does not follow that the tearing the clothes was in this case consequential to a battery, notwithstanding it is stated that the plaintiff, "then and there had them on:" clothes on the back of a person may be injured without a battery being committed, though it would be an assault; and unless an actual battery were proved, the Judge could not certify. The case then not falling within the Stat. Car. 2, the plaintiff is entitled to recover his full costs.

See also Tidd's Pr. 126, 8th edit. *Stevenson v. Danvers*, 2 Bos. & Pul. 109. *Walker v. Hawkey*, 5 Taunt. 853. *Adams v. Luck*, 3 B. & B. 25.]

(b) But see ante, 222.

(a) [Acc. *Lockwood v. Stunard*, 5 T. R. 482. *Bannister v. Fisher*, 1 Taunt. 357. Tidd's Pr. 1000, 8th ed. and see *Weathrell v. Howard*, 3 Bingh. 135.]

Rooke, Serjt., contra. By the ancient common law, the plaintiff was not entitled to any costs. The County Courts and courts baron were open to all the freeholders who were bound to attend; and in those Courts all disputes must be settled. After the Conquest, the King's Courts claimed jurisdiction of all trespasses committed *vi et armis*, because as they were breaches of the peace, a fine was paid to the King; but the Inferior Courts were still open to all other personal actions under 40s. Thus stood the law when the Statute of Gloucester was passed. That statute gave costs in all cases where damages might be recovered at common law, and consequently in all personal actions sounding in damages. But the same statute specially provided against bringing defendants wantonly into the King's Courts to answer trifling demands, or fictitious complaints: the eighth chapter confirms the jurisdiction of the County Courts, puts a check on certain actions in the King's Courts, and requires an affidavit in cases of trespass *de bonis asportatis*, that the goods were worth 40s.; and in cases of battery, that the plaint was true. But it appears from 2 Inst. 311, that this affidavit was soon disused, or rather never put in practice. Consequently plaintiffs were suffered to bring actions for trifling causes, in the Courts at Westminster, to the great oppression of the defendants, who might be ruined if the smallest damages were recovered, and the King's Courts were employed in determining trifling causes. To remedy this, the stat. 43 Eliz. c. 6, was passed, the preamble of which sets forth that it was made to prevent trifling suits being prosecuted in the Courts at Westminster, and the second section of which gives a power to the Judge to prevent, if he pleases, the plaintiff from recovering more costs than damages, by certifying that the damages do not amount to 40s.; with an exception only to the case of a title or interest in lands, the freehold or inheritance of lands, and of a battery. In all other cases, the Judge might by his certificate prevent more costs than damages from being allowed, where the damages were less than [294] 40s. But it appears from the judgment of Lord Chief Justice Willes, in *Milborne v. Read* (cited in 3 Wils. 323), that no certificate had ever been granted under this Statute of Eliz. In consequence of this, and to provide a further remedy, the stat. 22 & 23 Car. 2, c. 9, was made; which instead of leaving the matter to the discretion of the Judge, directs that in all actions of trespass, assault, and battery, and other personal actions where the damages are under 40s. shall the plaintiff recover no more costs than damages, unless the Judge shall certify that an assault and battery was sufficiently proved, or that the freehold or title of land was chiefly in question. The obvious construction of which is, that in no personal action whatever shall the plaintiff have more costs than damages if the latter be under 40s. except in cases of freehold or battery; and not even in these, without a certificate. In the first cases which arose on the Stat. of Car. 2, the Court seemed to adopt this construction. *Earl of Pembroke v. Westhall*, 3 Keb. 121. *Claxton v. Laws*, 3 Keb. 247. But in subsequent decisions, the Courts put a different construction on the Act, and the law is now settled that the Stat. Car. 2 extends only to cases in which the Judge can certify, namely to cases where the freehold is in question, and the assault and battery sufficiently proved. 3 Wils. 324. But of late, it has been considered as a hardship on defendants, that they should be brought to answer in the Courts of Westminster for trifling offences, or claims: certificates have accordingly been granted under 43 Eliz. and the construction of 22 & 23 Car. 2 has been extended by modern determinations. *Clegg v. Molyneux*, Dougl. 780. In cases of trespass merely for driving the cattle of the plaintiff or of an injury to a mere personal chattel, he is entitled to full costs, because no title of freehold can come in question; the case is therefore not within stat. 22 & 23 Car. 2, but remains as under the Statute of Gloucester, and if there be no certificate unrestrained by 43 Eliz. But trespass for breaking and entering a barn, locking the door and detaining goods where the damages were under 40s. did not carry full costs, because the title to the freehold might have come in question, and the injury to the goods should have been stated in a distinct independent count, *Reeves v. Butler*, Gilb. Rep. 199. So in *Clegg v. Molyneux*, the carrying away the turf was an injury consequential to the trespass, and the Judge not having certified, the plaintiff had no more costs than damages.

[295] As to the tearing the clothes being distinct from the battery, and the tradition that a laceravit carries costs, it is not always true: it is not so in trespass *quare clausum fregit*, Gilb. Rep. 198. There is no authority to shew that in a declaration framed like the present, the tearing would intitle the plaintiff to full costs; it states the clothes to have been on the back of the plaintiff: the tearing of them was therefore of itself

a battery. *Carruthers v. Lamb* was decided only in the Treasury, and does not set forth the declaration. In *Hamson v. Aidshead*, it was holden that if the declaration shews the injury to the clothes to be consequential, there should be no more costs than damages: and in the present case it was consequential. So if the jury find it to be consequential. *Cotterill v. Tolly*, 1 Term Rep. B. R. 655. In this case, the tearing the clothes was necessarily preceded by a battery, as the plaintiff had them on. The Judge might therefore have certified an actual battery sufficiently proved: but there is no certificate: the case then is within Stat. 22 & 23 Car. 2, and the damages being under 40s. the plaintiff cannot recover more costs than damages.

[Kerby, Serjt., amicus curiæ, then mentioned the case of *Atkinson v. Jackson*, in C. B. Pasch. 1786, which was a motion to tax the plaintiff his full costs. The declaration stated that the defendant struck the plaintiff many violent blows, and flung and threw a large quantity of water upon and over the plaintiff, "and then and there not only wetted him and put him in danger of catching cold, but spoiled his clothes, &c."

On this 1 Barnes 91, and Sayer's Costs, 52, were cited.

Lord Loughborough said there was much perplexity in motions of this sort, but the sense seemed to him to be, that where the jury do not find 40s. damages, there should be no more costs than damages.

Gould, J. observed, that the throwing the water and then and there spoiling the clothes, tied the whole count and complaint together.

And the rule was refused.]

Le Blanc in reply. In the case of *Reeves v. Butler*, no injury was stated to personal property, except what might have called the title to the freehold in question, respecting the locking up the barn and detaining the goods. The ground of the decision [296] in *Clegg and Molyneux* was, that the turf was part of the freehold. As to *Atkinson v. Jackson*, the declaration is not stated with sufficient certainty to be relied on.

LORD LOUGHBOROUGH.—There is no doubt in this case that the same question might have been left to the jury, which my brother Grose asked them in the case of *Cotterill v. Tolly*, namely, whether the tearing the clothes were part of the same act for which they gave 5s. damages; if they had answered that it was so, there would have been no question. But it is the same thing if it appears on the face of the declaration; which after stating the beating, goes on to state that the clothes of the plaintiff were spoiled, and then specifies each particular article, his coat, waistcoat, hat, wig, shoes, stockings, &c. Now I can only conceive one case, in which by any reasonable probability, these acts can be considered as wholly distinct; and that is by supposing that the defendant had first beat the plaintiff, then stripped him stark naked, and spoiled his clothes. But it is evident that one act was in consequence of the other; and the law is not to be evaded by a device of pleading.

GOULD, J.—There are two courses marked out for Judges in cases of this kind, one by the Stat. 43 Eliz. the other by 22 & 23 Car. 2. The first and best determination is in 3 Keble, but that has been open to a great deal of subtle reasoning and distinction. Yet I think that the best construction which best answers the end of the Legislature and puts a stop to all frivolous actions, by restraining more costs than damages from being allowed in the cases specified. If therefore the declaration states the tearing of the clothes to be done at the same time with the beating, the Court will construe it so as to accomplish the object of the statute, and will hold the tearing to be part of the same act, and a consequence of the battery. It was well determined in the case in 4 Co. (*Walker's case*, 4 Co. 41 b.) that the words *ad tunc* & *ibidem*, united and coupled all together.

HEATH, J., of the same opinion. Whatever difference of construction there was formerly on the Statute of Car. 2, it is now settled, that it must either appear on the face of the declaration or be found by the jury, that the tearing the clothes is a consequence of the beating. But after a general verdict it is to be intended that it was so found; and this may be without violence to the cases determined in the King's Bench.

[297] WILSON, J., of the same opinion, that the plaintiff is not entitled to his full costs. The cases rest on the form of the declaration. If in an action of this kind, the party chooses to forego the tort to his person, and goes only for the injury to his clothes, he would have his full costs. But if he will combine both together in one count, the case is within the Statute of Car. 2, because the principal injury is the battery; and the Judge may certify.

Rule absolute.

SCOTT *against* WHALLEY. Thursday, Nov. 19th, 1789.

Judgment being entered on a bond to secure the quarterly payment of an annuity, and a fi. fa. having issued for the arrears of the last half year, a second fi. fa. may be taken out for the next quarter without reviving the judgment (a)¹.

Judgment being entered on a warrant of attorney, given with a bond to secure an annuity payable quarterly by the defendant to the plaintiff, a fieri facias issued, on which the arrears of the preceding half year were levied on the defendant's goods. When the next quarter became due, another fieri facias was taken out, and a second levy made, but the judgment had not been revived. In consequence of this

A rule was obtained to shew cause why (amongst other things arising from objections made to the memorial enrolled pursuant to 17 Geo. 3, c. 26, but which the Court thought trivial) the goods levied under the latter execution should not be restored, on the ground that the judgment ought to have been previously revived by seire facias.

This point the Court thought worthy of consideration, but on this day they were clearly of opinion that it was not necessary to revive the judgment in order to sue out the second execution, and Mr. Justice Gould mentioned the case of *Ogilvie v. Foley*, 2 Black. 1111.

Rule discharged with costs.

Marshall, Serjt., for the plaintiff, Runnington, Serjt., for the defendant.

[298] CLAY *against* WILLAN AND OTHERS. Saturday, Nov. 28th, 1789.

Where a carrier gives notice by printed proposals that he will not be answerable for certain valuable goods, if lost, of more than the value of a specified sum, unless entered and paid for as such; and goods of that description are delivered to him by A. who knows the conditions, but concealing the value, pays no more than the ordinary price of carriage and booking; on a loss, the carrier is neither liable to the extent of the sum specified, nor to repay the price actually paid for the carriage or booking (a)².

The defendants were proprietors of a stage-coach, by which the plaintiff sent a quantity of light guineas to be carried from Wakefield to London. Two shillings were paid for the carriage, and twopence for booking. The following were the printed terms on which the defendants performed their business.

"Willan and Co. humbly beg leave to inform their friends and the public, that cash, plate, jewels, writings, or any such kind of valuable articles, will not be accounted for if lost, of more than 5l. value, unless entered as such, and a penny insurance paid for each pound value (a)³ when delivered to the book-keeper, or other person in trust, to be conveyed by any carriage that inns at the above inn."

The action was in the usual form against common carriers, and the plea, the

(a)¹ [Tidd's Pr. 1155, 8th edit.]

(a)² [See *Izett v. Mountain*, 4 East, 371, and *Nicholson v. Willan*, 5 East, 507, where the terms of the notice were nearly similar to those in the principal case, and it was held that the plaintiff was not entitled to recover anything. See also *Clarke v. Gray*, 6 East, 570. A carrier is not protected by his notice where he has been guilty of gross negligence, *Ellis v. Turner*, 8 T. R. 531. *Beck v. Evans*, 16 East, 247. *Bodenham v. Bennett*, 4 Price, 31. *Smith v. Horne*, 8 Taunt. 144. 2 B. Moore, 18. *S. C. Birkett v. Willan*, 2 B. & A. 356. *Batson v. Donovan*, 4 B. & A. 21. *Garnett v. Willan*, 5 B. & A. 58. *Sleat v. Fagg*, 5 B. & A. 342. *Duff v. Budd*, 3 B. & B. 177. Whether the notice furnishes a defence where the carrier was acquainted with the value of the parcel, see *Beck v. Evans*, 16 East, 244. *Wilson v. Freeman*, 3 Campb. N. P. C. 527. *Leri v. Waterhouse*, 1 Price, 280. *Alfred v. Horne*, 3 Stark. N. P. C. 137. And as to the obligation upon the party employing the carrier to inform him of the value, see *Batson v. Donovan*, 4 B. & A. 21. *Sleat v. Fagg*, 5 B. & A. 342.]

(a)³ It was said in the argument that after the words "pound value," were added, "over and above the common carriage." But the printed paper produced in Court was as above stated.

general issue. No money was paid into Court. At the trial the plaintiff was nonsuited, it being proved that the person by whom he sent the parcel to the inn, knew of the above terms, but had not discovered the contents of the parcel to the book-keeper, nor paid for them as valuables. A rule having been granted to shew cause why the nonsuit should not be set aside and a verdict entered for the plaintiff, on the ground that he was entitled to recover as far as 5l. by the printed conditions,

Rooke and Lawrence, Serjts., now shewed cause. On the fair construction of the printed paper, the plaintiff is not entitled to recover even the 5l. not having complied with the conditions; and the reason of those conditions is obvious; that if a parcel be above the value of 5l. but does not contain jewels, plate or the like, it would probably be of considerable bulk, and therefore not so likely to be lost or stolen. But it was contended at the trial, that by analogy to the case of insurance, the plaintiff was at least entitled to recover back the 2s. 2d. paid for the carriage and booking. Now an insurance is a mere contract of indemnity, but a carrier has a right to be paid for the trouble of the conveyance which he has actually taken. Yet an insurer is entitled to retain 10s. per cent. where there is a return of pre-[299]-mium. The plaintiff has also been guilty of a fraud; he knew the conditions which the defendants printed, yet by concealing the real value of the parcel, endeavoured to make them liable at all events. So where fraud has been manifest, the Court have ordered an underwriter to retain the premium. *Park. Insurance*, 247. To the same point also is *Lowry v. Bourdieu*, Dougl. 468, and in *Turner v. Gray* (sittings after Trinity term, 1785, Westminster), the plaintiff having sent money and deeds by the Nottingham coach, and being asked by the book-keeper as to the value, but denied it to be a parcel of value, was nonsuited and not permitted to recover the money paid for the carriage. Another reason also why the plaintiff should not recover the 2s. 2d. is, that the defendant comes prepared only to resist the claim of 5l., he has had no notice that the 2s. 2d. would be demanded, which was not the point to be tried: and it is laid down by Lord Mansfield, that where the parties come to trial on one ground, care ought to be taken that the defendant should not be surprised by another. 1 Term Rep. B. R. 134.

Adair and Le Blanc, Serjts., contra. The plaintiff is entitled either to recover the 5l. or the 2s. 2d. The printed terms being of doubtful construction, the matter must be determined by the rules of good sense, and the common consent of mankind. The payment of 2s. was a consideration fully adequate to the risk run, supposing the goods were not worth more than 5l., when it appears from the conditions themselves, that only one penny would be the insurance for every additional pound value; and the twopence paid for booking may be fairly deemed an additional insurance over and above the common carriage; the price fixed included both an insurance of safety to the goods, and a compensation for the care and trouble of the carrier. The defendants underwrote, as it were, as far as 5l., and on a total loss are to pay the money for which the risk was run; or if there was no risk, are to return the premium. *Tyrie v. Fletcher*, Cowp. 666. As to the case of *Turner v. Gray*, it appears that the plaintiff had there warranted the parcel not to be valuable, he therefore was not permitted to recover against his own warranty. The case of *Hutton v. Bolton* (b), is an authority in

(b) *Hutton and Ux. v. Bolton*, B. R. East. 22 Geo. 3.

This was an action of assumpsit against the defendant, the owner of a stage-coach for losing a trunk belonging to the plaintiffs. Though the loss, in point of value was full 50l. the defendant moved for leave to pay 20l. into Court, upon an affidavit, stating that he had long since published an advertisement,* that he would not be answerable for any parcels committed to his care above the value of 20l. unless he was paid in proportion to the risk; and that though the things lost in the present case exceeded that value, yet he was not informed of it, nor paid any thing extraordinary for the carriage.

On shewing cause against the rule, Erskine, for the plaintiffs, contended, that unless the demand is for a specific sum, the defendant cannot pay a specific sum into Court; for which reason it cannot be done in any action founded on a tort, in trover, or where the action sounds merely in damages. 12 Mod. 397. The forms of actions are immaterial to the present point, if the object and gist are the same. Though this action be on an implied assumpsit, yet a specific action on the case for negligence

* The precise terms of the advertisement do not seem to have been attended to.

[300] favour of the plaintiff, in which no doubt was made of a carrier being liable to the extent of the sum beyond which he had declared by an advertisement that he would not be answerable. [301] As to the argument that a fraud was practised by the plaintiff; though he did not pay a larger price for the carriage, yet the proprietors run no greater risk, took no more trouble, nor were put to any more expence in carrying the parcel, than if it had been only of the value of 5*l.* they were therefore not injured by the concealment, which was clearly not a fraud. The plaintiff gave up his indemnity, and having insured only to the amount of part of the value cannot recover more, but is entitled to that amount. The ground of the decision in *Lowry v. Bourdieu* was, that the contract was executed, and the plaintiff had waited till the risk was completely run. But it appears from that case, that where there is no risk, the premium shall be returned. Neither were the defendants in the present case taken by surprise, with respect to the demand of 2*s.* since it was stated in the declaration that 2*s.* were paid for the carriage, and there was also a count for money had and received.

The Court took time to consider till the next day, when they declared that the

would have lain; and as in the latter, the motion could not be granted, neither ought it to be in the former, the object of both actions being the same. Here it is quite a matter of damages, for though the jury would give the value of the goods by their verdict, yet they may nevertheless extend it to damages for such inconveniences as the plaintiffs may have sustained from the non-delivery of them; the damages therefore being uncertain, the defendant cannot be admitted to pay money into Court. No man can pay money into Court, but where under circumstances he may plead a tender, which could not be done in this case, inasmuch as nothing specific could be relied on. As to the advertisement which was the sole ground of the present application, the fact must be tried whether the plaintiffs had any notice of it. Notice to the public would not be sufficient to be effectual, it must be given to the party, which is mere matter of evidence to the jury.

Baldwin, in support of the rule, admitted that notice of the advertisement must be proved against the plaintiffs at the trial, or the payment of money into Court would not avail any thing in favour of the defendant. This is a question of costs, and ought the defendant to be liable to costs if the plaintiffs should not recover any more than 20*l.* at the trial? The motion is made on the ground of an express contract between the parties; upon an express stipulation that 20*l.* is the extent of the retribution. This is not an appeal to the discretion of the Court, but is a matter within the known principles which govern cases on stipulated contracts.

LORD MANSFIELD.—The governing principle in cases like the present is, that where the plaintiff makes that kind of demand, which is substantially for a specific sum of money, the defendant may move to pay money into Court. In torts indeed it is otherwise: there it is a mere question of damages; a chance, and as in such cases the defendant was originally in the wrong, he must take the event of that chance. In the present case the defendant truly says, "I am by express stipulation liable only for 20*l.* and am ready to pay it to you." What is the question on the merits? Is it true? If so, he is right; if not, he pays the costs. As to notice of the advertisement, it is open to be tried.

ASHHURST, J.—The whole question is who shall be liable for costs? which must fall on whoever is in the wrong: and if the fact were in the knowledge of both parties, it is but just and fair that the defendant should be permitted to pay the money into Court. It is not litigating the value of the goods; the motion is a very reasonable application.

BULLER, J.—Upon principle, I see no difficulty in suffering the money to be paid into Court. This is an action of assumpsit, and the goods are stated to have been of a specific value. The declaration does not state any particular damage or inconvenience in consequence of, and independent of the loss, and therefore the plaintiff cannot recover beyond the value of the goods in question; for which reason the declaration does not differ from the common case of goods sold and delivered. It is a declaration on the face of it only for the value of the goods. The defendant might have pleaded the fact, and a tender of the 20*l.* If so, this case comes within the general rule.

Rule absolute,

sense of the printed conditions seemed to be, that the defendants were not liable to any extent, unless the parcel had been entered and paid for as valuable; and therefore the rule for setting aside the nonsuit (*a*)

Was discharged.

SUMNER against GREEN. Friday, Nov. 27th, 1789.

Where a defendant is arrested on a contract, the legality of which is doubtful, and which may eventually subject the plaintiff to a penalty, the Court will discharge him on entering a common appearance. *Qu.* Whether the stat. 7 Geo. 1, st. 1, c. 21, does not extend to all trading by British subjects in the East Indies?

The defendant in this case having been arrested on a respondentia bond, for 5900l. a rule was granted to shew cause, why he should not be discharged out of custody on entering a common appearance. This rule was obtained on an affidavit, which stated, that the bond was given for goods shipped by the plaintiff, a British subject at Calcutta in the East Indies, on board an American ship homeward bound from thence to Rhode Island in America, which had previously landed in Bengal a cargo from Europe. And the question was, whether the bond under the above circumstances was not void by the 2d section of the statute 7 Geo. 1, st. 1, c. 21, which enacts, "That all contracts and agreements whatsoever, at any time from and after June 24, 1721, made or entered into by any of His [302] Majesty's subjects, or any person or persons in trust for them, for or upon the loan of any monies by way of bottomry on any ship or ships in the service of foreigners, and bound or designed to trade in the East Indies or parts aforesaid; and all contracts and agreements whatsoever made by any of His Majesty's subjects, or any person or persons in trust for them, for the loading or supplying any such ship or ships with a cargo lading of any sort of goods, merchandize, treasure, or effects, or with any provisions, stores, or necessities, &c. &c. shall be void?"

Le Blanc and Lawrence, Serjts., now shewed cause, contending that the bond in question was not avoided by the statute; the sole object and meaning of which, as it appeared from the title and preamble, was to prevent the subjects of Great Britain trading from Europe to the East Indies with foreign commissions, to the prejudice of the East India Company: but this was a case of a foreign ship homeward bound taking in a cargo at Calcutta, to be carried from thence directly to Rhode Island. It was also improper that a question of such importance should be discussed on a summary application to the Court, and not put upon the record.

Adair and Bond, Serjts., on behalf of the defendant, urged that the case was within the mischief designed to be remedied by the statute, the intent of which was not only to protect the exclusive right of the India Company from other British subjects, but also to secure the trade to the nation itself, by preventing foreigners from sharing in it in any degree, and for that purpose, throwing every possible difficulty in their way. As to the objection to the mode of application to the Court, it would be very oppressive to detain a foreigner in gaol who probably would not be able to find bail to the large amount required by the bond, when the bond itself might turn out to be void.

LORD LOUGHBOROUGH.—We are all of opinion in this case, that the defendant ought to be discharged on entering a common appearance. But we do not think it necessary to give a decided opinion on the Act, because, where the plaintiff has the defendant in custody, and the cause of the arrest being communicated in his own affidavit, appears by reference to the security on which the debt arises, it would be improper to hold the party in prison if there appears a probable ground, that the contract which is the foundation of the action is void. If the contract were not only void, but mischievous, the law [303] might be evaded, if the plaintiff were permitted to retain the advantage which he has gained over the defendant, and make use of the opportunity of treating with him while in confinement; for possibly the merits of the case might then never meet the examination of a Court of Justice. I do not choose to enter into the construction of the statute, because the consequences are very extensive, since if it be as the defendant suggests the security is not only void, but

(*a*) *Gibbon v. Paynton and Another*, 4 Burr. 2298. *Tily v. Morrice*, Carth. 485.

the other clauses go to subject the plaintiff to very considerable penalties: but I think it seems probable, that in its true meaning, it would reach all trading in the East Indies for the purpose of sending goods to other parts of the world, contrary to the provisions of the charter of the East India Company.

Rule absolute for the defendant's discharge.

TRELAWNEY against THOMAS. Saturday, Nov. 28th, 1789.

A. having given a general bond to B. for the payment of money, which it is understood between them, is to be applied towards indemnifying B. from the expences of an election in which B. is a candidate; in an action brought by C. against D. for money advanced and services performed in supporting the interest of B. at the request of D. A. is not a competent witness. In assumpsit for work and labour and money paid, the jury will in their verdict calculate interest on the money really advanced, but not on the damages for the work and labour (a).

Assumpsit for work and labour with the common money counts.

The action was brought for services performed and money advanced by the plaintiff at the request of the defendant, in support of Messrs. Cruger and Peach two

(a) [But it has been since decided that interest in such case is not recoverable. *Calton v. Bragg*, 15 East, 223. *De Haviland v. Bowerbank*, 1 Campb. N. P. C. 50. It appears to be now firmly settled, notwithstanding the conflicting authorities, that interest it only recoverable upon mercantile securities, or in those cases where there has been an express promise to pay interest, or where such promise is to be implied from the usage of trade or other circumstances, per Abbot, C. J. *Higgins v. Sargent*, 2 B. & C. 349. It still, however, remains a doubtful question, whether interest is properly recoverable as a separate demand, or whether merely as damages incidental to the recovery of the principal; and also, whether, if it can be claimed as damages, it can be recoverable under the indebitatus counts for goods sold and delivered, money had and received, &c.

On the one hand that interest can only be claimed where a contract, either express or implied, to pay it exists, appears from all the later decisions on the subject. So it has been held that debt will lie for interest, which were it merely a demand sounding in damages would not be the case. *Doran v. O'Reilly*, 5 Dow, 133. *Herries v. Jamieson*, 5 T. R. 556, but see *Seaman v. Deu*, 1 Vent. 198, contra, and see *Williams v. Fowler*, 1 Str. 410, where it is said that where interest is damages debt will not lie, but that it is otherwise where a stated interest is fixed at a stated rate. See also *Dickenson v. Harrison*, 4 Price, 286. That interest (accruing on a covenant to pay a certain sum of money with interest) is a separate demand, appears also from the last cited case; and see *Herries v. Jamieson*, 5 T. R. 553.

On the other hand, that interest is properly recoverable as damages incidental to the recovery of the principal, and not as a separate demand arising ex contractu, appears from several authorities. "Interest is recovered by way of damages, where damages are recovered *ratione detentionis debiti*." *Sweatland v. Squire*, 2 Salk. 623. "Where by deed the party covenants or binds himself to pay the principal with interest, the interest is not to be included with the principal in an action of debt, but shall be turned into damages which the jury is to measure," per Hale, C. J. *Seaman v. Deu*, 1 Ventr. 198. "Wherever interest is intended to be given, it forms part of the damages assessed by the jury," per Lord Kenyon, *Lee v. Lingard*, 1 East, 408, and see *In the Matter of Burgess*, 8 Taunt. 664. So where the obligee of a bond (reserving interest) received the whole principal, but not the whole interest, and afterwards brought an action on the bond for the interest unpaid, to which the defendant pleaded *solvit post diem*, Lord Kenyon ruled that the plaintiff could not recover, "That the jury give the interest in the form of damages, but there must be something to support them; that here the principal having been paid for it there could be no verdict; that that being gone, every thing founded on it must go too." *Dixon v. Parkes*, 1 Esp. N. P. C. 110. So also where in an action on a promissory note, the particulars of the plaintiff's demand contained no claim for interest, Lord Ellenborough held, "That though the interest was not claimed *eo nomine* by the particular, the plaintiff might recover it as arising out of the principal." *Blake v. Lawrence*, 4 Esp. N. P. C. 147.

of the candidates at the last election of members of Parliament for the City of Bristol.

The cause was twice tried, and on each trial the plaintiff recovered a verdict; on the latter, for the amount of the money advanced by him for the purposes of the election, viz. 44l. with interest, together with a certain sum for his attendance. The substance of the evidence on the part of the plaintiff, as it appeared on Lord Loughborough's statement of it, was, that the defendant, who was a member of a committee at Bristol for carrying on the election in favour of Peach and Cruger, had taken upon himself an active part in engaging the plaintiff to advance money, and attend in collecting the voters resident in London, and conveying them to Bristol. On the other hand, the defendant endeavoured to prove that he acted merely as the agent of Peach and by his authority; for which purpose he called, besides other evidence, two witnesses Lediard and Ewbank; but they being examined on a *voir dire*, Ewbank said he had given a bond to Peach for [304] the payment of a sum of money, which it was understood between them, was to be applied towards indemnifying him from the expences of the election; and Lediard acknowledged that he had entered into a written agreement to the same effect. From this account, Lord Loughborough thought they were interested in the event of the cause, inasmuch as by procuring the plaintiff to be nonsuited or a verdict against him, they would save themselves from the consequence of this action, since if he gained a verdict, as the defendant would call upon

See also *Francis v. Wilson*, 1 R. & M. N. P. C. 105, and *Ex parte Williams*, 1 Rose, 401. "As to what has been said in argument that promissory notes carry interest by force of the contract, Lord Hardwicke was an excellent common lawyer, and he has over and over again said that damages are given beyond the amount of bills of exchange and promissory notes, not by force of the contract, but in respect of a breach of it." Per Lord Eldon, *ibid*.

It has indeed been said, that interest is sometimes recoverable as damages, and sometimes as a debt. *Williams v. Fowler*; *Dickenson v. Harrison*, *supra*; and this was the opinion of one of the Judges in the late case of *Higgins v. Sargent*, 2 B. & C. 348. "If this, therefore, had been an action of debt, the payment of the principal sum would have been a good defence, because the interest is no part of the debt, but is claimed only as damages resulting from the non-payment of the debt. Where indeed the interest becomes payable by virtue of a contract expressed or implied, then it becomes part of the debt itself, and consequently it would then be no answer to an action of debt for the defendant to shew that he had paid the principal sum advanced. Here" (it was covenant on a policy of insurance upon the life of A. payable six months after A.'s death), "there being no contract either express or implied to pay interest, it is no part of the debt, but could only be recovered by way of damages for detaining the debt." Since the modern decisions, it is difficult to imagine a case in which the Court would allow a party to recover interest as damages resulting from the non-payment of the debt, where there is no contract either express or implied. If allowed in one instance, why not in all? Every creditor to whom money is due, and not paid, sustains a damage by reason of the detention of his debt in being deprived of the use of his money.

If interest is to be regarded as a sum of money due by virtue of the same contract under which the principal is payable, it seems not to be properly recoverable under the *indebitatus* counts for money had and received, &c. If due as arising by contract only, express or implied, such contract ought, as it seems, to be shewn by the plaintiff in his declaration, and he will not be allowed to give it in evidence under a count adapted to a contract of a different nature. But if interest be only an incident to the recovery of the principal, there seems better reason for holding that it may be recovered under any count by which the principal can be recovered, see 2 Starkie's *Evid.* 790.

That interest is not recoverable under the *indebitatus* counts, see *Moses v. M'Furlan*, 2 Burr. 1012. *Walker v. Constable*, 1 Bos. & Pul. 306. *Tappenden v. Randal*, 2 Bos. & Pul. 472. But in *Marshall v. Poole*, 13 East, 98, it was held, that interest might be recovered under a count for goods sold and delivered as part of the price of the goods, and in two cases the Courts have refused to interfere where interest has been given by the jury under the *indebitatus* counts. *Slack v. Lowell*, 3 Taunt. 157, *Harrison v. Allen*, 2 Bingh. 4. In the latter case there was an *indebitatus* count for interest.]

Peach to be reimbursed the damages and costs, they would be liable by their engagements to Peach; and if the plaintiff having failed in this action should bring another against Peach, they (the witnesses) might tender to Peach the amount of the plaintiff's demand, and thereby escape the costs, for if Peach should proceed against them on their securities, he would be restrained in equity from having execution for more than the damages recovered by the plaintiff in the former action, which would have been tendered.

A rule was obtained by Watson, Serjt., to shew cause why there should not be a new trial on the following grounds. That the defendant was merely the agent of Peach, and therefore not personally liable: that the evidence of Lediard and Ewbank ought to have been admitted, and that the jury ought not to have calculated interest, the damages in an action for work and labour being before verdict unliquidated.

Adair Serjt., who shewed cause, chiefly relied on two points. 1. That it was an established rule of law, too clear to be disputed, that though the principal was in general responsible for the acts of his agent, yet the agent might by special circumstances, make himself liable; that it was the province of the jury to determine on the evidence, whether there were such circumstances or not; and that in the present case, it was found by the verdict that the defendant had conducted himself so as to be personally liable. 2. That it sufficiently appeared from the examination of Lediard and Ewbank, that they were interested in such a manner in the event of the cause as to make their evidence inadmissible.

The Court delivered their opinions as follow:

GOULD, J.—It would be an exceedingly hard case, if the plaintiff Trelawney was not intitled to recover against the defendant Thomas, considering from the state of the evidence, the active share and part which he took in this business. For my own [305] part, if I had been present on the spot and observed his conduct, I should have looked upon him as a person supporting the credit of Cruger, and putting himself forward as a stake to be responsible to every body. With respect to the committee, it is clear that Thomas was a member of it, and supposing the money to come from that committee, and having said nothing to give the plaintiff a better right against any other person, he shall not be permitted to turn the plaintiff round. With respect to the objection to the witnesses, I take it, that unless a witness is interested in the event of a cause, the objection will not go to repel him; it will not go to his competency, but only to his credit. In this case it seems to me from the statement of it by my Lord Chief Justice, that there was an interest in these two witnesses, as they were liable to that sum of money which would follow a verdict in point of costs: they appear therefore to me interested to procure a nonsuit if they possibly could for the plaintiff, or a verdict against him. As to the last question relating to the interest on the money, I remember a case (2 Black. 761. 3 Wils. 205. [See 15 East, 228 (n)]) extremely well, where on a writ of inquiry the jury on assessing damages found interest for money lent; my brother Whitaker applied to set aside that inquisition on the ground that the giving interest was not warranted by any precedent: a case was then cited from Bunbury's Reports (Bunb. 119), in which the Court were of opinion, that for money lent interest should be recovered; and Whitaker's motion was refused. Now money laid out for the use of another, and money lent to him, seem to stand precisely on the same ground with respect to reason, justice, and equity. As far therefore as interest was assessed with respect to the liquidated sum, I think the verdict perfectly right, and ought to be sustained: as to the sum for day's wages, certainly in my apprehension, no interest ought to be allowed; and this distinction is made in the case in Bunbury, that for goods sold and delivered or work and labour, no interest ought to be allowed; otherwise of money lent. But there is a known and usual method of remitting damages of this kind. I am therefore of opinion that there ought not to be a new trial.

[It was then stated at the Bar, that no interest had been allowed on the sum for the daily attendance of the plaintiff; which the Court said was perfectly right.]

HEATH, J.—I am of the same opinion with my brother Gould, on the first point. I think it clear that Thomas has made him-[306]-self liable; he was one of the acting committee, and the only person the plaintiff can sue. As to the question concerning the witnesses who were examined on the voir dire, one says he has entered into a written agreement, the other that he gave a bond for the payment of money; and one says the money was to be made use of in defraying the expenses of the election. If

the party were sued on the bond, though in point of law, perhaps, it could not be pleaded that only such a sum was really advanced, yet in equity no more would be recovered. Then the question is, whether they are interested in the event of this suit? Now it appears clearly, that Cruger and Peach were joint candidates; it also appears that there was a committee formed for the interest of both, and that the defendant Thomas was a member of that committee. When therefore the two witnesses were called to be examined, and to nonsuit the plaintiff, who brings his action to recover the expenses of the election, they speak most materially in respect to their own interest; because the money to be recovered by this verdict, will be part of the money for the securing payment of which the agreement was entered into and the bond was given.

WILSON, J.—With respect to the first question, it is evident that the jury might have found either way; there being evidence on both sides, they might very well find for the plaintiff, which they have done. With respect to the other question of the two witnesses, I entertain very great doubts. I am not prepared to go the length of saying their testimony ought to be rejected. All that one of them says is, that he gave a bond to Mr. Peach conditioned for the payment of money, and that he understood Peach was to apply it to defray the expenses of the election. Now it does not at all appear that Peach would be answerable to the defendant Thomas, because if the committee undertook the election at their own expense by their own subscription, the candidate was not answerable to them; and if they were merely agents, they were not themselves personally answerable. There is no evidence therefore that Thomas could have compelled this money from Peach; and unless that was clearly established, I am of opinion that there is not a shadow of interest in the witness Ewbank. With regard to Lediard, I should also doubt whether he had an interest in this case, which must be shewn, though they might have a common cause. Yet even if the objection were to hold, it would go only to the credit of the witness. Now these persons are not to pay over to the defendant [307] either the damages or costs of suit which he might incur; but there is a chance that Peach may call upon them. It is also very likely that Lediard might be mistaken; when he was giving an account of a written engagement, he might not recollect exactly what it was, it might be a bond having some recitals in it, or something relating to the election; but we do not know what it was. But I think it is too much to reject the evidence of witnesses, unless there is a positive and direct proof, either out of their own mouths or by record (but out of their mouths it should be) that they are interested in the event of the cause. In the present case it ought to be shewn, that Thomas was employed by Peach, and that Peach was liable to him when he made himself liable for the money.

GOULD, J.—I remember a case in *Strange (Fotheringham v. Greenwood, Stra. 129)*, where the witness answered to the voir dire, that though he was not under any legal obligation to bear out the costs, yet he considered himself under an obligation in point of honour, and that repelled him (b).

LORD LOUGHBOROUGH.—In this case there was no evidence at all of there being any committee who had money of their own contributing to pay towards the expense of the election; on the contrary, the evidence on the part of the defendant proved the negative of that proposition. There was a committee managing the election for the absent candidate Mr. Cruger, and Mr. Peach one of the candidates has an engagement on the part of Mr. Ewbank to pay simply a sum of money; but Ewbank declares that the consideration on which he had given that bond, and what would make the real debt between Peach and him, was the application of so much of that sum as should be necessary towards the expenses of the election, in relief of Peach the partner of Cruger. The other witness Lediard, entered into an agreement which he states to be exactly of the same effect, for the payment of money which he understood to be for the expense of the election. Now they seem to me to have the most direct interest in the event of the cause; not that the verdict could be evidence on which the money would be demandable of them, but in the persuasion of their own minds, that the difference of the cause was just so much to them in the proportion of the costs. It is certainly sufficient from the case in *Strange*, that the witness thinks himself interested, though in point of law there could be no recovery against him. Now

(b) [*Pederson v. Stoffles*, 1 Campb. N. P. C. 145, *contrà*. And see 1 Phill. Evid. 150, 6th edit.]

if he dis-[308]-closes the nature of his interest, and honestly says what that interest is according to his own conception of it, and it is an interest which by immediate and necessary consequence must subject him to the costs in the action, it would be strange to say that it was indifferent to him whether the defendant or plaintiff recovered. Certainly in point of law, these witnesses must pay the money due on their agreements, but it is equally certain that Peach could have execution for no more than he could state to be paid by him for the expense of the election. The 44l. due to the plaintiff Trelawney is money advanced towards the expense of the election. In case he recovers, the obligation to pay the 44l. and all the costs of this and the other action attach, which in that respect become part of the expenses of the election. If the plaintiff had been nonsuited, they might have tendered the two sums to Peach, and thrown on him the costs (a)¹. With regard to the question, how far collateral interest in the same cause will affect the parties so as to reject their evidence, I am at a loss for a settled and known rule. The cases have differed very widely upon it, it has appeared in several cases that where the witness has stood precisely in the situation as either party to the cause, with respect to another action, it was better to hold it to be an objection that went to his competency rather than his credit. But I know that opinion is combatted by very great authority. Yet it was so ruled in the time of Lord Chief Justice Parker, by all the Judges of England. The case is in Fortescue, 246, *Lock v. Hayton*, where an action was brought on a policy of insurance, and the plaintiff having proved the policy and premium, the master of the ship was called to prove the loss and damages, who admitted that he himself made an insurance on some goods of his own on board; an objection was taken to his competency, which the Chief Justice reserved for the consideration of the Court; and afterwards on a communication with all the Judges, it is stated by Fortescue, who was himself a Judge at that time, to be their unanimous opinion, that it was a sufficient objection to repel the witness (a)². But this in the present case goes beside the point; as I take it here, there was a direct interest in the costs of the cause.

Rule discharged.

See *Walten v. Shelly*, 1 Term Rep. B. R. 296. *Bent v. Baker*, 3 Term Rep. B. R. 27. *Jordaine v. Lashbrooke*, 7 Term Rep. B. R. 601.]

End of Michaelmas term.

[309] CASES ARGUED AND DETERMINED IN THE COURT OF COMMON PLEAS, IN HILARY TERM, IN THE THIRTIETH YEAR OF THE REIGN OF GEORGE III.

KIRKMAN *against* PRICE. Monday, Jan. 25th, 1790.

The memorial of an annuity must set forth precisely, the manner in which the consideration money was paid; according to 17 Geo. 3, c. 26. Qu. Whether the consideration were a good one which consisted partly of money paid at the time, and partly of securities for money before advanced, then given up (a)³?

A rule had been obtained to shew cause why a bond, warrant of attorney, and deed of assignment of the defendant's pay as a lieutenant in the Navy, to secure an annuity, should not be given up to be cancelled, on the ground that the consideration of the annuity was not sufficiently set forth in the memorial according to 17 Geo. 3, c. 26.

The memorial stated generally the annuity to have been granted in consideration

(a)¹ [But quære whether Peach would have been liable to the costs? If the defendant was rightly sued, he should not have resisted the payment, and he could not throw upon Peach the costs of an action improperly defended, *Fisher v. Fallows*, 5 Esp. N. P. C. 171, and without the directions of Peach, *Howes v. Martin*, 1 Esp. N. P. C. 162. But see *Jones v. Brooke*, 4 Taunt. 464.]

(a)² [The case of *Lock v. Hayten* cannot now be considered an authority, since it appears to be well decided that a witness, who merely stands in the same situation as the party for whom he gives evidence, is competent. See the cases collected, 1 Phill. Evid. 45, 6th edit.]

(a)³ [Vide *Mouys v. Leake*, 8 T. R. 411. *Horwood v. Underhill*, 3 M. & S. 82.]

of 160l. paid by the plaintiff to the defendant; but it appeared upon affidavit, that 99l. 14s. 6d. of the money had been previously lent by the plaintiff, for which the defendant gave several promissory notes, and that the plaintiff at the time of granting the annuity, advanced only so much money as remained to complete the 160l. allowing twelve guineas for the expences of the deeds, but gave up the notes.

This Bond, Serjt. in shewing cause, said was sufficient, as the whole consideration money had in fact been received by the defendant, though at different times. He also said that the application came too early, since the statute did not give the Court authority to interfere, before execution was sued out on a judgment entered, or an action was brought.

[310] Adair, Serjt., supported the rule, by contending that neither the consideration was a good one, nor the mode of advancing it so clearly set forth as the statute required. As to the first point he cited *Jaques v. Withy*, 2 Term Rep. B. R. 557; as to the second (on which he principally relied), *Rumball v. Murray*, 3 Term Rep. B. R. 298.

The Court gave no decided opinion on the validity of the consideration (a)¹, but held clearly, that the particulars of it were not sufficiently specified, the words of the statute (sect. 3), being that the consideration should be "fully and truly set forth and described" and therefore made the

Rule absolute.

LOCKWOOD *against* HILL. Wednesday, Feb. 3d, 1790.

A variance between the writ and count, (the *ac etiam* being in case on promises, but the declaration in debt) is not a ground for entering an *exoneretur* on the bailpiece, where the sum sworn to is under 40l.(a)².

In this case, on the motion of Cockell, Serjt., a rule was granted to shew cause why an *exoneretur* should not be entered on the recognizance of bail, on the ground that in the *capias ad resp.* against the principal, the *ac etiam* was "in a certain plea of trespass on the case on promises" for 25l. but that the declaration was in debt for 260l. or simple contract.

Marshall, Serjt., shewed cause, arguing that as the sum sworn to was under 40l. the defendant might have been arrested and holden to bail on a common *clausum fregit* without an *ac etiam*. The stat. 13 Car. 2, st. 2, c. 2, which requires the cause of action to be expressed in the writ, and which gave rise to the clause of *ac etiam*, operates only where the sum is above 40l., when therefore the debt is under 40l., the *ac etiam* is not necessary, and a difference between that and the count is not material, particularly as relating to the bail, who engage to be answerable for the debt of the defendant. Prac. Reg. 137.

The Court were of this opinion, and the

Rule was discharged.

[311] ZOUCH ON THE DEMISE OF WARD *against* WILLINGALE.
Friday, Feb. 5th, 1790.

A distress taken for rent accrued after the expiration of a notice to quit, is a waiver of the notice (a)³.

In this ejectment, tried before the Lord Chief Baron at the last assizes at Chelmsford, the plaintiff was nonsuited on the following circumstances. In September 1787, the lessor of the plaintiff purchased the premises in fee then occupied by the defendant, who continued tenant from year to year, and to whom the lessor of the plaintiff

(a)¹ [That such consideration is valid, see *Ex parte Fallon & Ux.*, 5 T. R. 283, and *Kelfe v. Ambrosse*, 7 T. R. 551.]

(a)² [See *Kerr v. Sheriff*, 2 Bos. & Pul. 358.]

(a)³ [Accord. *Doe v. Johnson*, 1 Stark. N. P. C. 412. But after a verdict in ejectment for not quitting according to notice, a subsequent distress for rent due after the verdict, is not a waiver of the notice to quit, or a ground for setting aside the verdict or staying execution. *Doe dem. Holmes v. Darby*, 8 Taunt. 538.]

on the 19th of March 1788, gave the following notice to quit. "I do hereby give you notice to quit and leave the possession of all that messuage or tenement, &c. which you hold under me, &c. at Michaelmas Day next, &c." The defendant not having quitted possession in pursuance of the notice on the 24th of February 1789, the lessor of the plaintiff distrained for a year and a quarter's rent due at Christmas 1788, viz. for the year ending at the expiration of the notice to quit, and the quarter from that time to Christmas, during which the defendant held over. The demise was laid on the 1st of January 1789, and the question was as appeared from the Chief Baron's report, whether the distress taken for rent accrued subsequent to the time when the defendant had notice to quit, was not a waiver of the notice?

His Lordship was of opinion that it was a waiver, and therefore directed a nonsuit.

A rule having been obtained to shew cause why the nonsuit should not be set aside and a verdict entered for the plaintiff, or a new trial granted;

Bond, Serjt., now shewed cause. The lessor of the plaintiff could not recover in this ejectment, having by the taking a distress affirmed and continued the tenancy, which he had before admitted by the terms of the notice. Though in *Doe v. Batten*, Cowp. 243, the mere acceptance of rent was holden not to be of itself a waiver of the notice, but to be a question for the jury, whether it was the intention of the parties that such acceptance should be a waiver or not; yet in the present case no such question could arise, the distress being a direct acknowledgment that the tenancy continued. This principle is to be collected from Co. Lit. 212 b. —1 Roll. Abr. 475.—3 Co. 64, *Pennant's case*. Plowd. 133, which cites 14 Assize.—*Birch v. Wright*, 1 Term Rep. B. R. 378.

Runnington, Serjt., contra. As the defendant was tenant from year to year, the authorities cited from Lord Coke, which were [312] of the waiver of a forfeiture for a condition broken, are not applicable. As the landlord might have brought an action for use and occupation, there is no good reason why he may not also bring an ejectment. In the former, there is an implied contract between the parties, founded on a supposed permission by the plaintiff for the defendant to enjoy, in the latter, the contract is express; but the principle is the same. In *Doe v. Batten* acceptance of rent was holden not to be a waiver of a notice to quit; and in a case there cited tried at Launceston Assizes, though the plaintiff had accepted rent which had accrued after the demise, yet he both recovered in the ejectment, and afterwards in an action for use and occupation.

LORD LOUGHBOROUGH.—There could be no question of intention left to the jury, as the taking a distress was an act not to be qualified, and an express confirmation of the tenancy.

GOULD, J.—In the mere acceptance of rent, the quo animo is to be left to the jury agreeable to Lord Mansfield's doctrine in the case in Cowper (a)¹. But I agree with my Lord Chief Justice that the distress was in this case an act not to be qualified, and amounted to a confirmation of the tenancy.

WILSON, J.—I am of the same opinion. In *Doe v. Batten* there was a design to deceive the landlord, and a question I remember very well was made, whether he should be bound by the terms of the receipt in which the money was called rent for that direct purpose; which was the ground of Lord Mansfield's saying, that the question quo animo should be left to the jury. The mere acceptance of money is equivocal, it may be in satisfaction for the trespass, or it may be for rent; and in an action of trespass for mesne profits, accord and satisfaction may be pleaded in bar if rent has been accepted. There would be no doubt, but that the plaintiff would not have been precluded by taking a distress, if instead of the year and a quarter, it had been only for rent due at Michaelmas, because the statute (8 Anne, c. 14, s. 6 & 7) says, that a distress may be taken within six months after the determination of a lease, provided the interest of the landlord, and the possession of the tenant continue: the law in this respect being altered since the time of Lord Coke, when the old notion prevailed that a distress could not be taken, unless the same relation subsisted between the parties (a)².

Rule discharged.

(a)¹ [Receipt of rent by a banker without proof that it came to the landlord's hands, is not a waiver. *Doe d. Ash v. Calvert*, 2 Campb. N. P. C. 387.]

(a)² [See 1 Saund. 288 (n), 5th edit., and *Beavan v. Deluhay*, ante, p. 5.]

[313] COLLIS AND OTHERS *against* EMETT. Friday, Feb. 12th, 1790.

[Referred to, *London and South Western Bank v. Wentworth*, 1880, 5 Ex. D. 102.]

A. having signed his name to a blank paper duly stamped, and delivered it to B. for the purpose of drawing a bill of exchange in such manner as B. should think fit, B. draws a bill payable to a fictitious payee or order, and indorses it over for a valuable consideration to C. who is ignorant of the transaction. C. the indorsee may maintain an action against A. as the drawer of a bill payable to bearer on a count to that effect; or, C. may recover, on a count stating the special circumstances of the case, if that count do not vary from the verdict (*a*).

Indorsees against the drawer of a bill of exchange. The declaration contained six counts. 1. Stating, that the plaintiffs and defendant and certain persons using the name, style and firm of Livesay, Hargreave, Austie, Smith and Hall were persons respectively trading and using commerce, &c.: that the said persons so using the names, style and firm of Livesay and Co. were partners: that the defendant on the 5th of April, 1788, drew a bill of exchange directed to them, by which he required them three months after date to pay to Mr. George Chapman, or order, 1551l. value received, and delivered the said bill to them, and authorized them to negotiate and indorse the same in the name of George Chapman and thereby to raise money thereon for the use of the said persons so using the names, style and firm of Livesay and Co. The plaintiffs then averred, that when the said bill was so made as aforesaid or at any time afterwards, there was no such person as George Chapman the supposed payee in the said bill of exchange, but that the said name was merely fictitious to wit, at London, &c. which said bill of exchange, afterwards to wit, &c. by one Andrew Goodrick being a person thereunto in that behalf lawfully authorized, by Livesay and Co. upon sight thereof was accepted according to the usage and custom aforesaid. And the said persons so using the names, &c. of Livesay and Co. being so authorized as aforesaid, afterwards and before the payment of the said sum of money therein contained or any part thereof, and before the time thereby appointed for such payment, to wit, &c. negotiated and indorsed the said bill of exchange in and with the name of the said George Chapman, and by that indorsement in the name of the said George Chapman appointed the contents of the said bill of exchange to be paid to the said plaintiffs, and thereby raised money thereon, for the use of the said persons so using the names, &c. of Livesay and Co. and then and there delivered the said bill of exchange so indorsed to the said plaintiffs, who thereupon then and there on the credit thereof, advanced to the said persons so using the names, style, and firm of

(*a*) [This decision was never appealed from, but was relied upon by the counsel in argument, and by several of the Judges in giving their opinion in the House of Lords, in the case of *Minet v. Gibson*, see post, p. 590, 595, of this volume. See also the cases of *Tatlock v. Harris*, 3 T. R. B. R. 174. *Vere v. Lewis*, 3 T. R. B. R. 182. *Minet et Al. v. Gibson et Al.* 3 T. R. 481, post, 569, 625, of this vol. and Parl. Cases, 8vo. vol. ii. 48, 61, and *Gibson et Al. v. Hunter*, post, vol. ii. 187, 211, 288, 298, Parl. Cases, 8vo. vol. vi. 235, and the long note there. The result of all cases appears to be, that "a bill of exchange payable to a fictitious payee or order, and indorsed in his name by concert between the drawer and acceptor, is to be considered as a bill payable to bearer, in an action by an innocent indorsee for a valuable consideration, either against the drawer or acceptor of the bill." But see contra the opinions of Eyre, C. J., and Heath, J., post, pp. 508, 625, with whom the Lord Chancellor Thurlow coincided, see p. 625.] Note to the third edition.

[The above cases all of them arose out of the bankruptcy of Livesay and Co., and Gibson and Co. who negotiated bills with fictitious names upon them to the amount of nearly a million sterling a-year. Chitty on Bills of Exchange, 83 (*n*) 6th edit.

But where there is no proof that the circumstance of the payee being a fictitious person was known to the acceptor, the bill cannot, as it seems, be treated as a bill payable to bearer. *Bennet v. Farnell*, 1 Campb. N. P. C. 130, 180 c. Where a bill of exchange is drawn and negotiated, and a blank is left for the name of the payee, a bona fide holder may fill it up with his own name, and recover against the drawer. *Crutchley v. Clarence*, 2 M. & S. 90. See also *Crutchly v. Mann*, 5 Taunt. 529.]

Livesay [314] and Co. the said sum of money in the said bill mentioned; of which the defendant, &c. had notice. It was then stated that the bill was afterwards presented to the persons using the names, &c. of Livesay, &c. for payment, which was refused by them, of which the defendant had notice, by reason whereof he became liable, &c. and being so liable promised to pay, &c. &c.

Second count leaving out the special circumstances, stated the bill to be drawn by the defendant on the said persons using the names, &c. of Livesay, &c. who were thereby requested to pay to Mr. George Chapman or bearer 1551l. &c. and the plaintiffs averred that they were and still continued the bearers and proprietors of the said last mentioned bill of exchange in due form of law, and so being the bearers and proprietors, &c. presented it to the said persons using the names, &c. of Livesay, &c. for payment—their refusal to pay—notice to the defendant—he became liable—promise, &c.

3. Money paid.—4. Money lent.—5. Money had and received.—6. Insimul computassent.

Plea general issue.—The cause was tried before Lord Loughborough at Guildhall, and the following special verdict found.

That the said John Emmett (who was a partner with Livesay and Co. in the spinning of cotton, at Clithero) wrote his name upon a piece of blank paper with a shilling stamp thereon, and delivered the same to Livesay and Co. for the purpose of drawing a bill of exchange for such sum, payable at such time, and to such person or persons as they should think fit.

That afterwards the said Livesay and Co. on the 5th day of April, 1788, drew on the said paper above the name of the said John Emmett, a certain writing directed to the said Livesay and Co. in the words and figures following, viz. "Clithero, April 5th 1788, 1551l. three months after date, pay to Mr. George Chapman, or order, fifteen hundred and fifty pounds, value received as advised, John Emmett." That the occasion and manner of giving the said paper writing was as follows, viz. that on the said 5th of April, the said Livesay and Co. were indebted to Thomas Jeffery, in the sum of 1512l. 9s. upon a bill of exchange which became due that day, and which had been previously given for goods sold by Jeffery to them. That one Richard Collis clerk to the said Jeffery, on that day applied at the house of Livesay and Co. [315] in Cheapside for payment of the said bill; that on such application he saw the said Anstie, one of the said partners, who informed the said Richard Collis that he could not conveniently then pay the same, but requested the said Richard Collis to take a bill on the said house of Livesay and Co. for the said sum of 1512l. 9s. at three months date, including the interest thereof in the mean time, and gave to him the said blank paper above mentioned with the name of the said John Emmett written thereon, to be filled up by one of the clerks of the said Livesay and Co.

That one Ludlow a clerk of the said Livesay and Co. filled up the said writing for 1551l. being the amount of the said bill and interest in manner and form as above set forth, except the acceptance and indorsement thereof as hereinafter mentioned; and that immediately afterwards, the said paper writing was carried to Andrew Goodrick another clerk of the said Livesay and Co. and who was authorised by the said Livesay and Co. to accept the same, and which the said Andrew Goodrick accordingly did in the name of the said Livesay and Co. That with the authority of the said Livesay and Co. the name of George Chapman was then indorsed in the said paper writing, and that the said paper writing so filled up accepted and indorsed, was then delivered to the said Richard Collis, and the said Richard Collis thereupon delivered up the bill for 1512l. 9s. to the said Livesay and Co. That the said Thomas Jeffery afterwards negotiated the said paper writing with the plaintiffs, and received the full amount thereof from them, deducting a discount, at 4½l. per cent. and delivered the same to the said plaintiffs. That the same was duly presented for payment, to the said Livesay and Co. who refused to pay the same, whereof the said John Emmett had due notice. That there was no such person as the said George Chapman, the supposed payee of the said paper writing, but that the said George Chapman was merely a fictitious person; that Emmett gave no further or other authority than as aforesaid, and knew nothing of this transaction. That the plaintiffs had then no knowledge that the said George Chapman was a fictitious person, or of the circumstances under which the said paper writing was drawn, accepted, and indorsed, but that the said Thomas Jeffery had full knowledge of the whole of the said transactions.

This was argued in Trinity term last by Lawrence, Serjt., for the plaintiffs, and Runnington, Serjt., for the defendant; [316] and a second time in Michaelmas term, by Adair, Serjt., for the plaintiffs, and Cockell, Serjt., for the defendant. The following is the substance of the arguments on behalf of the plaintiffs.

On the face of the special verdict, there are facts sufficient to support the finding of the jury on either of the counts. The defendant having written his name on a blank paper, and given it to Livesay and Co. to be filled up as a negotiable instrument, gave them authority to pledge his credit to any amount, and was in law as completely the drawer of the bill as if he had made it in its present form: having used a shilling stamp, it is evident that he meant to offer his credit unlimited. He is therefore civilly responsible for all the purposes to which Livesay and Co. might apply the bill. Their acts must in law be considered as his. In the case of *Stone v. Freeland (a)*¹, Lord Mansfield held, that the acceptor was liable though there was a fictitious indorsement, and that he should not be suffered to deny the validity of the bill: so also in *Russell v. Langstaffe* (Dougl. 496), Lord Mansfield's words may be applied to the present case; the defendant here said to the plaintiffs "Trust Livesay and Co. to any amount, and I will be their security." But it has been objected that there is both a general principle of law, and a rule of practice, that the hand-writing of the first indorser must be proved, as a medium through which the holder must make out his title. But this is not universally true to the extent that no one can recover without proof of the indorsement, since in some cases such an indorsement is not ne-[317]-cessary, and in others where the form seemed to require it, it has been dispensed with. Though it is true, that in many cases where proof of the indorsement was not necessary, a verdict has been taken on the general money counts, and the paper instrument merely received as evidence, yet it has been decided both before and since the stat. 3 & 4 Anne, c. 9, that a bonâ fide holder of a bill might recover upon it as a bill, without proving the indorsement. 2 Shower, 235, *Hinton's case*, and 3 Burr. 1516, *Grant v. Vaughan*, from which latter case it may clearly be collected, that an indorsement is not indispensably necessary to give negotiability to a bill or note, but that a bonâ fide holder may recover without it. Yet it is said, that as this bill is drawn payable to George Chapman or order, it necessarily requires an indorsement. But this rule is not universally true. *Hankey v. Wilson*, Sayer, 223, where proof of the hand-writing of the indorser was dispensed with, because it was on the bill at the time of the acceptance: which proves that the rule admits of exceptions. So also is the case of *Pratt v. Howison (a)*², and though this doctrine may seem to be overruled by *Smith v. Chester*, 1 Term Rep. B. R. 654, yet that case can only govern those which are of the same kind. There the action was against the acceptor, here against the drawer. The reason on which that case is founded, can alone be applicable, where the acceptor is sued; which is, that the acceptor admits only the hand-writing of the drawer, (though

(a)¹ *Stone v. Freeland*, B. R. sittings at Guildhall, after Easter term, 1769.

[Considered, *Bank of England v. Vagliano*, [1891] A. C. 126, 152.]

Indorsee against the acceptor of a bill of exchange, payable to Butler and Co. and indorsed in that name. The plaintiff could not prove it to have been indorsed by any persons using that firm; on the contrary, his own witnesses said they believed it was indorsed by Cox the drawer. It also appeared that there was a house of Butler and Co. with whom Cox had dealings, but it was proved that the bill in question had never been in their hands. It was admitted that the bill was a true one, and that the defendant had regularly accepted it, but it was contended that the indorsement was fictitious, which was an essential part of the plaintiff's title.

LORD MANSFIELD.—The intent of the bill was only to enable Cox to raise money, and the reason why it was not made payable to the order of Cox was, that there were other bills at that time made payable to his order; if this had been also payable to the same order, too many would have been in circulation at the same time, in the same name, which would have had the appearance of fictitious credit. Names are often used of persons who never existed. The defendant has enabled Cox to do this by lending his acceptance, and when he has by so doing put the bill in circulation, it shall not lie in his mouth to make an objection that he has nothing to do with it.

Verdict for the plaintiff.

(a)² Guildhall sittings after Trin. 23 Geo. 3, cited 1 Term Rep. B. R. 654.

at the time of the acceptance, there be several indorsements on the bill,) and shall put the plaintiff on the proving the hand-writing of the first indorser: the obvious meaning of which is, that though there is a privity implied between the drawer and acceptor, there is not between the indorser and acceptor. But there is a privity between the drawer and the payee of a bill, which is supposed to be given for a valuable consideration. If the jury had found the whole bill to have been in the hand-writing of Emmett, would it have been necessary to prove that George Chapman really indorsed it? Emmett himself could not have objected that there was no such person, and on that objection nonsuited the plaintiff. This case then is clearly distinguishable from that of *Smith v. Chester*, which does not affect it. Besides, it is expressly stated in the declaration, that there was no such person as George Chapman, the defendant therefore shall not take ad [318]-vantage of this fictitious name invented by those to whom he gave unlimited credit, and deprive the bonâ fide holder of his remedy.

As to the rule then, requiring the hand-writing of the first indorser to be proved, admits of some exceptions, the present is as strong an exception as can well be imagined. Suppose it had been impossible to prove it, on account of some act of the party himself; the next best proof would be admitted. In general, bonds and other deeds can only be proved by the subscribing witnesses; but there are exceptions to that rule; and one is, where the party himself has rendered such proof impracticable or very difficult. On the facts contained in the first count therefore, the plaintiff is entitled to recover: but if this should be doubted, he clearly is on the second, in which the bill is stated to have been drawn payable to George Chapman or bearer. For if a bill be made payable to a person, who not having an actual existence can make no indorsement, it operates in law as payable to the bearer; particularly when given for a valuable consideration. *Tire v. Lewis*, 3 Term Rep. B. R. 182 (a). The action is also maintainable on the count for money lent. Money advanced on the credit of any man is in law money lent and advanced to him. *Tatlock v. Harris*, 3 Term Rep. B. R. 174.

But supposing the addition of a fictitious name to be felony, the answer to the defendant's objection that a felony cannot be the ground of a civil action, is, that though it cannot be the immediate ground of such an action, yet it may be so mediately. *Miller v. Race*, 1 Burr. 452. *Peacock v. Rhodes*, Dougl. 633.

The following were the arguments on behalf of the defendant. There is a variance in several material points between the special verdict and the declaration. The first count states that the defendant "drew a bill of exchange directed to Livesay and Co. payable to George Chapman or order, and delivered and authorized them to negotiate it, and thereby to raise money thereon," &c. This is a substantive allegation, which ought to have been proved as laid; but it is negated by the verdict; it being found that the defendant wrote his name upon a piece of blank paper, with a shilling stamp thereon, and delivered the same to Livesay and Co. for the purpose of drawing a bill of exchange for such sum, payable at such time, and to such person or persons, as they should think fit. It is likewise stated in the first count, that the plaintiffs "advanced to [319] Livesay and Co. the money mentioned in the bill," &c. but it appears on the verdict, that "Thomas Jeffery negotiated the paper writing with the plaintiffs, and that he received from them the amount of it," &c.

Admitting that the defendant has given an unlimited credit, by signing his name to a blank paper, yet there was nothing criminal in this; the verdict shews that he was not guilty of a forgery, nor was concerned in filling up the paper. Though he gave unlimited credit, yet it was by means of a legal instrument; he stands in the situation of a common drawer of a bill, in an action against whom, the hand-writing of the first indorser is necessary to be proved. As to the argument, that it is the same case as if the defendant had drawn the whole bill with his own hand, and himself indorsed the name of Chapman, if he had done so he would have committed a forgery, and this being a felony could not have been the ground of a civil action. As to *Hinton's case*, it proves only that the consideration of a bill or note must be proved. In *Grant v. Vaughan*, the bill was payable to the ship "Fortune," an inanimate thing, or bearer; on the face of it therefore it could only operate as payable to bearer; and the intent of the parties was sufficiently plain. In *Stone v. Freeland* there was a special under-

(a) See also *Minet v. Gibson*, *ibid.* 481.

taking by the acceptor, who had admitted effects in his hands. In *Russell v. Langstaffe*, a blank promissory note was given with an actual indorsement by Langstaffe; there was no fictitious person introduced; that case therefore is not applicable to the present. In *Hankey v. Wilson*, the Court coupled an express promise to pay with the indorsement, yet that was not deemed conclusive evidence; but the general rule is there admitted, that the hand-writing of the first indorser must be proved. In *Miller v. Race*, and *Peacock v. Rhodes*, the felony was exclusive and independent of the bill. But in the present case there is a forgery inherent in the bill itself. It is drawn in the usual form, made payable to order, and being so payable requires an indorsement; but that indorsement is forged. Yet as it is found that the defendant did not himself forge it, nor was privy to it, he is not estopped from alleging it in his defence. If the words "or order" be rejected, and the bill be considered as payable to bearer, any other part may as well be rejected, which could not be endured. The Court cannot say that a bill which is evidently payable to order, is payable to bearer: they cannot change the nature of a mercantile transaction contrary to the [320] express intent of the parties: they cannot put a construction on the instrument directly repugnant to it. But though as the bill in question is payable to Chapman or order, the form is preserved so far as to prevent it from being considered as payable to bearer, yet one of the essential constituent parts of a bill of exchange is wanting, viz. a real payee. 2 Black. Com. 456. Postleth. Dict. tit. Bills of Exch. By this the whole was vitiated. So a bill given on an usurious consideration, is void even in the hands of an innocent indorsee for a valuable consideration, and without notice. Dougl. 709. So for money won at play. Stra. 1155. A bill of exchange must also be necessarily negotiable; but it cannot be negotiable without an indorsement; and a false indorsement is as none. The case of *Pratt v. Howison* is overruled by *Smith v. Chester*. As to the argument that there was a privity between the payee and drawer, it is expressly found by the verdict that there was no privity between them in this instance. Then what is there to take this case out of the general rule? As to the argument that the defendant is in fact to be regarded as the maker of the bill, the jury have found it otherwise, namely, that the bill was filled up by other persons. Neither is the defendant liable on the money counts. That neither debt nor general indebitatus assumpsit will lie on the mere acceptance of a bill of exchange, is clear from Hardr. 485. 1 Vent. 152. Lord Raym. 280. Much less against the drawer who is only eventually liable. The cases relied on of *Tallock v. Harris*, and *Vere v. Lewis*, were decided on their own particular circumstances, and on a presumption that money had been actually had and received to the use of the holders. Those cases were against acceptors, here it is against the drawer; there the defendants were privy to the transactions, and there was fraud within their own knowledge; here the defendant acted bonâ fide, was ignorant of the conduct of Livesay and Co. and does not appear to have really obtained any money.

Cur. advis. vult.

On this day judgment was given, as follows, by

LORD LOUGHBOROUGH.—It is not necessary for me to repeat the evidence in this case, the facts of it being in the memory of every one. We have taken the whole into our consideration, and the result of our opinion is, that the plaintiff is entitled to recover. The special count in the declaration, stating the whole of the transaction, would have afforded a ground, upon which I should have thought that the judgment might have been very [321] properly pronounced in his favour. But it appears upon the record, that the case stated on the special count differs from the finding on the special verdict in two or three circumstances; that count therefore would clearly not support a judgment in favour of the plaintiff. The circumstances are not very material, but as the count and the verdict at present stand inconsistent with each other, a judgment for the plaintiff on the first count would undoubtedly be erroneous. We must therefore look into the declaration, to see if there be any count on the record, on which the plaintiff may support a judgment. And it appears to us, that it may fairly be supported on the count stating the bill to be a bill payable to bearer. It is certainly not literatim payable to bearer, it is drawn payable to George Chapman or order. Upon a fact set forth in the special verdict, it appears that by the permission at least, if not something more than the permission, of the defendant, a power was given to Livesay and Co. to frame bills of exchange, binding him, in any manner they thought proper, within the limits of that power. There is no doubt they might,

within those limits, have drawn a bill in terms payable to bearer; the bill they have chosen to draw, is a bill payable to Chapman or order; and it is found on the verdict that there is no such person as Chapman. Now the consequence of this seems naturally unjustly to be, that when a security is negotiated, on which, by the terms of it, the party receiving it apprehends he has a clear right to recover, and by the insertion of the name of a fictitious person his recovery is impeded, (it being impossible to prove the order of a person who has no existence,) it should seem in point of law precisely the same in effect, as if it had been made payable to bearer. A bill of exchange is an authority to pay pursuant to the order of the payee; and it is also an undertaking to pay pursuant to that order. But if there be no person who by any possibility can give such order, the engagement must be to pay the bill. If the order of the person cannot be procured, and with the knowledge and privity of the parties who make the bill, such a name is put in as cannot give an order, it is in effect, and in point of law, the same thing as if they had made it payable to the person who held the bill, namely, the bearer. The determination of the Court of King's Bench, has approved the same rule, and we think that a right determination.

Judgment for the plaintiff on the second count.

[322] PARSONS *against* THOMPSON. Friday, Feb. 12th, 1790.

A. being possessed of an office in a dock-yard, B. in order to induce him to procure himself to be superannuated, and retire on the usual pension, agrees (without the knowledge of the Navy-board to whom the appointment belongs) in case B. should succeed him, to allow him a certain annual share of the profits of the office. B. is appointed, but does not perform the agreement. A. can maintain no action on the agreement (*a*).

Assumpsit on a special agreement. The declaration stated, that the plaintiff was possessed of the place or office of master joiner of His Majesty's dock-yard at Chatham, and that in consideration that he would procure himself to be superannuated in respect of the said place or office, the defendant undertook in case he (the defendant) should succeed the plaintiff to be master joiner of the dock-yard, at the commencement of his superannuation, to allow the plaintiff his extra pay from the yard books, exclusive of his superannuation money, during his natural life. It then stated, that the plaintiff confiding in the said promise of the defendant to procure himself to be superannuated in respect of the said place or office, and that the defendant succeeded him as master joiner, at the commencement of his superannuation: that the defendant received divers large sums of money amounting in the whole to 200l. as and for the extra pay of the plaintiff; by reason whereof he became liable, &c. and being liable promised, &c. There were also the common counts. Plea general issue. Verdict for the plaintiff, subject to the opinion of the Court, on a case which stated in substance, that the plaintiff was for 30 years master joiner of the dock-yard at Chatham, and the defendant foreman of the joiners. That the defendant having a prospect of succeeding to the office of master joiner, (which does not go in regular succession, but is in the appointment of the Commissioners of the Navy) applied to the plaintiff to procure himself to be superannuated, which he did, on the following written agreement being entered into by the defendant.

"Agreed on the 29th day of March 1785, between Mr. John Parsons, master joiner of His Majesty's dock-yard at Chatham, and John Thompson foreman of the joiners of the aforesaid place. In case I should succeed Mr. Parsons to be master joiner of the said dock-yard, at the commencement of Mr. Parsons's superannuation, then I do agree to allow him his extra pay from the yard books exclusive of the superannuation money, during his natural life, &c. "JOHN THOMPSON."

The superannuation money was an annual allowance from Government.

[323] In 1785 the defendant was appointed to the office. The bare pay of the master joiner is half-a-crown per day, all above is extra pay. There are two sorts of

(*a*) [See *Barwick v. Read*, post, p. 627. *Huggins v. Bambridge*, Willes, 241. *Layng v. Paine*, ibid. 571. *Hughes v. Stratham*, 4 B. & C. 187. *Waldo v. Martin*, ibid. 319. See also *Whittingham v. Burgoyne*, 3 Anstr. 900.]

extra pay, the tide extra, (when the men work by the tide beyond the common yard hours) and the casual extra which includes other extraordinary work. It is all denominated extra pay in the yard books without distinction. From 1785 to 1787, the defendant paid to the plaintiff the common tide extra, at the rate of 7½d. per tide for the six winter months, and 1s. 3d. for double tides in the summer months, but not the casual extra, which the plaintiff did not demand. In the summer of 1787, the casual extra pay was much increased by the extraordinary work performed in fitting out ships on the prospect of an approaching war with the Dutch; this casual extra pay so increased, the plaintiff claimed by virtue of the agreement, but the defendant refused to account for to him; and in consequence this action was brought.

A rule having been granted to shew cause, why the verdict should be set aside and a nonsuit entered,

Lawrence, Serjt., shewed cause. In this case there are two questions. 1. Whether the agreement was valid; 2. Whether, if valid, it did not comprehend the casual extra, as well as the tide extra pay? As to the first, it is to be observed, that this is not an agreement for the sale of an office. The circumstances were, that the plaintiff having been a long time master joiner, was entitled to quit on being superannuated; the defendant being in hopes to succeed him, applied to him to quit, and as a compensation agreed to allow him the extra wages. This was not a sale, because the person who gave up the office was not to appoint his successor. If money is given for the appointment to an office, it is undoubtedly bad at common law, and for the wisest reasons; because if that sort of traffick were permitted, offices of the greatest trust might come to the hands of persons, who were wholly unfit for them. But no such mischievous consequences can ensue, for merely receiving a compensation where the party receiving it has no power to appoint a successor. In *Berrisford v. Done*, 1 Vern. 98, it was holden that where a bond was given to a captain in the Army in consideration of his resigning his company, to which the obligor was in hopes of succeeding the bond was valid. And in *Symonds v. Gibson* (2 Vern. 308, bonds were allowed to be legal, entered into to procure the obligor's admission to be purser of [324] a man-of-war; which was a stronger case than that of money being given merely to induce a man to resign. The same doctrine is also recognized in *Ive v. Ash*, Prec. Chanc. 199. The agreement therefore in the present case was not illegal.

The other question is, whether all casual extra pay is not included in the agreement? The terms are that the defendant shall allow the plaintiff his extra pay from the yard books; and the evidence proved that extra pay on the yard books is all extra pay: the defendant therefore was bound by his agreement to give to the plaintiff all the extra pay which he received.

Bond, Serjt., for the rule. The agreement was both contrary to the true policy of the law, and cannot be extended to any casual extra pay, which did not exist in the yard at the time of making it. It is a principle of law that no man shall be appointed to an office, the emoluments of which are served from it, and he is not to receive. It is equally impolite and illegal to give money to procure the vacancy of an office, as the appointment to it. The plaintiff having an annuity on account of his superannuation, had no right to receive any further profits from the office, unless by the consent of the Commissioners of the Navy to whom the appointment belonged. Here the persons who have the right of appointment are deceived. That the contract is bad, sufficiently appears from the doctrine of the Master of the Rolls in *Bellamy v. Burrow*, Cas. temp. Talbot 97, and *Law v. Law*, 3 P. Wms. 392.

[Lord Loughborough here said, he remembered a case where a bond was given to an agent as a consideration for procuring a commission in the Army, and Lord Chancellor Northington held, that though it was the practice in the Army to purchase, yet a bond given to procure a commission was bad.]

That determination of Lord Northington affords an answer to the cases cited from Vernon, which were of military offices sold by consent of Government, which is in daily practice. When a commission in the Army is sold, the seller only receives back what he had before given: but yet an officer must have a new permission to purchase on half-pay. As to the second question made on the other side, whatever may appear on the yard books, the agreement must be construed by the intent of the parties at the time of making it. But that could only relate to such extra pay as then existed. No casual and subsequent increase of profit ought in reason to be superadded.

[325] Lawrence replied, that in *Bellamy v. Burrow*, notwithstanding the opinion

of the Master of the Rolls, Lord Talbot ultimately decreed that Burrow was a trustee in the office for Bellamy. As to the case of *Law v. Law*, there money was actually given for procuring the office, which distinguishes it from the present case. The argument drawn from the supposed impropriety of severing the profits from the possession of an office, might be equally applied, if it had any weight, to military offices; but it is the common practice of the Army for a person who buys a commission to give part of the profits to another. As to the casual profits being subsequent to the agreement, the plaintiff had himself received the casual profits before, and the defendant knew that such casual profits might again happen; the parties therefore to the agreement must have had them in contemplation.

Cur. advis. vult.

After consideration, judgment was this day given by

LORD LOUGHBOROUGH.—On the trial of this cause two points were made, one, whether the agreement was legal, the other, what was the meaning of extra pay. The second question is immaterial, if the first be against the plaintiff. But it is to be observed, that if the construction be as the plaintiff contends, that all which the defendant could receive as master joiner would be 2s. 6d. a day, the objection to the validity of the agreement is still more apparent; because it would have this effect, that no exertion of the defendant for which extra pay would be due would be beneficial to himself, which might produce public mischief. But taking the agreement on this point in a restrictive sense, that it means a certain stated and fixed allowance beyond 2s. 6d. a day, understanding it to be a defined known share of perquisites, we are all of opinion that it does not afford a just cause of action. Every action on promises must rest on a fair and valuable consideration, which it is for the plaintiff to make out. What is the consideration stated here? That the plaintiff represented himself as unfit for future service, and entitled to a pension for the past. This he did at the request of the defendant, on the promise from him of a certain allowance. Now the representation was either true or false. If true, there was no ground for any bargain with the defendant: the plaintiff did nothing for the de [326]-fendant; all he did was for his own ease and advantage. If false, the public is deceived, the pension misapplied, and the service injured. It is not stated that the plaintiff procured the appointment for the defendant, (which would clearly have been brocage of office, and bad), but that he made way for the appointment. But from thence no valuable consideration can arise. Had the transaction passed with the knowledge of the Admiralty, judging of the case, and applying at their discretion the allowance they are bound to make, possibly it might have stood fair with the public: I say possibly only; to be sure the ground of deceit on the public would be done away. But this case rests on a private unauthenticated agreement between the officers themselves, which cannot admit of any consideration sufficient to maintain an action. If it could be proved that it was to be measured by money so as to form a valuable consideration, it must be in respect to the time when it was made, when the plaintiff was prevailed upon to retire in favour of the defendant. In this view it certainly would approach very near to brocage; it would differ very little in effect from selling the interest itself, though there would be a difference in the conduct of the party, who in the one case would be passive, in the other active. But his passive merit, if I may use the expression, would not avail him where his active exertion would be a demerit. The case cited from 1 Vern. 98, I think may be supported. It was of the purchase of a commission in the Army, which the Duke of Ormond refused to ratify on the ground that the plaintiff had bought without the other party having leave to sell, who had not bought. I should rather suspect from the usual inaccuracy of the cases in Vernon, that the plaintiff got the commission by succession, and set up this defence against the payment of the bond. There is something very like it in the reasoning of the Court, who held there was no relief against the bond. The question of the consideration did not occur to them; and they seem to have holden that where commissions were generally saleable, there was nothing unfair in such a transaction. The next case in 2 Vern. 308, if true, is a decision undoubtedly contrary to what we now decide, and I think contrary to an evident principle of law. On the state of the report, the bonds are directly and plainly given for brocage of an office of trust and profit, which is not an object of sale. I have therefore no difficulty to say that I hold that case to be extremely ill determined, if the note of it be at all correct. The [327] case of *Ire v. Ash*, Prec. Chanc. 199, I think rightly determined; there was a purchase of a commission allowed to be sold;

the commission was given up, and the purchaser wanted to get rid of the bargain, and be free from the agreement. He objected that a commission in the Marines could not be sold; but it turned out upon examination that the sale of such commissions was permitted, not being looked upon as within the statute. I therefore hold that case to be well adjudged: for the question whether an office is saleable or not is a matter of public regulation, and not a question for a Court (a)¹. If by public regulation right or wrong, certain offices are saleable, the Court cannot set aside the transaction for their sale; the Court is not to make the regulation. Whether by the general policy of the country an individual office is saleable or not, is not a matter of law. But in the present case there is no ground to say, that the defendant's office was sold under any regulation, or that the transaction between the parties was carried on under any authority, or with the consent of their superiors. This agreement resting on private contract and honour, may perhaps be fit to be executed by the parties, but can only be enforced by considerations which apply to their feelings, and is not the subject of an action. The law encourages no man to be unfaithful to his promise, but legal obligations are from their nature more circumscribed than moral duties.

Judgment for the defendant.

The following case with which I have been favoured, may not improperly be inserted in this place.

GARFORTH *against* FEARON. Thursday, Nov. 22d, 1787.

Mic. 27 Geo. 3.

A. by the interest, and on the application of B. is appointed customer of a port, having previously signed an agreement, declaring that his name was used in the application in trust for B. that he would appoint such deputies as B. should nominate, and would empower B. to receive the profits of the office to his own use. On the failure of A. to comply with the agreement, no action upon it will lie against him (a)².

This was an action of assumpsit for money had and received, brought by the direction of the Master of the Rolls, in consequence of a bill filed in equity by the plaintiff and his son, praying that the defendant might be declared a trustee of the office of customer of Carlisle for the plaintiff, for the benefit of the [328] son (b). On the trial of the cause at the sittings in Trinity term 1787, before Lord Loughborough, it appeared in evidence, that application was made to the Lords of the Treasury by the friends of the plaintiff, to procure for the defendant the office of customer of the port of Carlisle. On the 25th of February 1773, the defendant signed the following declaration, "I do hereby declare, that my own name was made use of in trust for Mr. John Garforth, on the application made to the Lords of the Treasury for the office or place lately held by Mr. Grape deceased, in the county of Cumberland; and I do hereby promise, in case any appointment has been or is made thereof, that I will, upon request, appoint such deputy or deputies as he shall nominate, and also empower the said Mr. Garforth to receive the salary, stipend, wages, and fees of the said office to his own use.

"Witness my hand,

"BENSON FEARON."

On the 27th of February 1773, the defendant was appointed by patent (c) to the office, and afterwards on the nomination of the plaintiff, constituted deputies for

(a)¹ [This distinction was recognized in *Blackford v. Preston*, 8 T. R. 94.]

(a)² [This appointment of Mr. Fearon afterwards gave rise to two actions in the Court of King's Bench, *Fearon v. Pearson*, and *Fearon v. Potter*, in both of which the plaintiff failed. Willes, 577 (n).]

(b) The plaintiff had given up the profits to his son in 1780.

(c) The following was the form of the patent.

George the Third, by the grace of God of Great Britain, France and Ireland King, defender of the faith, and so forth. To all of whom these presents shall come greeting. Know ye, that we of our special grace, certain knowledge, and mere motion,

Carlisle, Whitehaven, and Workington; but having received the profits, did not account for them to the plaintiff; in consequence of which the bill was filed. A verdict was found for the plaintiff, with leave to move the Court to enter a nonsuit. On a rule to shew cause being granted, the case was argued by Adair and Rooke, Serjts., for the plaintiff, and Le Blanc and Lawrence, Serjts., for the defendant; and the following judgment of the Court was delivered by

LORD LOUGHBOROUGH.—On full consideration of all the arguments used in this cause, I am of opinion that the transaction which is the foundation of the action is illegal, and the agree[329]-ment void. This transaction concerns a public office, deemed by law to be a place of public trust, prohibited to be sold; and even the deputation of which, where such deputation may be made, cannot be an object of sale. The transaction is, that Fearon being appointed by the recommendation of Garforth, shall not interfere in the office, but shall appoint such deputies as Garforth shall nominate and pay to him the profits. The effect of this is, that to all profitable purposes, and as to all the exercise of the office, except as to signing a receipt for the salary, Garforth is the real officer, but is not accountable for the due execution of it; he may enjoy it without being subject to the restraints imposed by law on such officers, for he does not appear as such officer; he may vote at elections, he may exercise inconsistent trades, he may act as a magistrate in affairs concerning the Revenue, he may sit in Parliament, and will be safe if he remains undiscovered. If extortion be committed in the office by those appointed, the profits of that extortion redound to him, but he escapes a prosecution; for not being the acting officer, he does not appear registered upon the records of the Exchequer, and is not liable to the disabilities imposed by the statute on officers guilty of extortion, who are incapacitated to hold any office relating to the Revenue. Whether a trust can be created in such an office, is for the consideration of the Court in which the suit was originally brought; the only question in this Court is, whether the agreement springing out of such a transaction can support an action?

The written agreement of the 25th of February 1773, was for two purposes: one, to appoint such deputies as the plaintiff should name; the other, to pay over to him all the profits of the office. Though this case has been argued very fully and very ingeniously by the counsel on both sides, I do not recollect any argument used in support of the first promise; namely, to appoint, at the nomination of another, deputies, for whom the person appointing is in point of law answerable, and whose places he is not allowed to sell or bargain for. The argument and doctrine laid down in the case of *Smith v. Coleshill*, 2 And. 55, which is similar to this, are, that if one part of the agreement were bad, no action could be maintained on any other part which might be good. But it is not necessary to rest on this point, because I am of opinion that the agreement is bad in both parts. If it be without any consideration in a Court of Law, no action will lie upon it; it is but nudum pactum. What then is the consideration upon which this agreement proceeds? [330] It is that Fearon is appointed on the application of Garforth, in trust for him; this is the consideration. Now what is this but, in plain terms, this proposition; viz. that the public is abused, and the King deceived, in the application? I should therefore not find much difficulty to conclude, if there were nothing more in the case, that the common law would not support an assumpsit on such an agreement.

But I think it is clearly void by positive law respecting this office. The appoint-

have constituted and appointed, and by these presents do constitute and appoint our trusty and well-beloved Benson Fearon, Esquire, to the office of customer or collector of all our customs and subsidies in our port of Carlisle, and in all and singular the ports, places, and creeks, to the said port belonging or adjoining, in the room and place of Richard Grape, Esquire, deceased; to have, hold, exercise, and enjoy the said office unto him the said Benson Fearon during our pleasure, together with all and every the wages, fees, profits, perquisites, advantages, and emoluments whatsoever, to the said office or place in any wise belonging or appertaining, and in as full and ample manner and form to all intents and purposes, as the said Richard Grape, or any other person or persons lately exercising the said office, hath or have had or received, or ought to have had or received, by reason thereof. In witness whereof, we have caused these our letters to be made patent. Witness, ourself at Westminster, the twenty-seventh day of February, in the thirteenth year of our reign, &c.

ment of any customer by any means contrary to the statute 12 Ric. 2, cap. 2, is a misdemeanor. That statute, though very antient, is certainly not obsolete; it is the statute under which they are sworn in the Exchequer. It not only prohibits the appointment, but goes on to say that "none that pursueth by him or by others, privily or openly to be in any manner of office shall be put in the same office or in any other," and the 5 & 6 Ed. 6, cap. 16, makes void all promises, bonds and assurances, as well on the part of the bargainor, as the bargainee. It is said that this was no sale of the office, that no money has passed on the part of Fearon to obtain it. But the statute does not stop there. It is neither confined in its expressions nor its intent. In the case where a person obtaining an office gives money, the words of the Act are extremely general, and according to their obvious construction without any enlargement necessarily require that all bargains for money concerning those offices which are mentioned in the statute, are and shall be prohibited. Now is it not clear that the plaintiff has bargained with the defendant? Would the defendant have had the office without that bargain? The promise, which is the ground of this action, is, that the plaintiff shall have all the profits. By the words of the statute any profit however small, would have affected the transaction; but here there is a bargain for the whole. Courts of Law have very properly considered this as a remedial statute, and have construed it liberally where the validity of such transaction has been brought before them.

The case of *Sir Arthur Ingram* (Co. Lit. 234 a.) has been cited, and there it is clear that the transaction was not immoral; it was no otherwise wrong than as it was prohibited by a positive statute. It was a bargain between Sir Edward Vernon and Sir Arthur Ingram, for a surrender of the office of cofferer of the household; on the surrender of Vernon, Ingram was appointed, and a bond given to account for the profits. This was holden to be within the statute, because he had charge of the King's [331] money to pay the household. In that case the King was not deceived, the transaction was public and notorious, and the Crown was disposed to have re-appointed the officer with a non obstante; but the question being referred to the Chancellor and twelve Judges, whether the King could by a non obstante give the right of receiving the appointment to Ingram; their opinion was, that the case was within the statute, and therefore that Ingram was disabled from taking the office, and could not by a non obstante be made capable of holding it. In the case of *Godolphin v. Tudor*, 6 Mod. 234, which is also in 2 Salk. 251 (S. C. 1 Salk. 468. [More fully stated Willes's Rep. 575 n.]) which was mentioned in the argument, the transaction was between the principal and the deputy, and the agreement was, that the deputy executing the office should pay to the principal, out of the profits, a certain sum. The Court there held, that where the agreement was to pay out of the profits a certain proportion of the profits, it was not within the statute; and the reason given is very plain, and carries its own authority with it, namely, that the principal is entitled to all the perquisites and fees of the office, and the deputy to a recompense, as it were on a quantum meruit for the labour he has in the execution of it. All the effect therefore of such an agreement is to ascertain the share which the deputy should have for the execution of the office. But it is remarkable with what strictness the Courts have holden that proposition, and how careful they have been to guard against any transaction that might give any colour to the principal's receiving a gross sum out of the profits of an office executed by a deputy. For in this case, as it is reported in 6 Mod. the agreement was that Tudor should pay Godolphin 200l. a year, and it appeared upon record that the profits of the office amounted to 329l. 10s. every year in which it had been executed by Tudor; but as the stipulation was to pay 200l. a year absolutely without any reference to the profits of the office, the Court thought themselves bound to give judgment for the defendant. Now that was a transaction perfectly fair, the mistake in stating the manner of the agreement was an innocent one, but the Court would not permit the plaintiff to recover on an agreement where it was not stated on the agreement itself that the payment should be only of a portion of the profits, and not an absolute one of the whole.

Courts of Equity, in setting aside securities supposed to be valid at law, have gone by the same rule, and have been just as [332] careful not to permit by any construction, any breaches to be made in the provisions of the statute. The case of *Lockner v. Strode*, 2 Chan. Cas. 48, was quoted as a determination, where the Court of Chancery held a looser rule with respect to giving a bond for the payment of a certain sum to the principal appointing a deputy. But that case is, as most of the others

are in the same book, grossly misreported ; no such determination was made, and both the state of the case and the decision are perfectly mistaken. I have a copy of it from Lord Nottingham's notes, from which it appears that the defendant being sheriff, made John Lockner his under-sheriff ; and the plaintiff who was the brother of John Lockner gave a bond as a temporary security till the common security was given. John gave a bond in the usual form from an under-sheriff to his principal, for performance of the covenants in the indenture ; but the first bond was not given up. Strode, after he was out of office, arrested the plaintiff on it, who was obliged to give bail to Sir Francis Rolle, the succeeding sheriff, in 600l. ; and to be relieved was the object of the bill. The defendant pleaded a special agreement, that the bond was to secure him 400l. by quarterly payments for the under-sheriff's place. This the plaintiff denied, and also insisted that such an agreement was illegal, and contrary to the statute 23 Hen. 6, cap. 9. The Chancellor being under doubts, a trial was directed, and the point reserved. So that no opinion was given by him on the validity of the transaction. The date of that case is also mistaken ; it is stated in the report to have been Feb. 9, 1680, but it was in fact in Hilary term, 28 Car. 2. But in a subsequent case, Lord Nottingham very plainly intimated what would have been his opinion, if the agreement had been found good in law. That was the case of *Juxton v. Morris* (2 Chan. Cas. 42), which is in the same book, and also misreported. By Lord Nottingham's notes, it appears that a bishop's registrar made a deputation of his office, rendering thereout 90l. per annum ; the plaintiff exhibited a bill for an account, and the defendant pleaded that it was within the Statute of 5 & 6 Ed. 6, and that there ought to be no account. It was answered, that this was only a reservation of part of the profits, and the principal being entitled to the whole it was not illegal ; which (says Lord Nottingham), "seemed specious." But upon looking into the bill, it charged an express covenant to pay 90l. a year, without reference to the profits of the office. The plea [333] was therefore allowed, and the bill dismissed. These cases connected, shew that the opinion of the Court of Chancery at that time, in considering how far these securities were liable to be avoided as contrary to the provisions of the statute, was, that between principal and deputy there might be a reservation out of the profits, (though Lord Nottingham did not expressly so determine,) but if otherwise, the security was clearly bad. In the case of *Law v. Law* (3 P. Wms. 392), Lord Talbot set aside a bond supposing it to be good in a Court of Law, the consideration of which differed very little from the present. On the part of the plaintiff, the case of *Bellamy v. Burrow* was relied on, as an authority to shew that a Court of Equity will permit a trust to be created of an office, clearly within the Statute of Ed. 6 ; and on reading that case with attention, I admit it is a determination full to the point for which my Brother Adair cited it ; and undoubtedly as such a determination it is of very considerable authority, both in respect to the learning and the known integrity of Lord Talbot. But it is fit to be observed, that in the same case there stands very fully delivered the opinion of Sir Joseph Jekyll to the contrary ; and it rests upon an opposition between two very learned and upright men. Either opinion is probable, when there is such authority for its support. I will not enter into the consideration of that case, nor is it necessary to give an opinion here, whether a trust can in any instance be created in such an office. I do not take upon myself to say, without other consideration than the present circumstances can afford, that there is no possible case in which a trust fit to be executed may not be created in offices within the Statute of Ed. 6. This is not a case of the execution of a trust, the cognizance of which is peculiar to a Court of Equity. Perhaps if the Master of the Rolls had fixed on Fearon the character of a trustee, a Court of Law might not think itself at liberty to question the authority of the determination. But the whole question for a Court of Law to determine is simply, whether there appears a good consideration on which an assumpsit can be supported ? And I am of opinion, for the reasons I have stated, both on the principles of the common law, and because the transaction is in defiance of the statutes which have been made to guard against the evils of the same nature, that the consideration of the promise in this case is bad, that conse-[334]-quently it will not support an assumpsit, and therefore that a verdict must be entered

For the defendant.

COMPTON *against* COLLINSON (a). Friday, Feb. 12th, 1790.

Where a married woman lives apart from her husband under articles of separation, by which he covenants that she shall enjoy to her own use all such estates, both real and personal, as shall come to her during the coverture, and that he will join in the necessary conveyances to limit them to such uses as she shall appoint; and copyhold lands having afterwards descended to her, the husband again covenants in the same manner as before, and that he will join in surrendering such estates to such uses as she shall appoint; the wife may surrender the copyhold lands without the husband joining, and without a special custom for that purpose.

This case which was sent out of Chancery for the opinion of this Court, stated, that

In 1752, Michael Collinson married Jane Banastre, and had issue by her the defendant Charles Steynsham Collinson, and Mary Collinson.

July 15, 1762. By articles of separation between the said Michael Collinson of the one part, Jane Collinson and Charles Banastre her father of the second part, and certain other persons of the 3d, 4th, and 5th parts, after stating the agreement to separate; the said Michael Collinson covenanted, that the said Jane Collinson should from thenceforth enjoy to her own use all such estates, both real and personal, as should come to her during her coverture, or that he should become entitled unto, in her right; and moreover that he would join with the said Jane, in levying a fine, or suffering a recovery thereof, and limiting the same to such uses as she should appoint. And the said Charles Banastre thereby covenanted to indemnify the said Michael Collinson the husband against all damages and expences, which he might sustain on account of his wife's debts contracted since the 12th day of June 1760, or which should be thereafter contracted.

August 17, 1770, the said Charles Banastre died; upon whose death certain copyhold premises, held of the two manors of Ryegate and Banstead, descended to the said Jane Collinson, as the customary heir of her father, the said Charles Banastre. By indenture of three parts, made December 12, 1770, between the said Jane Collinson of the first part, the said Michael Collinson of the second part, and the trustees of the third part, after reciting, among other things the articles of separation of the 15th of July 1762, the said Michael Collinson covenanted that the said Jane his wife should enjoy to her own use all the real and personal estate of her father, as well as any other real estate that might in any manner come to her during the coverture, and that he would join in levying a fine, suffering a recovery, or making a surrender of such estates, and in limiting the same to such uses as she should appoint.

[335] May 16, 1771. The said Jane Collinson was admitted to the copyholds held of the manor of Banstead, and on the same day she surrendered them to the use of her will.

June 3, 1771. The said Jane was admitted to the copyholds, held of the manor of Ryegate, and on the same day she surrendered them to the use of her will. July 5, 1772, by a certain paper writing of that date, purporting to be the will of the said Jane Collinson, she devised the copyholds held of both manors, subject to debts, legacies, and funeral expences, to John Willis and his heirs, and appointed him executor. July 15, 1772, the said Jane Collinson made an absolute surrender of the copyholds held of the manor of Banstead to the said John Willis and his heirs; and the same day the said John Willis was admitted thereto, and at the same Court the said John Willis surrendered the said copyholds to the use of his will.

July, 15, 1772. The said Jane Collinson made an absolute surrender of the copyholds held of the manor of Ryegate to the said John Willis and his heirs, and the same day the said John Willis was admitted thereto, and at the same Court the said John Willis surrendered the said copyholds to the use of his will.

Michael Collinson the husband of Jane did not join or concur in any of the aforesaid surrenders made by Jane his wife.

July 26, 1772. The said Jane Collinson by another writing of that date, purporting to be a codicil to her will, after reciting the said surrenders, and that the same were made in trust for securing the payment to the said John Willis of such sums as he should during her life advance for her use, declared, in case the copyholds

should not be sold at her death, for the purpose of paying her debts, then that the said John Willis should stand seised thereof, charged with all sums which should be due from her at her death, or which he should pay by her order, and the fines and fees of admission; in trust for himself, his heirs, &c.

September 1, 1772. The said Jane Collinson died, leaving the said Michael Collinson her husband surviving her, and Charles Steynsham Collinson her heir at law, and heir according to the custom of the said manors of Banstead and Ryegate.

The question was, whether John Willis took any, and what estate under the surrenders, will and codicil of the said Jane Collinson, or under either, and which of them?

This was argued in Easter term last, by Lawrence, Serjt., for the plaintiff, and Bond, Serjt., for the defendant, and in Michaelmas term, by Le Blanc, Serjt., for the plaintiff, and Adair, Serjt., for the defendant. On the part of the plaintiff, [336] it was contended that John Willis took an estate in fee in the premises, according to the customs of the respective manors, under the different surrenders made by Jane Collinson, after her separation from her husband, a separate maintenance allotted to her, and after he had been indemnified against any debts she might contract, and had covenanted that she should have to her own use all the estates both real and personal of her father, or that might descend to her during the coverture, and that he would join in levying a fine, suffering a recovery, or making a surrender of such estates, and limiting them to such uses as she should appoint.

The difficulty arises from the husband not having joined in the surrenders. But this may be obviated by considering the reason why in general it is necessary for a husband to join in the surrender of copyholds belonging to the wife. The reason is, because he has an interest in the lands during the coverture, which is not to be given up without his testifying his consent; insomuch, that a custom in a particular manor for a wife to surrender her copyholds without the concurrence of her husband, has been holden to be bad. 2 Wils. 1. But where the husband, as in the present case, agrees that the wife shall dispose of her property, he renounces his interest, and the difficulty is at an end. Cessante ratione, cessat et ipsa lex. Besides as by the deed of separation, the husband was indemnified for his wife's debts, there was a valuable consideration, and a Court of Equity would decree a specific performance of an agreement for a valuable consideration. By the common law, the wife loses all power of separately disposing of her property; the husband has an absolute right to all her personality, and a qualified one, during her life, to her real estates. If she could either sue or be sued, she might be taken in execution, and the husband deprived of his right over her person. The incapacity of an infant arises from a want of skill and judgment, but that of a feme covert from want of property, and because she is supposed to act under the control of her husband. There are many cases indeed, where the surrender of the wife's copyhold made by her and her husband is holden to be good by the customs of particular manors; but in those cases, both the husband is a party on account of his interest, and she examined separately as to her consent. The authorities of Dyer, 363 b. Moore, 123. Cro. Eliz. 717. Litt. Rep. 274, and 2 Wils. 1 shew, that a custom for a [337] feme covert to surrender, and devise with the consent of her husband, is good. The criteria (by which a custom of this sort has been holden reasonable or not) to be collected from these cases, are, the husband's joining to shew his consent, and the separate examination of the wife to prove that she does not act under the husband's control. In Coke's Entries, 576, such a surrender is pleaded, without a special custom to warrant it, and no objection made. But as the principal thing to be attended to is the husband's consent in these circumstances, in order that his interest may be preserved, so there are other cases, where the husband having no particular interest, the wife may convey without his assent. As in *Daniel v. Ubley*, Sir William Jones, 137, where feoffment and livery were made by a married woman of an estate given her by a former husband, without the second husband joining. So in Bro. Abr. tit. Cui in Vitâ, pl. 16, where it was holden that a married woman might convey without her husband's concurrence an estate given to her on condition to sell.

The question then is, whether, in the present case, the wife was not to be considered as a feme sole? Her husband and she were separated by mutual consent, he was discharged from her debts, and had expressly, by his own act, given up his interest in her property, when he covenanted that she should dispose of it, and had confirmed

her in the possession of it, after the descent from her father. Although it is a general rule of law, that a married woman can neither sue nor be sued without her husband, yet there are many exceptions to this rule, as where the husband was an exile or had abjured the realm, in which cases she might defend a plea of land as a feme sole. Co. Litt. 132 b. Bro. Abr. tit. Bar. & Feme, pl. 66, and in 2 Vern. 104, it was holden, that the wife of a man banished for life might in all things act as a feme sole, and make a will. So also in *Deerly v. The Duchess of Mazerine*, Salk. 116, the wife of an alien enemy was sued on a contract as if she had been single. The same principle was laid down by Mr. Justice Yates at Carlisle, where he held that the wife of a man transported might be sued alone. *Sparrow v. Carruthers*, cited 2 Blac. 1197. So also, according to the more modern authorities, where, by a deed of separation, the husband covenants with trustees to renounce all his interest in the property of his wife, and is indemnified from her contracts, she is considered as a feme sole. She is put in the same situation as by the old law she would be in [338] if her husband were an exile or had abjured the realm. The husband is considered as having renounced all his marital rights, 1 Bur. 542. This doctrine is fully established by the cases of *Ringstead v. Lady Lanesborough* (B. R. Hil. 23 Geo. 3, reported in Cooke's Bankrupt Law, last edit. 32), *Barnwell v. Brooks* (B. R. Hil. 24 Geo. 3, Cooke's Bankrupt Law, last edit. 36), and *Corbet v. Poelnitz*, 1 Term Rep. B. R. 5. Then what has the wife done in this case? Being sole tenant of copyhold lands, to which the husband has expressly given up all his claim (which would otherwise be the only material obstacle), and having the whole power over them, she exerts that power by surrendering them to the lord, under which surrender the plaintiff claims, who is the representative of Willis.

On the part of the defendant it was argued that as the husband did not join in the surrenders they were bad, and the descent to the heir at law must take effect. This was an executory contract on the part of the husband, which shews on the face of it that the wife could not convey alone; for if she could, it would be unnecessary for him to covenant that he would join. But the heir at law is not to be disinherited by an executory contract. The question is, whether any legal estate passed by the surrenders? As the case was sent from a Court of Equity for the opinion of a Court of Law, all equitable considerations must be laid aside. In *Peacock v. Monk* (2 Vezey, 190), Lord Hardwicke, after noticing the distinction between real and personal property, expressly determined that where the husband did not concur, the conveyance by the wife of a real estate should not operate to deprive the heir. It is also to be observed in this case, that no special custom of the manors is stated to warrant the surrenders by the wife alone, nor that she was separately examined by the steward according to the general law of copyholds. But the law is, that a feme covert cannot convey a real estate without the concurrence of her husband. Though in the cases mentioned by Lord Coke, Co. Lit. 132 b. a feme covert was permitted to sue for and recover lands, yet it by no means follows that she can dispose of them. By the antient common law a feme covert could not, even by joining with her husband in any conveyance whatever, bar herself or those claiming under her of her own estate. The principle upon which, in process of time, she was allowed to alienate by fine, was, that a fine being the compromise of an adversary suit, and the [339] concord being deemed to have the same effect as a judgment in a real action, the woman being tenant of the land, and brought before the Court with her husband, was bound by that compromise, which was as effectual as a judgment. The first mention of the examination of a married woman joining in a fine, is in the Stat. de Modo Levandi Fines, 18 Ed. 1, st. 4, the equity of which was afterwards extended to recoveries, *Mary Portington's case*, 10 Co. 43 a. But a recovery cannot be suffered by a married woman so as to bind her without her husband. Shep. Touch. 41. Where indeed the wife alone levies a fine, and the husband does not avoid it, the wife is estopped after his death, and her heirs are included by the estoppel. Shep. Touch. 14. Pollexfen, 24. But it does not follow that she can convey alone in other circumstances. The jus possessionis is in the husband, the jus proprietatis only in her. She has not such a quantity of estate as the law requires to make a conveyance. The cases cited on the part of the plaintiff shew that there are certain exceptions to the general rule of law, but unless the present case can be brought within those exceptions, the rule of law must have its course. But in truth none of those cases are applicable. In the old authorities cited from Co. Lit. 232 b. the husband was either exiled, or had abjured

the realm. In the case of *Deerly v. The Duchess of Mazarine*, the husband was an alien enemy: in 2 Vern. 104, he was banished by Act of Parliament. In all those cases the husband was under an incapacity to sue. But in the present case, he was not only under no incapacity, but had expressly covenanted to join in a conveyance. As to the more modern cases of *Ringshead v. Lady Lanesborough*, *Barwell v. Brooks*, and *Corbet v. Poelnitz*, many able lawyers have been surprised at the extent of the doctrines laid down in them. But whether those cases be good law or not, they only concern personal property. The rules which govern real property are of a different nature. As the husband has an absolute right to his wife's personal property, he may renounce it without injuring any one; but having no more than a qualified right to her real estates, he cannot join to disinherit the heir, unless certain prescribed ceremonies be performed. As to the case of *Daniel v. Ubley*, there the wife acted under a power of appointment, the estate was given to her on condition: if she had not made any appointment, the elder son would have taken the estate by descent; as it was, the second son took it by the [340] father's will, through the medium of the mother's appointment. The cases cited from Dyer, Moore, Cro. Eliz. and Litt. Rep. prove only that a custom for a married woman to surrender and devise with the junction of her husband is good; but they do not shew that such a surrender or devise would be good without the husband joining; and here it is expressly stated that he did not join. In those cases, the question was as to the validity of a custom for a feme covert to surrender; there was no doubt respecting the general rule of law: the question indeed of itself imports, that without a custom the surrender would not be good. The passage in Coke's Entries proves no more than that a special custom of a married woman to surrender need not be stated on the record; but it does not follow from thence that her surrender would be valid without such a custom. Yet it was said that in this case the husband had done what was tantamount to joining in the surrender, by assenting in the deed of separation, to the wife's sole disposition of her property; but the law adapts the mode of assent to the act to be done; the surrender could not be complete without the husband actually joining. *Taylor v. Phillips*, 1 Vez. 229.

Cur. advis. vult.

On this day the judgment of the Court was thus given by

LORD LOUGHBOROUGH.—The question in this case is whether John Willis took any and what estate under the surrenders, will, and codicil of Jane Collinson, or under either, and which of them? The subject of dispute being copyhold lands it is evident that unless the surrenders be valid no estate can pass at law. No special custom is stated, and therefore the surrenders must be judged of by the general law of copyhold estates. The several surrenders on the face of them are the surrenders of Jane Collinson as a feme sole: for it is not stated that she was privately examined, nor is any notice taken of her being a feme covert, nor is there any assent or evidence of assent on the part of the husband accompanying the surrenders. She is stated by the case to have been in truth the wife of Michael Collinson, separated from him, first, by articles renouncing all his right to whatever estates, real or personal, might come to her during the coverture; and secondly, by deed, after the copyhold estates had descended to her, covenanting that she should enjoy the same to her own use; and that he would join in making a surrender of such estates, and in limiting them to such uses as she [341] should appoint. By force of these articles, and of this deed, all the right of the husband is barred. The question therefore is, whether the surrenders of Jane Collinson, her husband not having joined, shall bar her heir? There are two distinct surrenders of each copyhold: the first made May 26 and June 3, 1771, to the use of her will; the second, July 14 and 15, 1772, absolute surrenders to John Willis, on which he was admitted and which he on the same day surrendered to the use of his will. If Jane Collinson had a full power to make a valid surrender, the last surrenders have passed all her estate at law to her surrenderee. These surrenders took effect immediately, she could not herself have avoided them, nor could the husband against his own covenant. If she had sued jointly with her husband to avoid them, it would have been incongruous to have alleged as a defect in the surrender, the omission of that which the husband had covenanted to do, and which it was in her power to procure; and if she had sued as a feme sole against her own surrender, it would have been still more preposterous. If therefore Jane Collinson could not have avoided these surrenders, it is difficult to conceive how her heir should

be in a better condition with respect to an absolute surrender binding upon her, whatever claim he might have against a surrender to the use of her will. It cannot be more necessary that the husband should join with his wife in the surrender of her copyhold, than in levying a fine of her freehold estates. But it has been settled ever since the case in the 17 Ed. 3 (Year Book, 17 Ed. 3, 52 & 78. 17 Assi. pl. 17. Bro. Abr. tit. Fines, pl. 75), that if a fine be levied by a feme covert without her husband, it shall bind her and her heirs, if it be not avoided by the husband; and both Rolle and Comyns (1 Roll. Abr. 346, l. 50. Com. Dig. tit. Bar. & Feme (P. 1)), seem to intimate that the law would be the same as to a recovery. Had the present case been of a freehold estate conveyed by the wife by fine without her husband, it would clearly have bound her heirs, and the husband being estopped by his deed, the estate of the conusee would have been indefeasible at law. The modes of conveying freehold and copyhold estates are different, but there is surely a fair argument from analogy, that a copyhold estate transmissible under the same circumstances as a freehold, should be governed by the same rules. Both are public conveyances; and from the nature of copyholds, there is more reason to support the surrender of a feme covert where the interest of the husband is not affected [342] by it, than there is to make a fine effectual without his joining. Of a freehold estate the husband is seised in right of his wife, of a copyhold he has a mere possession. He is not admitted in her right; she is the actual tenant; and when a copyhold descends to a married woman, the new grant of the lord is to her and not to the husband. In opposition to this reasoning, two cases were cited at the Bar which were supposed to have denied the application of any argument drawn from the case of a fine, to the validity of a surrender; and to have asserted the absolute nullity of a surrender by a feme covert, without the concurrence of her husband. The first of these cases is *Taylor v. Philips*, 1 Vez. 229. Now all that can be inferred from that report of Lord Hardwicke's opinion is, that if the fact had been fully before him, he would have made a case for the opinion of a Court of Law upon this very question, whether a surrender by a feme covert without her husband's joining, but with his assent, was an effectual surrender? But as there was some reason to suppose there might be a special custom to warrant that surrender, he directed a trial. It is evident, then, that Lord Hardwicke was of opinion that a custom for a feme covert to surrender without her husband joining, might be a good custom, for otherwise the trial would have been idle, and he would have directed at once a case for the opinion of the Judges. This observation will also materially apply to the next case, which is *Stephens v. Tyrell*, 2 Wils. 1, where, according to the report, the Court of Common Pleas held that a custom for a feme covert to surrender without her husband's joining is contrary to law, and bad. In this case it is said, that the Chief Justice observed that it was not stated whether the husband was to consent though he did not join, and therefore it must be taken to be without his consent. Now the natural inference from thence is, that the consent of the husband, though he did not join, would have made the surrender effectual. The Chief Justice there censures an inaccuracy in 2 Danvers' Abridgment, 430, pl. 10, cited in support of the custom, and the remark is just. But when one looks into the cases referred to in Danvers, it is evident that they furnish an authority in support of a surrender without the husband's joining in the act of the surrender. The first is an *Anonymous case* in Moore, 123, where a custom for a married woman to devise her copyhold lands with the assent of her husband was holden to be good. The next are 3 Leon. 81. Godb. 14 & 143, and 2 Brownl. 218, [343] which all treat of the same case, viz. *Skipwith's case*. There were two parts of the custom alleged in that case, the one that a married woman might devise, the other that she might surrender in the presence of the steward and six of the tenants. The state of the case in Lennard shews that the will was made in favour of the husband, in the presence of the steward and six of the tenants, and at the next court the surrender to the use of the will was also in the presence of the steward and six of the tenants. The custom seems to have been holden good in substance, and it is probable that it was so from the citation in 2 Brownl. 218 (a). This is therefore an authority, that a surrender without the husband's joining, though certainly in a case where his assent might be presumed, is good. The reasoning of the Chief Justice, according to Wilson's report, proceeds upon a supposition that the custom stated excludes the husband entirely, because it does not expressly require his

(a) It is there cited, arguendo, by the name of *Skegg's case*.

consent, and that it would therefore enable the feme covert to dispose of her estate against his consent. But this is by no means a necessary conclusion. A surrender without the husband may be a good disposition against all but him, and his right to avoid it is not inconsistent with such a custom. The reasons therefore on which the custom in *Wilson* is condemned, do not appear quite satisfactory; and it has always appeared to me somewhat arbitrary to condemn a custom because it is not conformable to the general law and policy of the nation. That estates should be holden in some manors by an heiress independent of her husband, is not more singular than in others that the estate should vest absolutely in the husband by the intermarriage, which is the case in some manors in Westmoreland. This case then goes no further than an opinion that a surrender in which the husband neither joins nor assents cannot be good; but if that opinion were well founded, it would not affect the present case. In both *Vezey* and *Wilson*, the observation made on the analogy of a fine is, that it works by estoppel. In the case in *Vezey*, Lord Hardwicke is speaking of the fine of a tenant in tail, where no interest passes, which he says will be good against the heir by estoppel, and the phrase is there correctly used. But as to a feme covert levying a fine where it conveys an interest, it shall bind her and her heirs, if the husband does not enter and avoid it, because, says Lord Coke, she was examined, and has power over the land, 10 Rep. 43 a. The fine there passes the estate, and when it is said that she is estopped [344] by it, the expression is used in the same loose manner as when it is applied to any other person contending in opposition to his own deed, by which he has passed away the interest and estate which he would claim.

It was objected in the argument that no custom is stated in the case, and that a surrender by a feme covert even with the husband's joining can in no case be good but by the particular custom of a manor. No authority was cited for this position, but it was argued that from the several cases, viz. *Dyer*, 363 b. *Cro. Eliz.* 717, and *Litt. Rep.* 274 (in which the validity of a custom for a feme covert being separately examined, and her husband joining to make a surrender, is affirmed) it was strongly implied that such a surrender would not be good by the general law of copyholds. This objection rests on a supposed defect in the statement of the case. But the Court will intend that the surrender by the wife separately examined with the husband joining, would have been good. The case could not otherwise have been made, and even if the argument had been upon a special verdict, the objection would not prevail. For it would be contrary both to law and reason, that the copyhold of a woman should become unalienable by her marriage, and it is against the nature of copyhold estates that they should not be surrendered back to the lord by the act of all the persons having any interest in them, and having a disposing power.

Lord Coke says, "This is the general custom of the realm, that every copyholder may surrender in Court, and need not to allege any custom therefore," *Co. Litt.* 59 a. and in *Combe's case*, 9 Rep. 75, it is holden to be a necessary consequence of this, that every copyholder may surrender by attorney, as a thing incident by the common law; and in the pleadings of that very case, a surrender by a feme covert and her husband is pleaded, without any custom being alleged. *Co. Entries*, 576. The cases which are said to afford a negative implication, that without a custom the surrender by a husband and wife of the copyhold of the wife would not be good, cannot be so construed. The case in *Dyer*, 363 b. arose upon a question whether a custom in the vill of Denbigh, that a feme covert with her husband, by surrender and examination in court might alien her land, was taken away by the Statute of Wales, 27 Hen. 8, c. 26, and the opinion of *Dyer* and *Wray* was, that such custom was not abrogated, because it was reasonable and agreeable to the custom of England for the assurance of purchasers. The case in *Cro. Eliz.* 717, states a question, whether the examination of a feme covert out of [345] court by two tenants be good without a special custom; and it is holden that it is not, because it is a judicial act more proper to be done in court; admitting at the same time that a surrender on a sole examination in court would bind her by the custom, i.e. by the general custom; for though the state of the facts does not appear by the report, it is fairly to be collected that no special custom for a feme covert to surrender in court was given in evidence. The short note in *Litt. Rep.* 274, seems more to favour the argument than the two preceding cases, which attentively considered rather make against it. But it may easily be discovered why in the case in *Littleton*, the Defendant chose to allege a custom rather than to rely on the general law. He makes use of terms much more extensive than the general law:

he pleads a custom that quælibet femina viro co-operta (including infants) may surrender; the Plaintiff replies that every woman of full age may surrender without traversing the custom that quælibet femina, &c. and the Court holds the replication bad, for he ought to have traversed the custom alleged by the Defendant. It might be a question, whether by special custom a feme covert infant could not surrender, though it is contrary to the general law, and therefore it is pleaded that every feme covert may surrender: but such a case affords no inference that it was necessary to allege a custom for the general position, that a feme covert with her husband might surrender.

For these reasons, this objection ought not to prevail even so far as to induce the Court to desire a fuller state of the case; which would be the only effect it could have; for the customs of most manors being consonant to this general law, there is little doubt but such a custom might be truly stated in any case where it were necessary that it should be particularly alleged.

The general objection to the validity of the surrenders, viz. that by the common law a feme covert is incapable of disposing of her lands without the concurrence of her husband, has been in part already considered; but it may be fit to examine this position more particularly. It certainly is generally speaking a true one, though perhaps not quite correctly expressed; for a feme covert has no power to convey with her husband, except by fine or recovery. It would be more accurate to state the law to be, that a married woman can make no conveyance of her lands except by fine or recovery, and that a fine levied by her alone is avoidable only by her husband. It is equally a general rule of law, that a feme covert cannot sue or be sued without her husband, and that she can make no contract to bind [346] herself. These rules are established on the principle (partly religious, and partly political,) that she has entered into an indissoluble engagement, by which she is placed under the power and protection of her husband, given up to him all personal property in her actual possession, and the right to receive all such as may be reduced into possession. To these general rules there have been in the process of the law various exceptions allowed, where the principle of the rules could not be applied to the circumstances of the case. In the case mentioned in Co. Litt. 132 b. and stated at large in Ryley Plac. Parliam. 19 Ed. 1, p. 66, the husband having abjured the realm for felony, the wife was permitted to sue, and had judgment to recover seisin of an estate, of which she was jointly enfeoffed with her husband for life against the lord who after satisfaction made to the King for the year, day and waste, claimed to have the land by escheat. In the 31 Ed. 1, it was holden, that the wife of one who had abjured the realm could make a feoffment by deed with warranty of her land, and should be bound by it. Fitz. Abr. Cui in Vita pl. 31. In the 10 Ed. 3 (Co. Litt. 132 b.) a quare impedit was brought for the King against the Lady Maltravers; she pleaded coverture, and upon the replication for the King, that her husband was exiled for a certain cause, she was ruled to answer. In the 1 Hen. 4 (Co. Litt. 133 b. case of *Sibel*, B. Year Book, 1 Hen. 4, 1, pl. 2), the same point was determined in the case of *The Lady Bellknap* whose plea of coverture was overruled on a replication that her husband was exiled: and in the following year, 2 Hen. 4, the same lady sued in her own name, and her suit was allowed. Lord Coke does not take notice of a circumstance mentioned in the Year Book (2 Hen. 4, 7, pl. 26) and in Brooke's Abridgement (tit. Baron and Feme, pl. 66), that some of the justices said, she sued as farmer of the King; which seems to strengthen the authority, for it shews that during the exile of her husband, she acted as a feme sole, holding an interest under a grant from the King, by which she might both sue and be sued alone.

A feme covert may convey in execution of a power, Sir W. Jones, 137, and Latch, 39 and 134, and though in that case there is much debate in the Court, and a difference in opinion, whether the wife had any estate, and whether she could convey in execution of a trust without her husband, yet all agreed that her feoffment without her husband was a valid act. A feme may execute a power to sell lands without her husband, and may sell them to him. Co. Litt. 112 a. A feme covert may act in auter droit as an executrix without her husband; and it is said, [347] that she may administer, or prove the will, notwithstanding his refusal. Com. Dig. Administration (D). In the three instances last mentioned, the law supports the act of the wife alone, because the husband has no interest in the execution of it; and in all the former instances she is enabled to act by herself, because she cannot have the authority

of her husband, whose exile or abjuration, though it does not dissolve the marriage, suspends the marital power.

Cases of separation, and in consequence of the relinquishment of the marital rights by the agreement of the husband, were not likely to have often occurred in the simplicity of antient times. But there is a case in the Year Book 47th of Ed. 3, c. 18 (pl. 43), which shews that they were not then totally unknown in the law. "An action of account was brought against one as bailiff of the plaintiff's land, to which the defendant pleaded, that there was a debate between the plaintiff and his wife, on which by the accord of their friends, the plaintiff assigned to his wife for her maintenance the lands of which the account was demanded, and that the wife leased these lands to him for a term of years. The plaintiff insists this is no plea, and amounts merely to a denial of the defendant being bailiff; but the Court held that he must answer the plea. And then the plaintiff traverses the lease alleged to be made by his wife." This case seems to prove that a feme covert might dispose of the profits of lands allotted for her maintenance, and make a lease of them without her husband joining in the lease. In *Croke Charles* there are two cases on bonds given to secure the disposal of a sum of money by a married woman. The first of them was in the 5 Car. 1. Cro. Car. 219 (*Marriott v. Kinsman*). It was an action upon a bond given by a man after marriage, conditioned to permit his wife to make a will, and dispose of a sum not exceeding 50l. in legacies: the defendant pleaded that the wife did not make any will, and on that plea issue was joined. It was found specially that she did make a will, and disposed of divers legacies not exceeding 50l., but that she was covert at the time of making the will. Judgment was given for the plaintiff, for though by law a feme covert could not make a will without her husband's assent, yet it was a will within the meaning of the condition. The other case was in the 10 Car. 1. Cro. Car. 376. It was an action on a bond conditioned to pay 300l. after the death of the wife by the husband, in case he survived, [348] for such uses as she should appoint by any writing under her hand and seal, in the presence of two witnesses. The defendant pleaded that she did not appoint. The plaintiff replied, that she by her will in writing, sealed and published in the presence of two witnesses, did will and appoint such sums to be paid; to which the defendant demurred, and judgment was given for the plaintiff. The argument seems to have been upon the pleading this writing as a will, and not as an appointment. But the Court held it to be sufficient, for though it was not properly a will, being made by a feme covert, yet it was a writing in the nature of a will.

Courts of Law then had at this period recognized the power of a married woman, authorized by her husband, to make in effect a testamentary disposition of personal property.

The case of *Manby v. Scott* (1 Lev. 5), decided soon after the Restoration on an action which had been commenced during the usurpation of Cromwell, gave rise to a very large discussion of the rights of husbands and wives. It seemed then to be the opinion of the majority of the Judges that the husband could not be sued for any debt contracted by the wife without evidence of his assent; consequently for no debt contracted by her when wilfully separated from him. Hale held the rule so strict, that in a case reported (*Calverly v. Plummer*), 2 Levinz, 16, some years after the judgment in *Manby v. Scott*, he nonsuited the plaintiff in an action brought by a gaoler against a husband for the diet and lodging of his wife. It appeared in the case that the husband had left his wife in the country and come up to London, where he married another woman. The former wife caused him to be indicted, and coming to London to prosecute, was, by his contrivance, arrested and sent to gaol. The husband was convicted on the prosecution. Yet Hale would not allow this peculiar case of the husband's procuring the arrest to be an exception to the rule, which required his assent to the debt. Subsequent cases, however, relaxed the extreme rigour of this rule, as where the husband turns the wife out of doors, he gives her credit wherever she goes, according to Holt's opinion (*Eltherington v. Parrot*). Salk. 118 (b). But still in the case of a wilful separation of the wife, the law was understood to be, that the husband was not liable to be sued for her debts. It seems very certain that the

(b) [See *Harris v. Morris*, 4 Esp. N. P. C. 41. *Liddlow v. Wilmot*, 2 Stark. N. P. C. 87. *Horwood v. Hejfer*, 3 Taunt. 421, S. P. And see *Freeman's Rep.* in K. B. & C. P. 249 n. 2d edit.]

Judges who argued the case of *Manby v. Scott*, did not conceive that an action could be brought against the wife. It was equally the supposition of those who maintained that the husband was [349] not chargeable, as of those who held the contrary, that the wife was incapable of having any property, could acquire no credit on her own account, and must either subsist on charity or starve, unless she could obtain an alimony from Chancery or the Ecclesiastical Court. On the one side, this situation of the wife separated from her husband, is urged as a strong argument to support the conclusion that the husband is liable to an action for necessities; while they who argue on the other side contend, that the distress in which the wife is placed is a just and expedient consequence of her separation from her husband, from which the law ought not to relieve her. It does not seem to have occurred to any of the Judges at that time that a wife, separated from her husband, may in fact possess property, that she will obtain credit by means of her apparent property, and that the consequence of her debts not being recoverable either against her or her husband, would only be prejudicial to the unwary, but honest tradesman.

The first case which appears, after this determination of *Manby v. Scott*, of an action brought against a married woman, is that of the *The Duchess of Mazarine*, 1 Salk. 116, Lord Raym. 147, Comb. 402, in which the Court avoid the question, though she was holden liable to the action. The reports say, it may be intended she was divorced, or her husband an alien enemy, and perhaps it may be like *The Lady Bellknap's case*, whose husband was exiled. The only notes of the case are very short, and the point appears to have been made upon a motion for a new trial, in which the Court felt what the justice of the case required, and were not pressed to explain the grounds of their opinion. It would however have been a strange situation if the Duchess of Mazarine, a woman enjoying a considerable fortune of her own, and for many years a large pension from the Crown of England, had been protected from every legal demand, by a rule of the law of England that no action could be brought against her, because she had a husband whose person and fortune were utterly unknown, and could not be attached by any one with whom she dealt. The only two grounds hinted at for the decision could not have stood examination. She neither was, nor could be divorced, the law of France not permitting a divorce; and though in the term when the motion for a new trial was denied, the treaty of peace had not been signed, and a Frenchman was then an alien enemy, yet that argument would not have been applicable in the next term. The ques-[350]-tion whether a married woman separated from her husband, and enjoying by his agreement a separate provision, shall be liable for her debts, has come before the Courts in several cases. In that of *Ringstead v. Lady Lanesborough* (Cooke's Bankrupt Law, 2 ed. 32), Hil. 23 Geo. 3, the point was directly brought before the Court of King's Bench upon the record, and judgment given that she was liable. In that case the husband was stated to be out of England. But in Hil. 24 Geo. 3 (*Barwell v. Brooke's*, Cooke's Bankrupt Law, 2d ed. 36), the same question was brought before the Court, the husband being in England, and the same judgment given. In Mich. 26 Geo. 3, the same question was again stated upon the record, in the case of *Corbet v. Poelnitz* (1 Term Rep. B. R. 5), with this difference only, that in that case the contract was for money, in the others, for goods; and the judgment was the same. About the same period, East. 16 Geo. 3, the question was agitated in this Court; first, in the case of *Hatchett v. Baddeley* (2 Black. 1079), where the Chief Justice and my brother Gould took a distinction on the pleadings, which neither stated a separation, nor a separate maintenance, but that the wife had eloped, and lived separately from her husband; which distinction has certainly great weight. But the two other Judges held that the action would not lie merely on the ground of the defendant being a married woman. In East. 18 Geo. 3, the question was again submitted to this Court, in the case of *Lean v. Schultz* (2 Black. 1195), on pleadings which distinctly stated a separation, and separate maintenance; but the question itself then received no determination, the Court having given judgment merely on a point of form, namely, that the husband ought to have been joined for conformity.

From this state of the decisions, it cannot be concluded that it is a settled point, that an action may be maintained against a married woman separated from her husband by consent, and enjoying a separate maintenance (b). But supposing the

(b) [It is now decided that such an action cannot be maintained. *Marshall v.*

law to be according to the three last determinations of the Court of King's Bench, it seems to be a necessary conclusion, that a married woman, whose separate property consists of a copyhold estate, should have a power to surrender it, for otherwise the law would compel her to pay without allowing her to use the means of paying, and enable the creditor to recover a demand, without the power of making that demand effectual. This is certainly an argument from inconvenience alone, and therefore not altogether conclusive; but it has great weight [351] when no possible inconvenience can be opposed on the other side. The interest of the husband is entirely out of the question; the interest of the lord is not hurt by the surrender; the expectancy of the heir is not an interest, and slight as it is, cannot be set up as a claim in justice, to take the estate without paying the debts.

But the main and substantial ground of the case is, that the wife is the tenant of the copyhold and not the husband; that the estate can be forfeited or surrendered only by her acts, not by his; that the authority which he acquires by his marital rights to direct and control her acts, is by his covenant in the present instances annulled, or at least suspended; and there is then no impediment to the validity of an Act, passed in the court of the manor between her and the lord.

The certificate sent to the Court of Chancery, was as follows:

"Having heard counsel on both sides, and considered this question, we are of opinion, that John Willis took an estate to him and his heirs, according to the several customs of the manors of Banstead and Ryegate, under the surrenders and admittances of the 14th and 15th of July 1772."

LOUGHBOROUGH.

H. GOULD.

J. WILSON.

ROUSE *against* BARDIN AND OTHERS. Friday, Feb. 12th, 1790.

In trespass, a plea of justification, stating that a public highway led from another highway (leading from A. to B.) in, through, over and along the locus in quo, to a certain other highway (leading from C. to D.) was well supported by evidence proving that the way in question led from the terminus a quo, viz. the way leading from A. to B., over the locus in quo, to a different way called E., and along that way into the way leading from C. to D., the terminus ad quem (a). In pleading a public highway it is not necessary to state any termini.

To this action of trespass for breaking and entering the close, &c. of the plaintiff, called Brompton Heath, the defendants pleaded in justification a right of way in the following words: "That from time whereof the memory of man is not to the contrary, there hath been a public common highway for all the liege subjects of this kingdom to pass and re-pass on foot, from a certain other common and public King's highway, leading from Knightsbridge, in the county of Middlesex aforesaid, unto a certain place called Earl's Court, in the parish of Kensington in the said county, in, through, over, and along, the said close, called Brompton Heath, otherwise the Heath, otherwise the Field, otherwise the Garden, in which, &c. unto a certain other common and public King's highway, leading from London to Fulham in the said county and back again from the said last-mentioned close, in which, &c. to the said first mentioned King's highway, at all times of the year, at their will and pleasure," &c.

[352] The evidence at the trial was, that the way in dispute led over Brompton Heath into a footway called the Church Lane, at the west side, and along that footway, into the road leading from London to Fulham.

Lord Loughborough, who tried the cause, thought the plea was not supported by the evidence, inasmuch as there was a variance with respect to the terminus ad

Rutton, 8 T. R. 545. Even where there has been a divorce a mensa et thoro. *Lewis v. Lee*, 3 B. & C. 291. *Hookham v. Chambers*, 3 B. & B. 92. In what cases the husband is liable for necessaries supplied to his wife, after separation, see *Nurse v. Craig*, 2 Bos. & Pul. N. R. 148. *Hornbuckle v. Hornbury*, 2 Stark. N. P. C. 177. *Holt v. Brien*, 4 B. & A. 253.]

(a) [But see *R. v. Great Canfield*, 6 Esp. N. P. C. 136. See also *Wright v. Rattray*, 1 East, 377. *Allen v. Ormond*, 8 East, 4.]

quem, and directed the jury to find a verdict for the plaintiff; which was accordingly done.

In the last term a rule was granted to shew cause why there should not be a new trial, against which Bond and Marshall, Serjts., shewed cause.

It is a rule of law necessary for the protection of property, that any one who comes on the soil of another, shall be deemed a wrong doer till he shews distinctly that he had a right. If he enters under pretence of an easement, he must shew precisely such an easement as will warrant what he has done; he is not to enter by virtue of a fancied right, not accurately defined. In the present case the defendants have no way over the plaintiff's close from the Earl's Court Road to the Fulham Road. Perhaps they may have a way partly over the plaintiff's close, and partly through the Church Lane to the Fulham Road; but no man can go from the Earl's Court Road, over the locus in quo directly to the Fulham Road, without committing a trespass. It is urged by the defendants that it is unnecessary to shew that the way goes out at the terminus ad quem stated in the plea. But if that be so, neither is it necessary to prove that it enters at the terminus a quo stated in the plea; and then it would follow that evidence of a way entering the field at any one point, and going out at another, would support the prescription. If this be law, it would be improper ever to state the termini in pleading a prescriptive right of way, as it might tend to mislead the other party; but the mode would be to prescribe generally for a way in, through, and over the locus in quo, without a more exact description, and the plea of extra viam would be nugatory. If the defendants had recovered a verdict on this prescription, the consequence would have been, that in future the public would have had two ways over the plaintiff's close instead of one. It is evident from adjudged cases, that in pleading a right of way, the terminus ad quem, as well as the terminus a quo, must be strictly proved. 2 Leon. 10. Yelv. 163. Hob. 189. 1 Vent. 13. 2 Keb. 488.

Adair and Runnington, Serjts., on the part of the defendants argued, that as this was the case of a common public high-[353]-way, it was sufficient that the substance of the allegation was proved, namely, that there was a right of way over the whole locus in quo, towards the Fulham Road, though it might first lead into the Church Lane. In *Halsey's case*, Latch, 183, the defendant was indicted for stopping the King's highway in Kensington, and an exception was taken that no boundaries were set out, it not being alleged from what place to what place the way led. But it was holden sufficient, because a highway leads from sea to sea over the whole kingdom; but otherwise if it had been another common way. The cases cited on the other side were all of private ways, in describing which greater strictness is required; but in 1 Ventris, 13, and 2 Keble, 488, it was holden, that if it were found that the defendant had a way over the locus in quo, it was not material to the justification after verdict, whither it might lead. To the same point also is 2 Keb. 89.

On this day, the Judges delivered their respective opinions as follow:

GOULD, J.—This case arises on pleadings of considerable length, stating that the trespass was committed in a place called Brompton Heath, with several variations in point of description. The defendants say, that from time, whereof the memory of man is not to the contrary, there has been a common public highway, for all the liege subjects of this kingdom, to pass and repass on foot, from a certain other common public highway leading from Knightsbridge to Earl's Court, in, through, over, and upon the said close called Brompton Heath, under a certain other common highway leading from London to Fulham, and back again, in, through, and over the locus in quo. I understand, that at the end of this close leading towards the Fulham Road, that is, in the line of the way, you do not immediately issue into what is called the Fulham Road, but into another common highway called the Church Lane, and from thence over a very short space, you enter into that which is properly called the Fulham Road. Now my apprehension always has been, that in cases of this sort, the intermediate spaces, either before the entrance into a field, or at the exit out of it before you reach the terminus ad quem, are immaterial. This is the case of a common public highway, and there have been very considerable doubts, whether in a common highway any termini at all need be set forth. There was a case mentioned at the Bar, of an indictment for stopping a highway at Kensington, in which it was holden that the way was sufficiently described, without [354] stating from what place to what place it led; and among other things, a reason was given for that opinion, because a highway runs from the sea across the whole island. But nevertheless, if a defendant

will state the termini in his justification, he is bound to prove them. There are many instances, which must occur to every one, where things are not necessary to be alleged in pleading, yet if they be alleged, they must be proved. Such as the description of a public Act of Parliament; the day when the sessions were holden; and the like. So where an officer justifies under process of execution out of a Court, it is unnecessary for him to state a judgment, yet if he will state it, he is bound to prove it as described. These are common cases, and many more might be adduced. The question then in the present case is, what the terms of this plea require to be proved, and whether they necessarily import that the way in dispute was adjoining to the Fulham Road? Now that is not the case; the way is described to go, in, through, over and along Brompton Heath, unto the Fulham Road. But there is an intervening space between that and the Fulham Road. If it had been described to be adjoining to the Fulham Road, I have already given my opinion as to the proof. But it is stated to lead unto the Fulham Road; which, in my apprehension, is nothing more than this; a common highway which is one entire thing, leads over this field to the Fulham Road; and so it does, notwithstanding there is an intervening piece of ground. The case cited at the Bar from *Ventris* comprehends this idea. It is there said to be sufficient to state the places from which, and to which the way leads, though the mesne passages should be mistaken. It will be material to advert to ancient pleadings in justification. I find in *Rastall's Entries*, 617 b. a right of way pleaded as follows. A man was seised of a messuage in S. and prescribed for a way for all those whose estate, &c. both for horse and foot "from the messuage to the parish church of E. and the market town of M. with all his carriages *ultra clausum prædictum*." Now it would be productive of infinite uncertainty to require an exact description of the line of the way, to say that it went so many yards to the north, then turned to the west, and then to the east, in that irregular manner. Such justifications as these would then be clogged with insuperable difficulties in point of proof. And I think it would be totally unnecessary; the usage defines the way. I mention this as occurring to me from the books and pleadings; and with regard to experience, I have [355] always understood that the intermediate spaces are disregarded, both as to the approach to a field and the quitting it. It is sufficient to enter the trespass, and justify under a right to pass over the close. I therefore think this is not a material variance from the plea.

WILSON, J.—I am of the same opinion. Where the way is a public highway, it is in no sort necessary to state either the *terminus à quo*, or the *terminus ad quem*; where it is a private way, it is necessary to state them, because private ways are given for particular purposes, and the justification must shew that they were used for those purposes. But it is different with regard to a public highway, because all His Majesty's subjects have a right to use that way for all purposes, and at all times. The reason given in the ancient cases, why a highway must be particularly described is not a very good one, namely that it must be stated to lead to a market town, in order to shew that it is a highway. Lord Hale says, whether it be a highway or not, depends much on reputation. I am therefore of opinion, that in justifying a trespass because the place in question is a highway it is not necessary to state the places to which and from which it leads. If that be so, the next question is, whether those places being stated in the plea, they are sufficiently proved? With respect to that, the way in dispute is stated to be a highway leading from one highway to another highway. I think it cannot be doubted but that this is a sufficient description. But it is impossible to state the specific line of road under that description, which can only be, that it leads from one point to another. What the line is on which the highway passes, must be matter of evidence. The objection in this case is, that the way is stated to lead to the Fulham Road, but that before it reaches the Fulham Road, it goes for a little space on another highway. But I do not conceive that to be a material variance. I understand the allegation to import no more than this, namely, that there is a highway over the close, on which you may go from the Fulham Road to the Kensington Road; but not that the Fulham Road joins to the close over which the highway leads. But even if that were the import of the allegation, I should have considerable doubts whether this were a variance. But clearly the allegation means no more than this; there is a highway over the close, leading from the Fulham Road to the Kensington Road, which I think was sufficiently proved by the evidence.

LORD LOUGHBOROUGH.—My brother Heath has informed me, that he is of the

same opinion with my brothers Gould and [356] Wilson. I therefore certainly fee that the authority of the Court ought to govern my opinion. But on the best consideration I have given the question, I have not been able to bring myself to agree with them. I still retain the opinion I first had at the trial, and think that in all cases, where a real difference in opinion exists, it is right to avow it, and state the grounds on which we differ. What weighs with me in the present case, is the positive authority of 2 Rolle's Abridgement 81 (tit. Indictment, pl. 18), in which it is said, that in an indictment for an obstruction, or nuisance near a highway, it is necessary to set out the terminus à quo, and the terminus ad quem; a case in 15 Car. 1 is referred to, where an indictment was quashed for this reason, which was said to be a common exception, and divers indictments had been quashed on the same account. Against that authority, a case in Latch, 183, and some subsequent cases were cited. But that case in my apprehension, tends rather to confirm than weaken the authority of Rolle's Abridgement, for it shews that a much nicer objection was allowed by all the Court. It was stated in the indictment, that at Kensington the defendant obstructed the King's highway from London to Kensington, and the Court two several times held this to be bad, because they said the manner of describing the way excluded Kensington. The indictment was then drawn in a third form, and the way described to be, the King's highway in Kensington; this was holden to be sufficient, first by Jones and afterwards by Doderidge and Whitlock, and the reason given is, because a highway leads from the sea through all England. But that reason I do not conceive to be a fair one: the obvious reason is, that a highway stated to be in a town is sufficiently certain. And in that case Jones distinguishes a common way, in which the termini must be set out, from *alta via regia*. The case in 3 Keble, 89, is not applicable to the present: it was of a presentment on a view by a jury, on an annoyance in a cloth fair, which the Court after verdict held good. I think the case in Andrews, 137, before Lord Chief Justice Lee, was rightly determined on its own grounds. One question there was, whether the description of the river Thames at Fulham, was sufficient without stating the places to which and from which it flowed. But it would be absurd to require abutments of navigable rivers; in that case it was holden sufficient to say the river Thames at Fulham, and both Probyn and Chapple say, it was not necessary to set [357] out the termini, for the Court would take notice of the river Thames. But admitting that in an indictment for a nuisance in not repairing, it was sufficient to state a highway generally, yet it seems to me that the same rule is not to be applied to a plea in bar of an action of trespass; because every man has *primâ facie* a right to exclude all others from coming over his land, and the justification must be set out with due certainty, and notice to the plaintiff of the way claimed over his soil. There may be many ways claimed, and the occupier of the field ought to know which is insisted upon; he may admit one, and deny the other; he has a right to apply *extra viam*, which he cannot do, unless the way is explained, with defining the term where it commences and ends. In the case before the Court, the plaintiff might have admitted the road to the Church Lane, he is deceived by the plea, for he knows there is no road over his field which directly terminates in the Fulham Road. But whether the defendant was or was not obliged to describe the way so particularly, he has undertaken to do it, and has not done it truly; a way terminating in the Church Lane, and a way terminating in the Fulham Road, are not only distinct, but it is physically impossible they can be the same. If the road were a line drawn from the Knightsbridge to the Fulham Road, the line actually taken into the Church Lane, must of necessity be *extra viam*, and so *vice versâ*. To state generally a right to cross a field without any given direction, seems to me so uncertain, that it is impossible to meet it with precision, either in a replication or on traverse of the plea.

Rule absolute for a new trial.

MASON AND OTHERS *against* LICKBARROW AND OTHERS, IN THE EXCHEQUER CHAMBER, IN ERROR. Thursday, Feb. 11th, 1790.

See 2 Term Rep. B. R. 63. [4 B. P. C. 657.]

[For note see S. C. 2 T. R. 63; 100 E. R. 35.]

Where the consignee of goods becomes insolvent, the consignor may stop them in transitu, before the consignee gains possession.—In such case also, the consignor

may stop the goods in transitu, though the consignee assign the bills of lading to a third person for a valuable consideration; the right of the consignor not being divested by the assignment (a).

The defendants in the original action having brought a writ of error in the Exchequer Chamber, after two arguments, the following judgment of that Court was there delivered by

[358] LORD LOUGHEBOROUGH.—This case comes before the Court on a demurrer to the evidence; the general question therefore is, whether the facts offered in evidence by the plaintiffs in the action are sufficient to warrant a verdict in their favour?

The facts are shortly these. On the 22d of July 1786, Messrs. Turings shipped on board the ship "Endeavour," of which Holmes was master, at Middleburgh to be carried to Liverpool, a cargo of goods by the order and directions and on the account of Freeman of Rotterdam, for which, of the same date, bills of lading were signed on behalf of the master to deliver the goods at Liverpool, specified to be shipped by Turings to order or to assigns. On the same 22d of July two of the bills of lading indorsed in blank by Turings were transmitted by them together with an invoice of the goods to Freeman at Rotterdam, and were duly received by him, that is, in the course of the post, one of the bills being retained by Turings. I take no notice of there being four bills of lading, because on that circumstance I lay no stress. On the 25th of July bills of exchange for a sum of 477l. being the price of the goods, were drawn by Turings, and accepted by Freeman at Rotterdam, and Freeman, on the same day, transmitted to the plaintiffs in the action, merchants at Liverpool, the bills of lading and invoice, which he had received from Turings, in order that the goods might be sold by them on his account; and of the same date drew upon them bills to the amount of 520l. which were duly accepted, and have since been paid by them, and for which they have never been reimbursed by Freeman, who became a bankrupt on the 15th of August following. The bills accepted by Freeman for the price of the goods shipped by Turings, had not become due on the 15th of August, but on notice of his bankruptcy, they sent the bill of lading, which remained in their custody, to the defendants at Liverpool, with a special indorsement to deliver to them and no other, which the defendants received on the 28th of August 1786, together with the invoice of the goods and a power of attorney. The ship arrived at Liverpool on the 28th of August, and the goods were delivered by the master, on account of Turings, to the defendants, who, on demand and tender of freight, refused to deliver the same to the plaintiffs.

The defendants in this case are not stake-holders, but they are in effect the same

(a) [This decision was reversed in the House of Lords, and a venire de novo awarded. See post, vol. ii. p. 211, and 5 T. R. B. R. 367, 683. On the second trial, a special verdict was found, and the Court of K. B., without discussing the question anew, declared that they retained their former opinion, that the right of the consignor was divested by the assignment. See *Solomons v. Missen*, 2 Term Rep. B. R. 674, as to fraud or notice in the assignee. Note to the second edit.]

The very elaborate opinion of Mr. Just. Buller, on the argument of this case, before the House of Lords, may be found in 6 East, 20 (n). On the decision of the Court of King's Bench, 5 T. R. 683, a writ of error was again brought, but it was subsequently abandoned. Abbott on Shipping, 398.

The right of stoppage in transitu is divested by a bonâ fide indorsement for a valuable consideration, although the indorsee knows that the consignor has not received a money-payment for his goods, but has taken the consignee's acceptances not yet due. *Cuming v. Brown*, 9 East, 506. So it is divested by a sale of the goods for a valuable consideration without any indorsement of the bill of lading. *Davis v. Reynolds*, 4 Campb. N. P. C. 267. An indorsement of the bill of lading without consideration does not divest the right to stop in transitu. *Waring v. Cox*, 1 Camp. N. P. C. 369, and see *Patten v. Thompson*, 5 M. & S. 350. Nor does an indorsement with notice of the insolvency of the consignee. *Vertue v. Jewell*, 4 Camp. N. P. C. 31. Nor where the bill of lading is given before the goods are put on board. *Osey v. Gardner*, Holt's N. P. C. 405. In what manner a vendor may retain a right to stoppage in transitu, so as to prevent the operation of an assignment, see *Craven v. Ryder*, 6 Taunt. 433, 2 Marsh. 127, S. C.]

as Turings, and the possession they have got is the possession of Turings. The plaintiffs claim under Freeman, but though they derive a title under him, they do not [359] represent him, so as to be answerable for his engagements, nor are they affected by any notice of those circumstances which would bar the claim of him or of his assignees. If they have acquired a legal right, they have acquired it honestly, and if they have trusted to a bad title, they are innocent sufferers. The question then is, whether the plaintiffs have a superior legal title to that right which, on principles of natural justice, the original holder of goods not paid for has to maintain that possession of them which he actually holds at the time of the demand?

The argument on the part of the plaintiffs asserts that the indorsement of the bill of lading by the Turings, is an assignment of the property in the goods to Freeman, in the same manner as the indorsement of a bill of exchange is an assignment of the debt. That Freeman could assign over that property, and that by delivery of the bill of lading to the plaintiffs for a valuable consideration, they have a just right to the property conveyed by it, not affected by any claim of the Turings, of which they had no notice. On the part of the defendants it is argued, that the bill of lading is not in its nature a negotiable instrument; that it more resembles a chose in action, that the indorsement of it is not an assignment that conveys any interest, but a mere authority to the consignee to receive the goods mentioned in the bill; and therefore it cannot be made a security by the consignee for money advanced to him; but the person who accepted it must stand in the place of the consignee, and cannot gain a better title than he had to give. As these propositions on either side seem to be stated too loosely, and as it is of great importance that the nature of an instrument so frequent in commerce as a bill of lading should be clearly defined, I think it necessary to state my ideas of its nature and effect.

A bill of lading is the written evidence of a contract for the carriage and delivery of goods sent by sea, for a certain freight. The contract, in legal language, is a contract by bailment. 2 Lord Raym. 912. In the usual form of the contract, the undertaking is to deliver to the order or assigns of the shipper. By the delivery on board, the ship-master acquires a special property to support that possession which he holds in the right of another, and to enable him to perform his undertaking. The general property remains with the shipper of the goods, until he has disposed of it by some act sufficient in law to transfer property. The indorsement of the bill of lading is simply a direction of [360] the delivery of the goods. When this indorsement is in blank, the holder of the bill of lading may receive the goods, and his receipt will discharge the ship-master; but the holder of the bill, if it came into his hands casually, without any just title, can acquire no property in the goods. A special indorsement defines the person appointed to receive the goods; his receipt or order would, I conceive, be a sufficient discharge to the ship-master, and in this respect I hold the bill of lading to be assignable. But what is it that the indorsement of the bill of lading assigns to the holder or the indorsee? a right to receive the goods and to discharge the ship-master as having performed his undertaking. If any farther effect be allowed to it, the possession of a bill of lading would have greater force than the actual possession of the goods. Possession of goods is *prima facie* evidence of title; but that possession may be precarious, as of a deposit; it may be criminal, as of a thing stolen; it may be qualified, as of things in the custody of a servant, carrier, or a factor. Mere possession without a just title gives no property, and the person to whom such possession is transferred by delivery must take his hazard of the title of his author. The indorsement of a bill of lading differs from the assignment of a chose in action, that is to say, of an obligation, as much as debts differ from effects. Goods in pawn, goods bought before delivery, goods in a warehouse, or on ship-board, may all be assigned. The order to deliver is an assignment of the thing itself, which ought to be delivered on demand, and the right to sue, if the demand is refused, is attached to the thing. The case in 1 Lord Raym. 271, was well determined on the principal point, that the consignee might maintain an action for the goods, because he had either a special property in them, or a right of action on the contract; and I assent to the dictum that he might assign over his right. But the question remains, what right passes by the first indorsement or by the assignment of it? An assignment of goods in pawn, or of goods bought but not delivered, cannot transmit a right to take the one without redemption, and the other without the payment of the price. As the indorsement of a bill of lading is an assignment of the goods themselves, it differs

essentially from the indorsement of a bill of exchange; which is the assignment of a debt due to the payee, and which by the custom of trade, passes the whole interest in the debt so completely, that the holder of the bill for [361] a valuable consideration, without notice, is not affected even by the crime of the person from whom he received the bill.

Bills of lading differ essentially from bills of exchange in another respect.

Bills of exchange can only be used for one given purpose, namely, to extend credit by a speedy transfer of the debt which one person owes to another, to a third person. Bills of lading may be assigned for as many different purposes as goods may be delivered. They may be indorsed to the true owner of the goods by the freighter who acts merely as his servant. They may be indorsed to a factor to sell for the owner. They may be indorsed by the seller of the goods to the buyer. They are not drawn in any certain form. They sometimes do, and sometimes do not, express on whose account and risk the goods are shipped. They often, especially in time of war, express a false account and risk. They seldom if ever bear upon the face of them any indication of the purpose of the indorsement. To such an instrument, so various in its use, it seems impossible to apply the same rules as govern the indorsement of bills of exchange. The silence of all authors treating of commercial law is a strong argument that no general usage has made them negotiable as bills. Some evidence appears to have been given in other cases (*a*), that the received opinion of merchants was against their being so negotiable. And unless there was a clear established general usage to place the assignment of a bill of lading upon the same footing as the indorsement of a bill of exchange, that country which should first adopt such a law would lose its credit with the rest of the commercial world; for the immediate consequence would be to prefer the interest of the resident factors and their creditors to the fair claim of the foreign consignor. It would not be much less pernicious to its internal commerce; for every case of this nature is founded in a breach of confidence, always attended with a suspicion of collusion, and leads to a dangerous and false credit at the hazard and expense of the fair trader. If bills of lading are not negotiable as bills of exchange, and yet are assignable, what is the consequence? That the assignee by indorsement must enquire under what title the bills have come to the hands of the person from whom he takes them. Is this more difficult than to enquire into the title by which goods are sold or assigned? [362] In the case of *Hartop v. Hoare* (2 Stra. 1187. 1 Wils. 8), jewels deposited with a goldsmith were pawned by him at a banker's. Was there any imputation, even of neglect, in a banker trusting to the apparent possession of jewels by a goldsmith? Yet they were the property of another, and the banker suffered the loss. It is received law, that a factor may sell, but cannot pawn the goods of his consignor. *Patterson v. Tash*, 2 Str. 1178. The person therefore who took an assignment of goods from a factor in security, could not retain them against the claim of the consignor; and yet in this case the factor might have sold them and embezzled the money. It has been argued, that it is necessary in commerce to raise money on goods at sea, and this can only be done by assigning the bills of lading. Is it then nothing that an assignee of a bill of lading gains by the indorsement? He has all the right the indorser could give him, a title to the possession of the goods when they arrive. He has a safe security if he has dealt with an honest man. And it seems as if it could be of little utility to trade to extend credit by affording a facility to raise money by unfair dealing. Money will be raised on goods at sea, though bills of lading should not be negotiable, in every case where there is a fair ground of credit; but a man of doubtful character will not find it so easy to raise money at the risk of others.

The conclusions which follow from this reasoning, if it be just, are, 1st, that an order to direct the delivery of goods indorsed on a bill of lading, is not equivalent nor even analogous to the assignment of an order to pay money, by the indorsement of a bill of exchange. 2dly, that the negotiability of bills, and promissory notes, is founded on the custom of merchants, and positive law; but as there is no positive law, neither can any custom of merchants apply to such an instrument as a bill of lading. 3dly, That it is therefore not negotiable as a bill, but assignable; and passes such right, and no better, as the person assigning had in it.

This last proposition I confirm by the consideration, that actual delivery of the

(*a*) *Snee v. Prescott*, 1 Atk. 245. *Fearon v. Bowers*, post.

goods does not of itself transfer an absolute ownership in them without a title of property; and that the indorsement of a bill of lading, as it cannot in any case transfer more right than the actual delivery, cannot in every case pass the property; and I therefore infer that the mere indorsement can in no case convey an absolute property. It may however be said, that admitting an indorsement of a bill of lading does [363] not in all cases import a transfer of the property of the goods consigned, yet where the goods when delivered would belong to the indorsee of the bill, and the indorsement accompanies a title of property, it ought in law to bind the consignor, at least with respect to the interest of third parties. This argument has, I confess, a very specious appearance. The whole difficulty of the case rests upon it; and I am not surprised at the impression it has made, having long felt the force of it myself. A fair trader, it is said, is deceived by the misplaced confidence of the consignor. The purchaser sees a title to the delivery of the goods placed in the hands of a man who offers them to sale. Goods not arrived are every day sold without any suspicion of distress, on speculations of the fairest nature. The purchaser places no credit in the consignee, but in the indorsement produced to him, which is the act of the consignor. The first consideration which affects this argument is, that it proves too much, and is inconsistent with the admission. But let us examine what the legal right of the vendor is, and whether with respect to him the assignee of his bill of lading stands on a better ground than the consignee from whom he received it. I state it to be a clear proposition, that the vendor of goods not paid for, may retain the possession against the vendee; not by aid of any equity, but on grounds of law (*a*). Our oldest books (*b*) consider the payment of the price, (day not being given,) as a condition precedent implied in the contract of sale; and that the vendee cannot take the goods, nor sue for them without tender of the price (*c*). If day had been given for payment, and the vendee could support an action of trover against the vendor, the price unpaid must be deducted from the damages, in the same manner as if he had brought an action on the contract for the non-delivery. *Snee v. Prescott*, 1 Atk. 245. The sale is not executed before delivery: and in the simplicity of former times, a delivery into the actual possession of the vendee or his servant was always supposed. In the variety and extent of dealing which the increase of commerce has introduced, the delivery may be presumed from circumstances, so as to vest a property in the vendee. A destination of the goods by the vendor to the use of the vendee; the marking them, or making them up to be delivered; the re-[364]-moving them for the purpose of being delivered, may all entitle the vendee to act as owner, to assign, and to maintain an action against a third person, into whose hands they have come. But the title of the vendor is never entirely divested, till the goods have come into the possession of the vendee. He has therefore a complete right, for just cause, to retract the intended delivery, and to stop the goods in transitu. The cases determined in our Courts of Law have confirmed this doctrine, and the same law obtains in other countries.

In an action tried before me at Guildhall, after the last Trinity term, it appeared in evidence, that one Bowering had bought a cask of indigo of Verrulez and Co. at Amsterdam, which was sent from the warehouse of the seller, and shipped on board a vessel commanded by one Tulloh, by the appointment of Bowering. The bills of lading were made out, and signed by Tulloh, to deliver to Bowering or order, who immediately indorsed one of them to his correspondent in London, and sent it by the post. Verrulez having information of Bowering's insolvency before the ship sailed

(*a*) [*Acc. Houlditch v. Desanges*, 2 Stark. N. P. C. 337. So where part of the purchase-money has been paid the vendor has a lien on the goods for the remainder. *Freize v. Wray*, 3 East, 102.]

(*b*) See Hob. 41, and the Year Book there cited.

(*c*) [But the property passes by the bargain before payment or tender, although no action can be maintained before payment or tender. Noy's Max. 88. *Hinde v. Whitehouse*, 7 East, 571. *Phillimore v. Barry*, 1 Campb. N. P. C. 513. Unless a future day has been appointed for the payment. Noy's Max. 87. *Thorpe v. Thorpe*, Rep. temp. Holt, 96. 6 East, 24 (*n*). *Crawshay v. Homfray*, 4 B. & A. 50. *Bloxam v. Sanders*, 4 B. & C. 941. Since the Statute of Frauds, however, the property will not pass before delivery, unless there has been a note in writing or earnest. *Bloxsome v. Williams*, 3 B. & C. 232.]

from the Texel, summoned Tulloh the ship-master before the Court at Amsterdam, who ordered him to sign other bills of lading to the order of Verrulez. Upon the arrival of the ship in London, the ship-master delivered the goods, according to the last bills, to the order of Verrulez. This case as to the practice of merchants, deserves particular attention, for the Judges of the Court at Amsterdam are merchants of the most extensive dealings, and they are assisted by very eminent lawyers. The cases in our law, which I have taken some pains to collect and examine, are very clear upon this point. *Snee v. Prescott*, though in a Court of Equity, is professedly determined on legal grounds by Lord Hardwicke, who was well versed in the principles of law; and it is an authority, not only in support of the right of the owner unpaid, to retain against the consignee, but against those claiming under the consignee by assignment for valuable consideration, and without notice. But the case of *Fearon v. Bowers* (a), tried before [365] Lord Chief Justice Lee, is a case at law, and it is to the same effect as

(a) *Fearon v. Bowers*, Guildhall, March 28, 1753, coram Lee, Ch. J*.

[Approved, *The Tigress*, 1863, Bro. & Lush. 43. Disapproved, *Glyn v. East and West India Dock Company*, 1882, 7 App. Cas. 613.]

Detinue against the master or captain of a ship. On the general issue pleaded, the case appeared to be, that one Hall of Salisbury had written to Askell and Co. merchants at Malaga, to send him 20 butts of olive oil, which Askell accordingly bought, and shipped on board the ship "Tavistock" of which the defendant was commander, who signed three bills of lading, acknowledging the receipt of the goods, to be delivered to the order of the shipper. In the bills was the usual clause, that one being performed, the other two should be void.

The goods being thus shipped, Askell sent an invoice thereof, and also one of the bills of lading to Hall indorsed by Askell, to deliver the contents to Hall; and Askell at the same time sent to Jones his partner in England, a bill of exchange drawn on Hall for the amount of the price of the oil; and also another of the bills of lading, indorsed by Askell to deliver the contents to Jones. The bill of exchange was presented to Hall, but not being paid by him, it was returned protested; whereupon Jones on the 1st of September 1752, (a day or two after the ship arrived) applied to the defendant to deliver the oils to him, and having produced his bill of lading, the defendant promised to deliver them accordingly. But the ship not being reported to the Custom-House, the oils could not be then delivered; and before they were delivered, the plaintiff, on the 3d of September, produced the bill of lading sent to Hall, with an indorsement thereon by Hall to deliver the contents to the plaintiff, and also the invoice, upon the credit of which he had advanced to Hall 200l.—Notwithstanding this, the defendant afterwards delivered the oils to Jones, and took his receipt for them on the back of the bill of lading.

For the plaintiff it was contended, that the bill of lading indorsed to Hall, and by him to the plaintiff, had fixed the property of the goods in the plaintiff. That the consignee of a bill of lading has such a property that he may assign it over, *Evans v. Martlett*, 1 Lord Raym. 271. There it is laid down, if goods are by bill of lading consigned to A., A. is the owner, and must bring the action against the master of the ship, if they are lost: but if the bill be special, to deliver to A. for the use of B., B. ought to bring the action; but if the bill be general, and the invoice only shews they are upon the account of B., A. ought to bring the action, for the property is in him, and B. has only a trust, per totam Curiam. Holt, C.J., said the consignee of a bill of lading has such a property that he may assign it over, and Shower said, it had been adjudged so in the Exchequer. It has been farther insisted, that the plaintiff had advanced the 200l. on the credit of the bill of lading, in the course of trade, and no objection was made that the oils had not been paid for; for that would prove too much, namely, that the bill of lading was not negotiable. And the indorsement was compared to the indorsement of a bill of exchange which is good, though the bill originally was obtained by fraud. Merchants were examined on both sides, and seemed to agree that the indorsement of a bill of lading vests the property; but that the original consignor if not paid for the goods, had a right by any means that he could to stop their coming to the hands of the consignee, till paid for. One of the witnesses said, he had a like

* [See *Mills v. Ball*, 2 B. & P. 462.]

Snee v. Prescott. So also is the case of *The Assignees of [366] Burghall v. Howard (a)*, before Lord Mansfield. The right of the consignor to stop the goods, is here considered as a legal right. It will make no difference in the case, whether the right is considered as springing from the original property not yet transferred by delivery, or as a right to retain the things as a pledge for the price unpaid. In all the cases cited in the course of the argument, the right of the consignor to stop the goods is admitted as against the consignee. But it is contended, that the right ceases as against a person claiming under the consignee for a valuable consideration, and without notice that the price is unpaid. To support this position, it is necessary to maintain that the right of the consignor is not a perfect legal right in the thing itself, but that it is only founded upon a personal exception to the consignee, which would preclude his demand as contrary to good faith, and unconscionable. If the consignor had no legal title, the question between him and the bonâ fide purchaser from the consignee, would turn upon very nice considerations of equity. But a legal lien, as well as a right of property, precludes these considerations; and the admitted right of the consignor to stop the goods in transitu as against the consignee, can only rest upon his original title as owner, not divested, or upon a legal title to hold the possession of the goods, till the price is paid, as a pledge for the price. It has been asserted in the course of the argument, that the right of the consignor has by judicial determinations been treated

case before the Chancellor, who upon that occasion said, he thought the consignor had a right to get the goods in such a case back into his hands in any way, so as he did not steal them.

It also appeared by the evidence of merchants and captains of ships, that the usage was, where three bills of lading were signed by the captain and indorsed to different persons, the captain had a right to deliver the goods to whichever he thought proper; that he was discharged by a delivery to either, with a receipt on the bill of lading, and was not obliged to look into the invoice or consider the merits of the different claims.

Lee, Ch. J., in summing up the evidence, said, that, to be sure, nakedly considered, a bill of lading transfers the property, and a right to assign that property by indorsement: that the invoice strengthens that right by shewing a farther intention to transfer the property. But it appeared in this case, that Jones had the other bill of lading to be as a curb on Hall, who in fact had never paid for the goods. And it appeared by the evidence, that according to the usage of trade, the captain was not concerned to examine who had the best right on the different bills of lading. All he had to do was to deliver the goods upon one of the bills of lading, which was done. The jury therefore were directed by the Chief Justice to find a verdict for the defendant, which they accordingly did.

(a) *Assignees of Burghall, a Bankrupt, v. Howard*.

At Guildhall sittings after Hil. 32 Geo. 2, coram Lord Mansfield.

One Burghall at London gave an order to Bromley at Liverpool to send him a quantity of cheese. Bromley accordingly shipped a ton of cheese on board a ship there, whereof Howard the defendant was master, who signed a bill of lading to deliver it in good condition to Burghall in London. The ship arrived in the Thames, but Burghall having become a bankrupt, the defendant was ordered on behalf of Bromley not to deliver the goods, and accordingly refused, though the freight was tendered. It appeared by the plaintiff's witnesses that no particular ship was mentioned, whereby the cheese should be sent, in which case the shipper was to be at the risk of the peril of the seas. The action was on the case upon the custom of the realm against the defendant as a carrier.

Lord Mansfield was of opinion that the plaintiffs had no foundation to recover, and said he had known it several times ruled in Chancery, that where the consignee becomes a bankrupt, and no part of the price had been paid, that it was lawful for the consignor to seize the goods before they come to the hands of the consignee, or his assignees; and that this was ruled, not upon principles of equity only, but the laws of property*.

The plaintiffs were nonsuited.

* [See 6 East, 27 (n).]

as a mere equitable claim, in cases between him and the consignee. To examine the force of this assertion it is necessary to take a review of the several determinations.

The first is the case of *Wright v. Campbell*, 4 Burr. 2046 ([1 W. Bl. 628, S. C.]), on which the chief stress is laid. The first observation that occurs upon that case is, that nothing was determined by it. A case was reserved by the Judge at Nisi Prius, on the argument of which the Court thought the facts imperfectly stated, and directed a new trial. That case cannot therefore be urged as a decision upon the point. But it is quoted as containing in the report of it, an opinion of Lord Mansfield that the right of the consignor to stop the goods cannot be set up against a third person claiming under an indorsement for value and without notice. The authority of such an opinion, though no decision had followed upon it, would deservedly be very great, from the high respect due to the experience and wisdom of so great a Judge. But I am not able to discover that his opinion was delivered to that extent, and I assent to the opinion as it was delivered, and very correctly applied to the case then in question. Lord Mansfield is there speaking of the consignment of goods to a factor to sell for the owner; and he very truly observes, 1st, that as against the factor, the owner may retain the goods; 2dly, that a person into whose hands the factor has passed the consignment with notice, is exactly in the same situation with the factor himself; 3dly, that a bona fide purchaser from the factor shall have a right to the delivery of the goods, because they were sold bona fide, and by the owner's own authority. If the owner of the goods entrust another to sell them for him, and to receive the price, there is no doubt but that he has bound himself to deliver the goods to the purchaser; and that would hold equally if the goods had never been removed from his warehouse. The question on the right of the consignor to stop and retain the goods, can never occur where the factor has acted strictly according to the orders of his principal, and where, consequently, he has bound him by his contract. There would be no possible ground for argument in the case now before the Court, if the plaintiffs in the action could maintain that Turings and Co. had sold to them by the intervention of Freeman, and were therefore bound ex contractu to deliver the goods. Lord Mansfield's opinion upon the direct question of the right of the consignor to stop the goods against a third party, who has obtained an indorsement of the bill of lading, is quoted in favour of the consignor, as delivered in two cases at Nisi Prius; *Savignac v. Cuff* (2 Term Rep. B. R. 66), in 1778, and *Stokes v. La Riviere* (1 Term Rep. B. R. 75) in 1785. Observations are made on these cases, that they were governed by particular circumstances; and undoubtedly when there is not an accurate and agreed state of them, no great stress can be laid on their authority. The case of *Caldwell v. [368] Ball* (1 Term Rep. B. R. 205), is improperly quoted on the part of the plaintiffs in the action, because the question there was on the priority of consignments, and the right of the consignor did not come under consideration. The case of *Hibbert v. Carter* (1 Term Rep. B. R. 745), was also cited on the same side, not as having decided any question upon the consignor's right to stop the goods, but as establishing a position, that by the indorsement of the bill of lading, the property was so completely transferred to the indorsee, that the shipper of the goods had no longer an insurable interest in them. The bill of lading in that case had been indorsed to a creditor of the shipper; and undoubtedly if the fact had been as it was at first supposed, that the cargo had been accepted in payment of the debt, the conclusion would have been just; for the property of the goods and the risk would have completely passed from the shipper to the indorsee; it would have amounted to a sale executed for a consideration paid. But it is not to be inferred from that case, that an indorsement of a bill of lading, the goods remaining at the risk of the shipper, transfers the property so that a policy of insurance upon them in his name would be void. The greater part of the consignments from the West Indies, and all countries where the balance of trade is in favour of England, are made to a creditor of the shipper; but they are no discharge of the debt by indorsement of the bill of lading; the expense of insurance, freight, duties, are all charged to the shipper, and the net proceeds alone can be applied to the discharge of his debt. That case therefore has no application to the present question. And from all the cases that have been collected it does not appear that there has ever been a decision against the legal right of the consignor to stop the goods in transitu, before the case now brought before this Court. When a point of law which is of general concern in the daily business of the world is directly decided, the event of it fixes the public attention, directs the opinion, and regulates

the practice of those who are interested. But where no such decision has in fact occurred, it is impossible to fix any standard of opinion upon loose reports of incidental arguments. The rule therefore which the Court is to lay down in this case will have the effect, not to disturb, but to settle the notions of the commercial part of this country on a point of very great importance as it regards the security and good faith of their transactions. For these reasons we think the judgment of the Court of King's Bench ought to be reversed.

End of Hilary term.

[369] CASES ARGUED AND DETERMINED IN THE COURT OF COMMON PLEAS IN EASTER TERM, IN THE THIRTIETH YEAR OF THE REIGN OF GEORGE III.

NOONE *against* SMITH. Monday, April 26th, 1790.

A plea of tender may be pleaded, after a Judge's order for time to plead has been obtained.

A rule having been granted on the motion of Watson, Serjt., to shew cause why the defendant should not plead several matters, viz. non assumpsit as to part, tender as to the residue, and a set-off,

Rooke, Serjt. shewed for cause, that the defendant had obtained four several orders of a Judge, for time to plead, between the 9th of February last and the 9th of April; that after time to plead being given (which was always on terms of pleading issuably, &c.) the defendant could not plead a tender without special leave to plead it, because, strictly speaking, a plea of tender was in the nature of a plea in abatement, and not an issuable plea; that this was established as the practice of the Court in the case of *Nottle v. Hervey*, East, 27 Geo. 3.

Watson for the rule urged, that the practice of the King's Bench was, to allow a plea of tender after time to plead granted: that the only ground of objection was, that it was formerly not considered as an issuable plea; but that in truth it was both an honest and an issuable plea, as it went to take away the plaintiff's right of action, and bring the merits fairly before the Court.

On this day, LORD LOUGHBOROUGH declared that as the practice of the King's Bench differed from the practice of this Court, and as a plea of tender was a fair and just plea, it would be right to alter the practice of this Court in conformity to that [370] of the King's Bench, and to permit the defendant to plead a tender after a Judge's order for time to plead. The rule was therefore made absolute; but it was thought reasonable that the defendant should pay the costs of shewing cause, as the Court had laid down a rule of practice different from the last determination on the subject.

GOULD, J. observed, that though the first case in Barnes (*Davenhill v. Barritt*, 1 Barnes, 243 8vo, 337 4to), on this subject 10 Geo. 2, was an authority to shew that a plea of tender could not be pleaded after obtaining a Judge's order, yet there were two subsequent determinations in the same book, one in 25 Geo. 2 (*Whaley v. Harrison*, 2 Barnes, 8vo 293, 360 4to) and the other in 26 & 27 Geo. 2 (c), which were agreeable to the rule which the Court now laid down.

THE BUTCHERS' COMPANY *against* MOREY. Monday, May 10th, 1790.

A power granted by charter to a company exercising a particular trade in a certain place to make by-laws for the government of all persons exercising that trade in that place, enables it to make by-laws binding on persons so exercising the trade, who are not members of the company as well as those who are (a).

This was an action of debt for 8l. The declaration stated "That King Geo. 2, by letters patent bearing date the 10th of October, in the 23d year of his reign,

(c) *Pitfield v. Morey*, 2 Barnes, 296, 8vo, 362 4to. See 1 Burr. 59. 1 Crompt. Prac. 155. Impey's Pract. B. R. 191. Id. C. B. 262.

(a) [As to the form of the declaration for the penalty, see *The Butcher's Company v. Bullock*, 3 Bos. & Pul. 434.]

ordained that all and singular the Freemen of the Society of the Art or Mystery of Butchers, within the City of London, and every other person who then used or exercised, or should thereafter use or exercise the art and mystery of butchers within the City of London, the liberties and suburbs thereof, and within any other place whatsoever within two miles from the said City of London, by whatsoever name such society was called or known, and their successors for ever thereafter might and should be, by virtue of the said patent, one body corporate and politic, by the name of the Master, Wardens, and Commonalty of the Art or Mystery of Butchers of the City of London," &c. After other particulars, the power of the company to make by-laws was thus stated: "That they should have full power and authority to appoint, from time to time, such reasonable ordinances, decrees, orders, and constitutions in writing, which to them or the major part of them, &c. should seem to be good, wholesome, profitable, honest, and necessary, for the good order and government of the master, wardens, &c. and of all other persons for the time being, exercising or using the said art or mystery of butchers, or exposing flesh to sale within the City of London, and for [371] declaring in what manner the said master, &c. and all persons using the art, &c. or exposing flesh to sale within the said city, and within two miles thereof, in their offices, servants, and trades should behave, bear, and use themselves for the public good and common benefit of the said master, wardens, &c. and in all cases and things whatsoever, touching or in what manner soever concerning the art or mystery, &c. and as often as they should make, constitute, &c. such institutions, ordinances, orders, and constitutions, should make, limit, and provide such pains, penalties, and punishments, by imprisonment of the body, or by fines and forfeiture, or by either of them, against and upon all offenders against such laws, as to the said master and wardens, &c. should seem necessary, &c." It was also stated that the said fines and forfeitures were to be recovered and levied to the use of the said master and wardens, &c. "which said letters patent the said freemen of the Society of the Art or Mystery of Butchers, and the said other persons therein named, and thereby meant to be incorporated afterwards, &c. accepted, &c." The by-law in question was as follows, "That whereas the Lord's Day, commonly called Sunday, was by Christians to be kept holy, it was ordained that no person then using, or who should thereafter use the said art, &c. and should inhabit and dwell within the said city or suburbs thereof, or within two miles of the same city, should keep open any shop or offer to sale any fresh meat upon the said day; and that every such person who should offend, contrary to any part of that ordinance, should forfeit and pay to the said master, wardens, &c. for the first time 20s., for the second time 40s., and for every time afterwards 3l. And that it was farther ordained, that all the penalties, forfeitures, and sums of money to be forfeited, should be to the use of the master, wardens, &c. and on refusal should be recovered by action of debt," &c. of which said by-law the defendant had notice. It was then averred that the defendant after the making of the said law, and before committing the several offences thereafter mentioned, had been and still was a butcher, and then used and still did use the art, &c. within the space of two miles from the said city, in Mint Street, &c. that the defendant did on the 29th of January 1786, the same being Sunday, in a certain shop of him the said defendant, &c. sell divers large quantities of flesh, to wit, thirty pounds weight of port, &c. to divers persons unknown, contrary to the form and effect of the said order in that behalf made as aforesaid, whereby he forfeited the sum of 20s. &c. The other offences were stated in a similar manner, and the declaration concluded in the common form.

[372] Plea nil debet. The cause was tried at Guildhall, at the sittings after last Michaelmas term, and a verdict found for the plaintiffs. A rule having been obtained for arresting the judgment,

Adair, Le Blanc, and Watson, Serjts., shewed cause. There is no ground for arresting the judgment in this case, the by-law not being made for the improper restraint of trade, but the due regulation of it consonant to the law of the land, 29 Car. 2, c. 7. Though the charter would not have been good without acceptance, 2 Brownl. 100, yet it is here expressly stated that the "freemen and the said other persons accepted it." The majority of persons exercising the trade of butchers having accepted it, their acceptance must be taken to be the acceptance of all, and to bind their successors as well as themselves. So in *The Chester case* (*The King v. Amery*, 1 Term Rep. B. R. 575), the former inhabitants being incorporated by charter, they who afterwards became inhabitants were considered to be under the same government.

It is a clear principle, that where corporations are established for general local government, the laws made by them, if not beyond the limits of their jurisdiction, bind all persons, as well those who are within those limits at the time of making the laws, as those who become so in future. These laws being once passed, continue in force till they are repealed. If this be true in cases of general local government, it must also be true in those of particular government; the only difference is, that in one instance the limits of the government are more extensive than in the other. In *Cudden v. Eastwick* (1 Salk. 192), it is laid down, that "a corporation is properly an investing the people of the place with the local government thereof, and therefore their law shall bind strangers." In *Pierce v. Bartrum* (Cowp. 269), a by-law of the corporation of Exeter, to prohibit butchers and other persons from slaughtering any beast within the walls of the city, was holden to bind the defendant though not a member of the corporation, upon the principle, that whoever comes to reside in any place is subject, for the time being, to the local jurisdiction of that place. And though in *Franklin v. Green* (a), a by-law of the Corporation of Butchers, merely respecting the manner of preparing a particular sort of meat, was holden not to bind strangers, yet it is there said, that the law "would have been good to bind strangers, if made to suppress fraud or any other general inconvenience." Now there cannot be a greater general inconvenience than the public profanation of the Lord's Day.

[373] Bond and Lawrence, Serjts., contra. The Company of Butchers cannot make laws to bind those who are not members of the company. No corporation can make by-laws binding on strangers without the authority of Parliament. There can be no charter to establish a power of making laws, more extensive than the incorporation itself. The King cannot grant such a charter, and here the defendant is not a member of the company. As to the case of *The Corporation of Exeter*, though the general corporation of a large town may have power to bind strangers by its local regulations, yet it does not follow that a particular corporation within such a town has the same power. This distinction will clearly appear from attending to the nature of general corporations, the purposes for which they were established, and the large powers granted to them at their first institution in every country of Europe: Robertson's Hist. Charles V. vol. 1, p. 296, 301, note. The same distinction is taken in the case of *The Trinity House v. Crispin* (Sir Thomas Jones, 145). So also in *Dodwell v. The University of Oxford* (2 Ventr. 33), the Court were inclined to hold that a by-law of the university did not extend to the inhabitants of the town, and in *The Mayor of Guildford v. Clarke* (2 Ventr. 247), it was holden to be an incurable objection to the declaration, that it stated a by-law of the corporation to be, "That if any inhabitant should be duly elected to the office of bailiff and refuse to take it upon him, he should forfeit 20l. because the corporation could not make by-laws to bind all the inhabitants of the town, but only the freemen or members of the corporation." On the same principle likewise are Bro. Abr. tit. Custom, pl. 32. Ibid. tit. Prescription, pl. 40.

Adair, in reply, did not dispute the position that no corporation could make by-laws to bind all persons whatever without the authority of the Legislature; but argued that the distinction between general corporations like London or Exeter, and particular guilds or fraternities, was this, that a general corporation could make by-laws binding on all persons within its local limits whatever trade they might carry on, and whatever might be the subject of such by-laws; but that a particular guild or fraternity could only make regulations respecting its particular trade. The Company of Butchers could not restrain the Company of Weavers from exercising their trade on a Sunday, because the regulation of the latter was not the object of the incorporation of the former. But that object was evidently the [374] regulation of all butchers within the limits prescribed. The fallacy of the argument on the other side consists in using the term "strangers" in its most extensive sense, instead of confining it to persons who are not members of the company.

LORD LOUGHBOROUGH.—I can see no good ground of objection to this by-law itself, nor to the subject-matter of it. It is a regulation made in affirmance of the general statute law of the kingdom, which prohibits buying and selling on the Lord's Day. The Butchers' Company have affixed a penalty on persons exercising the trade of butchers who shall sell meat on that day, and have increased the

(a) 1 Bulstr. 11. See also 1 Roll. Abr. 365, pl. 9. 5 Co. 63 b. Hob. 212. 1 Lev. 15. Hardr. 56.

penalty in proportion to the first, second and third offence. The objection raised is, that the authority by which these regulations are made, is defective, because, it is contended, it can only extend to those persons who are members of the company. It is also said, that though large corporations, and those which are established for the general purposes of local government, have a right to bind by their laws all persons within the limits of their jurisdiction, yet that a private particular corporation like the Butchers' Company can have no right to affect any person but their own members. But no case was cited which supports this position. I agree that strangers and they who are not concerned in the trade, for the regulation of which the company was established, cannot be bound by the laws of that company: if this by-law had inflicted a penalty on the buyers of meat, I should hold it to be clearly bad, because they are perfect strangers. It is an object of public policy that the exercise of certain trades should be under the regulations of particular bodies; charters have various effects according to the subjects of them. Some are granted with exclusive rights to particular persons, others contain rules which only affect certain members. On principles of general policy, the object of the law is, that by means of charters of this kind, the power of carrying on trade, of making up goods, of exposing them to sale, and the like, should belong to the local government of particular districts. For these purposes, certain restraints are imposed, since every regulation is more or less a restraint. Now, if in the present instance the Butchers' Company had no power to regulate their own trade, so as to make laws binding on persons who exercise that trade, as well those who were not members of the company, as those who were; the consequence would be, that the beneficial purpose of the charter would be entirely defeated, and the only persons injured by the restraint would be the members themselves. [375] For then all other persons might carry on the trade without control, while the members of the company would be excluded, and the whole business of supplying meat on Sundays would fall into the hands of butchers not of the company. But this would be contrary to the intent of the charter. I think this case comes within the principle of *The Exeter case*, and therefore that the judgment ought not to be arrested.

GOULD, J.—The only difference between this and *The Exeter case* is, that there the regulations were confined to the City of Exeter, but here the limits extend beyond the boundaries of the City of London. But where a charter is granted to a company in affirmance of an Act of Parliament, made for the purpose of common decency and piety, it is fit that the limits of the charter should be as extensive as the mischief to be remedied. If the charter were confined to the city itself, persons who pay no regard to the law might easily go out of the limits prescribed and buy meat; by which means the purpose of the charter would be defeated. I therefore think these are reasonable limits, and see no reason to object to the validity of the by-law.

HEATH, J.—I am of the same opinion. The by-law seems to me to be a good one, and within the authority given by the charter to the company. Nor is it contrary to the case in 1 Bulstr. 2, where it is said the by-law had been good if made to suppress any general inconvenience. And that case may well be reconciled with 2 Ventr. 33, which was on a question, whether a by-law of the University of Oxford was good, which restrained all persons, townsmen as well as students, from walking in the streets after nine o'clock at night: a prohibition was granted, and one of the Judges observed, that though it might be proper to restrain scholars of the university from being in the streets after that hour, yet there was no reason why the townsmen should be under the same restraint. Now this agrees with the doctrine in *Bulstrode*, for so far from suppressing a general inconvenience, it would be highly inconvenient if the inhabitants of a town were prevented from walking in the streets after nine o'clock, whatever may be the case in regard to the students of an university.

WILSON, J.—I am of the same opinion. I think it a good by-law, and that no objection can be made to the subject-matter of it. The same prohibition is established all England over by Act of Parliament. But it was said, that the charter could give no such power to the company. If this be true, the King [376] had no right to grant such a charter, which expressly gives a power to bind, not only members of the company, but likewise all persons exercising the trade in London, and within two miles round. The question then is, whether the King could give this power; for the object of its exertion is admitted to be a proper one. Now is there any authority denying the King to have the right? It is allowed, that general corporations have

such a power by their charters. But by what authority? Who could give them that power but the King? Then if the King can grant a power of this kind to general corporations, what shall prevent him from granting it to particular and private corporations?

Rule discharged.

THRALE, COWPER AND LAWRENCE, Executors and Trustees of Caleb Lomax, Esq. *against* THE BISHOP OF LONDON, FRANCIS HENRY BARKER, Clerk, AND EDWARD BARKER, Esq. Saturday, May 15th, 1790.

In quare impedit, the plaintiff having stated his title in the declaration, the defendant pleads his own title in bar, in deducing which several incidental points are also stated: the plaintiff in the replication sets forth essential matter which, if true, would fully avoid the defendant's title, but does it by way of inducement to a traverse of one of those incidental points, with which traverse the replication concludes; the defendant in the rejoinder takes no notice of the traverse in the replication, but traverses the matter of inducement which precedes it. This rejoinder is good, and may well pass by the traverse in the replication, that traverse being an immaterial one. In pleading a right in co-parceners to present to an advowson by turns, it is good to state that such right arose because they did not agree to present. [Which is synonymous to saying they could not agree.]

Quare impedit. The declaration stated that the defendants were summoned to answer the plaintiffs, executors and devisees in trust named in the will of Caleb Lomax, Esq. deceased, of a plea that they permit them to present a fit person to the vicarage of St. Stephens, near St. Albans, which is vacant, &c. That the said Caleb Lomax was in his life-time seised in fee of the advowson in gross of the said vicarage; that he presented one Daniel Bellamy, his clerk, who was admitted, instituted, and inducted into the same, in the time of peace, in the time of our late Sovereign Lord King George II., &c., that the said Caleb being so seised, he devised the said advowson to the said plaintiffs, until his son Caleb Lomax should attain the age of 25 years, or should die, which should first happen, with remainders over: that Caleb Lomax the father died so seised without altering or revoking his will, his son being alive and under 25 years, whereby the plaintiffs became seised of the said advowson; that being so seised, the vicarage aforesaid became vacant by the death of the said Daniel Bellamy, and is yet vacant: that Caleb Lomax the son is living, and under the age of [377] 25 years, that is to say, of the age of 22 years. By reason whereof it belonged and still belongs to the plaintiffs to present a fit person to the said vicarage. And the defendants unjustly hindered, &c.

The bishop pleaded the usual plea, that he neither had nor claimed any thing in the said vicarage, but the admission, institution, and induction, &c. as Ordinary, &c.

Francis Henry Barker, clerk, pleaded also as usual, that he did not hinder the plaintiffs from presenting, &c.

The defendant Edward Barker, pleaded first, "That one John Ellis, Esq. deceased, was in his life-time seised of the said advowson of the said vicarage in the said declaration mentioned, in gross by itself, as of fee and right, and being so thereof seised, he the said John Ellis in his life-time, presented to the said vicarage, being then vacant, Thomas Perkins his clerk, who on that presentation was admitted, instituted, and inducted into the said vicarage in the time of peace, in the time of His late Majesty Charles the Second, late King of England, and became incumbent thereof; and the said Thomas Perkins so being such incumbent, and the said John Ellis being so seised of the said advowson as aforesaid, he the said John Ellis afterwards, to wit, on the 30th day of June, in the year of our Lord 1680, at the parish aforesaid, made his last will and testament in writing, executed and attested so as to pass his real estate, and thereby devised the said advowson unto his then wife Rebecca, to hold the same to the said Rebecca and her assigns for her life, and after her decease, he devised the same unto his second son Thomas Ellis, and to the heirs male of his body lawfully to be begotten, with divers remainders over in default of such issue in the said will mentioned, and the said John Ellis afterwards, to wit, on the same day and year aforesaid, at the parish aforesaid, died so seised of the said advowson as aforesaid, upon whose death the said Rebecca became and was seised of and in the said

advowson, in gross by itself, as of freehold and right for her life, the several remainders thereof respectively belonging as in the said will is for that purpose limited and declared; and the said Rebecca being so thereof seised, and the several remainders belonging as aforesaid, the said Rebecca afterwards, to wit, on the 1st day of June in the year of our Lord 1682, at the parish aforesaid died so seised of and in the said advowson; upon whose death the said Thomas Ellis became and was seised of and in the said advowson, in gross by itself, to him and the [378] heirs male of his body lawfully to be begotten, the further remainders thereof belonging as aforesaid, by virtue of the devise aforesaid: and the said Thomas Ellis being so seised thereof, afterwards, to wit, on the 28th day of October, in the second year of the reign of His late Majesty King James the Second, late King of England, &c. at the parish aforesaid, in the said county of Hertford, by a certain indenture then and there made between the said Thomas Ellis of the first part; John Dod, gent. and John Reeve, gent. of the second part; and William Musson, citizen and barber-chirurgeon of London of the third part; and duly inrolled of record in the High Court of Chancery, of His said late Majesty King James the Second, at Westminster, in the county of Middlesex, within six months after the making thereof, according to the form of the statute in that case made and provided, (one part of which said indenture sealed with the seal of the said Thomas Ellis, the said Edward Barker brings now here into Court, the date whereof is the day and year last aforesaid,) the said Thomas Ellis, for and in consideration of a certain sum of money to him in hand paid by the said John Dod and John Reeve, bargained and sold the said advowson to the said John Dod and John Reeve, and their heirs, to hold the same to the said John Dod and John Reeve and their heirs, as by the same indenture more fully appears; by virtue of which said indenture, the said John Dod and John Reeve became and were seised of the said advowson in gross by itself, as of fee and right: and the said John Dod and John Reeve being so seised thereof, the said William Musson afterwards to wit, on the octave of St. Martin in the term of St. Michael, in the second year of the reign of His said late Majesty King James the Second, in the Court of His said late Majesty of the Bench, impleaded the said John Dod and John Reeve, then tenants of the freehold of the said advowson, in a plea of land of the said advowson, by a writ of our said lord the King of entry sur disseisin en le post, then returnable in the same Court, and duly returned: and the said William Musson then duly appearing in the said Court, the aforesaid John Dod and John Reeve, in the Court of the said late King James the Second, of the Bench at Westminster at the return of the said writ, came and vouched thereof to warranty the said Thomas Ellis, who was then present in the same Court, who in his proper person freely then and there warranted to them the said advowson, and vouched thereof to warranty John Wheeler, who was then and there likewise present in the said Court in his proper person, and freely warranted to him [379] the said Thomas Ellis the said advowson: and thereupon in the same Court, before Sir Henry Beddingfield, Knight, and his companions then justices of the said late King James the Second, of the Bench aforesaid, in the same term of St. Michael, such proceedings were had, that it was considered by the same Court that the said William Musson should recover his seisin against the said John Dod and John Reeve of the advowson aforesaid, and that the said John Dod and John Reeve should have of the land of the said Thomas, to the value, &c. and that the said Thomas should further have of the land of the said John Wheeler, to the value, &c. and that the said John Wheeler should be in mercy, &c. whereupon the said William Musson prayed the writ of the said late King James the Second, to be directed to the then Sheriff of the county of Hertford returnable immediately, to cause seisin of the said advowson to be delivered to him, which writ was granted to him returnable in the same Court, and the said sheriff afterwards in the same term returned, that he delivered seisin thereof to the said William Musson, as by the said writ he was commanded, as by the record of the said judgment and proceedings in the said Court of our said lord the now King of the Bench here remaining, more fully appears. Which said recovery in form aforesaid had, was had to the use of the said Thomas Ellis and his heirs. By virtue of which said recovery the said Thomas Ellis became and was seised of the said advowson in gross by itself, as of fee and right; and being so seised thereof, afterwards, to wit, in Hilary term, in the second year of the reign of their late Majesties, William & Mary, late King and Queen of England, &c.; in the Court of their said late Majesties, before Henry Pollexfen, John Powell, Thomas Rokeby and Peyton Ventris, then their late

Majesties' Justices, and other loving subjects of their said late Majesties' then present, a certain fine was levied between Henry Killigrew, Esq. plaintiff, and the said Thomas Ellis and Mary his wife deforceants of the said advowson, whereof a plea of covenant had been summoned between them in the same Court, namely, that the said Thomas Ellis and Mary his wife acknowledged the said advowson to be the right of the said Henry Killigrew, as the same which the said Henry Killigrew had of the gift of the said Thomas Ellis and Mary his wife, and they remitted and quit claimed the same from the said Thomas Ellis and Mary his wife and their heirs, to the said Henry Killigrew and his heirs; and the said Thomas Ellis and Mary his wife granted for themselves and the heirs of the said Thomas, that they would warrant to [380] the said Henry Killigrew and his heirs the said advowson, against them the said Thomas Ellis and Mary and the heirs of the said Thomas for ever; as by the said fine remaining of record in the Court of our lord the now King of the Bench here, more fully appears: which said fine so as aforesaid had and levied, was had and levied to the use of the said Henry Killigrew and his heirs for ever; whereby the said Henry Killigrew became and was seised of and in the said advowson in gross by itself, as of fee and right. And the said Henry Killigrew being so seised thereof as aforesaid, the said vicarage afterwards and in the life-time of the said Henry Killigrew at the parish aforesaid, in the said county of Hertford, to wit, on the first day of May in the year of our Lord 1693, became vacant by the death of the said Thomas Perkins, whereby it then and there belonged to the said Henry Killigrew to present a fit person to the said vicarage; but the said vicarage continued and remained so vacant for the space of one year and the half of another year, next after the death of the said Thomas Perkins; by reason whereof, and by force of the royal prerogative, the right of presenting a fit person to the said vicarage for that turn devolved upon His said late Majesty King William the Third, then being King of England; whereupon His said late Majesty King William the Third, afterwards to wit, on the 29th day of March in the year of our Lord 1695, presented to the said vicarage John Fothergill his clerk, who on that presentation was admitted, instituted, and inducted into the same in the time of His said late Majesty King William the Third, and became incumbent thereof; and the said John Fothergill so being such incumbent, and the said Henry Killigrew being so seised of the said advowson, afterwards, to wit, on the 8th day of December, in the year of our Lord 1704, at the parish aforesaid, in the said county of Hertford, he the said Henry Killigrew made his last will and testament in writing executed and attested so as to pass his real estate, and thereby devised the said advowson to Lucy Killigrew his wife for her life, and afterwards to wit, on the 20th day of December, in the year of our Lord 1712, at the parish aforesaid, in the said county of Hertford, died seised of the said advowson as aforesaid, without leaving issue male of his body; upon whose death the said Lucy by virtue of the said last mentioned devise, became and was seised of the said advowson, in gross by itself as of freehold and right for her life; and the reversion thereof then descended and came to the three daughters of the said Henry Killigrew, to wit, to Lucy Killigrew the eldest daughter, [381] Mary Killigrew the second daughter, and Judith Killigrew the youngest daughter of the said Henry Killigrew, as the daughters and co-heirs of the said Henry Killigrew; whereby the said Lucy, Mary and Judith the daughters, then and there became and was seised of the said reversion of the said advowson, in gross by itself as of fee and right, in coparcenary: and the said Lucy Killigrew the mother being so seised of the said advowson for her life, and the reversion thereof belonging to the said Lucy, Mary and Judith the daughters of the said Henry Killigrew and their heirs in form aforesaid, the said Mary afterwards, to wit, on the 3d day of February, in the year of our Lord 1726, at the parish aforesaid, took to husband Edward Barker, Esq. the late grandfather of the said Edward Barker the now defendant: whereby the said Edward Barker the grandfather, and the said Mary, in right of the said Mary, became and were seised of and in the said reversion of the said Mary, of and in her said one third part of the said advowson, in gross by itself as of fee and right; and being so thereof seised, and the said Lucy Killigrew the mother, being so seised of the whole of the said advowson, in gross by itself as of freehold and right for her life, the said vicarage afterwards and in the lifetime of the said Lucy Killigrew the mother, to wit, on the first day of October in the year of our Lord 1728, became vacant by the death of the said John Fothergill; whereby it then and there belonged to the said Lucy Killigrew the mother to present a fit person to

the said vicarage, but one Caleb Lomax, Esq. then and there usurping upon the title of the said Lucy Killigrew the mother, presented one John Romney his clerk to the said vicarage so being vacant, who on that presentation was admitted, instituted, and inducted into the same, in the time of His late Majesty George the Second, late King of Great Britain, and became incumbent thereof: and the said John Romney so being such incumbent, and the said Lucy Killigrew the mother so being seised of the said advowson for her life, afterwards to wit, on the 10th day of September in the year of our Lord 1729, at the parish aforesaid, in the said county of Hertford, the said Lucy Killigrew the mother died so seised of such her said estate, upon whose death one James Cook who had then lately intermarried with the said Lucy the daughter, the eldest of the said three daughters of the said Henry Killigrew, became and was seised in right of the said Lucy, of and in one-third part of the [382] said advowson, and the said Edward Barker the grandfather and Mary his wife, in right of the said Mary, became and were seised of and in one other third part of the said advowson, and the said Judith Killigrew became and was seised of and in the other third part of the said advowson; and the said John Romney so being incumbent as aforesaid, the said vicarage afterwards, to wit, on the 8th day of June in the year of our Lord 1730, became vacant by the resignation of the said John Romney, which said avoidance was the first and next avoidance of the said vicarage after the death of the said Lucy Killigrew the mother; and because the said James Cook, Edward Barker the grandfather and Mary his wife, and Judith did not then and there agree among themselves, to present jointly a fit person to the said vicarage, it then and there belonged to the said James Cook to present a fit person to the said vicarage, but His said late Majesty King George the Second, usurping upon the said James Cook, presented the said John Romney to the said vicarage so being vacant, in the turn of the said James Cook, who on that presentation was admitted, instituted, and inducted into the same, in the time of His said late Majesty King George the Second, and became incumbent thereof: and the said John Romney so being such incumbent, and the said Judith being so seised of her said third part of and in the said advowson as aforesaid, the said Judith afterwards, to wit, on the 10th day of May in the year of our Lord 1731, at the parish aforesaid in the said county of Hertford, made her last will and testament in writing, executed and attested so as to pass her real estate, and thereby devised her said one-third part of and in the said advowson, (among other things,) unto Sir Philip Butler, Bart. and Thomas Bruce, Esq.; and their heirs upon trust that they should dispose of the rents and profits thereof during the life of the said Mary Barker, to such persons and uses as she should notwithstanding her coverture appoint, exclusive of her then, or any after taken husband, and after her decease in trust for Edward Barker the father of the said Edward Barker, the now Defendant, and son of the said Edward Barker the grandfather and Mary his wife, and the heirs of his body lawfully to be begotten with divers remainders over in default of issue of the said Edward Barker the father in the said will mentioned, and afterwards, to wit, on the 18th day of June in the year of our Lord 1731, at the parish aforesaid, in the said county of Hertford, the said Judith died so seised of and in her said [383] third part of the said advowson, without revoking or altering her said will; upon whose death the said Sir Philip Butler and Thomas Bruce, by virtue of the said devise, became seised of the said Judith's third part of the said advowson, during the life of the said Mary Barker, on the trusts aforesaid, the said immediate remainder thereof, and the several other remainders thereof respectively belonging, as in the said will of the said Judith is for that purpose limited and appointed: and the said Sir Philip and Thomas Bruce, being so seised thereof as aforesaid, the said Mary afterwards, to wit, on the 1st day of May, in the year of our Lord 1734, at the parish aforesaid, in the said county of Hertford, died, leaving issue by her said husband, the said Edward Barker the father, who was her only son, and on her death her said husband and the said Edward Barker the grandfather held himself in of the third part of the said advowson, (the reversion whereof originally descended to the said Mary from her said father Henry Killigrew,) and became seised thereof for his life, as tenant by the law of England, and the reversion thereof then and there descended and came to the said Edward Barker the father, as son and heir of the said Mary: and the said Edward Barker the father then and there also became by force of the said will of the said Judith, seised of the one third part of the said advowson, which was the said Judith's, in gross, by itself, to him and the heirs of his body; and afterwards, to wit,

on the 1st day of November in the year of our Lord 1747, the said vicarage became vacant by the death of the said John Romney, which said avoidance was the second avoidance of the said vicarage, after the death of the said Lucy Killigrew the mother; and the said Edward Barker the grandfather afterwards, and during the vacancy of the said vicarage, to wit, on the 28th day of November, in the year last aforesaid, at the parish aforesaid, in the said county of Hertford, died so seised of the said third part of the said advowson, (the reversion whereof expectant as aforesaid, descended from the said Henry Killigrew to the said Mary as aforesaid,) having first duly made his last will and testament in writing, and appointed Edward Radcliffe, Arthur Radcliffe, and James Whitechurch the Younger, executors thereof; upon whose death the said Edward Barker the father became seised of the same one third part of the said advowson; and being so seised thereof, and being so also seised in form aforesaid of the said other third part of the said advowson, which was the said Judith's, and the said vicarage being so vacant, it then [384] and there belonged to the said executors of the said Edward Barker the grandfather, to present to the said vicarage, but one Caleb Lomax usurping on the said executors, presented the said Daniel Bellamy, in the said declaration of the said William Thrale, John Cowper, and William Lawrence mentioned, his clerk to the said vicarage so being vacant as aforesaid; who on that presentation was admitted, instituted, and inducted into the same, in the time of His said late Majesty King George the Second, and became incumbent thereof, in manner and form as the said William Thrale, John Cowper and William Lawrence have in their said declaration above alleged; and the said Daniel so being such incumbent, afterwards, to wit, on the 19th day of April in the year of our Lord 1751, at the parish aforesaid, in the said county of Hertford, by a certain indenture then and there made between the said Edward Barker, the father, of the one part, and one Joseph Pickering, gent. of the other part, (one part of which said last mentioned indenture, sealed with the seal of the said Edward Barker the father, the said Edward Barker the now defendant brings here into Court, the date whereof is the day and year last aforesaid), the said Edward Barker, the father, for the consideration of a certain sum of money therein mentioned to be paid to him by the said Joseph Pickering, did bargain and sell to the said Joseph Pickering the two third parts of the said advowson, which were of the said Mary and Judith, to have and to hold the same unto the said Joseph Pickering, from the day of the date of that indenture, for one year from thence next ensuing, as by the same indenture more fully appears; by virtue whereof the said Joseph Pickering became possessed of those two third parts of the said advowson for that term, and being so possessed thereof, and the reversion thereof belonging to the said Edward Barker the father, afterwards, to wit, on the 20th day of the same month of April, in the year of our Lord 1751, at the parish aforesaid, in the said county of Hertford, by a certain indenture then and there made between the said Edward Barker the father, of the first part; the said Joseph Pickering of the second part; and one Joseph Warner of the third part; (one part of which said last mentioned indenture sealed with the seal of the said Edward Barker, the father, the said Edward Barker the now defendant brings here into Court, the date whereof is the day and year last aforesaid) the said Edward Barker the father granted to the said Joseph Pickering and his heirs, the same two third [385] parts of the said advowson. To have and to hold the same unto the said Joseph Pickering and his heirs, as by the said last mentioned indenture more fully appears; by virtue of which said last mentioned indenture the said Joseph Pickering became and was seised of those two third parts of the said advowson in gross, as of fee and right; and the said Joseph Pickering being so seised thereof the said Joseph Warner, afterwards, to wit, in fifteen days of Easter, in Easter term in the 24th year of the reign of His said late Majesty King George the Second, in the Court of His said late Majesty of the Bench, impleaded the said Joseph Pickering, in a plea of land, of those two third parts of the said advowson by a certain other writ of His said late Majesty King George the Second, of entry sur disseisin en le post, then returnable in the same Court, and duly returned; and the said Joseph Warner then duly appearing in the said Court, the said Joseph Pickering in the Court of His said late Majesty King George the Second of the Bench at Westminster, at the return of the said writ, came and vouched thereof to warranty the said Edward Barker the father, who was then present in the same Court, in his proper person, and freely then and there warranted to the said Joseph Pickering the said two third parts of the said advowson, and

vouched thereof to warranty Edmund Wilson, who was then and there likewise present in the same Court, in his proper person, and freely warranted to the said Edward Barker the father the said two third parts of the said advowson, and thereupon in the same Court before Sir John Willes, Knight, and his companions, then Justices of His said late Majesty King George the Second of the Bench aforesaid, in the same Easter term, such proceedings were had upon the said last mentioned writ, that it was considered by the same Court that the said John Warner should recover his seisin against the said Joseph Pickering of the same two third parts of the said advowson, and that the said Joseph Pickering should have of the land of the said Edward Barker the father, to the value, &c.: and that the said Edward Barker the father, should have of the land of the said Edmund Wilson, to the value, &c., and that the said Edmund Wilson should be in mercy, &c. Whereupon the said Joseph Warner prayed the writ of His said late Majesty King George the Second, to be directed to the then sheriff of the said county of Hertford, returnable immediately, to cause full seisin of the same two third parts of the said advowson to be delivered to him; which writ was granted to him returnable in the same [386] Court; and the said sheriff afterwards in the same term returned that he delivered seisin thereof to the said Joseph Warner, as by the said last mentioned writ he was commanded; as by the record of the said judgment and proceedings in the said Court of our said lord the now King of the Bench here remaining, it more fully appears: which said recovery in form aforesaid had, was had to the use of the said Edward Barker the father and his heirs; by virtue of which said recovery the said Edward Barker the father became and was seised of the same two third parts of the said advowson, in gross, by itself, as of fee and right: and being so seised thereof, the said Edward Barker the father afterwards, to wit, on the 1st day of October, in the year of our Lord 1751, at the parish aforesaid, in the said county of Hertford, by a certain other indenture then and there made between the said Edward Barker the father of the one part, and Windmills Crompton, Esq. and James Whitechurch, Esq. &c. of the other part, (one part of which said last mentioned indenture, sealed with the seal of the said Edward Barker the father, the said Edward Barker the now defendant brings here into Court, the date whereof is the day and year last aforesaid) for and in consideration of a certain sum of money therein mentioned to be paid to him by the said Windmills and James Whitechurch, bargained and sold the same two third parts of the said advowson to the said Windmills and James Whitechurch to have and to hold the same unto the said Windmills, and the said James Whitechurch, from the day next before the day of the date of the said last mentioned indenture, for one year from thence next ensuing, as by the said indenture more fully appears; by virtue whereof the said Windmills and James Whitechurch became possessed of those two third parts of the said advowson for that term; and being so possessed thereof, and the further reversion thereof belonging to the said Edward Barker the father the said Edward Barker the father afterwards, to wit, on the 2d day of October, in the said year of our Lord 1751, at the parish aforesaid in the said county of Hertford, by a certain other indenture then and there made between the said Edward Barker the father and Anne his wife of the first part, the said James Cook of the second part; and the said Windmills and James Whitechurch of the third part; (one part of which said last mentioned indenture sealed with the seal of the said Edward Barker the father, the said Edward Barker the now defendant brings here into Court, the date whereof is the day and year last aforesaid) for the consideration therein mentioned, granted to [387] the said Windmills and James Whitechurch, the same two-third parts of the said advowson, to have and to hold the same unto the said Windmills and James Whitechurch and their heirs, to the use of the said Edward Barker the father for the term of his life, and from and after the determination of that estate, to the use of the said Windmills and James Whitechurch and their heirs during the life of the said Edward Barker the father, to support the contingent remainders thereafter limited, and to preserve the same from being defeated and destroyed, and from and after the death of the said Edward Barker the father, to the use of the said Anne Barker for her life, and from and after the death of the said Anne Barker, to the use of all and every the children of the said Edward Barker the father and the said Anne, or any one or more of such children, in such parts, shares and proportions, and for such estate and estates, and subject to such provisoes, conditions and limitations, and in such manner and form as the said Edward Barker the father, by any writing or writings under his hand

and seal duly executed in the presence of two witnesses, or by his last will and testament in writing duly executed and attested, should direct and appoint, and for default of such direction and appointment, to certain uses in the said last-mentioned indenture mentioned, as by the same indenture more fully appears: by virtue of which said last-mentioned indenture, the said Edward Barker the father became seised of the same two-third parts of the said advowson in gross by itself as of freehold and right for his life, the several remainders and reversions thereof respectively belonging as in the said last-mentioned indenture is for that purpose limited and declared: and the said Edward Barker the father being so seised thereof, and the several remainders and reversion thereof respectively belonging as aforesaid, the said Edward Barker the father afterwards, to wit, on the 20th day of June, in the year of our Lord 1759, at the parish aforesaid, in the county of Hertford, by a certain indenture then and there made between the said Edward Barker the father, under the hand and seal of the said Edward Barker the father, and duly executed by the said Edward Barker the father, in the presence of two witnesses, of the one part, and one Henry Barker, Esq. of the other part (one part of which said last mentioned indenture sealed with the seal of the said Edward Barker the father, the said Edward Barker the now defendant brings here into Court, the day whereof is the day and year last aforesaid), [388] for the considerations therein mentioned, did direct and appoint the same two-third parts of the said advowson from and after the several deceases of the said Edward Barker the father, and Anne his wife, unto the said Edward Barker the now defendant, and his heirs, to hold the same from and immediately after the death of the said Edward Barker the father and the said Anne, and the survivor of them, unto the said Edward Barker the now defendant and his heirs, as by the same indenture more fully appears; by virtue of which said last-mentioned indenture, the said Edward Barker, the now defendant became seised of the reversion of the same two-third parts of the said advowson, in gross by itself, as of fee and right; and the said Edward Barker the now defendant being so seised thereof, the said Edward Barker the father afterwards, to wit, on the 1st day of January, in the year of our Lord 1761, at the parish aforesaid, in the said county of Hertford, died so seised of the same two-third parts of the said advowson, upon whose death the said Anne Barker became seised of the same two-third parts of the said advowson, in gross by itself, as of freehold and right for her life; and the said Anne Barker being so seised thereof, and the said Edward Barker the now defendant being so seised of the reversion thereof as aforesaid, afterwards to wit, on the 27th day of January, in the year of our Lord 1779, by a certain indenture then and there made between the said Anne of the one part, and the Rev. John Lockman, D.D. of the other part (one part of which said last-mentioned indenture, sealed with the seal of the said Anne Barker, the said Edward Barker the now defendant, brings here into Court, the date whereof is the day and year last aforesaid), the said Anne Barker for a certain sum of money therein mentioned to be paid to her by the said John Lockman, did grant, bargain and sell the same two-third parts of the said advowson unto the said John Lockman, to have and to hold the same unto the said John Lockman, from the day next before the day of the date of that indenture, for one year from thence next ensuing, as by the same indenture more fully appears; by virtue whereof the said John Lockman became possessed of the said two-third parts of the said advowson for that term; and the said John Lockman being so possessed thereof, the said Anne afterwards, to wit, on the 28th day of January, in the year of our Lord 1779, at the parish aforesaid in the county of Hertford, by a certain other indenture then and there made [389] between the said Anne of the first part, the said Edward Barker, the now defendant, of the second part, and the said John Lockman of the third part (one part of which said last-mentioned indenture sealed with the seal of the said Anne Barker, the said Edward Barker the now defendant, brings here into Court the date whereof is the day and year last aforesaid), for the considerations therein mentioned, granted the same two-third parts of the said advowson to the said John Lockman and his heirs, to have and to hold the same unto the said John Lockman and his heirs, in trust for the said Edward Barker the now defendant, and his heirs, as by that indenture more fully appears; by virtue whereof the said Edward Barker, the now defendant became and was seised of and in the said two-third parts of the said advowson, in gross by itself, as of fee and right: and the said Edward Barker the now defendant being so seised thereof, the said vicarage became vacant by the death of the said Daniel Bellamy, as the said William

Thrale, John Cowper and William Lawrence, have in their said declaration above alleged, which said avoidance is the third avoidance of the said vicarage after the death of the said Lucy Killigrew the mother, whereupon it then and there belonged, and still belongs to the said Edward Barker the now defendant to present a fit person to the said vicarage; and this the said Edward Barker the now defendant is ready to verify, wherefore he prays judgment if the said William Thrale, John Cowper and William Lawrence, ought to have or maintain their said action against him, together with his damages, according to the form of the statutes in that case made and provided, and a writ to the bishop, &c."

The second plea of Edward Barker the defendant was the same as the first, till it came to the devise of Henry Killigrew, which was thus stated: "And thereby devised the said advowson to Lucy Killigrew his then wife for her life, and from and after her decease, he devised the same to the heir male of him the said Henry Killigrew, upon the body of the said Lucy Killigrew begotten or to be begotten, and to his heirs and assigns, and for want of such issue, to all and every the daughter and daughters of the said Henry Killigrew, upon the body of the said Lucy begotten or to be begotten, and to her or their heir or heirs and assigns for ever, as tenants in common, if more than one, and not as joint tenants; and afterwards, to wit, on the 27th day of December, in the year of our Lord 1712, at the parish aforesaid, in the said county of Hertford, died so seised of and in the said advowson, without leaving issue male of his body, and leaving [390] the said Lucy Killigrew, and three daughters of him the said Henry Killigrew, begotten on the body of the same Lucy, to wit, Lucy Killigrew, Mary and Judith him surviving, upon whose death the said Lucy Killigrew the mother, by virtue of the said last-mentioned devise, became and was seised of the said advowson, in gross by itself, as of freehold and right, for the term of her life, the remainder thereof belonging to the said Lucy Killigrew the daughter, Mary and Judith; and the said Lucy Killigrew the mother, being so seised of the said advowson, for the term of her life as aforesaid, and the remainder thereof belonging to the said Lucy, Mary and Judith the daughters and their heirs, in form aforesaid, and the said John Fothergill so being incumbent of the said vicarage afterwards, to wit, on the 28th day of August, in the year of our Lord 1716, at the parish aforesaid, in the said county of Hertford, by a certain indenture of five parts, then and there made between one James Cook, Esq. of the first part, the said Lucy Killigrew the mother of the second part, the said Lucy Killigrew the daughter of the third part, Martin Killigrew, Esq. and Samuel Diggle, gent. of the fourth part, and William Grimston, Esq. and James Jennings, Esq. of the fifth part (one part of which said last-mentioned indenture, sealed with the several seals of the said Lucy the mother, and Lucy the daughter, the said Edward Barker the now defendant brings here into court, the date whereof is the day and year last aforesaid,) they the said Lucy Killigrew the mother and Lucy Killigrew the daughter, for and in consideration of a marriage intended then shortly to be had and solemnized between the said James Cook and the said Lucy Killigrew the daughter, and for and in consideration of a certain sum of money by the said William Grimston and James Jennings, to the said Lucy Killigrew the mother and Lucy Killigrew the daughter in hand paid, did, and each of them did grant the one-third part of the said advowson (the remainder whereof expectant on the said life estate of the said Lucy Killigrew the mother belonged to the said Lucy Killigrew the daughter as aforesaid, unto the said William Grimston and James Jennings, and their heirs, to hold the same unto the said William Grimston and James Jennings, and their heirs, to the several uses hereafter mentioned, that is to say, to the use of the said Lucy Killigrew the mother for life, and from and after her decease, to the use of the said James Cook for life without impeachment of waste, and from and after the decease of the said James Cook, to the use of the said Lucy Killigrew the daughter, for her life, and immediately [391] from and after the determination of the said estates, to the use of the said William Grimston and James Jennings and their heirs, for and during the lives of the said James Cook and Lucy Killigrew the daughter, and the longer liver of them, to support the contingent remainders therein after limited, and to preserve the same from being defeated and destroyed; and from and after the decease of the survivor of them, the said James Cook and Lucy Killigrew the daughter, to the use and behoof of the sons and daughters of the said James Cook on the body of the said Lucy Killigrew the daughter lawfully to be begotten, in such succession and for such estates as in the said indenture is for that purpose limited; and for

default of such issue to the use and behoof of the said James Cook and his heirs, as by the said last mentioned indenture more fully appears: and the said Edward Barker the now defendant further saith, that the said intended marriage between the said James Cook and the said Lucy the daughter, afterwards to wit, on the 29th day of August in the year of our Lord 1716 at the parish aforesaid, in the said county of Hertford, took effect, and that by virtue of the said indenture the said Lucy Killigrew the mother became seised in gross by itself as of freehold and right for the term of her life, of and in the same one third part of the said advowson, the several remainders and reversion thereof respectively belonging as in the said last mentioned indenture is for that purpose limited and declared; and being so thereof seised, and the several remainders and reversion thereof respectively belonging as aforesaid, and the said Lucy Killigrew the mother being also so seised of the said other two third parts of the said advowson as aforesaid, and the said Mary and Judith being so respectively seised of and in their said respective remainders of their said respective third parts of the said advowson as aforesaid, the said Mary afterwards, to wit, on the 3d day of February in the year of our Lord 1726, at the parish aforesaid in the said county of Hereford, took to husband the said Edward Barker the grandfather, whereby the said Edward Barker the grandfather and Mary his wife, in right of the said Mary, became and were seised in gross by itself as of fee and right, of and in the said remainder of the said Mary, of and in the said one third part which was the said Mary's; and being so seised thereof, and the said Lucy the mother being so seised of the whole of the said advowson as aforesaid, the said vicarage afterwards and in the life-time of the said Lucy the mother, to wit, on the first day of October in the year of our Lord 1728, at the [392] parish aforesaid, became vacant by the death of the said John Fothergill; whereupon it then and there belonged to the said Lucy Killigrew the mother to present to the said vicarage so being vacant; but one Caleb Lomax, usurping on the title of the said Lucy Killigrew the mother to the said advowson, presented one John Romney his clerk to the said vicarage so being vacant, who on that presentation was admitted, instituted, and inducted into the same in the time of His said late Majesty King George the Second, and became incumbent thereof: and the said John Romney so being such incumbent, and the said Lucy Killigrew the mother so being seised of the said advowson as aforesaid, the said Lucy the mother afterwards, to wit, on the 10th day of September in the year of our Lord 1729, at the parish aforesaid died so seised of the said advowson, upon whose death the said James Cook became seised in gross by itself as of freehold and right for his life, of one third part of the said advowson, and the said Edward Barker the grandfather and Mary his wife, in right of the said Mary, became and were seised in gross by itself as of fee and right of one other third part of the said advowson, and the said Judith Killigrew became seised in gross by itself as of fee and right of the other one third part of the said advowson; and being so respectively seised, and the said John Romney so being incumbent as aforesaid, the said vicarage afterwards, to wit, on the 28th day of June in the year of our Lord 1730, became vacant by the resignation of the said John Romney, whereupon it then and there belonged to the said James Cook, Edward Barker the grandfather and Mary his wife, in right of the said Mary and Judith, to present a fit person to the said vicarage being so vacant, but His said late Majesty King George the Second, usurping upon the title of the said James Cook, Edward Barker the grandfather and Mary his wife, and Judith Killigrew, presented the said John Romney to the said vicarage so being vacant, who on that presentation was admitted, instituted, and inducted into the same in the time of His said late Majesty King George the Second, and became incumbent thereof, &c."

The remaining part of this plea was nearly the same as the first, the only variation arising from the daughters of Henry Killigrew being stated to be tenants in common.

The third plea was also similar to the first; it stated a descent of the advowson to the daughters of Henry Killigrew in coparcenary, and also that on the resignation of Romney, James Cook, Edward Barker the grandfather and Judith Killigrew, did not agree to present, &c. but it concluded with a traverse, "without [393] this, that the said Caleb Lomax the father, in the said declaration of the said William Thrale, John Cowper, and William Lawrence, mentioned deceased, was in his life time seised of the said advowson of the said vicarage in manner and form as the said William Thrale, John Cowper, and William Lawrence, have in their said declaration above alleged, and this the said Edward Barker is ready to verify, &c."

The fourth plea was also the same as the first as far as the resignation of Romney, but went on as follows; "Which said resignation was fraudulently made by the said John Romney without any notice given by the said John Romney thereof to the said James Cook and Lucy his wife, Edward Barker the grandfather and Mary his wife, and Judith Killigrew, or to any of them in that behalf: and thereupon His said late Majesty King George the Second, usurping upon the said James Cook and Lucy his wife, Edward Barker the grandfather and Mary his wife, and Judith, before they or any of them had notice of the same vacancy, presented the said John Romney to the said vicarage so being vacant, who on that presentation and before the said James Cook and Lucy his wife, Edward Barker the grandfather and Mary his wife, and Judith, or any of them had notice of the same vacancy, was admitted, instituted, and inducted into the same in the time of His said late Majesty King George the Second, and became incumbent thereof, &c."

It then went on like the first plea, to the death of Edward Barker the grandfather, during the vacancy occasioned by the death of Romney, his appointing executors of his will, and Edward Barker the father being seised of the two third parts of Mary his mother, and Judith Killigrew: after which it stated, "Because the said James Cook, Edward Barker the grandfather, and Edward Barker the father did not in the life-time of the said Edward Barker the grandfather, and the said James Cook, Edward Radcliffe, Arthur Radcliffe, and James Whitechurch, and Edward Barker the father did not after the death of the said Edward Barker the grandfather, after the said vacancy, agree among themselves to present jointly a fit person to the said vicarage, it then and there belonged to the said James Cook to present a fit person to the said vicarage, but one Caleb Lomax usurping on the said James Cook presented the said Daniel Bellamy, &c."

The remaining part of this plea was the same as the first.

Replication and judgment in the usual form against the bishop and the clerk.

[394] Replication to the first plea of the defendant Edward Barker.

"That after the death of the said Henry Killigrew, the said Lucy Killigrew the mother being so seised of the said advowson in gross by itself as of freehold and right for her life, by virtue of the said devise of the said Henry Killigrew, and the reversion thereof belonging to the said Lucy, Mary, and Judith the daughters, as in that plea is mentioned, she the said Lucy Killigrew the mother on the first day of January in the year of our Lord 1715, at the parish aforesaid in the county aforesaid, by her certain writing then and there made and sealed with her seal, for the considerations therein mentioned, gave, granted, and conveyed to the said Caleb Lomax the grandfather of the said Caleb Lomax the son in the said declaration mentioned, the first and next advowson, donation, nomination, presentation, and free disposition of the said vicarage of the church of Saint Stephen's near Saint Alban's aforesaid, whensoever and howsoever the same should first and next thereafter happen to become vacant; by virtue whereof the said Caleb Lomax the grandfather was possessed of the advowson of the said vicarage, for the first and next avoidance thereof; and the said Caleb Lomax the grandfather being so possessed thereof, afterwards and during the lifetime of the said Lucy Killigrew the mother, to wit, on the first day of October in the year of our Lord 1728, the said vicarage became vacant by the death of the said John Fothergill, which said avoidance was the first and next avoidance of the said vicarage after the said grant, whereupon it then and there belonged to the said Caleb Lomax the grandfather, to present a fit person to the said vicarage so being vacant upon such first avoidance, who thereupon presented the said John Romney his clerk to the said vicarage so being vacant, who on that presentation was admitted, instituted, and inducted into the same in the time of peace, in the time of His late Majesty George the Second, late King of Great Britain, and became incumbent thereof; and the said John Romney so being such incumbent, and the said reversion of and in the said advowson belonging to James Cook, (who had intermarried with the said Lucy the daughter,) and Lucy the daughter in right of the said Lucy the daughter, Edward Barker the grandfather (who had intermarried with the said Mary), and the said Mary in right of the said Mary and Judith Killigrew, afterwards, to wit, on the 10th day of September in the year of our Lord 1729, at the parish aforesaid in the county aforesaid, she the said Lucy Killigrew the mother died so seised of the said advowson for the term of her life as aforesaid; upon [395] whose death the said James Cook and Lucy his wife in right of the said Lucy, the said Edward Barker the grandfather and

Mary his wife in right of the said Mary, and the said Judith Killigrew then and there became and were seised of the said advowson in gross by itself, as of fee and right in coparcenary; and the said John Romney so being incumbent as aforesaid, the said vicarage afterwards, to wit, on the 8th day of June in the year of our Lord 1730, became vacant by the resignation of the said John Romney, which said resignation was fraudulently made by the said John Romney without any notice given by the said John Romney thereof to the said James Cook and Lucy his wife, Edward Barker the grandfather and Mary his wife, and Judith Killigrew, or any or either of them in that behalf; and thereupon His said late Majesty, usurping upon the said James Cook and Lucy his wife, Edward Barker the grandfather and Mary his wife, and Judith, and before they or either of them had notice of the same vacancy of the said vicarage, presented the said John Romney to the said vicarage so being vacant, who on that presentation was admitted, instituted, and inducted into the same in the time of His said late Majesty King George the Second, and became incumbent thereof: By reason of which said fraudulent resignation so made by the said John Romney as aforesaid, and the said usurpation of His said late Majesty, the said James Cook and Lucy his wife, Edward Barker the grandfather and Mary his wife, and Judith, were prevented from agreeing among themselves to present a fit person to the said vicarage upon that vacancy, as they would otherwise have done; and the said John Romney as being such incumbent afterwards, to wit, in Michaelmas term, in the 5th year of the reign of His late Majesty King George the Second, late King of Great Britain, &c. in the Court of His said late Majesty, before Robert Eyre, Robert Price, Alexander Denton, and John Fortescue, all and then His said Majesty's Justices, and other faithful subjects of His said late Majesty then present, a certain fine was levied between the said Caleb Lomax the grandfather, plaintiff, and the said James Cook and Lucy his wife, Edward Barker the grandfather and Mary his wife, and Judith Killigrew, deforceants, of the said advowson, whereof a plea of covenant had been summoned between them in the same Court, namely, that the said James Cook and Lucy his wife, Edward Barker the grandfather and Mary his wife, and Judith Killigrew, acknowledged the said advowson to be the right of the said Caleb Lomax the grandfather, as the same which the said Caleb Lomax the grandfather had of the gift of the said [396] James Cook and Lucy his wife, Edward Barker the grandfather and Mary his wife, and Judith Killigrew, and they remitted and quit claimed the same from the said James Cook and Lucy his wife and their heirs, Edward Barker the grandfather and Mary his wife and their heirs, and Judith Killigrew and her heirs, to the said Caleb Lomax the grandfather and his heirs; and the said James Cook and Lucy his wife, Edward Barker the grandfather and Mary his wife, and Judith Killigrew, granted for themselves and their heirs respectively, that they would warrant to the said Caleb Lomax the grandfather and his heirs, the said advowson against them the said James Cook and Lucy his wife, Edward Barker the grandfather and Mary his wife, and Judith Killigrew and their respective heirs for ever, as by the said fine remaining of record in the Court of our lord the now King of the Bench here, more fully appears: which said fine so as aforesaid had and levied, was had and levied to the use of the said Caleb Lomax the grandfather and his heirs for ever; whereby the said Caleb Lomax the grandfather became and was seised of and in the said advowson in gross by itself, as of fee and right: and the said Caleb Lomax the grandfather being so seised of the said advowson of the said vicarage as aforesaid, afterwards died seised of his said estate therein, upon whose death the advowson of the vicarage descended to Caleb Lomax the father of the said Caleb Lomax the son in the said declaration mentioned, as the son and heir of the said Caleb Lomax the grandfather; whereby the said Caleb Lomax the father was seised of the said advowson as in gross by itself, as of fee and right; and being so seised thereof, afterwards and after the death of the said Caleb Lomax the grandfather, to wit, on the first day of November in the year of our Lord 1747, the said vicarage became vacant by the death of the said John Romney, whereby it then and there belonged to the said Caleb Lomax the father to present a fit person to the said vicarage, and the said Caleb Lomax the father accordingly presented the said Daniel Bellamy his clerk to the said vicarage so being vacant, who on that presentation was admitted, instituted, and inducted into the same in the time of peace in the time of His said late Majesty King George the Second, and became incumbent thereof in manner and form as the said William Thrale, John Cowper, and William Lawrence

have in their said declaration above alleged; Without this, that upon the said avoidance so made by the resignation of the said John Romney, it then and there belonged to the said James Cook to present [397] a fit person to the said vicarage, in manner and form as the said Edward hath in and by his said plea by him first above pleaded in bar in that behalf alleged, &c."

The replication to the second plea was as follows;—

And the said William Thrale, John Cowper, and William Lawrence, as to the said plea of the said Edward by him secondly above pleaded in bar, say that they, by reason of anything by the said Edward in that plea above alleged, ought not to be barred from having and maintaining their aforesaid action thereof against him, because they say that after the death of the said Henry Killigrew without issue male, the reversion of the said advowson expectant upon the death of the said Lucy Killigrew the mother, descended upon the said Lucy the daughter, Mary, and Judith, as daughters and co-heiresses of the said Henry Killigrew in coparcenary; and the said Lucy Killigrew the mother being so seised of the said advowson in gross by itself as of freehold and right for her life, by virtue of the said devise of the said Henry Killigrew, and the reversion thereof belonging to the said Lucy, Mary, and Judith the daughters in coparcenary as above-mentioned, she the said Lucy Killigrew the mother, on the first day of January in the year of our Lord 1715, at the parish aforesaid in the county aforesaid, by her certain writing then and there made and sealed with her seal, for the considerations therein mentioned, gave, granted, and conveyed to the said Caleb Lomax the grandfather of the said Caleb Lomax the son in the said declaration mentioned, the first and next advowson, donation, nomination, presentation, and free disposition of the said vicarage of the church of Saint Stephen's near Saint Alban's aforesaid, whensoever and howsoever the same should first and next thereafter happen to become vacant; by virtue whereof the said Caleb Lomax the grandfather was possessed of the advowson of the said vicarage for the first and next avoidance thereof; and the said Caleb Lomax the grandfather being so possessed thereof, afterwards and during the life-time of the said Lucy Killigrew the mother, to wit, on the first day of October in the year of our Lord 1728, the said vicarage became vacant by the death of the said John Fothergill; which said avoidance was the first and next avoidance of the said vicarage after the said grant; whereupon it then and there belonged to the said Caleb Lomax the grandfather to present a fit person to the vicarage so being vacant; who thereupon presented the said John Romney his clerk to the said vicarage so being vacant, who on that presentation was admitted, instituted, and in-[398]-ducted into the same in the time of peace, in the time of His late Majesty King George the Second, late King of Great Britain, and became incumbent thereof; and the said John Romney so being such incumbent, afterwards, to wit, on the 10th day of September in the year of our Lord 1729, at the parish aforesaid, in the county aforesaid, she the said Lucy Killigrew the mother died so seised of the said advowson for the term of her life as aforesaid, upon whose death the said James Cook (to whom the said Lucy the daughter had before her intermarriage with him, granted her third part of the said advowson expectant upon the death of the said Lucy Killigrew the mother for the term of his natural life, with other remainders over), Edward Barker the grandfather who had intermarried with the said Mary the daughter, and the said Mary in right of the said Mary, and the said Judith Killigrew then and there became and were seised of the said advowson in gross by itself, that is to say, the said Edward Barker the grandfather, and Mary in right of the said Mary, and the said Judith of their said respective third parts as of fee and right, and the said James Cook as of freehold and right of his third part for the term of his natural life; And the said John Romney so being incumbent as aforesaid, the said vicarage afterwards, to wit, on the 8th day of June in the year of our Lord 1730, became vacant by the resignation of the said John Romney, which said resignation was fraudulently made by the said John Romney without any notice given by the said John Romney thereof to the said James Cook, Edward Barker the grandfather and Mary his wife, and Judith Killigrew, or any or either of them in that behalf; and thereupon His said late Majesty usurping upon the said James Cook, Edward Barker the grandfather, and Mary his wife, and Judith, presented the said John Romney to the said vicarage so being vacant, who on that presentation was admitted, instituted, and inducted into the same in the time of His said late Majesty King George the Second, and

became incumbent thereof: And the said John Romney so being such incumbent, afterwards, to wit, in Michaelmas term in the 5th year of the reign of His said late Majesty George the Second, late King of Great Britain, &c. in the Court of His said late Majesty before Robert Eyre, Robert Price, Alexander Denton, and John Fortescue Aland, then His said late Majesty's Justices, and other faithful subjects of His said late Majesty's then present, a certain fine was levied between the said Caleb Lomax the grandfather plaintiff, and the said James Cook, Edward Barker the grandfather and [399] Mary his wife, and Judith Killigrew, deforceants of the said advowson, whereof a plea of covenant had been summoned between them in the same Court, namely, that the said James Cook, Edward Barker the grandfather and Mary his wife, and Judith Killigrew acknowledged the said advowson to be the right of the said Caleb Lomax the grandfather, as the same which the said Caleb Lomax the grandfather had of the gift of the said James Cook, Edward Barker the grandfather and Mary his wife, and Judith Killigrew; and they remitted and quit claimed the same from the same James Cook and his heirs, Edward Barker the grandfather and Mary his wife and their heirs, and Judith Killigrew and her heirs, to the said Caleb Lomax the grandfather and his heirs; and the said James Cook, Edward Barker the grandfather and Mary his wife, and Judith Killigrew granted for themselves and their heirs respectively, that they would warrant to the said Caleb Lomax the grandfather and his heirs the said advowson, against them the said James Cook, Edward Barker the grandfather and Mary his wife, and Judith Killigrew and their respective heirs for ever, as by the said fine remaining of record in the Court of our lord the now King of the Bench here more fully appears; which said fine so as aforesaid had and levied, was had and levied to the use of the said Caleb Lomax the grandfather and his heirs for ever; whereby the said Caleb Lomax the grandfather became and was seised of and in the said advowson in gross by itself as of fee and right: and the said Caleb Lomax the grandfather being so seised of the said advowson of the said vicarage as aforesaid, afterwards died seised of his said estate therein, upon whose death the said advowson of the vicarage descended to Caleb Lomax the father of the said Caleb Lomax the son in the said declaration mentioned, as the son and heir of the said Caleb Lomax the grandfather; whereby the said Caleb Lomax the father was seised of the said advowson of the said vicarage as in gross by itself as of fee and right; and being so seised thereof, afterwards and after the death of the said Caleb Lomax the grandfather, to wit, on the 1st day of November in the year of our Lord 1747, the said vicarage became vacant by the death of the said John Romney, whereby it then and there belonged to the said Caleb Lomax the father to present a fit person to the said vicarage, and the said Caleb Lomax the father accordingly presented the said Daniel Bellamy his clerk to the said vicarage so being vacant, who on that presentation was admitted, instituted, and inducted into the same in [400] the time of peace, in the time of His said late Majesty King George the Second, and became incumbent thereof, in manner and form as the said William Thrale, John Cowper, and William Lawrence, have in their said declaration above alleged, without this, that the said Henry Killigrew devised the said advowson from and after the decease of Lucy Killigrew the mother, to the heir male of him the said Henry Killigrew upon the body of the said Lucy Killigrew begotten or to be begotten, and to his heirs and assigns, and for want of such issue to all and every the daughter and daughters of the said Henry Killigrew, upon the body of the said Lucy begotten, or to be begotten, and to her or their heirs and assigns for ever, as tenants in common if more than one, and not as joint-tenants, in manner and form as the said Edward hath in and by his said plea by him secondly above pleaded in bar in that behalf alleged, &c.

Replication to the third plea took issue on the traverse of Caleb Lomax the father being seised, &c.

General demurrer to the fourth plea, and joinder.

Rejoinder to the first replication protesting against the sufficiency of the replication, denied that there was any record of the fine supposed to be levied by James Cook, Edward Barker the grandfather and Mary his wife, and Judith Killigrew to the use of Caleb Lomax the grandfather, &c. and of this the said Edward Barker put himself upon the record, &c.

Rejoinder to the second replication took issue on the traverse of the devise of Henry Killigrew to the heir male of his body, and for want of such issue, to his daughters, &c.

Rejoinder to the third replication joined issue on the traverse. Joinder in demurrer to the fourth plea.

Subrejoinder, special demurrer to the rejoinder to the first replication, "For that the said William Thrale, John Cowper, and William Lawrence, in and by their said replication by them above pleaded to the plea of the said Edward Barker the now defendant, by him first above pleaded in bar, traversed a material and issuable point, and by that traverse tendered to the said Edward Barker, a material issue, but the said Edward Barker the now defendant hath not in and by his rejoinder by him first above made, taken issue upon that traverse or joined in issue with them thereupon, but hath passed by and taken no notice thereof, and hath denied another part of the said replication of the said William Thrale, John Cowper, and William Lawrence, and hath attempted to put another point in issue between the said Edward [401] Barker the now defendant, and the said William Thrale, John Cowper, and William Lawrence; and thereby hath attempted to introduce great uncertainty and confusion, and unnecessary length of pleading. And for that the said rejoinder concludes with the said Edward Barker's (as to the matter therein contained) putting himself upon the record, which is inconsistent with the allegation contained in the said rejoinder, that there is no such record as is alleged in the replication, which the said rejoinder purports to be an answer to: whereby the said Edward Barker offers to prove the allegation contained in his said rejoinder by a mode of trial, which, if that allegation be true, is impossible: whereas the said Edward Barker ought to have concluded his said rejoinder, by offering to verify the negative allegation therein contained, when and where the Court should direct, in order to have given the said William Thrale, John Cowper, and William Lawrence, an opportunity to have answered thereto, and maintained the affirmative allegation contained in the said replication, &c." Issue joined on the rejoinder to the second replication.

Joinder in demurrer.

This case was argued in Hilary Term last, by Le Blanc, Serjt., for the plaintiffs, and Lawrence, Serjt., for the defendants, and again in the present term by Adair, Serjt., for the plaintiffs, and Bond, Serjt., for the defendants. The arguments on behalf of the plaintiffs were to the following effect.

In this case two points arise; one, on a general demurrer to the fourth plea; the other, on a special demurrer to the first rejoinder. The former, therefore, is a matter of substance, the latter of form. The substantial objection to the fourth plea, (which is also applicable to the first,) is, that it does not sufficiently shew a disagreement of the coparceners to present on the first avoidance of the vicarage after the death of Lucy Killigrew the mother: it is only stated that they did not agree, whereas it ought to have been that they could not, since unless they could not agree, no right devolved to the husband of the eldest sister. As the defendant deduces his title from the two younger coparceners, it is incumbent on him to shew precisely in what manner the vicarage was presentable by turns, and make out his title against the eldest. If the right of the eldest coparcener to present, arose merely from the non-agreement, it might often happen, that she would be injured by being ignorant of her right [402] having accrued, and an usurpation be incurred, by which her turn would be lost. This might happen either where there was no notice given of the vacancy, or where the vacancy was procured by a secret and fraudulent resignation. But the law is, that the right of presenting by turns arises from an actual disagreement, which is a constructive partition of the advowson. The fact that coparceners did not present, is no more than evidence, that they could not. All the authorities shew, that the right of the eldest coparcener to present, arises when she and the others cannot agree. In Co. Litt. 166 b. it is laid down, "If there be divers coparceners of an advowson, and they cannot agree to present, the law doth give the first presentment to the eldest." So also in Co. Litt. 186 b. it is said, "If two or more coparceners be, and they cannot agree to present, the eldest shall present." So in 2 Inst. 356. "By the common law, if an advowson descended to divers coparceners, if they cannot agree to present, the eldest sister shall have the first turn." To the same point are Fitz. N. B. 81 (4to edit.) Dyer, 55. Year Book, 30 Ed 3, 15. Roll. Abr. 346, tit. Present. al Eglise. pl. 1. Mallory Qua. Imp. 74. 17 Vin. Abr. 407, note on pl. 6. Bro. Abr. Present. al Eglise, pl. 35 & 53. On the same principle, the best precedents in pleading state that the coparceners could not agree. Co. Entr. 468 (ed. 1670). Rast. Entr. 515. Herne's Pleader, 601. 2 Lutw. 1123. And in a late case of *Pyke v. Lindsey* (Hil. 27 Geo. 3, C. B.) a right to present was stated to be in the eldest of four coparceners, because they

could not agree among themselves to present. It is also to be observed, that great doubts have been entertained, whether the privilege of the eldest coparcener to present on a disagreement, was alienable. Co. Litt. 166 b. note in the last edition. Thus much as to the substantial defects of the fourth plea.

With respect to causes of the special demurrer to the first rejoinder, the first point to be considered is, how the matter of title stands on these pleadings. Now, though it be a general rule that the plaintiff must rest on the strength of his own title, and not on the weakness of that of his adversary, yet here the rule seems to be inverted; the defendant not having traversed the plaintiff's title, but passing that by, and setting up a title of his own, has put himself in the same situation in which the plaintiff would otherwise be in, viz. he has taken upon him-[403]-self to make good his own title against all mankind (*d*). For the principal defect shewn by the demurrer is, that the defendant has passed by the traverse taken by the plaintiff, and himself traversed matter of inducement to the traverse of the plaintiff. There are two clear general rules of pleading, by which these objections must be decided; one, that a traverse cannot be taken upon a traverse, the other, that matter of inducement is not traversable. The latter rule evidently appears from Latch, 111. Sir William Jones, 91, Cro. Car. 442; the former from Vaughan, 62, Hob. 103, Com. Dig. tit. Pleader (G). Some exceptions indeed there are to these rules, but they are to be taken with reference to time and place. Cro. Car. 105. In all cases where the traverse in the bar takes away the time or place alleged in the declaration, the plaintiff may either join issue on that traverse, or himself traverse the matter of inducement. As in case for words spoken in the county of A., the defendant pleads a concord for words in every other county, and traverses the county of A., the plaintiff may either join issue on the county, or traverse the concord. Co. Litt. 282 b. So in trespass on such a day, if the defendant pleads a licence on such a day, and traverses all days before or since, the plaintiff may traverse the licence. Hob. 104. But as it is also laid down by these authorities, that unless the first traverse be material, another traverse may be taken upon it, it must be considered whether the traverse in this case taken by the plaintiff, namely, "That on the resignation of John Romney, it belonged to James Cook to present, &c." be not a material traverse. That it is a good traverse appears from *The Grocers' Company v. The Archbishop of Canterbury*, 3 Wils. 214, S. C. 2 Black. 770. In that case the traverse was "Without this, that it belonged to the said wardens and commonalty to present to the said church at the second turn, when the same became vacant by the death of the said Timothy Puller, in manner and form as the said William Backhouse hath above in that plea alleged, &c." The objection made to it on a special demurrer was, that it had not traversed matter of fact, but had attempted to put in issue matter of law to be tried by a jury. But the Court on solemn argument determined it to be a good traverse, it being compounded [404] of matter of law and of fact, the law resulting from the fact. So in the present case, the traverse that on the resignation of Romney it belonged to Cook to present, was a mixed matter both of law and fact, where the law was an inference from the fact; yet it was objected, that this traverse went to put matter of law in issue. It is also a material traverse, inasmuch as the title of the defendant depended on the right of James Cook to present. On the face of the pleadings the defendant is bound to prove his own title. The plaintiff having stated his title, the defendant, instead of denying it, sets out a paramount title of his own: if therefore the plaintiff can defeat the title of the defendant, his title, as stated in his declaration which the defendant has not denied, remains unimpeached upon the record. The traverse then is a material one, as it is a direct denial of a circumstance, without which the defendant's title could not be supported. His claim is derived from the right of the coparceners to present by turns. But the right of coparceners, as such, is to present all together. It is only on their disagreement that the right of presenting by turn arises. If then it did not belong to Cook, who had married the eldest sister, to present on the resignation of Romney, in the first turn, neither did it belong to the

(*d*) With regard to the second cause of the demurrer to the rejoinder, viz. that the defendant ought to have concluded with a verification, instead of putting himself upon the record, it was admitted on both the arguments that the objection could not be maintained, the law being now settled that either conclusion was good. Vid. 2 Wils. 113, and 2 Term Rep. B. R. 439, and the several authorities there cited. (Note to the first edition.)

defendant in the second or third turn. By denying the right of James Cook to present, the right of the coparceners to present in turns is also denied, on which the title of the defendant entirely depends. But even supposing it not to be a material traverse, this defect ought to have been pointed out by a special demurrer.

The substance of the arguments on the part of the defendant, was as follows:—

There are two points made on the side of the plaintiffs; one arising from the substance, the other from the form of the pleadings. With respect to the first, it is contended that from the words “could not agree” being used in many authorities and precedents, it is improper to say that the coparceners “did not agree.” But there is no authority to prove that an express disagreement must be stated. It may fairly be understood from the books using the words “cannot” or “could not” that they mean “do not” or “did not.” From whatever cause the disagreement arises, the expression “cannot” or “could not” may be equally satisfied; whether it be that all the parties do not know that there is a vacancy, or that some are infants, or out of the kingdom, or that the eldest presented without consulting the others. The words “cannot” or “could not” therefore do not necessa- [405]-rily imply an actual disagreement. Besides, the plaintiff claims under all the coparceners: his title therefore does not depend on the question, whether one turn or the other was taken away by usurpation? But the law seems to be, that it belongs to the eldest to present if the coparceners do not all agree, and that the right depends more properly on non agreement than disagreement. In Bro. Abr. tit. Present. al Eglise, pl. 19, it is said by Hill, Justice, that “where an advowson descends to four coparceners, the first presentation of mere right belongs to the eldest.” In the Doctor and Student, b. 2, c. 30, p. 240, it is laid down, that “a presenting by turn holdeth always between coparceners of an advowson, except they agree to present together, or that they agree by composition to present in some other manner.” In *Watson's Clergyman's Law* (folio ed. 1701), 45, it is stated, that “if an advowson doth descend to four coparceners, and the church after the death of their ancestor doth become void, if they do not all agree in a presentment, the clerk of the eldest shall be received, &c.” And after citing authorities it goes on to say, “Or if they do agree for one or more turns, to present jointly, and after do not so agree, the eldest sister shall present, &c.” In like manner on the record of the former quare impedit, in which the right of the same advowson was disputed by the same family of Lomax, it was stated that the coparceners “never did agree,” which case was determined on solemn consideration, as appears from the note of Mr. Justice Burnet (vide post, [412, and Willes, 665, S. C.]). As to the case cited from Dyer, 55, nothing appears to have been decided by it; if the guardian there mentioned were guardian in chivalry, the presentation in the names of both the coparceners was right. With respect to the authority quoted from Mallory, which is a comment on the case in Dyer, the note there supposes the guardian to have been guardian in socage; but it is much more probable that he was guardian in chivalry.

With respect to the objections made by the plaintiffs on the form of the pleadings, that the defendant has passed by the traverse tendered, and endeavoured to put in issue matter of inducement; those objections can only hold, if that traverse be material. But that it is immaterial will be clear from adverting to the case upon the record. The declaration states, that Caleb Lomax was seised in fee and presented Bellamy: the plea shews the presentation of Bellamy to have been by usurpation on the executors of Edward Barker the grandfather, and claims the [406] present turn under the will of Judith Killigrew; the replication ought to support the declaration by shewing that the title of Caleb Lomax was a good one; this was all that was necessary; it accordingly sets forth a fine levied by the coparceners to the use of Caleb Lomax in fee; here it ought to have stopped, that the defendant might have an opportunity to deny this material point; instead of which, it goes on to traverse that on the resignation of Romney, it belonged to James Cook to present: this vitiates the replication, inasmuch as it attacks the defendant's title without supporting that of the plaintiff set forth in the declaration, it being a certain rule that the plaintiff must recover by the strength of his own title, and not by the weakness of that of his adversary. The question is, whether the plaintiffs have made out a good title, which cannot be, unless they support their count. According to the rule in *Tufton v. Temple*, Vangh. 8, the traverse taken by the plaintiff should have been of some fact inconsistent with the plaintiff's title, and which, if found against the defendant, would destroy his title. Now this traverse is not of a fact inconsistent

with the title of the plaintiff, for his title is derived from all the coparceners, and it is a matter of perfect indifference as to him upon which of them the usurpation was. Nor does it destroy the defendant's title, for this is either the second or third turn since the usurpation, and in either the defendant is entitled. The traverse of the plaintiff's is also bad on another ground; it is taken of a conclusion in law; the words of the plea are, "Because the coparceners did not agree, &c. it then and there belonged to the said James Cook to present, &c." This is traversed in the replication, which, being the traverse of a legal consequence, is bad. Doctr. Placit. 351. 11 Coke, 10 b. Yelv. 199, 200. As to the conclusion of the rejoinder to the record, this is sufficiently warranted by Poph. 101. Carth. 517. 2 Wils. 113. The traverse then not being material to the plaintiff's title, the defendant might well pass it by, and traverse that part of the replication which is material. *Digby v. Fitzherbert*, Hob. 106. If that which is the very essence of the plaintiff's case be pleaded only as an inducement to a traverse, and therefore not to be denied by the defendant, the plaintiff by a trick avoids having the merits of his own title tried, and yet denies that of the defendant. In *Tufton v. Temple*, Vaugh. 7, it is laid down that "the plaintiff who is to recover that which he hath not, must shew a good title before he can recover, or he shall never avoid the defendant's possession by shewing no title, or an insufficient, [407] which is the same as none. It can be neither law nor common reason for the plaintiff to tell the defendant you have no title, and thence to conclude, therefore I have. The plaintiff must recover, if at all, by his own strength and not by the defendant's weakness, as is well urged and claimed in *Digby's and Fitzherbert's case* in the Lord Hobart." And in *The Bishop of Worcester's case*, Vaugh. 58, it is said, "when you will recover any thing from me, it is not enough for you to destroy my title, but you must prove your own better than mine; for it is not rational to conclude that you have no right to this, and therefore I have; for without a better right, melior est conditio possidentis." As to the argument that matter of inducement is not traversable, though generally speaking this be true, yet where a material part of the plaintiff's title is stated by way of inducement, there it may be traversed by the defendant, who could not otherwise have an opportunity to answer it. In Poph. 101 it is said, there may be a traverse upon a traverse where falsity is used to oust the plaintiff of the benefit which the law gives him. So also in Fortescue, 349, and Str. 117, it is holden, that when the first traverse is immaterial, i.e. when it does not put the proper point in issue, there may be a traverse upon a traverse; and the authority of Str. 117 is particularly applicable to the present case, as there the defendant was an actor who was to recover on the strength of his own title as the plaintiff is here. To the same effect also is Co. Lit. 282 b. Cro. Eliz. 99. Carth. 166. Hob. 106.

It was replied, that as to the authority of Bro. Abr. tit. Present. pl. 19, the dictum of Hill, Justice, is applied to a different case in the Year Book to which Broke refers, 21 Ed. 3, c. 38 (a). With regard to the Doctor and Student, the title of the chapter containing the passage cited must be attended to; and the title is, "Where there are divers patrons of an advowson, and the church voideth, and the patrons vary in their presentments, whether the bishop shall have liberty to present which of the incumbents that he will or not?" The Court therefore in construing the passage adduced, will observe what the question in discussion was to which the passage was applied, and which obviously related to a variation in presenting by joint-patrons. As to Watson's Clergyman's Law, the authority cited only regards the duty of the Ordinary where there is a variation [408] in the presentment, and is therefore inapplicable to the present question. As to the record of the former proceedings in quare impedit to recover the same advowson, in the first action Crispin, the only person who pleaded, claimed under the Crown; and on the trial the title was found against him. Afterwards another action was brought, in which Lomax relied on the judgment by default against Cook which was conclusive against him. There was no question concerning an usurpation on one or the other coparcener, nor any averment that on account of a disagreement between the coparceners it belonged to the eldest to present. As to the demurrer to the rejoinder, it is said that a traverse is taken in the replication on an inference of law which is not traversable, and which, if the subject were traversable,

(a) The question in the Year Book is, whether a grant by several coparceners of their right in an advowson to the eldest, was good, not being stated to be by speciality. It is to this that the observation of Hill, Justice, refers.

is not a material traverse. It is therefore contended, that the other party may pass it by, and traverse the matter of inducement. Now all the authorities cited with respect to the plaintiff's traverse go only to shew that the general rule is, that the plaintiff must not desert his own title, and fall upon the title of the defendant. But admitting that rule, it is not applicable in the present case. For though the plaintiff cannot desert his own title where the defendant denies it, yet it is clearly otherwise where the defendant confesses and avoids it: For there the plaintiff in his replication may traverse the matter of avoidance contained in the defendant's plea. This evidently appears from *Digby v. Fitzherbert*. The true point to be considered is, whether the defendant rests on the matter of avoidance, if he does, the plaintiff may traverse it. The situation of the parties to this record is changed by the method of pleading; the plaintiff stands as it were in the place of the defendant, and is entitled to take advantage of the same rules of pleading to which the defendant would have been entitled if he had traversed the plaintiff's title instead of confessing and avoiding it.

Cur. advis. vult.

On this day the judgment of the Court was thus given by

LORD LOUGHBOROUGH. The plaintiffs in this case are executors and devisees in trust, and entitle themselves to the advowson in question under the will of Caleb Lomax, whom the declaration states to have been seised in fee of the advowson, and to have presented on a former avoidance. To this declaration the defendant Edward Baker pleads four pleas. On the second and third, issue is joined; the first and fourth are the subject of [409] the argument before the Court. The first plea states a title to the advowson of one Ellis who presented in 1680; that Ellis conveyed it to Killgrew, that Killgrew devised it to his wife Lucy for her life, and that the reversion on the death of Killgrew descended to his three daughters in coparcenary. It then states an avoidance during the life of Lucy the widow, and a presentation by Lomax the father of the testator, usurping on Lucy. It then states that the living again became vacant, after the death of Lucy, by the resignation of the then incumbent Romney, and that the Crown by usurpation on the right of the eldest coparcener presented again the same clerk. It then states an avoidance by the death of that presentee, and another presentation on that avoidance by Lomax usurping upon the right of the second coparcener. A title is then deduced at considerable length to the defendant from the second and third coparcener, concluding with a claim to present on the existing vacancy in the third turn.

A replication is put in to this plea, and that replication states a purchase by Lomax of the right of Lucy Killgrew the widow, and a presentation of the advowson made by him during the life of Lucy, on an avoidance then happening. A fine is then set forth, levied by the three coparceners of the advowson, and a conveyance to Lomax under that fine. Having stated this title in behalf of the plaintiffs in answer to the plea, the replication concludes that the resignation of Romney was fraudulent and without notice, and traverses that upon that resignation it belonged to the eldest coparcener to present. To this replication there is a rejoinder by the defendant, in which the defendant traverses the fine; and to that rejoinder there is a special demurrer alleging as a defect, that there is a traverse taken upon a traverse.

In this part of the argument it is incumbent on the plaintiffs to shew that their replication was good, and that the traverse with which it concludes was a material traverse. For if the replication be not good, and the traverse material, the consequence will be that the plea is a good bar to the title which the plaintiffs have set up in their declaration. It is a certain rule that the plaintiff must recover on the strength of his own title. That rule is not at all controverted; but it is argued on the part of the plaintiffs, that a defect in the defendant's title will leave the plaintiffs in possession of the title upon which they have declared, unanswered; and that the defendant when he pleads and sets forth a title in himself, puts himself in the situa-[410]-tion of a plaintiff. This argument would be well founded if the plea which the defendant has put in were bad on the face of it, since in that case the first error in pleading would be committed by the defendant, and the general title which the plaintiffs have shewn in their declaration would remain unanswered. But in the case before us it is not so; the plea is on the face of it a good plea; there is no objection to the manner in which the defendant has pleaded his title. The plaintiffs therefore must shew a more particular title than they have set forth in the declaration, and they find themselves under the

necessity of abandoning the general title on which they declared, and of shewing by the replication a better title than that which the defendant has stated in his plea. Accordingly they do so; for admitting the right of Killigrew, who is the ancestor under whom the defendant claims, the plaintiffs claim by virtue of a fine levied by all the coparceners. This, no doubt, is a full and complete answer to the title set out in the plea. But then the plaintiffs instead of resting on that title, instead of putting any matter in issue on that title, instead of drawing any conclusion on which there can be an issue, conclude with suggesting that the resignation of Romney was fraudulent, and that the usurpation for that turn was not an usurpation on the right of the eldest coparcener; for that is distinctly the effect of the traverse. A great many cases were cited to shew that this traverse was material; and I admit that is the point to be proved. But it cannot be material in the abstract; it is material or not, *quoad* the right to support which it is taken. Now the right insisted on by the plaintiffs in their replication, is a right under the title of Killigrew to the advowson by a conveyance from the three coparceners; and to that right so set out, whether the avoidance in question is in the first, second, or third turn, is of no sort of consequence. There is no question of turn with respect to a person who claims in himself a title to the whole advowson; and the irrelevance of the traverse taken by the plaintiffs to the title set out, cannot appear more strongly than by comparing this case with the case, 3 Wils. 214, which was cited in the argument to shew the sufficiency of the traverse on the part of the plaintiffs. In the case in Wilson, the title set up by the pleadings on each side was distinctly that of a presentation by turns. Neither the Company of Grocers nor the archbishop pretended either of them to have the general right to present to the living. But on the title deduced in the prior part of the pleadings, it was manifestly a [411] presentation in which two turns belonged to the archbishop and one to the Grocers' Company. The title of the plaintiffs therefore was directly maintained by the traverse which was taken in the replication: the archbishop had not only two turns, but the first turn was his confessedly *de jure*; the denying then that the plaintiffs had the right to the second turn, and the asserting that they had the right to the third turn, were in effect precisely the same propositions. By making good the point on which they took their traverse, they must by necessary consequence affirm and support the title set out in their declaration. But in the present case admitting what in all probability was true, that the right was not in the coparceners, it would not tend to shew that the plaintiffs had derived a right from Killigrew, who by confession of the pleadings was clearly at one time intitled to the right which descended on the coparceners, and which, unless it was passed by them, would still remain in them to be exercised according to the nature of their interest. It is said, however, that the defendant has rejoined informally, that he ought to have demurred to the replication. Now I take it, that wherever a traverse is immaterial, the other party may pass it by, and put in issue a more material part. But it is not necessary to consider whether it were better for the defendant to have demurred to the replication, or to have rejoined as he has done; because if the traverse be bad the replication is bad, and the defendant is intitled to judgment on the plaintiff's replication. I doubt, however, whether it would have been safe for the defendant to have done that which would have permitted the averment to stand confessed of the fine levied by the three coparceners to the use of Lomax in fee. If that be a substantive allegation, he has met it; if it be not, then the plaintiffs having admitted the title in Killigrew and the descent from him, have shewn nothing to avoid it, or to support any right in themselves, and the replication is no answer to the plea.

The fourth plea states the right correctly and truly, and is also agreeable to a former judgment of this Court on the same right of the same parties. There is but one objection made to it, namely, that it is pleaded that the coparceners did not agree to present, and therefore that on the first avoidance the presentation belonged to the eldest. The argument is that in the language of many books and some pleadings, the right of presenting by turns is said to arise when coparceners cannot agree, and many authorities have been quoted [412] to prove this position. It is also laid down in Bro. tit. Present. al Eglise, 19. Fitz. Nat. Brev. Qua. Imp. 81. Co. Litt. 166 b. Doctor and Student, b. 2, c. 30, and is clear law, that the first presentation in such case of mere right belongs to the eldest, descends to her issue, goes to her husband by the courtesy, and passes by her grant. The expression then that they cannot agree, therefore the exercise of the right must be by turns, is generally true. It is a legal presumption,

that on a right so circumstanced they cannot agree. The eldest has it pleno jure, and the concurrence of the others would only operate to their own prejudice. But it is not a position of fact that they cannot agree, nor could any issue be taken upon it. If they do not agree, the eldest must present in the first turn; an actual agreement can alone prevent it. No authority has been cited to shew it to be bad pleading to state that they did not agree; on the contrary, in the case of this very advowson the phrase in the pleadings is distinctly, that they "did not agree" and the Court in giving judgment reason upon it as being precisely synonymous with "could not agree." Besides this, in a plea in bar, certainty to a common intent is sufficient. On this ground, therefore, the fourth plea is well pleaded, and on that also there must be Judgment for the defendant.

The following case was cited in the argument from the MSS. of Mr. Justice Burnet.

BARKER AND COOK *against* THE BISHOP OF LONDON, LOMAX, AND BELLAMY, 1790.
Mic. 26 Geo. 2. C. B.

In a quare impedit brought against A. and B. tenants in common of an advowson, being assignees of coparceners, who do not agree to present, A. suffers judgment by default, and B. dies pending the writ. This judgment is a bar to another quare impedit brought by A. and C. the representative of B. (in which A. is summoned and severed,) to recover the same presentation, but is not a bar to C.'s right to recover on the next avoidance in his turn (a).

This was an action of quare impedit brought by Edward Barker and James Cook, (in which James Cook was summoned and severed) against the Bishop of London, Caleb Lomax, and Daniel Bellamy his clerk.

The declaration stated, that John Ellis was seised in fee of the advowson in gross of the vicarage of St. Stephen's, near St. [413] Alban's, and presented one Thomas Perkins his clerk, who was thereupon admitted, instituted, and inducted; that John Ellis by his will of the 30th of June 1680, devised the advowson to Rebecca his wife for life, remainder to his second son Thomas in tail male, remainder to his third son John in tail male, remainder to his fourth son James in tail male, remainder to the heirs of his second son Thomas for ever. John Ellis died. Rebecca died in 1682.

Thomas Ellis in Michaelmas term, 2 James 2, by bargain and sale enrolled, conveyed this advowson by the name of all that capital messuage or late dissolved hospital of St. Julian, with the appurtenances, and the advowson of the parish church of St. Stephen's, to John Dod and John Reeve in fee; against whom a common recovery was had in that term, in which Thomas Ellis came in as vouchee, which was to the use of Thomas Ellis in fee. In Hilary term, 2 William & Mary, a fine was levied by Thomas Ellis, and Mary his wife, to Henry Killigrew, to the use of Henry Killigrew in fee.

Thomas Perkins died the 1st of May 1693, and by his death the said church became vacant; which church remaining vacant for 18 months, King William the Third by lapse presented John Fothergill in 1695, who was admitted, instituted and inducted. Henry Killigrew by his will, 8th December, 1704, devised this advowson to his wife Lucy for life, and died in December 1712, whereby his widow Lucy Killigrew was seised for life of the advowson, with a remainder in fee to his three daughters, Lucy, Mary and Judith, as coparceners.

Lucy Killigrew, the mother, by indenture of the 28th of August 1716, on an intended marriage of her daughter Lucy with James Cook (one of the plaintiffs in this writ), and the said Lucy the daughter, conveyed one-third part of the advowson to trustees, to the use of Lucy, the mother for her life, remainder to the use of James Cook for his life, remainder to the use of Lucy the daughter for life, remainder to trustees for their lives, to preserve contingent remainders, remainder to their first, and

(a) [This case is reported in Willes's Rep. 659, and the point of it is thus stated by Mr. Durnford, in the margin: "If A. and B. coparceners in an advowson, do not agree to present on a vacancy, A. the eldest (or her assigns) may present to the first turn, and B. or her assigns to the next. And if when A. and B. do not agree, C. (a stranger) implead A. only, by quare impedit on a vacancy, and recover, it is a bar to a quare impedit brought by B. against C. for that turn, though not for the next turn."]

every other son in tail male, remainder to their daughters as tenants in common in tail, remainder to the heirs of James Cook in fee.

In 1726, Mary the daughter married Edward Barker father of the present plaintiff. In October 1728, the church became vacant by the death of John Fothergill, on which one Caleb Lomax, by usurpation on Lucy Killigrew the mother, [414] presented John Romney, who was admitted, instituted and inducted.

Lucy Killigrew the mother died in 1729, whereby James Cook became seised during his life, of one-third part of the advowson, with remainders over as aforesaid; Edward Barker in right of his wife became seised in fee of one other third part, and Judith Killigrew in her own right was seised of the other third part. On the 8th of June 1730, the church became vacant by the resignation of John Romney, whereupon the King by usurpation presented the said John Romney, who was thereon admitted, instituted and inducted.

Judith Killigrew, by her will of the 10th of May 1731, devised her third part, among other things, to trustees to pay and dispose the rent, issues and profits thereof to such persons and to such uses as Mary Barker, during her coverture, should appoint, exclusive of her husband; remainder, after Mary's decease, to the present plaintiff in tail male, with remainders over, and afterwards, viz. on the 18th of June 1731, the said Judith Killigrew died.

In May 1734 Mary Barker died, whereupon James Cook became seised for life of one-third part, Edward Barker the father of one other third part for his life, and Edward Barker the present plaintiff of one other third part in fee tail; and afterwards the church became vacant by the death of John Romney, whereby it belonged to those three to present.

During the vacancy, on the 28th of November 1747, Edward Barker the father died, whose third part thereupon came to Edward Barker the plaintiff: that it belonged to James Cook and him to present, but that the bishop, Caleb Lomax and Daniel Bellamy, unjustly hindered them, &c.

The bishop claimed nothing but as Ordinary, &c.

The defendant, Caleb Lomax, pleaded four pleas:—

1st. He pleaded a special title under a recovery, and traversed the seisin in fee of John Ellis.

2d. He pleaded the same title, and traversed that Thomas Perkins was instituted to the church on the presentation of John Ellis.

3d. That in Michaelmas term in the twentieth year of the reign of Geo. 2, he brought a quare impedit in this Court against the Bishop of London, Daniel Crispin, clerk, James Cook, one of the plaintiffs to the present writ, and Edward Barker the father, in his life-time; and in Hilary term, in the 21 Geo. 2, by the [415] consideration of the Court, recovered against the said James Cook his presentation to the said vicarage, by default of the said James Cook, and in the Easter term following declared against the Bishop and Daniel Crispin, and had a verdict and judgment, and a writ to the bishop to institute a fit person at his presentation: that his clerk, Daniel Bellamy, one of the now defendants, was admitted, instituted and inducted; it was then averred that James Cook, Edward Barker the father, and the now plaintiff, and since the decease of Edward Barker the father, James Cook and the now plaintiff never did agree among themselves to present a fit person, wherefore he prayed judgment, &c.

The 4th plea traversed that the fine between Henry Killigrew and Thomas Ellis and Mary his wife, was levied to the use of Henry Killigrew and his heirs, on which issue was joined.

The defendant, Bellamy, pleaded the same pleas.

The plaintiff replied to the several pleas of each:

1st. That John Ellis was seised in fee, and on that, issue was joined.

2d. That Thomas Perkins was instituted into the church at the presentation of John Ellis, on which issue was joined.

3d. To the third plea there was a general demurrer, in which the defendant joined.

This was argued upon the demurrer, by

Boote, Serjt., and at another day by Prime, Serjt., for the plaintiff, who contended that a recovery in quare impedit, even after plenarty by it, was no bar to the right of a stranger. Keilw. 49 a. 6 Co. 48 b. *Boswell's case*. The right of presentation or advowson is an entire thing, and one coparcener, or tenant in common, cannot

bar the other. That it is an entire thing, is holden in Co. Litt. 197 b. and that the one cannot bar the other by non-appearance or release, is laid down. 2 And. 48, 49. In case of a thing entire, and in the realty, as the presentation of a church, the release of one shall be only a bar to his part, but shall enure to the benefit of the other, who shall recover the whole presentation. 5 Co. 97 b. *The Countess of Northumberland's case*. In this case the default of Cook in the former action is to be considered as a fraud, which cannot injure the present plaintiff, who was no party to that suit. If he had been a party he might have had judgment, and a writ to the bishop notwithstanding Cook's default: for if several defendants be, and one makes default, there is a writ to the bishop awarded against him; but if there is judgment for the other [416] defendant, he shall have a writ to the bishop against the plaintiff by the common law. 2 Inst. 124, 125. Jenk. 2, Cent. 95 (case 85). As to the averment that the coparceners or tenants in common, did not agree to present a fit person, that is wholly immaterial; for though after a partition they may bring their separate actions of quare impedit, each for their respective turn, yet before partition, even after a composition to present by turns, they must join in the writ, 2 Inst. 365. Keilw. 1. But when Cook is summoned and severed in a joint writ, Barker sues for his own presentation alone, and Cook has no interest in the suit. 2 Roll. Abr. 350 (pl. 8). 1 Roll. Rep. 242. The same rule holds in the case of ravishment of ward; and also in debt by two executors. Dy. 319 b.

Draper, Serjt., and at another day, Poole, Serjt., for the Defendant, argued, that though it was true that three coparceners in law make but one person, and that after summons and severance, one coparcener shall recover alone, yet the title is always joint. The Stat. Marlbridge, c. 12, says, That if the disturber makes default there shall be a writ to the bishop, "quod reclamatio impeditoris illâ vice conquerenti non obsistat, salvo impeditori alias jure suo, cum inde loqui voluerit." By which it appears that the defendant loses his right of presenting illâ vice, for that turn, with a saving of his right at another turn.

Here is a joint right in three as tenants in common, assignees of three coparceners. A suit is brought against two of them, one dies pending the suit, the other suffers judgment against him by default, the third is no party to the suit. The defendant against whom judgment was recovered, has lost all his right to that presentation, to Lomax the plaintiff in that suit. If so, and the tenants in common were assignees of coparceners, who could not agree to present, which is admitted by the demurrer, whose turn was it to present? It was Cook's turn, as assignee of the eldest sister. 2 Inst. 365. Co. Litt. 186 b. But supposing this point were not so, and that they were barely tenants in common, the advowson being an entire thing, the presentation of one if accepted, serves for them all; so the recovery against one bars all from suing for that turn. The recovery against Cook is peremptory for that turn against him, and all claiming with or under him. Moore, 81.

If therefore Cook be a disturber for that turn, and peremptorily so by his own default, how can any one set up a title to present to that turn in the right of Cook and himself? How [417] will the judgment be peremptory against his claim pro illâ vice, if that may be done? It is said that the present plaintiff was no party to the suit against Cook; but he was privy to the title of Cook. Lomax had no reason to make the present plaintiff a defendant in that action, as Cook and Barker the father presented and were disturbers. Upon the whole it seems clear, that no title can be set up to this turn in Cook, or jointly with him; and that Barker has no right to this presentation upon this record, since Cook, as assignee of the eldest sister, is entitled to this turn, and might have brought his quare impedit against Barker, the plaintiff, had he hindered him. Co. Lit. 186. There is no ground therefore for the plaintiff to recover this presentation.

The Court were unanimous in the following judgment.

If this had been the case of mere tenants in common, it would have been more doubtful, for the advowson in that case is one entire thing, not in its nature severable but by partition. There if one releases it shall enure to the benefit of the other. 5 Co. 97. So if two tenants in common be sued in a quare impedit, one makes default, and the other appears, if he hath judgment, he shall have a writ to the bishop, though on default the plaintiff is entitled to a writ to the bishop against him who made default. 2 Inst. 124, 125. So if two tenants in common sue in quare impedit, one is nonsuited, the other shall recover. Co. Litt. 197 b. But though these rules

are laid down where two joint-tenants, or tenants in common, are parties as plaintiffs and defendants to the same suit, yet there is no case where one joint-tenant or tenant in common, is sued or sues alone, and after a recovery against him, be it in chief or by default, and a writ to the bishop, it hath been held that the other may sue with him, summon and sever him, and recover that very presentation. For it should seem that as the presentation of one joint-tenant or tenant in common, will be a presentation in the right of all, so a recovery by default against one joint-tenant or tenant in common, will be a bar for that presentation to all. 2 Roll. Abr. Present. 372, pl. 1 et. 2, 373, pl. 12. However then the case may be, with respect to mere joint-tenants or tenants in common of an advowson, it is clear as to the case of coparceners; though they may join in a quare impedit, yet upon their not agreeing to present, the law considers their right of presenting as severed by a partition to present by turns, as much as if they had actually made such a composition; therefore though tenants in common must join in quare impedit, co-[418]-parceners need not (*a*). 5 Hen. 7, 8, pl. 17. If they cannot agree, it is of common right that the eldest shall present on the first avoidance; the second on the second, the third on the third, and so on. 2 Roll. Abr. 364, pl. 1. This privilege goes to the issue or assignee in law, or in fact, of coparceners, such as the grantee, or tenant by the curtesy. 2 Roll. Abr. 346, pl. 2 and 3. Co. Litt. 166 b. Moore, 225. And if any of the coparceners be disturbed by the other, or their assigns, she may bring quare impedit against them. Suppose then a lapse incurs, where persons have a right to present by turns, it is held that only the right of the person who had then a right to present, shall be lost. Bro. Present. pl. 26. So, if there are four coparceners, the eldest and second present, a stranger usurps on the third; this usurpation will only affect that turn, and the fourth may present when his turn comes, and if disturbed bring quare impedit; for the usurpation only displaced the turn of the third. Bro. Qua. Imp. pl. 118. Suppose Cook had granted away his turn, would not his grantee be thereby entitled to his turn against Barker? And is there a stronger way of granting, than by suffering a judgment against him and execution for this turn by Lomax as is here done? Why is a usurpation against a bishop no bar to his successor, though it is to himself? Because by 1 Eliz. (C. 19) a bishop cannot grant away such an advowson. Cro. Jac. 673. Sir W. Jones 45, S. C. where a recovery without title by default, against a former Bishop of Ely, was held not binding on his successor. In this case therefore the recovery against Cook is to be considered as a grant of his turn, or a usurpation on his turn only, and therefore conclusive to Barker, who has no right to his turn, unless they had agreed to present, which is not averred, and not denied that they did not. This recovery therefore is peremptory for this turn, but will be no bar to Barker recovering the presentation at the next avoidance.

Judgment for the defendant.

ARTHINGTON AND HARDCASTLE *against* THE BISHOP OF CHESTER AND
JACKSON, Clerk. Saturday, May 15th, 1790.

Where the grant of a rectory by the crown contained an exception of all churches and vicarages thereto belonging, a perpetual curacy belonging to the rectory passed by the grant, not being included in the exception.

Quare impedit. The declaration stated, that the Defendants were summoned to answer the Plaintiffs of a plea, that they permit the Plaintiffs to present a fit person to the perpetual [419] curacy of the Church of Coverham, in the county of York and diocese of Chester, &c. That one Thomas Harcastle was seised of five undivided sixth parts of the impropriate rectory of the parish Church of Coverham, and one Richard Geldart of the other undivided sixth part of the said rectory in their demesne as of fee, as tenants in common, and not as joint-tenants, to which said rectory the nomination and appointment of the curacy of the parish Church of Coverham did belong and appertain, and doth yet of right belong and appertain; that the said Thomas Harcastle and Richard Geldart being so seised, and the curacy being vacant, they nominated and appointed one Christopher Lonsdale clerk to the said curacy, who on that nomination and appointment was licensed by the then Bishop of Chester to

(a) [Where such composition has been made, see Wats. Cl. Law, 254.]

the said curacy and to be the curate thereof in the time of Geo. 2: that in the twelfth year of the reign of Geo. 2, a fine sur cognizance de droit come ceo, &c. was levied by the said Richard Geldart and his wife, of his undivided sixth part of the said rectory of Coverham, with the appurtenances, &c. to the use of the said Thomas Hardcastle in fee, who thereupon became seised of the whole rectory in fee: that December 7th, 1743, the said curacy was augmented by Queen Anne's Bounty: that December 3d, 1750, the said Thomas Hardcastle, by a deed poll, granted to the present Plaintiffs the right of nomination to the said perpetual curacy, when the same should first and next become vacant by the death or resignation of the said Christopher Lonsdale: that December 26th, 1788, the said curacy became void by the death of the said Christopher Lonsdale, and yet is vacant, and by reason thereof it belongs to the Plaintiffs to nominate, &c.

Plea, by the bishop as usual, that he claimed nothing but the admission, &c. as ordinary, &c.

Plea by Jackson, the clerk, that he is curate on the presentation, nomination and appointment of our lord the present King duly licensed, &c. that King Geo. 1 was seised of the advowson, right of presentation or nomination, and appointment of and to the perpetual curacy of the parish church of Coverham as of one in gross by itself as of fee and right in right of his crown of England; that the curacy being vacant, he presented, nominated and appointed one Humphry Dickinson clerk to the said curacy, who was licensed by the then Bishop of Chester, and duly admitted to the curacy in the time of Geo. 1: that Geo. 1 died so seised, on whose death the advowson, right of presentation, &c. descended and came to Geo. 2, who was seised, &c.: [420] that the curacy became vacant by the death of Humphry Dickinson; on whose death, the said Thomas Hardcastle and Richard Geldart usurping upon the right of Geo. 2, nominated and appointed the said Christopher Lonsdale to the said curacy, &c.: that Geo. 2 died so seised, on whose death the advowson, &c. descended and came to our lord the present king as grandson and heir of Geo. 2, whereby he became seised, &c. and being so seised the curacy became vacant by the death of Christopher Lonsdale, whereupon it belonged to the present king to present, &c. Without this, that the nomination and appointment to the curacy of the parish church of Coverham aforesaid, belonged and appertained to the said rectory in manner and form as the said Plaintiffs have above alleged, &c.

Replication in the common form to the plea of the bishop, with judgment and a cesset executio till the plea between the Plaintiff and Jackson the clerk be determined.

Replication to Jackson's plea took issue on the traverse of the nomination and appointment to the curacy belonging to the rectory of Coverham, &c.

This issue came on to be tried at the last Summer assizes, for the county of York, when a verdict was found for the Plaintiffs, subject to the opinion of the court on a case, which stated,

That in the reign of Hen. 3 the rectory of Coverham was appropriated to the abbey of Coverham, and from that time to the time of the dissolution of the abbey the parish church of Coverham was served either by some of the monks, or by some person whom they employed, there not appearing to have ever been a vicarage endowed.

Upon the dissolution of the abbey in the 27th year of Hen. 8 the same with all its members and appurtenances came to the crown, and continued in the crown till the 5th year of Ed. 6, when that king by letters patent granted the same to John Ward for 21 years by the following description "Totam rectoriam ecclie (ecclesie) pochial (parochialis) de Coverham, cum pertin(entiis) in com(itatu) suo Ebor(acensi) Abbie (Abbatie) de Coverham in eodem com(itatu) auctoritat(e) Parliament(i) supress(u) & dissolut(u) quondam spectant(em) & pertinent(em), ac omnia domos, edificia, horrea, terr(as) glebas, oblacões (oblationes), obvenções (obventiones), proficua, commoditat(es) et emolumenta quecuq. eidem rector(ie) quoquomodo specan(tia) sive pertinen(tia); except(is) tamèn semp'(er) nobis heredibus et successoribus nostris om-[421]-nino reservat(is), omnibus boscis et suboscis, (de in et super pmissis (pæmissis) crescen(tibus) et existen(tibus), ac advocat'(a), vicar(ie) ecclie (ecclesie) de

(a) It is obvious, that if this abbreviated word be here used in the ablative case, the advowson of the vicarage is included in the exception; if in the accusative, that it passed by the grant.

Coverham prædict(æ) hend (habendum) et tenend. (tenendum)," &c. reserving an annual rent of 20l. &c.

Queen Elizabeth by letters patent in the 14th year of her reign, after reciting the above grant of Ed. 6, in consideration of 853l. 12s. granted to Thomas Allen and Thomas Freeman "Revecoem (Reversionem) et revecoes (reversiones) pædict (prædictæ) rector(æ) ecclie (ecclesie) pœchial (parochialis) de Coverham cum ptin (pertinentiis) ac pelicôr (prædictorum) domor(um) edificiorum) horreor(um) terr(arum) gleb(arum) decim(arum) oblae' (oblationum) obvene (obventionum) pfc' (proficuum) commoditat(um) et emolument(or)um quor'cunq (quorumcunque) eidem rector(æ) quoquomodo spectan(tium) sive ptinent (pertinentium), &c. &c." These letters patent then went on to grant the whole rectory of Coverham to Allen and Freeman with the several appurtenances described (but without mentioning the vicarage) and at the end of the description contained the following clause. "Ac omnia alia commoditates et emolumenta quæcunq, eidem recôrie (rectoriæ) quoquomodo spectan(tia) sive pertin'(entia) aut ut membr(a) ptes (partes) vel pcell (parcella) ejusdem rector(æ) hît(habita) cognit'(a) accept(a) usitat(a) et reputat(a) existen(tia) modô vel nup(er) in tenur(â) sive occupa'coe (occupatione) pe'dei (prædicti) Jôhis (Johannis) Ward, &c. &c." Then followed "Nec non totam illam r'oriam (rectoriam) nrâm (nostram) de Ifordecum omnibus suis p'tin (pertinentiis) in com(itatu) nro (nostro) Sussex," &c. with a particular enumeration (a) of the appurtenances belonging to the rectory of Iford, To have and to hold the said rectories of Coverham and Iford in as full and ample a manner as any Abbot of Coverham, or the former owners of the rectory of Iford (naming them) had enjoyed the same.

"Except(is) tamen (semp(er) et extrâ presentem concessionem n'ram (nostram) nob(is) hered(ibus) et successoribus n'ris (nostris) omnino reservatis omnibus campanis, et toto plumbo, de, in, et super premissis existent(ibus) præter plumbeas gutturas, et plumbum in fenestris eor'dem (eorundem) pre-[422]-miss(or)um ac etiam omnibus advoe'ne (advocationibus) rector(iarum) vicar(iarum) et eccliar (ecclesiarum) premiss(is) seu eor(um) alicui spectan(tium) seu pertin(entium) nob(is) hered'(ibus) et successoribus nris (nostris) simili modo except(is) et reservat(is)," &c.

The case farther stated, that during the time the rectory of Coverham remained in the crown, an annual pension of 5l. 6s. 8d. was paid by the crown to the person who was chaplain and curate for the time being of the parish church of Coverham.

That there was a vicarage at Iford at the time of the above grant of Queen Elizabeth to Allen and Freeman.

That in 1642 Thomas Dickinson was licensed to serve the curacy of Coverham. on the presentation of William Hardecastle and Thomas Horner impropiators.

That in 1691 Thomas Oddie was licensed to serve the curacy of Coverham, but it did not appear on whose nomination.

That between the years 1691 and 1708 (the exact time not appearing) John Turner was licensed to serve the curacy of Coverham.

That in 1708 the said John Turner was instituted to the rectory and vicarage of Coverham, on the presentation of Queen Anne, patron per lapsum temporis.

That in 1727, on the supposed death of the said John Turner, Humphry Dickinson was instituted to the vicarage of Coverham on the presentation of King George 2, patron pleno jure. That Turner afterwards appeared and claimed the church, upon which Dickinson gave it up.

That in 1737 while the said Turner was in possession of the church, Christopher Lonsdale was nominated to the curacy of Coverham by Thomas Hardecastle and Richard Geldart impropiators.

That by a process in the consistory court of Chester, the said Turner was dispossessed, and that in 1739 the said Lonsdale was licensed to the curacy of Coverham, which he enjoyed till his death in 1789.

On the part of the Plaintiffs, Lawrence, Serjt., argued in the following manner. The question in this case is, whether in the exception of the advowson of "all rectories, vicarages, and churches," contained in the grant of Queen Elizabeth, the right of nominating a curate to the church of Coverham be included? The several nominations and presentations which have taken place subsequent to that grant, are no farther ma-[423]-terial, than as the usage may operate to explain the grant. For

(a) But did not mention the vicarage of Iford.

the *quare impedit* is brought to recover the nomination to the curacy, and the plea of the Defendant Jackson is, that he is curate on the nomination of the king. But there are two points which seem clearly in favour of the Plaintiffs: 1st, That under the words of the exception, considered without relation to the usage, no right was reserved to the crown of naming the curate; 2d. That the usage, as far as it is found, operates against the Defendant.

It is stated that the appropriation was made in the reign of Henry 3, and that prior to the dissolution of the Abbey of Coverham the church was served by some of the monks, at which time there does not appear to have been any vicarage endowed. It is also stated, that during the time the church was in the hands of the crown, a pension was paid by the crown to the curate. Upon this state of the case, it appears that when the lease was made by Ed. 6, and the reversion granted by Eliz there was no vicarage in existence upon which the exception could operate. The question then comes to this, whether, as there was no vicarage, properly speaking, to which the exception could be applied, it did not mean, and may not be understood to reserve to the crown the right of nominating the person who was to perform the spiritual office, though such person were only chaplain or curate. The great difference between rectories appropriate, and those which are not, is that in the latter, the rector is for life, in the former perpetual, Plowd. 495. 2 Roll. Abr. 341. Where there is no vicarage endowed, the appropriation is as to the service of the church, in the same state as before the passing the 15 Ric. 2, c. 6, & 4 Hen. 4, c. 12. As the rector cannot himself execute the duty, he must find a clerk to perform the office for him. Prior to those statutes the persons employed were removable at the will of the rector, and had no claim to any salary but such as was agreed upon with the rector. Gibs. Cod. 717. 1 Burn's Ecc. Law, 71. 2 Burn's Ecc. Law, 71. 1 Blac. Comm. 387. Bunb. 273. Nor has a curate now any interest for which any remedy is given by law, except an action for work performed on a quantum meruit. To such an office as this, the terms of the exception are in no degree applicable. An advowson is the right of presentation or collation to a church. Co. Litt. 119 b. Every church is either presentative, collative, donative, or elective. Ib. A *quare impedit* may be sued *de ecclesiâ*, which always imports a rectory [424] or parsonage. F. N. B. 76. A curate signifies a clerk not instituted to the cure of souls. 2 Burn's Ecc. Law, 52. But to a curacy there is neither presentation nor collation. The term advowson is never applied but to a benefice, which formerly a curacy was not. In times when the feudal system prevailed, institution took its rise; the Ecclesiastical law considered benefices as analogous to lay fees, and therefore required institution to be made by the bishop. But where there was no benefice no institution was necessary; and no curate was ever instituted to an office which he held merely at will.

The term vicarage, which at the time of the grant had a known defined sense distinct from its original meaning, implied an office to which institution and induction were necessary according to stat. Ric. 2 & Hen. 4. There may be strictly speaking an advowson of a vicarage, but the term advowson can neither be applied to a curacy nor by fair construction be holden to mean it. The only argument which can be used on the other side is, that unless the words mean a curacy, they mean nothing, there being no vicarage at Coverham. The answer to this is, that the words were used *ex majori cautela*, and that the officers of the crown inserted them, lest there might possibly be a vicarage at Coverham, as there clearly was at Iford. This evidently appears from the word rectories being used in the same sentence, and that they made the exception as of course, without attending to the import of the words: for the exception extends to the very subject of the grant, namely, the rectory. In Hob 303, it is laid down that grants are to be construed according to their plain and easy sense; in 10 Co. 105 b. it is said that every exception and reservation is to be strictly construed. In Co. Litt. 47 a. the difference is marked between an exception, which is ever part of the thing granted, and of a thing in esse, and a reservation, which is always a thing not in esse, but newly created or reserved out of the land or thing demised. But here there was no new creation of a vicarage.

This rule holds even in construing grants made by the crown, as in cases of patents granted according to 43 Eliz. c. 1, which are to be taken most strongly in favour of the patentee. The meaning indeed of that maxim of law, which says that the grants of the crown shall be strictly construed, is that they shall not exceed the intent of the crown, and shall be expounded most for the honor of the crown. Nor is it

probable from the nature of the thing, that to a curacy without a certain salary or any [425] fixed emolument, the crown should wish to retain the right of appointment; and in a case too where the person appointed could not have any remedy whatever to obtain his office. At common law no remedy would lie, and it was not till the stat. Geo. 1, st. 2, c. 10, was passed, which put augmented curacies upon a footing with other benefices, that a quare impedit could have been brought. Though a mandamus would go to compel the bishop to license, yet it could not oblige the impropriator to admit an officer who held at will. But whatever might have been the intention of the crown, it had no power to reserve the presentation to the curacy out of the grant of the rectory. The nomination of the curate could not be separated from the rectory. Dyer, 58 b. Before the dissolution of monasteries, all rectories now impropriate were in the hands of religious houses, who in contemplation of law (where there was no vicarage endowed) were in every sense the rectors of parishes, and were considered as themselves discharging the duties. From them the right of naming a curate could no more be separated, than from a rector at the present day. This could not now be done; a condition of that kind in a presentation would be void. If so, it could not have been good in the case of a religious house. By becoming appropriator the house possessed all the qualities, and was liable to all the burthens of parson. It became responsible to the bishop, and liable to his process for neglect of duty. No instance can be found of a separation while the religious houses continued. On the dissolution of those houses the appropriations were vested in the crown or its grantees to hold in the same manner as the religious houses held them. Stat. 27 H. 8, c. 28, s. 2, & 31 H. 8, c. 13, s. 2. No new character was created, but the impropriator becoming rector stood in the same situation as the monastery did before: he was the only person to whom the law looked for a performance, and against whom it could proceed for a neglect of the duties. It seems a necessary consequence, that he who is punishable for neglect of duty, and on whom the law imposes certain burthens, should have the sole power of appointing his substitute when he cannot himself personally discharge the office.

But if on the other hand it should be argued, that when the nomination of the curate is transferred to another, the rector is no longer answerable for the discharge of the duty, or punishable if no curate be appointed; the consequence would be, that [426] there might be no means of compelling the performance of the duty. The person to whom the right belonged might be unknown, or out of the reach of Ecclesiastical censures. He might have *enobona Ecclesiastica* liable to sequestration. Before the passing the stat. 1 Geo. 1, st. 2, c. 10, which held curacies to be ecclesiastical benefices, no lapse incurred for not nominating to a curacy; nor had curacies any of the qualities necessary to an inheritance. Whatever could have been reserved to the crown capable of descent, must have been either a corporeal or incorporeal hereditament. But the right of appointing a curate, is no more an hereditament than the right of appointing any other servant.

With respect to the usage, the first presentation made by the crown was merely *per lapsum temporis* to the rectory: the second was wrongful, and the presentee was in fact removed by the persons claiming under the grant of Queen Elizabeth, so that there appears no act of the crown exercising the only right which, it is now contended, exists.

Le Blanc, Serjt., for the Defendant. The question, as it is said on behalf of the Plaintiffs, arises from the construction of the two grants of Ed. 6, and Eliz. which must be construed together; and the question is, whether the curacy which was separated from the rectory by the reservation in the grant of Eliz. can again become appurtenant? Now it is a clear rule of law, that an advowson or the like which was appurtenant and has been once severed from the principal, can never afterwards become appurtenant, though it should come again into the same hands. 2 Mod. 1. With respect to the argument, that the king's grants shall be construed in favour of the grantee, it is contrary to the general rule of construction. Plowd. 243. But, another rule is, that all the words of a grant shall, if possible, take effect. In the grant of Ed. 6, the words of the exception cannot be operative, unless they mean the curacy. When the monastery was dissolved, it came to the crown, from which an annual stipend was paid to the curate, but there was no vicarage belonging to it. If the words thereof of the exception in this grant do not mean the curacy, they can have no effect, there being no vicarage at Coverham. In the grant of Elizabeth the

exception is of all advowsons of vicarages and churches, &c. in the plural number; this seems to have been done by design, as there was a vicarage at Iford, and with reference to the exception in the grant of Ed. 6, which is in the singular [427] number, and could only be applicable to the curacy. The exception therefore in the grant of Elizabeth, comprehended the vicarage of Iford, and all that it could mean to comprehend at Coverham, namely the curacy. As to the argument, that the term advowson is inapplicable to a curacy, it certainly may be understood to mean the patronage which the founder of the church originally had, whether it were a donative, or the right of presentation or nomination. Originally the office of vicar and curate were the same, whether called vicarius, capellanus, or by any other appellation. Those persons who discharged the duty of the rector were so described. A vicar was one who performed the service of the church vice rectoris; so also was a curate. In the term "vicarages" therefore a curacy might well be included, as a vicarage and a curacy were in effect the same office. With respect to the argument, that as a stipendiary curate was not instituted to his office, therefore the term advowson could not be applied to a curacy, the same argument would go the length of proving that there could be no advowson of a donative, because to a donative no institution is necessary. As to the authority cited from Hobart, 303, that was not the case of the construction of a grant of the crown, but only whether an advowson passed by the words "commodities, emoluments, profits and advantages," which the Court held it did not. The same answer may be given to 10 Coke, 105, which was not on a question between the crown and the subject, but between subject and subject. As to the 43 Eliz. c. 1, that was passed for the particular purpose of the patentees of the crown. It was stated on the other side, that though the object of the crown might be to reserve the nomination of the curacy, yet that it had no such power, because it was inseparable from the rectory. But what is the issue? If the curacy could not be severed from the rectory, the issue must fail. It is stated to have been appurtenant to the rectory; if so, it might clearly have been severed. Admitting that where the impropiator does not appoint the curate, he is not answerable for a neglect of duty, it proves nothing more than this, namely, that if the appointment be taken away, responsibility is also taken away. The case in Dyer, 58 b. was merely between lessor and lessee. With respect to the assertion that this is neither a corporeal nor incorporeal hereditament, yet it is as much incorporeal as the advowson of a vicarage, and equally capable of being reserved to the grantor his heirs and successors.

[428] As to the usage, there is no evidence of what was done from 1561 to 1642, a period of near eighty years; but of the instances which are given of the several nominations, two were made by the crown, and it is uncertain by whom those of 1691 and 1758 were made.

Cur. advis. vult.

LORD LOUGHBOROUGH. In this case, it is stated, that after the dissolution of religious houses the abbey of Coverham was demised by E. 6, to one Ward for 21 years, and that in the grant, after the demise of the rectory there is an exception of all woods, underwoods, and a demise of the advowson of the vicarage of the church of Coverham: and that the reversion expectant on that term for years was sold by Queen Elizabeth to Allen and Freeman. The letters patent of Eliz. are set forth, which begin by reciting the former demise, and then the Queen grants the reversion of the rectory with the appurtenances as before specified in the patent and the demise for years. After this, there is a grant of the whole rectory with a very ample description and all general words of grant, which concludes with granting it to Allen and Freeman in as full a manner as it was possessed by any abbot of Coverham. This undoubtedly grants expressly more than was contained in the terms of the demise to Ward, because it directly grants the woods and underwoods which were excepted out of the demise to Ward. It then mentions a grant of the rectory of Iford, in the county of Sussex; and at the close there is an exception of all advowsons of the rectories, vicarages, and churches belonging to the premises. The case goes on to state, that there was a vicarage belonging to the rectory of Iford, but none to the rectory of Coverham; but during the time the rectory of Coverham remained in the crown, an annual stipend of 5l. 6s. 8d. was paid by the crown to the curate. It is then stated, that Thomas Dickenson was admitted to the curacy in 1642 on the nomination of the grantees; that in 1691, one Oddie was licensed by the diocesan to serve the curacy; that afterwards one Turner was licensed in the same manner, and that the same Turner in 1708,

was instituted to the rectory and vicarage of Coverham, on the presentation of Queen Anne by lapse. The case next states, that in 1727, on the supposed death of Turner, one Dickenson was instituted to the vicarage of Coverham, on the presentation of King George I, *pleno jure*; that afterwards Turner who was not dead, nor had made any avoidance of the living, ap[429]-peared, and claimed the church, upon which Dickenson gave it up: that in 1737, one Lonsdale was nominated to the curacy by the impropriators, while Turner was in possession, who was afterwards dispossessed by process in the consistory court of Chester; and that by the death of Lonsdale there is now an avoidance.

On this case, the question for the determination of the court is, what passed by the grant of Queen Elizabeth, to the persons under whom the present parties claim? for if all the interest in the rectory passed, the curacy which is incident to the rectory, (I rather call it incident than *appurtenant*,) undoubtedly passed along with it. It is contended on the part of the plaintiffs, that on the true construction of the grant no exception can be intended of the curacy, and that if such exception had been inserted in the grant it would have been void as repugnant to the grant itself, because the rector of a rectory impropriate where there is no vicarage endowed and no perpetual curacy, is obliged by law to find a curate to serve the church and give him a reasonable allowance. He may make the best terms he can, but that it is the duty of the bishop by ecclesiastical censures to compel the performance of the duty for the sake of the church. That question would lead pretty far, but it is immaterial to enter into the consideration of it, if on a thorough view of the grant together with the facts of the case there is no reason to say that the curacy was excepted. That to us appears to be the true construction, and confirmed by the usage. The grant of Elizabeth begins, as I before stated, with a recital of the demise to Ward; but it would not be just to conclude that it meant to give no more. It is manifest that Ward had not all which the grantees afterwards had, because there is an express reservation in the demise to him of a part which they enjoyed. He was to have the profits of the rectory paying a rent of 20*l.* per annum during the term; but the transaction with Allen and Freeman was for an absolute sale at a large price paid. The grant does not stop short; it was necessary to recite the term because it was a grant in fee, and the purchaser under the crown acquired a right during the remainder of the term to the rent. It therefore begins with giving to the grantees the reversion after the term for years, and goes on in explicit and distinct words, granting this and all other commodities and emoluments whatever belonging to the rectory, parcel of the possessions of the abbot of Coverham; it mentions expressly the woods, underwoods, and trees, and closes a very long recital of the particulars with the [430] words "in as ample a manner and form as any abbot of the abbey of Coverham had possessed and enjoyed the same." The general exception which follows was to prevent dilapidations, which were at that time very common to the destruction of churches. In the exception of the vicarage it is perfectly clear that the nomination to the curacy is not in terms included. Yet it is argued, that in a grant of the crown which is to be favourably construed, the court would extend the meaning to a reservation of the nomination to the curacy, if the words of the grant could justify that extension to be made. But the words of this grant hardly justify such an extension. If there had been an exception of the advowson of a vicarage specifically named in the grant of the rectory of Coverham, the argument would have had this ground to stand upon, namely, that something must be meant to be excepted, that as in reality (there being no vicarage at Coverham) the only nomination which could be made, was to the curacy, it must be implied that the curacy was meant, though improperly described as a vicarage. But that is not the case. The words in the grant are general and sufficiently answered, if there be a vicarage belonging to either of the livings. Now to one of the livings, to Iford, there is a vicarage belonging. That fully satisfies the words of the exception. They are not nugatory words, and it is not necessary in the construction of them that there should be an intention in the grant to make any exception whatever relative to the rectory of Coverham. Besides this, there are subsequent words in the grant which I think go pretty far to shew that this could not be the intention. For there is a provision on the part of the crown, to indemnify the purchasers from all burthens, charges, and rents which might be issuing out of the object of the grant, and a particular exemption from the payment of a pension of four shillings per annum, payable out of the rectory of Iford to the vicar. Now the nomination to that vicarage being

intended to be reserved to the crown in the general mention which is made of all burthens issuing out of the things granted, the payment of this annual stipend to the vicar of Iford is particularly noticed. But there is no exemption from the payment of any allowance to be made to the curate. The effect therefore of the grant would be, according to the argument, to make the grantee of the rectory subject in the law to payment of the curate without giving him the power of nomination; and we should intend a reservation severing the nomination to the curacy from the fund out [431] of which the provision for the curate must come. This would be certainly contrary to good policy and productive of mischief, by making it questionable who was to maintain the curate, and leaving the ecclesiastical court destitute of means to compel such maintenance by sequestering the profits of the living. The curate also would be left without having any resort to the person by whom he was nominated, for a provision for his subsistence. It is too much therefore to contend, as the Defendant does in this case, without special words, that a reservation should be made by intendment out of the general words of the grant when there is no part of the subject-matter, nor any thing in the nature of the case, which would tend to induce such an intendment, and when reason and policy are against it. If this intendment were to hold, then the question would arise which my Brother Lawrence argued with a great deal of force, but which it is not necessary now to enter into, whether such a reservation could be made? The usage, it is said, stands very loosely on behalf of the impropiators. But it is certainly in their favour. The first nomination of which there is an account, was made by the impropiators. How the next person was appointed does not appear. The nomination of Turner which followed, which is the first exercise of the right of the crown, is stated to have been by lapse, from which it is to be presumed that the crown had no original right to nominate. The next presentation of Dickenson in 1727 is still less in favour of the right of the crown, because it was clearly made on complete misinformation. There was no vacancy, no avoidance, and Turner had still the title to the living. It must have been made on supposition either that he was dead, or that there was an avoidance by some other means. It was a presentation granted by the crown in a case which neither intitled the crown nor any one else. Turner appeared, and Dickenson gave up the church to him, and he resumed the possession. While Turner was so in possession, the impropiators nominated Lonsdale, and on a suit in the Consistory Court, the Bishop of Chester affirmed their right to nominate, and Turner was in consequence dispossessed, which would not have been if the right had been in the crown. All therefore that we know of the enjoyment of the right of nomination to this curacy from the time of the grant down to the present time is, as far as it goes, in favour of the plaintiffs, and there is no instance of a [432] clear right of nomination on the part of the crown. It is for these reasons we are of opinion that there ought to be

Judgment for the plaintiffs.

BOX *against* BENNETT. Monday, May 17th, 1790.

Though a writ of error may be brought on a judgment of nonsuit, the court will not in any case stay proceedings, or set aside an execution for the costs, on that account (a).

The Plaintiff was nonsuited at the trial of this cause at the last assizes for the county of Kent, but immediately after the taxation of costs served the Defendant with the allowance of a writ of error. The Defendant not regarding this, proceeded to take out a fi. fa. for the costs, under which the sheriff took the Plaintiff's goods in execution.

A rule having been granted to shew cause why the fi. fa. should not be set aside, and the goods restored to the Plaintiff,

Bond, Serjt., shewed cause, contending that no writ of error could be brought on a

(a) [In *Evans v. Swete*, 2 Bingh. 326, the Court said that they would abide by the decision in the principal case, and refused to stay execution unless some real error were pointed out, acc. *Kempland v. Macaulay*, 4 T. R. 436, but see *Levell v. Perry*, 5 T. R. 669, and *Masterman v. Grant*, *ibid.* 714.]

judgment of nonsuit, as the Plaintiff was out of court, and no error could be assigned on the proceedings.

Kerby, Serjt., in support of the rule, argued that it was the constant practice to grant writs of error on judgments of nonsuit, and cited Dyer, 32 a. 1 Rol. Abr. 744. Str. 235.

The Court said, that though error might be brought on a judgment of nonsuit, it did not follow that the execution ought to be set aside. And on this day, after consideration, they laid it down as a general rule, that they would in no case stay proceedings or set aside an execution on account of a writ of error being brought on a judgment of nonsuit, which evidently must be for the purpose of delay and vexation.

Rule discharged.

End of Easter term.

[433] CASES ARGUED AND DETERMINED IN THE COURT OF COMMON PLEAS IN TRINITY TERM, IN THE THIRTIETH YEAR OF THE REIGN OF GEORGE III.

MILLS *against* AURIOL. Tuesday, June 15th, 1790.

[Referred to, *Thomas v. Sylvester*, 1873, L. R. 8 Q. B. 372.]

The bankruptcy of the Defendant cannot be pleaded in bar of an action of covenant for rent (a).

This was an action of covenant for non-payment of rent payable quarterly. The covenant on which the breach was assigned, after the usual words, "yielding and paying, &c." was as follows. "And the said Peter James (the Defendant) for himself, his heirs, executors, administrators, and assigns, did thereby covenant, promise, and agree, (amongst other things) to and with the said Benjamin, (the Plaintiff,) his heirs and assigns, that he the said Peter James, his heirs, executors, administrators, or assigns, should and would, during all the rest of the said term thereby demised, well and truly pay, or cause to be paid, unto the said Benjamin, his heirs and assigns, the said clear yearly rent of 110l. in manner and form aforesaid, according to the true intent and meaning of the said indenture." The breach was the non-payment of 27l. 10s. for a quarter ending December 25, 1789.

The Defendant pleaded 1st, Non est factum. 2d, Riens arrere. 3d, "That after the making of the said indenture in the said declaration mentioned, and before the suing out of the original writ of the said Benjamin against the said Peter James, to wit, on the first day of January in the year of our [434] Lord 1789, and from thence until the day of suing out the commission of bankruptcy hereinafter mentioned against the said Peter James, he the said Peter James was a trader within the intent and meaning of the several statutes made and then in force against bankrupts; that is to say, a merchant, dealer, and chapman, to wit, at London aforesaid, in the parish and ward aforesaid, and during all that time, used and exercised the trade and business of a merchant, in buying and selling divers silks and other goods, wares and merchandizes, and receiving consignments of silks and other goods, and selling the same on commission for his correspondents and customers, for profit and gain, and thereby sought and endeavoured to get his living as other persons of the same trade usually do; and the said Peter James so being such trader as aforesaid, within the intent and meaning of the said several statutes made and then in force concerning bankrupts, and so seeking his living by way of buying and selling as aforesaid, he the said Peter James afterwards, and before any of the rent or money in the said declaration mentioned became due and payable, to wit, on the 8th day of June in the year aforesaid, at London aforesaid, in the parish and ward aforesaid, became and was indebted to one George Tickner Hardy, gentleman, then being a subject of this realm, in 100l. of lawful money of Great Britain, for so much money, before that time, paid, laid out and expended by the said George Tickner Hardy, to and for the use of the said Peter James, at his special instance and request; and the said

(a) See stat. 6 Geo. 4, c. 16, s. 75.

Peter James being so indebted as aforesaid, and being a subject of this realm, and so seeking his living by way of buying and selling as aforesaid, he the said Peter James, afterwards, to wit, on the same day and year last aforesaid, at London aforesaid, in the parish and ward aforesaid, (he the said George Tickner Hardy so being a creditor of the said Peter James, and being then wholly unsatisfied his debt) manifestly became a bankrupt within the intent and meaning of the several statutes made and then in force against bankrupts; and the said Peter James so being and remaining a bankrupt as aforesaid, he the said George Tickner Hardy, as well for himself, as for all other creditors of the said Peter James afterwards, to wit, on the 9th day of June, in the year aforesaid, at Westminster, in the county of Middlesex, to wit, at London aforesaid, in the parish and ward aforesaid, exhibited his certain petition in writing, to the Right Honourable Edward Lord Thurlow, then Lord High Chancellor of Great Britain, and thereby petitioned the said Lord Chancellor to grant to the said [435] George Tickner Hardy His Majesty's commission, to be directed to such and so many persons as he should think fit to be directed to such and so many persons as he should think fit to give his authority of and concerning the said bankrupt, and to all other intents and purposes, according to the provisions of the statutes made and then in force concerning bankrupts, as by the said petition remaining in the Court of Chancery of our lord the now King at Westminster aforesaid, more fully appears; and the said Peter James further saith, that upon the said petition of the said George Tickner Hardy so exhibited as aforesaid, on behalf of himself and all other the then creditors of the said Peter James, according to the form of the statutes in such case made and provided, for giving them relief on that behalf, afterwards and before the said sum of money in the said declaration mentioned, or any part thereof became due, and before the said supposed breach of covenant, to wit, on the ninth day of June in the year aforesaid, at Westminster aforesaid, to wit, at London aforesaid, in the parish and ward aforesaid, a certain commission of our lord the now King, founded upon the statutes made and then in force concerning bankrupts, in due form of law issued, under the Great Seal of Great Britain, bearing date the same day and year last aforesaid, directed to Michael Dodson, Thomas Plumer, Edward Finch Hatton, Robert Comyn, and Charles Proby, Esquires, and was then and there to them directed, by which said commission our said lord the now King gave full power and authority to them the said Michael Dodson, Thomas Plumer, Edward Finch Hatton, Robert Comyn, and Charles Proby, four or three of them, to proceed, according to the said statutes, and all other statutes then in force concerning bankrupts, not only concerning the aforesaid bankrupt, his body, lands, tenements, both freehold and copyhold, goods, debts, and all other matters whatsoever, but also concerning all other persons, who by concealment, claim, or otherwise should offend touching or concerning the premises, or any part thereof, against the true intent and purport of the said statutes, and to do and execute all and everything and things whatsoever, as well for and towards satisfaction and payment of the creditors of the said Peter James, as towards and for all other intents and purposes whatsoever, according to the order and provisions of the said statutes, as by the said commission [436] (amongst other things) more fully appears: by virtue of which said commission, and by force of the statutes aforesaid, the said Michael Dodson, Edward Finch Hatton and Robert Comyn, three of the commissioners named in the said commission afterwards, to wit, on the eleventh day of June, in the year aforesaid, to wit, at London aforesaid, in the parish and ward aforesaid, having taken upon themselves the burthen of the said commission, then and there duly adjudged and declared the said Peter James to have been and become on the day of the issuing of the said commission, and then to be a bankrupt, within the true intent and meaning of the said statutes, some or one of them: and the said Peter James further says, that afterwards, to wit, on the 26th day of June in the year aforesaid, at London aforesaid, (the said Peter James then remaining and continuing a bankrupt as aforesaid) they the said Michael Dodson, Edward Finch Hatton and Robert Comyn in due manner, and according to the form of the statute in such case made and provided, by an indenture then and there duly made, and bearing date the same day and year last aforesaid, between the said Michael Dodson, Edward Finch Hatton and Robert Comyn of the one part, and Robert Mendham of Walbrook, London, merchant, George Marsh of Broad-Street, London, silk broker, and the said George Tickner Hardy of the other part, then and there duly bargained, disposed, assigned and set over, amongst other things, the said indenture of lease in the said declaration mentioned, and all the estate

and interest of the said Peter James, of, in, and to the same, and of, in, and to the premises thereby demised, to the said Robert Mendham, George Marsh, and George Tickner Hardy (the said Robert Mendham, George Marsh, and George Tickner Hardy, before the said assignment so made to them as aforesaid, having been duly chosen assignees of the debts, credits, goods and chattels, estate and effects of the said Peter James the bankrupt, according to the form of the statutes in such case made and provided), to hold to them the said Robert Mendham, George Marsh, and George Tickner Hardy, their executors, administrators and assigns, from thenceforth for the residue of the said demised term, then to come and unexpired; by virtue of which said assignment, all the estate, interest, and term of years then to come and unexpired, property, claim, and demand of the said Peter James, of and in the said indenture of lease, and of and in the premises thereby demised, then and there became and was vested in the said Robert Mend-[437]-ham, George Marsh, and George Tickner Hardy, as such assignees, and the same from thence hitherto hath been, and still is vested in them, the said Robert Mendham, George Marsh, and George Tickner Hardy (the said commission still remaining in full force and effect, in no ways superseded, cancelled, or set aside,) and the said Robert Mendham, George Marsh, and George Tickner Hardy, then and there, to wit on the same day and year last aforesaid, at London aforesaid, became, and were, and for a long time, to wit from thence hitherto have been, possessed of and in the said demised premises, with the appurtenances, and this the said Peter James is ready to verify," &c.

To this plea there was a general demurrer, and issue joined on the two first.

The demurrer was argued in Easter term last by Bond, Serjt., for the Plaintiff, and Le Blanc, Serjt., for the Defendant; and in this term by Adair Serjt., for the Plaintiff, and Lawrence, Serjt., for the Defendant. The following was the substance of the arguments on the part of the Plaintiff.

The matter disclosed in the third plea, affords no answer to the demand of the Plaintiff, because the covenant on which the action is brought, being express, personally bound the Defendant, and was not done away by the assignment under the commission of bankrupt. In leases there are two sorts of covenants, by which tenants are liable either to an action of debt or covenant; namely, express, and implied covenants. In the latter, the lessee is liable to either species of action, unless there has been a complete assignment with the assent of the lessor, for by such an assignment, the right of action of the lessor is certainly divested. *Walker's case*, 3 Co. 22 a. where the lessee having assigned his term without the assent of the lessor, was still holden to be subject to debt for the rent in arrear. So in *Wulham v. Marlow* (a), Lord

(a) *Woodham v. Marlow*, B. R. Mich. 25 Geo. 3*.

This was an action of debt for rent due on a lease which was expired. The defendant pleaded: 1. Non est factum. 2. As to 18l. 5s. one quarter's rent, that he became a bankrupt, and that the said sum of 18l. 5s. was due before his bankruptcy. 3. As to the residue of the sum demanded, that it became due after the bankruptcy. On the first plea issue was joined. On the second the plaintiff remitted the 18l. 5s. and demurred generally to the third.

It was argued in support of the demurrer, that where there is an assignment by the original lessee, if the lessor accepts rent of the assignee the lessee is thereby discharged, it being an acceptance of the assignee as tenant. The lessor may either resort to the lessee on the privity of contract, or the assignee on the privity of estate. But having made his election against whom to proceed, he is bound by it. *Walker's case*, 3 Co. 22, *Devereux v. Barlow*, 2 Saund. 181. The case of *Coghill v. Freelove*, 3 Mod. 325, goes farther, as there it is said, that privity of contract with the testator is not discharged by his death. In *Cantrel v. Graham*, Barnes, 69, the Court interposed on behalf of the liberty of the person. That is like the case of a certificated bankrupt having by a subsequent promise made himself liable to a debt contracted before his bankruptcy, where the Court have permitted a common appearance.

As to the general question, whether the Plaintiff can recover notwithstanding the assignment, the bankrupt may indeed say, that he has parted with his whole interest, and that it is hard he should be called to account, on a contract previously made.

* Cooke's Bankrupt Laws, last edit. 518 [more fully and correctly reported in 8 East, 316 (n)].

Mansfield says that the tenant [438] shall not by his own act destroy the tenancy without the concurrence of the landlord. As the law is thus with regard to [439] the action of debt on an implied covenant, so also it is with respect to the action of covenant on an implied covenant, in which the general rule is, that without the assent

But if there be any hardship, it is for the Legislature to interpose. Bankruptcy arises from the act of the bankrupt himself, he therefore is liable as much as any other lessee. The certificate can discharge from no debt but what is due before the bankruptcy. In *Aylett v. James*, C. B. 22 Geo. 3, which was an action of covenant, the defendant pleaded his discharge under an insolvent act, and on demurrer judgment was given for the plaintiff. It was there said, that a bankrupt is liable for covenants made before his bankruptcy : and there seems to be no reason why he should not also be liable for a debt accruing in consequence of a covenant made before it.

For the defendant it was contended, that debt only was brought on the reddendum of the lease. Plowd. 132. Co Litt. 142 a. 2 Black. Com. 41. It is payable out of the land, not on account of the land. The moment the lessee parts with the possession, the action can no longer be maintained. Notice to the lessor of the assignment by the lessee, is sufficient to discharge him. There is a great difference between covenant and debt on the reddendum ; the words "yielding and paying" create a covenant to pay, but only on condition that the lessee shall enjoy. It does not hold after eviction or loss of possession. But after loss of possession the party is still liable on an express covenant. 1 Sid. 447. 1 Brownl. 20. Rent arises on a contract executory. Suppose the bankrupt had entered into a contract to deliver goods at a future day : his assignees might have affirmed or disaffirmed the contract. All his personal engagements pass to them. If the term be of greater value than the rent, it shall be presumed that the assignees have accepted it, and the lessee shall be exonerated. The privity of contract is destroyed by the assignment. When the lessee is deprived of the land without remedy over, he ceases to be liable for the rent. So it is on eviction, entry, and expulsion. Plowd. 71. Noy, 75. So if deprived by the act of God. 1 Roll. Abr. 236. But here the defendant is deprived by the act of law. 7 Vin. Abr. 84. 1 Atk. 67. A commission of bankruptcy is an execution in the first instance, not an act of the party. Burr. 2439, *Mayor v. Steward*. There is a difference between an insolvent person and a bankrupt.

LORD MANSFIELD. Two points were argued for the Plaintiffs. 1st. If there had been no bankruptcy, but the lessee had merely assigned to another, he would still remain liable in debt, till the lessor had assented to the assignment. 2d. Bankruptcy being an act done by the bankrupt himself, he shall remain liable, like any other lessee. As to the first point, it is not necessary that there should be an actual acceptance of rent by the lessor in order to discharge the lessee from the action of debt or the reddendum ; but any assent is sufficient. The action on the reddendum is founded, not merely on the terms of the demise, but on the enjoyment of the tenant. In *Warren v. Conset*, 2 Lord Raym. 1500, it was agreed that "levied by distress and sic nil debet" was a good plea to debt for rent on an indenture. What shall be deemed an enjoyment by the tenant hath been much agitated as a question of law ; but he cannot destroy the tenancy without the assent of the lessor. On behalf of the Defendant it was argued, that notice to the lessor is a sufficient discharge of the lessee. But in the cases in Brownl. and Cro. Jac. there was an express acceptance, and in *Siderfin*, though the case is short and confused, it must be so understood. In 2 Saund. 181 it is said he may sue either assignee or lessee. In the present case there is neither acceptance of rent, nor assent ; and if there were nothing but notice, we are all of opinion, that the lessee would be liable to the action. This brings me to the second point, on which there are only two cases ; for that of *Aylett v. James* does not apply. Those cases are *Mayor v. Steward* and *Cantrel v. Graham*. The first was determined on the ground that the covenant was collateral ; but there is a strong though obiter dictum of Yates J., that it would be hard to leave the lessee liable to the covenants, when the act of law had divested him of the emoluments, and vested them in his creditors. In *Cantrel v. Graham*, the Court made a direct determination on the point. We have a fuller note of it than there is in Barnes. The counsel said it was merely an effort made to relieve the Defendant on account of the hardship of the case. But the Court would not have discharged him, unless they had been satisfied that the action was not founded. This case is precisely in point, and we

of the lessor, the lessee shall not discharge himself from his covenant by an assignment of the term.

Thus the law stands as to implied covenants. But with regard to an express covenant, though it be true that no action of debt will lie on it against the lessee, after an assignment, where the lessor has by a direct act (such as the acceptance of rent from the assignee) confirmed the assignment, Cro. Jac. 334, yet it is equally true, that on an express covenant, an action of covenant will lie for the lessor against the lessee, notwithstanding his acceptance of rent from the assignee. 1 Sid. 402, Cro. Jac. 309, Cro. Car. 188, 580, Cas. temp. Hardwicke, 343; and in Cro. Jac. 522, 1 Sid. 447, the distinction between express and implied covenants is taken; that in an express covenant, though the lessor accept rent from the assignee, yet he may have an action of covenant against the lessee, but not in case of an implied covenant, which, it is said, is cancelled by the assignment.

The question then is, whether in the present case, the lease and all the bankrupt's interest being vested in the assignees under the commission, he is discharged from an express covenant? Now the contrary appears from *Thursby v. Plant*, 1 Saund. 237. The assignees of a bankrupt are like any other assignees of a lease. The assignment under the commission is no more than any other assignment with the assent of the lessor, every one having virtually given his assent to an Act of Parliament. *Wadham v. Marlow*. A bankrupt though divested of his property is still liable on his express covenants.

[440] The protection from debts which is given to bankrupts, is on condition of a complete obedience to the regulations of the several Acts passed on the subject. It is therefore material to consider what those regulations are. By 13 Eliz. c. 7, bankrupts were only discharged to the extent of the sum actually paid; and thus the law remained till the passing of 4 Anne, c. 17, by which a bankrupt surrendering, and conforming with the terms prescribed, was discharged from all debts due at the time he became a bankrupt; the reasons of which provision are stated by Lord Hardwicke, 1 Atk. 256. To make the remedy complete, the stat. 5 Geo. 2, c. 30, s. 7, gives the defence of a general plea of bankruptcy, and allows the certificate to be evidence in support of it. But the bankrupt is not discharged by these statutes from contingent debts, *Tully v. Sparkes*, Lord Raym. 1546, nor from uncertain damages, nor from debts accruing after the act of bankruptcy, though arising on a cause preceding it. The certificate is not a bar to an action, founded on an express collateral covenant, which does not run with the land, *Mayor v. Steward*, 4 Burr. 2439. In that case, the bankrupt was holden liable on an express covenant, and if he be so on one sort of express covenant, why not on another? The reason why in general the creditors of a bankrupt are barred by the certificate, is that they may prove their debts under the commission. But where the creditor cannot come in under the commission, there the certificate is not a bar; and in the present case no debt could be proved under the commission. The defence here set up is founded on a mere obiter dictum of Yates, J., in *Mayor v. Steward*, where he says, that "as the act divests the bankrupt of his whole estate, and renders him absolutely incapable of performing the covenant, it would be a hardship upon him if he should remain still liable to it, when he is disabled by the Act of Parliament from performing it." But whether there would be a hardship or not, was a matter for the consideration of the Legislature. In fact the hardship would not be greater than in suing a felon after attainder and forfeiture of his lands; yet a felon in such a situation is liable to an action. *Bannister v. Trussel*, Cro. Eliz. 516. Noy, 1. Owen, 69. But in truth the hardship would be greater on landlords, if the tenant becoming a bankrupt were discharged from his express covenants. They would be liable to fraud, and might be deprived of their rent. The assignees of the bankrupt might assign the lease to an insolvent person, as in Stra. [441] 1221, where the former assignee of a term made a further assignment to a prisoner in the Fleet,

agree with the determination. The bankrupt's estate is vested in the assignees by Act of Parliament. Every man's assent shall be presumed to an Act of Parliament. It was agreed, that if a man be divested by act of law without his own default, he is discharged. This is as strong, because though it was his own act originally on which the assignment was founded, yet the immediate effect produced is by the Act of Parliament; et in jure non remota, sed proxima spectantur.

Judgment for the defendant.

and by such assignment was discharged from debt for rent by the original lessor, it being holden that an assignee of a term was no longer liable than while the privity of estate continued, and he occupied the premises; which doctrine also agrees with *Walker's case*. By assignment therefore the landlord may be left without remedy unless he should resort to the antiquated process of cessavit, or to the assistance of two justices under stat. 11 Geo. 2, c. 19, s. 16. Although an action of debt on the reddendum of a lease is barred by a bankrupt's certificate, according to the case of *Wulham v. Marlow*, and although an action of covenant on an implied covenant is also barred by an assignment, yet it does not follow that an action of covenant on an express covenant is likewise barred. Though the party be exonerated in debt, he is not necessarily so in covenant. Debt lies on the reddendum, because a rent issues out of the land, Plowd. 132; Co. Litt. 142 a. It is payable out of the land, and when the possession of the land is parted with, the rent and the action of debt for the recovery of it are gone. But an express covenant is a solemn engagement from one man to another; it neither issues out of land, nor is done away by the loss of possession. In 1 Salk. 82, it is said, that the action of debt is founded on privity of estate, but covenant on privity of contract, which seems to be admitted. 7 Vin. Abr. 330. In the case of *Cotterel v. Hooke*, Dougl. 97, on covenant for non-payment of an annuity, it appeared on oyer, that there was a bond conditioned for payment of the annuity, besides the deed of covenant; it was pleaded that both were given for the same purpose, that the bond was avoided, and the Defendant discharged under an insolvent act. But the Court held, though the bond were forfeited before the discharge, yet the Defendant might be sued afterwards on the covenant. To the same point is *Hornby v. Houlditch*, Andr. 40, the judgment of Lord Hardwicke in which case is more fully stated in 1 Term Rep. B. R. 93, which is directly in point to shew, that an assignment by an Act of Parliament does not discharge a party from an express covenant. So also in *Aylet v. James* (C. B. 22 Geo. 3), which was an action of covenant, the Defendant pleaded his discharge under an insolvent act, to which there was a demurrer, and judgment for the Plaintiff, the Court saying, that a bankrupt was liable on an express covenant made before the bankruptcy. The case of an eviction is totally different, since in that case no rent is due, whether the eviction be by the lessor himself, or a person having a superior title.

The following were the arguments for the Defendant. Admitting the authority of the cases cited on the other side, which shew that where there is a voluntary assignment by a lessee, such assignment does not excuse him from an express covenant; admitting also that the acceptance of rent by the lessor from the assignee, would not discharge the lessee from an express covenant; yet there is a clear distinction to be made between an assignment by virtue of the bankrupt laws, and a voluntary assignment by the lessee. By the former, the bankrupt is divested by act of law of all the property, out of which, and in respect of which the covenant was made. A covenant for payment of rent runs with the land; when therefore the tenant is evicted by a superior title, he is released from his covenant. When he is prevented from enjoying the land in respect of which he entered into the covenant, he is no longer liable on the covenant. Rent is defined to be a certain profit issuing yearly out of lands and tenements corporeal. Plowd. 71. 2 Blac. Com. 41, when therefore the land is gone, there is an end of the profits; and it is on account of the profits that covenants of this kind are made. When the consideration is gone, the rent fails. 1 Roll. Abr. 454, pl. 8. Where the lessee makes a voluntary assignment of his term, he has it in his power to make what stipulations he pleases with the assignee; he may receive a consideration, may covenant for rent, for indemnity, and the like. But in case of bankruptcy, the bankrupt can make no stipulation, nor receive himself any valuable consideration. There is no analogy therefore between the assignment under a commission of bankrupt and a voluntary assignment by the lessee himself. But it is admitted on the other side, that a voluntary assignment will bar a covenant arising from the words "yielding and paying," &c. which it is said is only an implied covenant; but in *Style*, 387 and 406, those words were holden to make an express covenant. As to the hardship which is supposed to be brought upon the landlord, he may re-enter on non-payment of rent, may distrain and resort to the land itself for satisfaction. But the lessee if he be evicted, can have no such remedy: he might therefore suffer a greater hardship. In case of a lawful eviction the lessee is discharged from his covenants; and where he is divested of his property by an Act

of Parliament, it operates as an eviction, and he ought in justice to be equally discharged. Though the act of bankruptcy was orig-[443]inally his own act, yet the statute is an act of law, and according to Lord Mansfield's doctrine in *Wadham v. Marlow*, in jure non remota, sed proxima spectantur. The case of *Mayor v. Steward* is clearly in favour of the Defendant, to shew the analogy between an eviction of the tenant by the landlord, and an eviction under an Act of Parliament: there also the distinction is taken between collateral covenants and those which run with the land. As to *Bannister v. Trussell*, there was no question in that case of rent reserved on a demise, and the particular enjoyment of certain lands; the point was, whether an attainted person was freed generally from all his debts; which the Court very properly held he was not. In *Wadham v. Marlow*, Lord Mansfield says "There is a strong though obiter dictum of Yates J., that" it would be hard to leave the lessee liable to the covenants, when the act of law has divested him of the emoluments and vested them in his creditors," and his Lordship also says, that "in *Cantril v. Graham* the Court would not have discharged the Defendant, unless they had been satisfied that the action was not founded." In *Lulford v. Barber*, though the point was not directly decided, yet the opinion of the Court seems to be plainly intimated, that if it had been a question like the present, the rule laid down in *Wadham v. Marlow* would have guided their determination. As to *Hornby v. Houlditch*, there was no bankruptcy in that case, but a South Sea director was for his misconduct deprived of his property by a bill in the nature of pains and penalties; there was no act of law operating for the benefit of an unfortunate tradesman; besides, there was a large sum reserved for the maintenance of the person who was the object of the punishment; that case therefore cannot be applied to the present. Here the lessor himself has taken away the obligation to pay the rent, by taking away the land which was the consideration of the covenant; since it was assigned by virtue of an Act of Parliament, to which, according to *Wadham v. Marlow*, the lessor was himself a party.

LORD LOUGHBOROUGH. There is no degree of doubt but that the law is established, that an action of covenant may be brought on a covenant to pay rent, though the lessee be not in possession of the land, and after acceptance of rent from the assignee by the lessor. This is by privity of contract, but the distinction is clear between debt and covenant. Then when the [444] term is taken under the assignment of commissioners of bankrupt, the question is, whether it is not by the act of the bankrupt himself? It is taken from him because he has contracted debts, and instead of any single creditor suing out a fieri facias, the common law execution, there being many creditors they join in taking out a commission of bankruptcy, which is in the nature of a statute execution. By this the property is vested in the assignees, but not so absolutely as in the vendee by a sale under a fieri facias made by the sheriff; because if the effects were sufficient without it, the term would remain to the lessee. Covenant then may well be brought against him. Though he is out of possession, yet he is placed in that situation by his own act. I am therefore of opinion that the demurrer ought to be overruled.

GOULD, J., of the same opinion.

HEATH, J., of the same opinion.

WILSON, J. The plea of the Defendant is not supported by any adjudged case. It has never yet been decided that an action of covenant would not lie upon a covenant by a lessee which runs with the land, and which was entered into before, but broken after the bankruptcy of the covenantor. I entertained no doubt on this question, except what arose from the hints thrown out by some of the judges of the Court of King's Bench, whenever the question has come before them, on account of the dictum of Mr. Justice Yates, in *Mayor v. Steward*, that as the bankrupt is divested of his whole estate, and rendered incapable of performing the covenants, it would be a hardship upon him if he should still remain liable to it, when he is disabled by the Act of Parliament from performing it. But this opinion was clearly extra judicial, for under the circumstances of that case the Court held the plea to be bad. In *Wadham v. Marlow*, Lord Mansfield spoke of the opinion of Mr. Justice Yates as deserving great weight, though it was extra judicial. But in that case it was not stated that the Plaintiff had accepted rent from the assignee as his tenant, and it was contended that debt as well as covenant would lie against the lessee, because the lessor had done no act to shew his assent to the assignment. But the Court decided, on the ground that the Plaintiff had virtually assented to the assignment, every man's assent being implied

to an Act of Parliament, and not on the ground that an action of debt would not lie. And in *Ludford v. Barber* the Court gave judgment for the Defendant, because the covenant declared upon had never been entered into by him with the Plaintiff. Thus the question stands with respect to judicial decisions. The several statutes relating to bankrupts prior to the 4 Anne, c. 17, left the bankrupt not only liable to all contingent debts, but to the remainder of the debts which his effects had been unable to satisfy. The hardship was the same, for the bankrupt was deprived of his all, and yet left without any protection against his creditors. The statutes, previous to that time, meant to give an execution for the equal benefit of all the creditors, and if they were not fully satisfied by it, to leave them for what was unsatisfied, to every remedy against the bankrupt which they had before. Neither that statute nor the now existing statutes upon the subject extend to this case. The 34 Hen. 8, c. 4 (sect. 1), directs that the Lord Chancellor and other great officers shall have power to sell and dispose of the lands and goods of bankrupts in as full a manner as the bankrupt himself might have done. Subsequent statutes have empowered the assignees to make the same disposition. The intent of these several statutes was that the act of the assignees should do no more than the act of the bankrupt himself. I therefore do not see how the maxim "In jure non remota, sed proxima spectantur" is applicable. The Act of Parliament only assigns the interest of the bankrupt in the land, but does not destroy the privity of contract between lessor and lessee. An action of covenant remains after the estate is gone; but generally speaking, when the land is gone, the action of debt is also gone, debt being maintainable because the land is debtor. Covenant is founded on a privity collateral to the land. A covenant of this kind is mixed, it is partly personal and partly dependent on the land, it binds both the person and the land. This brings the case within the principle of *Mayor v. Steward*.

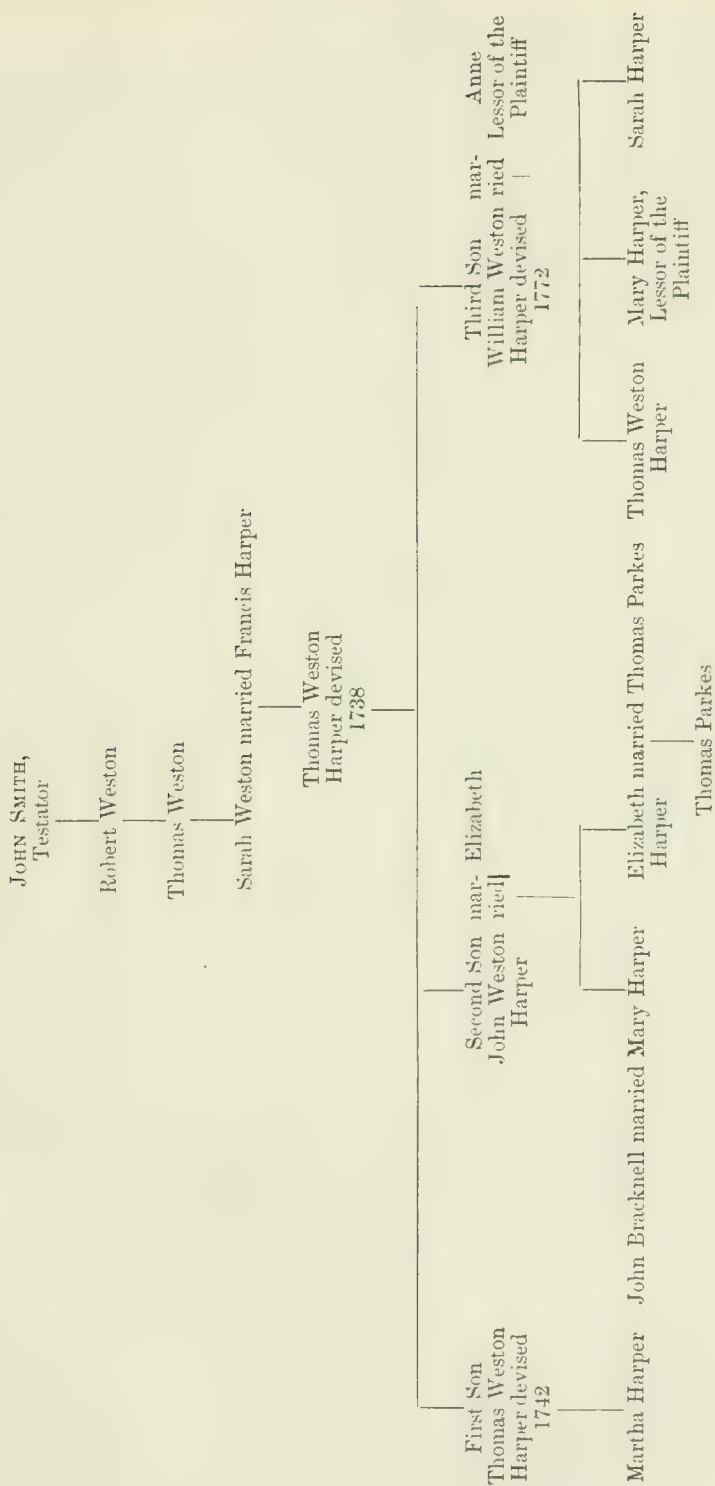
Judgment for the Plaintiff.

[446] ROE ON THE DEMISE OF EBERALL AND OTHERS, AND ALSO ON THE DEMISE OF ANNE WESTON, Widow, AND ALSO ON THE DEMISE OF MARY WESTON, OTHERWISE MARY WESTON HARPER, Spinster, *against* LOWE, POWELL AND DAVIS, Claiming by Distinct Titles. Monday, June 21st, 1790.

[447] A. devises copyhold lands to "trustees in fee (who are to be from time to time renewed) in trust that the rents and profits shall for ever afterwards be disposed of to certain charitable purposes; and directs that the rent of the said copyhold lands being 11l. per ann. shall never be improved or raised, but shall continue at 11l. per annum, and that B. who was the tenant of the said copyhold lands, and his children and posterity which shall succeed, shall never be put forth or from the same, but always continue the possession paying the rent of 11l." Neither B. nor his descendants were ever admitted on the court rolls. If B. took any estate it was an equitable estate tail, the above words being clearly such as would create an estate tail. But the interest of B (whatever it is) will not prevent the trustees recovering in ejectment, though the rent has been regularly paid. An equitable estate tail of a copyhold cannot be barred by the devise alone of the tenant in tail. Q. Whether it would be barred by a lease of the equitable tenant in tail for a long term, i.e. 2000 years (a)? But clearly where such lease is attended with doubtful or suspicious circumstances, it shall not prevent the trustees who have the legal estate from recovering in ejectment against the lessee. Nor is it an objection to the title of the trustees, that from the time of the original devise of A., to a certain period, the former trustees do not appear to have been admitted on the rolls of the manor, if there have been regular surrenders and admittances for a considerable length of time (ex. gra. for above 40 years) since that period; for it will be presumed, that surrenders and admittances were duly made before that period, especially as the rent has been paid during the whole time.

Upon an ejectment tried at the Summer Assizes for the county of Warwick 1789,

(a) [It is now the received doctrine of the profession that the same steps must be taken to bar an equitable estate tail in copyholds as must be pursued in the case of a legal entail. Sugd. Vend. and Purch. 180, 6th edit. 1 Preston on Conv. 155. 1 Watk. Copyh. 181, 2d edit.]



before Mr. Baron Hotham, a verdict was found for the lessors of the Plaintiff subject to the opinion of the Court upon the following case:—

John Smith of Sherborne in the county of Warwick, clerk, deceased, being seised in fee of the premises mentioned in the declaration, by his will of the 24th of December 1625, after reciting that on the 21st day of December then last, he had surrendered a copyhold messuage and cottage with the appurtenances, situate in Knowle in the said county, then in the occupation of Robert Weston, being of the value of 11l. per annum, into the hands of the lord of the manor of Knowle, by two customary tenants according to the custom there, to such uses as were and should be contained in that his will, did bequeath, and his will and desire was, that the inheritance of the said copyhold lands should be granted unto Rowley Ward, Esq. Thomas Cowper and John Savage, or to such two of them as the said Rowley Ward should think fit, and their heirs, and he did as much as in him was, grant and direct the said copyholds to them and their heirs, and the rents, issues and profits thereof, to the uses, intents and purposes thereafter expressed; that is to say, from and after the decease of the said John Smith, his will and desire was, that Susannah his wife should hold and enjoy the same, and take the rents and profits thereof for her life, and that from and after the decease of him the said John and Susannah his wife, then his will was, that the said Rowley Ward, Thomas Cowper and John Savage, or such as should be new takers thereof as aforesaid, and their heirs, should for ever stand and be seised thereof, and that the rents, issues and profits thereof should for ever afterwards be employed and disposed of in the buying and making up ten gowns yearly, against the feast of Christmas, for ten poor men of the parish of Saint Mary in Warwick, such as the said Rowley Ward whilst he lived, and after his death such as the said Thomas Cowper and John Savage, and others succeeding [448] them in the trust, concerning the said copyhold lands should think fit, and his will was, that the herdsman of Saint Mary's for the time being should be one; also his will and desire was, that the rent of the said copyhold lands being 11l. per annum, should never be improved or raised, but should continue at 11l. per annum, and that the said Robert Weston, who was then tenant, and his children and posterity which should succeed, should never be put forth, or from the same, but always continue the possession of the said copyhold premises, paying the same yearly rent duly from time to time, and to and for the purposes aforesaid, and not otherwise; and his mind and will was, that all chief rents and other payments, in respect of the said lands, should be from time to time satisfied and discharged out of the rents, issues and profits thereof respectively; and directed that there should be from time to time, two persons trustees at least estated, and interested in fee of and in his aforesaid copyhold lands, to and for the purposes aforesaid, and that after the death of Rowley Ward, Esq. and either Cowper or Savage, the bailiff of the town of Warwick for the time being, should within one month nominate another trustee of the aforesaid lands, with the survivor of the aforesaid Rowley Ward, Thomas Cowper and John Savage.

That the said John Smith died without revoking his said will; that Robert Weston by virtue of the said will, enjoyed all the said premises during his life, and paid the said yearly rent of 11l. unto the said trustees named in the said will, and to the persons claiming under them as trustees for the time being; and after the decease of the said Robert Weston, Thomas Weston his only child enjoyed the same during his life, and paid the said yearly rent of 11l. unto the trustees named in the said will, and to the persons claiming under them as trustees for the time being; and after the decease of the said Thomas, Sarah the only daughter of the said Thomas, who intermarried with Francis Harper, and he the said Francis Harper, in like manner, held and enjoyed the same during their lives, and paid the said yearly rent of 11l. unto the said trustees named in the said will of the said John Smith deceased, and the persons claiming under them as trustees for the time being; and after the death of the survivor of them, the said Francis Harper and Sarah his wife, Thomas Weston Harper their only child held and enjoyed the same during his life, and paid the same rent of 11l. unto the said trustees named in the said will, and the persons claiming under them as trustees [449] for the time being; that some time in or about the year 1737, the said Thomas Weston Harper built a small house and shop on part of the said premises, and duly made and executed his will bearing date the 4th day of March 1738, and did thereby will and devise, and as far as in him lay give and devise all and singular the said premises devised by Smith's will, and all his estate, right, title, and interest

therein, or thereto, (except the said house, shop, &c.) unto his eldest son Thomas Weston Harper, his heirs and assigns for ever, he and they paying out of the same the yearly rent of 11l. according to the will of the said Smith, and thereby as far as he could, for ever disburthening the said house, shop, &c. from the payment of the same or any part thereof, to the end that that part of the premises might be held and enjoyed free from the payment of any rent whatsoever; and as to the said house, shop, &c. being then in the tenure of the second son John Weston Harper, he devised the same and all his estate, right, title and interest therein and thereto disburthened as aforesaid unto his said son John Weston Harper, his heirs and assigns for ever, he also gave several pecuniary legacies to his other children, and bequeathed the residue of his personal estate unto his son Thomas Weston Harper, and appointed him his executor: that the said first named Thomas Weston Harper died in the year 1741, leaving issue three sons, viz. Thomas Weston Harper his eldest son, John Weston Harper his second son, and William Weston Harper his youngest son, and without having altered his will; that upon the death of the said Thomas Weston Harper the father, John Weston Harper, his second son, entered upon such part of the said premises as was devised to him by his said father's will as aforesaid, and enjoyed the same during his life, and died some time in the year 1748, leaving Elizabeth his widow, and two daughters, Mary and Elizabeth, his only children: that after his death the said Elizabeth his widow entered upon and enjoyed the premises last mentioned during her life, and after her decease the said Elizabeth the daughter, who intermarried with Thomas Parkes, entered upon and enjoyed the said last mentioned premises: that by an indenture bearing date the 30th day of December 1777; and made between John Bracknell and Mary his wife, (which Mary was one of the two daughters and co-heiresses of the said John Weston Harper the devisee in 1738,) Thomas Parkes the younger, the eldest son and heir of the said Thomas Parkes, by Elizabeth his wife late deceased, (who was the other daughter and co-heiress of the [450] said John Weston Harper,) of the one part, and Edward Lockman of the other part, for barring all estates tail in the premises last mentioned, and for limiting the inheritance thereof to the uses thereafter expressed, it was agreed that the said John Bracknell, and Mary his wife, Thomas Parkes the elder and Thomas Parkes the younger should levy a fine sur conuzance, &c. of all that messuage or tenement, &c. &c. at Katherine a Barn's Heath in the parish of Hampton in Arden, which premises were thentofore in the occupation of the said John Weston Harper, and since of Elizabeth Weston Harper his widow, and then of the said Thomas Parkes senior, and of all other the messuage, lands, tenements and hereditaments of them the said John Bracknell and Mary his wife, Thomas Parkes the elder, and Thomas Parkes the younger, any or either of them, in the parish of Hampton in Arden aforesaid, which were in fact those devised to John Weston Harper by the said will of the first named Thomas Weston Harper in 1738, and part of the premises devised or mentioned to be devised in and by the will of the said John Smith, and described to be in the occupation of the said Robert Weston. The uses of which fine were declared as to one moiety of the premises to such uses as they the said John Bracknell and Mary his wife should during their joint lives, by any deed or writing under their hands and seals executed in the presence of two or more witnesses, direct, limit, and appoint, and for want of such appointment to the use of the said John Bracknell and Mary his wife for their several lives, with remainder to the said Mary in fee; and as to the other moiety thereof, to the use of the said Thomas Parkes the elder and Thomas Parkes the younger in fee as joint-tenants.

That in Trinity Term, 18 Geo. 3, a fine was duly levied with proclamations in consequence of the last mentioned deed. That by indenture of lease and release of the 18th and 19th of May 1778, between the said John Bracknell and Mary his wife of the one part, and the said Thomas Parkes the elder and Thomas Parkes the younger of the other part, they the said John Bracknell and his wife, in consideration of 10l. 10s. to them paid by the said Thomas Parkes the elder and Thomas Parkes the younger did (in pursuance of the last abstracted indenture) grant, &c. unto the said Thomas Parkes the elder and Thomas Parkes the younger an undivided moiety of all the last mentioned premises, to hold unto and to the use of the said Thomas Parkes the elder and Thomas Parkes the younger in fee as [451] joint-tenants. The case then set forth several conveyances of the undivided moiety of Parkes the elder and younger to Davis the Defendant in fee. It then

stated that the premises devised to John Weston Harper by his father the first mentioned Thomas Weston Harper aforesaid were wholly in the parish of Hampton in Arden, but not within the manor of Knowle, and were part of the premises devised or mentioned to be devised in and by the said will of the said John Smith, and described to be in the occupation of the said Robert Weston; and that it did not appear that they were held of any other manor: that the Defendant Davis was in possession of the said premises under the said conveyances above mentioned; and that he and those under whom he derived his title to the same by virtue of the will of the said first named Thomas Weston Harper, and the conveyances above mentioned have quietly and uninterruptedly enjoyed the same without contributing to any part of the said rent of 11l., and without any entry or claim made by the lessors of the Plaintiff, or any of them, or any person or persons under whom they or any of them derive their, his or her title, from the year 1741 until the present ejectment brought: that Thomas Weston Harper, the eldest son of the said testator, the said first named Thomas Weston Harper, entered upon the premises in the parish of Hampton in Arden aforesaid, devised to him by the said first named Thomas Weston Harper in the year 1741, which were part of the said premises devised or mentioned to be devised in and by the said will of the said John Smith, and described to be in the occupation of the said Robert Weston, and enjoyed the same during his life, and died leaving a daughter Martha his only child, and by his will bearing date the 10th June 1742, gave to his said daughter and only child Martha 100l. and several other legacies to his wife and other relations; and in case his personal estate should not be sufficient to pay his legacies he charged the farm, land and premises devised to him by the said first named Thomas Weston Harper with the payment thereof; and subject thereto he also gave, devised and bequeathed all and singular the said premises unto his brother William Weston Harper in fee, to whom he also bequeathed the residue of his personal estate, and appointed him sole executor of his will: that the said Thomas Weston Harper the son died soon after making his will, and upon his death William Weston Harper his brother and devisee, entered upon and enjoyed the premises devised to him as aforesaid during his life, and by his will bearing date the 19th [452] September 1772, devised to his son Thomas Weston Harper in fee all the premises devised to him the said William Weston Harper, by the will of his said brother the said Thomas Weston Harper deceased as aforesaid; he also gave the use of a room in the dwelling-house unto his wife Ann Weston for her life, if she continued unmarried, and gave to his two daughters Mary and Sarah 40l. a piece, &c. &c. That the said William Weston Harper died soon after making his will, leaving the said Thomas Weston Harper his eldest and only son and two daughters Mary and Sarah, which Sarah was his youngest daughter, but who afterwards died. That the last named Thomas Weston Harper entered upon the premises devised to him by his father's will as aforesaid, and being in the possession thereof by lease and release, and a fine sur consuance de droit, come ceo, &c. conveyed to the Defendant Lowe in fee four closes of land, containing about thirteen acres, situate in the parish of Hampton in Arden aforesaid, part of the premises devised or mentioned to be devised in and by the will of the said John Smith, and described to be in the occupation of Robert Weston. That Lowe has quietly enjoyed the said premises under the said lease, release and fine, and that no actual entry hath been made by the lessors of the plaintiff, or any of them, and that the said premises and no part thereof are within the manor of Knowle, but are part of the lands and tenements devised or mentioned to be devised in and by the will of the said John Smith, and described to be in the occupation of the said Robert Weston in manner aforesaid: and it did not appear that they were held of any other manor. That the Defendant Joseph Powell, who was in possession of, and claimed title to the premises after mentioned, situate in the manor of Knowle, and parish of Solihull (and which were the remaining part of the premises devised by Thomas Weston Harper the testator, in 1742, to William Weston Harper as aforesaid, and by the same William devised to his son Thomas Weston Harper), derived his title thereto in manner after mentioned, (that is to say) by indenture of the 13th of April 1775, between the said Thomas Weston Harper, the devisee in the will of the said William Weston Harper of the one part, and the said Powell the Defendant of the other part, whereby the said last named Thomas Weston Harper, in consideration of the rents, &c. demised to Powell all the premises devised by the said will then in his occupation, consisting of a farm-house, buildings, garden,

and [453] upwards of 30 acres of land from Lady-day then last for 21 years, under the yearly rent of 30l., with the usual covenants; and it was thereby agreed by the said Thomas Weston Harper that his mother, the said Ann Weston, should have one room in the dwelling-house (if she thought proper to demand it) during the term, in case she so long lived, and the said Thomas Weston Harper also agreed during the term to attend the said Joseph Powell yearly to Warwick to see the 11l. a-year paid to the corporation, before the rent of 30l. should be demanded. By indenture between the said Ann Weston Harper (the widow) and the said Thomas Weston Harper the son of the said William Weston Harper deceased of the one part; and the said Joseph Powell (the Defendant) of the other part; in consideration of 85l. to the said Ann Weston Harper and Thomas Weston Harper paid by the said Joseph Powell, they the said Ann Weston Harper and Thomas Weston Harper did demise, grant, bargain, sell and assign, unto the said Joseph Powell, his executors, administrators and assigns, all the messuage or tenements, buildings, lands and premises demised by the last mentioned deed, and which were then in the tenure of the said Joseph Powell, to hold unto the said Joseph Powell, his executors, administrators and assigns from the date thereof, for the term of 2000 years, sans waste, charged with the payment of 11l. a-year to such persons, and to and for such uses, intents, and purposes as were by the will of the said John Smith for that purpose mentioned and appointed, and under the rent of a pepper-corn, payable to the said Ann Weston Harper and Thomas Weston Harper at Michaelmas yearly; with the usual covenants, and thereby Powell covenanted to pay the said rent or charge of 11l. a-year, pursuant to the will of the said John Smith, and all taxes, &c. that the consideration-money in the said last mentioned indenture was duly paid: that Robert Weston, and those deriving title under him, were not nor were any or either of them ever admitted tenants of the said copyhold of the said manor of Knowle, of or for any part of the estate and premises devised by the will of the said John Smith, nor ever made any surrender of any part thereof, to the use of any will or other instrument. That on the 24th of October, 1744, at a court leet, and court baron, held for the manor of Knowle, it was presented by Charles Petit as copyholder, and allowed by the homage, that Henry Mander, of Warwick, gent. one of the aldermen of the borough of Warwick aforesaid, did out of court, on the 23d day of October then instant, surrender by the hands of the said Petit, his attorney, all the right, interest and estate of him [454] the said Henry Mander, of, in, and to all that messuage or tenement, &c. &c. situate in the said manor near a place called Catherine a Barne's Heath then in the tenure of ——— Harper, (which premises were formerly the estate of John Smith, clerk, deceased, who surrendered the same to, for and upon the several uses and trusts in his last will mentioned,) to the use of John Stanton, esq., John Richardson, Edward Croft, John Dadley, Isaac Twycross, John White, William Collins, and Nicholas Rothwell, of the said borough, aldermen (pursuant to the directions and appointment of Robert Hands, gent. mayor of the said borough) and to their heirs and assigns, nevertheless to, for, upon and under the several uses, trusts, and limitations, contained in the said will of the said Smith, according to the custom of the said manor; and to this court came the said Stanton, Richardson, White, and Collins, and were admitted, and paid 20l. for a fine, but Dadley and Rothwell were not admitted; that the admittance of Ward and the other trustees in Smith's will, and those who succeeded from his death until 1744, do not appear by the rolls of the manor of Knowle: That on the 30th January 1779, Isaac Twycross the surviving trustee in the copy of the court roll of the 24th October 1744, surrendered out of court according to the custom of the manor of Knowle, all the right, title and estate of him the said Isaac Twycross, of, in and to all that messuage or tenement, &c. &c. situate, lying, and being within the said manor of Knowle, at or near a certain place called Catherine a Barn's Heath, theretofore in the tenure of ——— Harper, his assigns or under-tenants, and then of the Defendant Joseph Powell; all which premises were formerly the estate of the said John Smith, clerk, long since deceased, who surrendered the same to and for, and upon several uses and trusts, in his last will mentioned and contained, or in whatsoever other manner the same premises could or might be better known or described, to the use of Joseph Eberall, esq., mayor of the borough of Warwick aforesaid, and the said Isaac Twycross, and of George Eberall, John Hands, Robert Moore, George Cattell, John Sharp, William Roe, Francis Hiorne, Charles Frances Greville, Charles Porter Packwood, John Mitchell,

and Bernard Geary, of the same borough, aldermen, pursuant to the directions of the said Joseph Eberall the mayor, and to their heirs and assigns, nevertheless to, for, and upon the several uses, trusts, and limitations, mentioned and contained in the will of the said John Smith; and at a court leet and court baron held for the said manor, on the 5th of October 1781, the said John Mitchell, [455] the then mayor, and Joseph Eberall and the other surrenderees, the aldermen above mentioned, were admitted by Thomas Greenaway, a person appointed by their letter of attorney for that purpose: that Isaac Twycross, George Eberall, John Hands, and William Roe, are since dead: that the lessors of the Plaintiff, (except Ann Weston and Mary Weston Harper) are the survivors of the said trustees who were admitted in 1781. That the said rent of 11l. per annum was regularly paid by the family of Weston unto the trustees for the time being claiming under the said will of the said John Smith deceased, until the conveyance made by the said last named Thomas Weston Harper to the Defendant Powell above mentioned, who hath since regularly paid the same down to Michaelmas 1787 unto the said trustees for the time being claiming under the said will of the said John Smith, and hath since duly tendered the same to the said John Sharp one of the said trustees, to Michaelmas last: that the Defendant John Lowe has never contributed to the payment of the said rent, or any part thereof. That on the 31st of March 1788, notices were given to the Defendant Powell and to the respective tenants of the premises claiming under the Defendants Lowe and Davis, signed by all the trustees aforesaid, except the said John Mitchell, on behalf of themselves and him the said John Mitchell, to quit the premises in the respective occupations of such tenants, and which are expressed in the several notices to be situate in the manor of Knowle, at Michaelmas then next following, old style, being the end of the year, and the time when the said annual rent of 11l. became due: that Ann Weston one of the lessors of the Plaintiff is the widow of the said William Weston Harper, that Mary Weston Harper another of the lessors of the Plaintiff is the sister and heir at law to the last named Thomas Weston Harper, and heir of the said Robert Weston according to the custom of the said manor of Knowle, which is Borough-English, but not being descended from the eldest son of her grandfather Thomas Weston Harper, she is not the heir of the said Robert Weston according to the common law of descents: that by the custom of the said manor, lands and tenements may be intailed, and the youngest son of the person last seised of any copyhold estates therein, whether in fee simple or tail, is the customary heir, and if no son, the youngest daughter is the customary heir, and that the same custom extends to collateral heirs; and by the custom of the said manor estates are passed from one to another by surrender, and admittance, by will and surrender to the use of [456] it or by descent; and by no other means whatsoever; and estates tail of lands or tenements are barred by surrender and admittance, and by no other means whatsoever.

This was argued in Easter Term last, by Bond, Serjt., for the lessors of the Plaintiff, and Le Blanc, Serjt., for the Defendants; and in this term by Hill, Serjt., for the lessors of the Plaintiff, and Adair, Serjt., for the Defendants. On both arguments, it was admitted that there could be no doubt as to the freehold, which clearly passed by the fine. The counsel therefore confined themselves to the question, whether the lessors of the Plaintiff were intitled to recover the copyhold lands in the possession of the Defendant Powell? The arguments on that point were to the following effect.

On the true construction of the will of John Smith, it seems clear that he devised a legal estate in fee in the copyhold lands to the trustees, and perhaps an equitable estate tail to Robert Weston, on condition that he and his descendants should pay the annual rent of 11l. The words "children and posterity" are sufficient to create an estate tail. In 6 Co. 17 b. it is laid down that "if A. devise his lands to B. and his children or issues, and he hath not any issue at the time of the devise, the same is an estate tail;" now "children and posterity" are like "children and issues," and it is not stated that Robert Weston had any children born at the time of the devise. To the same point are 1 Anders. 43, Dougl. 321 & 431 (last ed.) in which cases the word "children" is holden to be a word of limitation: but here the expression is "children and posterity," which makes the present case stronger than those. The intention indeed of John Smith the testator, seems to have been to create a perpetuity, as he says, that the Weston family "should never be put forth, but always continue in possession of the said copyhold premises." But this was contrary to the rules of law.

It is clear also that a proviso or condition inconsistent with the grant or devise of an estate is void. Cro. Eliz. 34. But here there is a devise of a fee-simple, with a direction not to raise the rent; but that part is void, being repugnant to the estate given. It can amount to be nothing more than a recommendation. 2 Vern. 596, 746. But it was necessary that the legal estate should be in the trustees, to enable them to perform the trusts of the will. They were to dispose of the rents and profits, to pay all chief rents, &c. and were to be [457] estated and interested in fee of the copyhold lands. If the Westons therefore took any estate in the copyhold lands, it must have been an equitable estate tail. That being the case, the estate tail could not be barred without the proper method being used to bar it, namely, a surrender, which does not appear, and then the lessor of the plaintiff Mary Weston Harper the heir in tail is intitled to recover. An equitable estate tail of a freehold is hardly barrable by deed alone according to the opinion of the Chancellor in 1 P. Wms. 91, and *Harvey v. Parker*, 10 Vin. Abr. 266, pl. 6, which was afterwards affirmed in the House of Lords (b). And the same rule holds with respect to the copyholds. Neither will equity assist the conveyance of a copyhold without a surrender. 1 P. Wms. 354. But inasmuch as it is not perfectly clear what estate the Weston family took, and as it is beyond dispute that the trustees in the will of Smith took a legal estate in fee, their title in ejectment shall not be defeated by setting up the estate of cestui que trust, according to the doctrine laid down by Lord Mansfield, Dougl. 721 & 777, (last Ed. *Doe v. Pott*, and *Goodright v. Wells*. To the same effect also is 1 Brown Rep. Chan. 75, *Shapland v. Smith*. The lessors of the Plaintiff in the first demise, are likewise trustees for the benefit of a charity. They were to dispose of the rents in buying and making up ten gowns for ten poor men. Now it is clear law, that if the trustee of a charity surrenders or releases the lands, the surrenderee or releasee takes them subject to the original trust. The object of the charity must be fulfilled, and probably the Court of Chancery would interfere in this case to increase the rent, for the benefit of the charity. 8 Co. 130 b. Case of *Thetford School*, 2 Vern. 397, 412, 596. 4 Vin. Abr. 496. The lessors of the Plaintiff in the first demise therefore, having the legal estate, are intitled to recover in the ejectment. And though the trustees under the will of Smith do not appear to have been admitted as tenants of the copyhold before the year 1744, yet the rent was regularly paid by the Westons from the death of Smith. It is then fairly to be presumed that the surrenders and admittances were duly made; or at least it shall not be allowed to the Defendant to deny the title of the Plaintiffs on that account. In stating a title at a great distance of time, it is not necessary to produce every mere assignment which has taken place. It is enough to shew the beginning of the title, and a reasonable length of enjoyment under it. The [458] Defendant therefore cannot object to the apparent chasm in the Plaintiff's title, from the circumstance of there being no admittances of trustees under the will of Smith entered on the rolls of the manor, previous to the year 1744.

On behalf of the Defendant it was argued, that on the fair construction of the will of Smith, the Westons took an equitable estate in fee, subject to a rent-charge of 11l. per annum, for the benefit of the charity, in which the trustees had a legal interest. The words of the devise are full large enough to give an estate in fee; they direct that the rent should never be improved or raised, but continue at 11l. per annum, and that Robert Weston and his children and posterity which should succeed, should never be put forth or from the same, but always continue the possession of the said copyhold premises. Now though the word children alone gives an estate tail according to the cases cited on behalf of the Plaintiff, yet here words of perpetuity are superadded. In 3 Bulst. 195, it was decided that a devise to A. and B. and that they and their successors should pay a certain yearly rent to a corporation, gave them a fee-simple. So also are 1 Roll. Rep. 399. 1 Roll. Abr. 835, l. 15. *Bendloe*, 11. 2 *Freeman*, 268. 1 *Salk.* 685. If then Thomas Weston Harper had an estate in fee, the question is at an end, proper conveyances having been executed to pass an estate in fee. With respect to the argument that the trustees may support an ejectment against the cestui que trust, it is to be observed that they are only intitled to a rent-charge of 11l. per annum; as long as that is paid they have no right of entry, and consequently no right to bring an ejectment: and the case states that the rent has been regularly paid to the year 1787, and since tendered. The trustees are not the landlords, the Weston family are

(b) As appears from the printed state of the case in the House of Lords.

not their tenants: they had no right to give notice to quit: the rent was not paid for the occupation of the estate, but merely charged upon it. The cases cited from Douglas are not applicable, as there is no question here of doubtful equity between the trustee and cestui que trust, nor any thing to give the trustees a right to enter. The true construction of the will of Smith is, that the Westons had an equitable estate in fee charged with the rent to the trustees. But supposing Thomas Weston Harper took an estate tail as is contended on the other side, it was barred by the devise to his brother in 1741. Not being tenant on the rolls of the manor, he could not surrender. He therefore took the most effectual means in his power to bar the entail, namely, by devise. So it has been holden, that the [459] mortgagor of a copyhold out of possession who could not surrender, might devise the equity of redemption, 3 P. Wms. 360, *King v. King* (a). So in 2 Vezey, 204, *Carr v. Singer*, it was decided that an entail in a copyhold might be barred by a surrender to the use of the will of the tenant in tail. Or, if the devise in 1741 was not sufficient to bar the entail, the deed of the last named Thomas Weston Harper was fully adequate to that effect. The principle of all the authorities on this point is, that to avoid a perpetuity, the best means in the power of the tenant in tail shall be used to bar the entail. If he is in possession, and his name is on the court rolls, he may do it by surrender to the use of his will, where there is no other customary method. If he is not in possession, and only intitled to an equity of redemption, he may do it by devise alone. So in the present case, the best means were used which the tenant in tail had in his power to use.

Cur. advis. vult.

LORD LOUGHBOROUGH, after stating the case at length, proceeded thus. On this case it is clear that the verdict must be entered for the Defendants Lowe and Davis, as to the premises in their respective occupations; first, because no title is shewn in any of the lessors of the plaintiff to the freehold lands; 2dly, because the fine in one case, and the length of adverse possession in the other, would bar an ejectment.

With regard to the copyhold lands, the first question is, whether the lessors of the plaintiff in the first demise have shewn a title? It is fairly objected, that they do not derive a title by distinct surrenders from the persons named in the will of Smith. But they shew a title by surrender from a surviving trustee in 1844. It may then be presumed that antecedent to that surrender the estate had been duly conveyed, and it is not competent to the defendant Powell, who has constantly paid the rent of 11l. to the trustees, to object to their title to receive it; and they could have no other title but as under the appointment of that will. The next objection is, that they are mere trustees with respect to the estate, and shall not recover the possession from the cestui que trust, while the rent of 11l. is duly paid; on which the following points arise. 1st. Whether any and what estate is given by the will of Smith to Robert Weston? 2d. In whom the right of Robert Weston is now vested? 3d. [460] Whether this is a case in which a Court of Law can stop the effect of a legal title to obtain possession? The will of Smith with respect to Robert Weston, is argued to import a mere recommendation of him and his family to be continued tenants; and it is said that a direction not to raise the rent would be void, as repugnant to the estate given; to support which position two cases from 2 Vern. 596 & 746 were cited. But those cases are not applicable. In the one, the trustees of an estate given to a charity had thought fit to impose such a condition; in the other, the Chancellor had established it on a proposal for the benefit of the trust estate. In both, the act was done without due authority. But a testator in giving his estate may impose any terms consistent with the rules of law, and it can only be a question on the intention, when bequests seem to encounter each other. In the present case, the devisees take no benefit; they are mere trustees. The object of the charity is limited, and the sum defined. The direction to continue the possession of Weston and his children, and posterity paying that sum, is as positive as the direction to lay out the 11l. and to distribute the gowns bought with it to ten poor men. The trustees are as much bound to support one bequest as the other. But although it is clear that the Weston family are the objects of a trust in this will, it is far from being clear in what manner the bequest in their favour is to

(a) On this point see the authorities referred to in a note subjoined to *King v. King*, in the excellent edition of Peere Williams, by Mr. Cox.

take effect. It is not a necessary conclusion that some estate must pass to them by the will. It must be allowed, that a condition to pay a rent for ever will create an estate in fee, as in the case cited from 3 Bulstr. 194, and that "posterity" may be a word of limitation, as in the cases cited in the first argument. But all these cases are upon words annexed to an express devise of an estate. In this will there is no express devise to Robert Weston. It is only, that "he who was then tenant, and his children and posterity should never be put forth, but continue the possession." The idea of the testator seems to have been a perpetual tenancy at a fixed rent. Thinking the bequest imperative to the trustees, I do not know but that trust might have been well executed by granting leases for years renewable. I am not sure that it would be a breach of trust to follow either the course of succession to personal estate, on the legal course of descent in continuing the possession to the posterity of Robert Weston. But supposing that the trust is executed in the trustees, and that an estate passed to Robert Weston, the words "to his [461] children and posterity who should succeed," must confine it to an estate tail. An estate to a man and his children, if he has none born, is an estate tail according to *Wild's case*, 6 Co. 16 b. Posterity goes still further. It is an exclusion of collateral heirs, and must cut off the fee-simple by necessary implication. If then any estate passed to Robert Weston, it was an equitable estate tail of a copyhold descendible by the custom in Borough English, and the lessor of the Plaintiff Mary Weston Harper is heir in tail unless it were barred. This brings it to the question, whether the estate tail is barred? It was argued that it was barred by the will of Thomas Weston Harper. Now though it is true that the devise of an equity in a copyhold requires no surrender, yet that is where the testator has a devisable estate. The entail must first be barred. The party must have done some antecedent act to enable him to devise. Here no such thing was done. And the will of Thomas Weston Harper did not operate long: there was no length of possession against the entail on which to presume a surrender. But it is said that the entail was barred by the deed of the younger Thomas Weston Harper. But it would require a good deal of argument to prove that a lease made by the equitable tenant in tail of a copyhold, should be a bar of the entail. It is not clear then that the estate tail was de facto barred by any act of the tenant; if not, then Mary Weston Harper is intitled as heir in tail. But supposing it to have been barred, and that William Weston Harper was tenant in fee, then she is intitled as customary heir at law. Yet on that supposition it is clear that Powell is intitled to hold against the Plaintiffs for the term of 2000 years? He takes a lease for 21 years at the yearly rent of 30l. A few weeks after this he has a conveyance of the same premises for 2000 years in consideration of 85l. But this consideration was grossly inadequate; it was not five years' purchase. It must therefore have been either a mortgage to secure the sum of 85l. or a purchase evidently fraudulent, and only obtained by some imposition on an ignorant man. If it were a mortgage, the mortgagee had no right of possession as long as the money was paid. If it were a fraudulent purchase, there could be no equitable title. Then the third question is, whether there is such an equity, as can obstruct the clear legal title of the Plaintiffs in the first demise to obtain possession? Now the rule is, that unless in the case of a clear trust, the equitable title of cestui que trust shall not be set up against the legal title of the trustee (a); and in the present case it is not clear who is the [462] cestui que trust. If the trusts are not clearly executed in favour of any one, it is fit that the trustees should be in possession, and if any remedy is required, it must be sought in another place.

We are therefore of opinion that a verdict must be entered for the lessors of the Plaintiff in the first demise, as to the premises in the occupation of Powell.

(a) [It is now settled that even in the case of a clear trust, the equitable estate of cestui que trust shall not be set up against the legal title of the trustee. See the cases of *Doe d. Hodsdon v. Staple*, 2 T. R. 684. *Goodtitle d. Jones v. Jones*, 7 T. R. 45. *Roe d. Reade v. Reade*, 8 T. R. 122. *Doe d. Shewen v. Wrool*, 5 East, 138.]

GRAY *against* FOWLER AND OTHERS, Assignees of Purser, a Bankrupt.
Monday, June 21st, 1790.

A bona fide debt is not destroyed by being mingled with an usurious contract relating to it (a).

This was an issue sent from the Court of Chancery, to try whether one James Purser at the time he became a bankrupt was or was not indebted to the Plaintiff in any and what sum of money?

The cause came on to be tried at the Sittings after Michaelmas Term, at Guildhall, before Lord Loughborough, when the jury found, that Purser at the time he became a bankrupt, was indebted to Gray in the sum of 597l. and also in the sum of 685l. for malt, subject to the opinion of the Court upon the following case. The Plaintiff Gray a malt factor, had supplied Purser, who carried on the business of a brewer, with large quantities of malt, and usually drew upon him, at the expiration of three months from the delivery of each parcel of malt, for the amount; and Purser accepted the bills. On the 28th of January 1787, Purser owed Gray 1125l. for malt delivered and bills accepted, some of which were then due, and the remainder nearly due. Gray at this time demanded payment, and upon Purser's requesting further indulgence, and proposing to pay the principal and interest by instalments within a period of fourteen months, Gray insisted upon a fixed sum of 150l. being added to the debt, declaring he would have nothing to do with interest, and if the proposal was refused, he should insist on immediate payment. Purser accordingly on the 30th of January, accepted five bills of exchange of the dates and amounts following, viz. one dated 30th January payable at two months for 160l., another bill of the same date for 280l. at five months, another of the same date at eight months for 262l. another of the same date at twelve months for 275l., and another bill of the same date at fourteen months for 298l., amounting together to [463] 1275l. which bills, at Gray's instance, were also indorsed by Purser's wife who was supposed to have a separate property. The two first of the bills, amounting together to 440l., were afterwards paid by Purser about the time they became due; and Purser became further indebted to Gray for other quantities of malt sold and delivered in a sum of 597l. after the 30th of January. In the month of October 1787, all dealings between them ceased, and Gray insisting on a better security for the debt then due to him, agreed to accept an assignment of some leasehold premises and some butts of beer. The deed of assignment was executed on the 2d of November, and the sum left in blank by the attorney who prepared it, was filled up at the time of the execution, as settled between Gray and Purser themselves, with the sum of 1416l. 4s. 7d., which was to be discharged, with interest at 5l. per cent. out of the sale of the things assigned. By which deed of assignment, Purser covenanted with Gray to pay him the said sum of 1416l. 4s. 7d. and interest on the days therein specified. This sum inserted as the consideration of the deed, agrees with the sum which would remain due on the bills accepted for 1275l. and the further delivery of malt for 597l. after deducting for the bills paid 440l., except what was deducted as the discount on the current bills not then due. Upon the sum contained in this assignment, Gray received on the 2d February 1789, three months' interest then due at 5l. per cent. as stipulated in the deed. In May 1788, a commission of bankruptcy issued against Purser, the Defendants were chosen assignees, and by an action of trover against Gray, tried in the Court of King's Bench, recovered the goods and lease comprised in the assignment of the 2d November 1787, a latent act of bankruptcy having been committed by Purser long before the date of the deed.

The question for the opinion of the Court was, whether the above sum of 1416l. 4s. 7d. or any part of it remained legally due; or whether the whole or any part of it was any way affected by the usurious contract of the 30th January 1787? The latter sum of 685l. being due for goods really delivered before the 30th January 1787, if the Court should be of opinion that the said sum of 685l. remained legally due, then the verdict to be entered for 1282l., being the amount of the said several sums of 597l.

(a) [See *Dutton's case*, Noy, 171, Vin. Ab. Evid. (T. b. 124) acc. "There are many authorities for saying that a bargain for usurious interest upon a pre-existing debt, does not bar a claim for that debt." Per Bayley J., *Parker v. Iamshotbottom*, 3 B. & C. 270. See *Phillips v. Cockayne*, 3 Campb. N. P. C. 119.]

and 685l. If the Court should be of opinion that the said sum of 685l. did not remain legally due, but that the sum of 597l. was legally due, then the verdict to be entered [464] for 597l. only. But if the Court should be of opinion that neither the said sum of 685l. nor the said sum of 597l. remained legally due, then the verdict to be entered for the Defendants.

This was argued in Easter Term last, by Bond, Serjt., for the Plaintiff, and Runnington, Serjt., for the Defendants. And in this term by Adair, Serjt., for the Plaintiff, and Le Blanc, Serjt., for the Defendants.

On behalf of the Plaintiff two points were made: 1. That the prior legal debt which the jury had found to be due, was not vitiated by the subsequent usurious contract for the forbearance of it; 2. That this debt was not extinguished by the deed of assignment. To establish the first point, it was said, that the statutes 12 Car. 2, c. 13, s. 2, and 12 Ann. st. 2, c. 16, s. 1, had declared that "all bonds, contracts, and assurances whatever, whereupon and whereby usurious interest should be taken, &c. should be void." But these expressions could not extend to a prior *bonâ fide* debt, independent of any such contract or assurance. It was admitted that the five bills of exchange which covered the usurious transaction, were void; but it was urged that the Plaintiff was fairly and justly intitled to the two sums of 597l. and 685l. To shew that a former legal debt was not destroyed, by a subsequent illegal agreement, these authorities were cited, viz. Cro. Eliz. 20. 1 Mod. 69. 2 Mod. 307. 7 Mod. 119. 1 Saund. 294. Sir Thomas Raym. 197. 3 Salk. 391. 3 Keb. 142. 2 Burr. 1077. Cowp. 112.

With regard to the second point, it was argued that the simple contract was not extinguished by the deed, which was invalidated by the recovery of the assignees in the King's Bench: that the principal being gone, the incidental covenants were likewise annihilated. Yelv. 19. 1 Bac. Abr. 541. So also a bond taken for a simple contract debt, after an act of bankruptcy, does not extinguish the simple contract, or prevent the creditor from coming in under the commission. Stra. 1042. S. C. Cas. Temp. Hardwicke 267. Bull. N. P. 182. So if an infant become indebted for necessities, and give a bond with a penalty, conditioned for the payment of the debt; the bond being void does not extinguish the simple contract, though it would be otherwise, if it were a single obligation. Co. Lit. 172 a. and Harg. note, last edit. Cro. Eliz. 920. Bull. N. P. 182.

On the part of the Defendants, the sum of the arguments [465] was, that at the time when the usurious contract was made, the parties stood as debtor and creditor, on an account of goods sold and bills given in the course of trade. All these were annulled, and then Gray became a lender of the money owing to him, and Purser a borrower of it, as much as if the money had been paid, and lent again at an usurious interest.

The Court were all clearly of opinion, that the fair debt for the goods sold still subsisted, unimpeached by the usurious transaction, and was not a colourable pretence to cover a real loan. Accordingly judgment was ordered to be entered for the Plaintiff as to the two sums found by the jury.

BRAITHWAITE *against* COOKSEY AND ANOTHER. Tuesday, June 22d, 1790.

[Distinguished, *Turner v. Barnes*, 1862, 3 B. & S. 451.]

Where the lessee of lands dies before the expiration of the term, and his administrator continues in possession during the remainder and after the expiration of it; a distress may be taken for rent due for the whole term. [The possession of the administrator being the possession of the tenant within the Statute of Anne.]

Replevin for taking on the 13th of October 1788, the goods of the plaintiff, an infant, who sued by *prochein amy*.

Avowry and cognizance, that for six years next before, and ending on the 29th September 1788, one William Braithwaite deceased, in his life-time, and Elizabeth Braithwaite his administratrix, held and enjoyed the said places in which, &c. in manner following, that is to say, the said William Braithwaite for and during a part of the aforesaid time, until and at the time of his death, and the said Elizabeth Braithwaite as such administratrix as aforesaid, from the death of the said William

Braithwaite for and during the residue of the term aforesaid, under and by a certain demise thereof, thentofore made, and before the said time when, &c. determined, at a certain yearly rent, to wit, the yearly rent of 65l. 3s. And the said Elizabeth Braithwaite administratrix as aforesaid, continued and was in the possession of the said places in which, &c. from the determination of the said demise, until and at the said time when, &c. and because a large sum, to wit, the sum of 396l. 18s. of the said yearly rent for six years of the said demise ending and ended on the said 29th day of September in the year of our Lord 1788, on that day and year, and also at the said time when, &c. were in arrear and unpaid to the said Holland (Cooksey) by the said Holland in his own right well avows, and the said Humphry (the other Defendant) as bailiff of the said Holland, well [466] acknowledges the taking of the goods and chattels in the said declaration mentioned in the said places in which, &c. at the said time when &c. the said time when, &c. being within the space of six calendar months after the determination of the aforesaid demise, and during the continuance of the said Holland's title and interest in and to the same demised premises with the appurtenances, and during the possession of the said Elizabeth Braithwaite administratrix as aforesaid, from whom and the said William Braithwaite such arrears of rent became due as aforesaid, and justly, &c. for and in the name of a distress for the said rent so due, in arrear, and unpaid as aforesaid, and which said rent still remains due and unpaid, and this, &c. wherefore, &c.

The second avowry and cognizance stated the yearly rent to have been 42l. and the arrears 252l. but in other respects were the same as the first.

The third stated, "That for a long space of time before the said time when, &c. to wit, for the space of six years next before, and ending and ended on the said 29th day of September in the said year 1788, the said William Braithwaite deceased, in his life-time, and the said John (the Plaintiff) held and enjoyed the said places in which, &c. (amongst other premises) with the appurtenances, as tenants thereof to the said Holland, in manner following, to wit, the said William Braithwaite for and during a part of the time last aforesaid, until and at the time of his death, and the said John from the time of the death of the said William Braithwaite for and during the residue of the time last aforesaid, under and by virtue of a certain other demise thereof thentofore made, and before the said time when, &c. determined, at a certain yearly rent, to wit, the yearly rent of 66l. 3s. and the said John continued and was in the possession of the said place, in which, &c. from the determination of the said last mentioned demise, until and at the said time when, &c. and because a large sum, to wit, the sum of 296l. 18s. of the said last mentioned yearly rent, for six years of the said last mentioned demise, ending and ended on the 29th day of September in the said year 1788, on that day and year, and also at the said time when, &c. were in arrear and unpaid to the said Holland, by the said Holland in his own right well avows, and the said Humphry as bailiff of the said Holland, well acknowledges the taking of the said goods and chattels in the said declaration mentioned in the said places in which, &c. at the said time when, &c. the said time when, &c. being within the space of six calendar months after the determination of the said last mentioned demise, and [467] during the continuance of the said Holland's title and interest in and to the said demised premises, and during the possession of the said John, from whom and the said William Braithwaite such arrears of rent became due as last aforesaid, and justly, &c. for and in the name of a distress for the said rent so due, in arrear and unpaid as last aforesaid, and which said rent still remains due and unpaid, &c.

The fourth were like the third, except that the annual rent was stated to be 42l. and the arrears 252l.

To each avowry and cognizance there was a general demurrer, in support of which Clayton, Serjt., argued in the following manner. At common law no distress could be taken after the expiration of the term. 1 Roll. Abr. 672. Co. Litt. 47 b. The statute 8 Anne, c. 14, gave a power to executors and others to distrain within six months after the determination of the term, and during the possession of the tenant. The avowant is in the nature of a Plaintiff, and to entitle himself to enter must make a good title in omnibus. He ought to shew that the distress was taken during the possession of the tenant. Here William Braithwaite died before all the rent became due, for which the distress was taken. The case therefore is not within the terms of the proviso, nor within the spirit of it, as it would tend to this, that the succeeding

tenant should be liable to be distrained for rent due from his predecessor, who was out of possession, and after six months had expired from the end of the term. The first and second avowries state that Elizabeth Braithwaite the administratrix continued in possession, and the third and fourth that the Plaintiff did the same; the pleading then is bad, for the time that William Braithwaite was tenant. The term *quoad* William Braithwaite determined by his death.

Adair, Serjt., for the Defendants. The three principal statutes concerning distresses make these avowries good. The 32 Hen. 8, c. 37 (s. 4), enables the landlord to distrain against executors and administrators (*b*)¹; the 8 Anne, c. 14 (s. 6 & 7), to distrain within six [468] months after the end of the term; and the 11 Geo. 2, c. 19 (s. 22), to avow generally.

The Court were very clearly of this opinion, and therefore gave Judgment for the Defendants (*b*)².

STUDD *against* ACTON (*a*). Wednesday, June 23d, 1790.

An action on the case on the stat. 23 Hen. 6, c. 9, will not lie against a sheriff for refusing to take bail on an attachment out of chancery; that statute referring only to process in courts of common law (*b*)³.

Middlesex (to wit). Nathaniel Lee Acton, late of Levermere in the county of Suffolk, Esq. late sheriff of the same county, was attached to answer to James Studd, in a plea of trespass on the case, &c. and thereupon the said James by Townley Ward, his attorney, complains:—For that whereas by a certain act made in the parliament of the lord Henry the Sixth, late King of England, &c. holden at Westminster in the county of Middlesex, on the 25th day of February, in the 23d year of his reign, it was amongst other things enacted by the authority of the same parliament, that all sheriffs should let out of prison all manner of persons by them or any of them arrested, or being in their custody, by force of any writ, bill or warrant, in any action personal, or by cause of indictment of trespass, upon reasonable sureties of sufficient persons, having sufficient within the counties where such persons be so let to bail or mainprize, to keep their days in such place as the said writs, bills or warrants should require (as by the said statute, reference being thereunto had, may more fully appear). And whereas after the making and publishing of the said act, to wit, on the 16th day of December, in the 30th year of the reign of our present sovereign lord the king, one John Revett prosecuted out of the court of our said lord the king of his chancery the same then being at Westminster in the said county of Middlesex, a certain writ of our said lord the king of attachment, directed to the Sheriff of Suffolk, by which said writ the same lord the king commanded the said sheriff to attach the said James and Elizabeth his wife, and one James Reilly and Elizabeth Cotton, so as to have them before the same lord the king in his court of chancery in eight days after Saint Hilary, wheresoever the said court should then be, there to answer to the said lord the king as well touching a certain contempt which they, as it was alleged, had committed against our said lord the king, as also such other matters as should be then and there laid to their charge; and further to perform and abide such order as our said lord the king's said court should make in that behalf; and that the same sheriff should bring that writ with him; which said writ was thus indorsed "by the Court for not answering at the suit of John Revett, Esq. Plaintiff." [469] Which said writ so indorsed, the said John Revett afterwards and before the return of the same, to wit, on the 26th day of December, in the 30th year of the reign of his present majesty at Westminster aforesaid, in the county of Middlesex aforesaid, delivered to the said Nathaniel Lee, then sheriff of the said county of Suffolk, in due form of law to be executed; by virtue of which said writ, the said Nathaniel Lee so being such sheriff of the county of Suffolk as aforesaid, afterwards and before the return of the

(*b*)¹ [This statute enables the executors of tenants in fee simple, &c. to distrain, and therefore does not seem to apply to the present case.]

(*b*)² The rule for judgment was drawn up general for the Defendants, but the opinion of the Court was given on the two first avowries.

(*a*) As this action was rather uncommon, the declaration is stated at length.

(*b*)³ [See post, p. 475, n. (*a*).]

said writ, to wit, on the said 26th day of December in the year last aforesaid, at Campsay Ash in the said county of Suffolk, took and arrested the said James Studd and Elizabeth his wife: and the said James Studd in fact says, that immediately after the taking and arresting of them the said James and Elizabeth his wife, they the said James and Elizabeth his wife then and there tendered and offered to the said Nathaniel Lee so being such sheriff as aforesaid, reasonable sureties of sufficient persons, to wit, Thomas Carthew and James Lynn, then and there being sufficient persons, and having and each of them having sufficient within the county of Suffolk aforesaid for the appearance of them the said James and Elizabeth his wife, according to the command of the said writ, according to the form of the said statute. Nevertheless the said Nathaniel Lee not regarding the said statute, but contriving and wrongfully intending unjustly to injure, aggrieve, and oppress the said James Studd, and to put him to great trouble and expence in this behalf, absolutely refused to accept of any bail or sureties for them the said James and Elizabeth his wife, and afterwards, to wit, on the same day and year last aforesaid, carried them the said James and Elizabeth his wife, to the common gaol of our said lord the king, in and for the said county of Suffolk, and them then and there kept and detained prisoners under the custody of the said Nathaniel Lee, then sheriff of the said county of Suffolk for a long space of time, to wit, for the space of 10 days, against the form of the statute in such case made and provided; whereby the said James Studd was not only during all that time deprived of his liberty and hindered and prevented from transacting his lawful affairs and business, but also by reason of the said imprisonment of his said wife, lost, and was deprived of the service and assistance of his said wife in his affairs and business, wherefore the said James Studd saith he is injured and hath sustained damage to the value of 1000*l.* and therefore he brings suit, &c.

[470] To this declaration there was a general demurrer; which was argued in Easter Term last, by Le Blanc, Serjt., for the Defendant, and Lawrence, Serjt., for the Plaintiff; and in the present term by Rooke, Serjt., for the Defendant, and Adair, Serjt., for the Plaintiff. The following were the arguments in support of the demurrer.

The question in this case is, whether the sheriff is bound by the stat. 23 Hen. 6, c. 9, to take bail on an attachment issuing out of chancery? It is clear that such process is not within the words of the statute, which are "That the said sheriffs and all other officers and ministers aforesaid, shall let out of prison all manner of persons by them or any of them arrested, or being in custody by force of any writ, bill, or warrant, in any action personal, or by cause of indictment of trespass, upon reasonable sureties, &c." Now the term "action" is confined to suits in courts of common law. It is to be considered therefore, whether the meaning of the statute extends to this process of attachment out of a court of equity. At common law, there was no arrest in civil actions, except in cases of trespass *vi et armis*, and in suits to recover the debt of the king: but by a gradual progress it was extended to all personal actions as at the present day. The stat. 52 Hen. 3, c. 23, and eighteen years after, the stat. West. 2, 13 Ed. 1, c. 11, gave an attachment against the bodies of bailiffs, servants, chamberlains, and receivers, for arrears of accounts. The 13 Ed. 1, st. 3, gave the *capias si laicus* against the consor of a statute merchant. By 25 Ed. 3, st. 5, c. 17, the same process is given in debt and detinue as in account. The 27 Ed. 3, st. 2, c. 9, enables the mayor of the staple to arrest the consor of a statute staple. The 19 Hen. 7, c. 9, allowed the same process in case, as in debt or trespass. The 23 Hen. 8, c. 14, ordained the like process in forcible entry on 5 Ric. 2, as in trespass at common law, and the like in annuity and covenant, as in an action of debt. And 21 Jac. 1, c. 4, the like process in popular actions, as in trespass *vi et armis* at common law. An arrest therefore, by the process of a court of common law is a matter of right in the Plaintiff, which courts of law cannot prevent, and in which, before the Legislature interfered, the sheriff had no legal power to take bail. For this purpose the 23 Hen. 6, c. 9, 13 Car. 2, st. 2, c. 2, and 12 Geo. 1, c. 29, were passed. But an arrest in a court of equity is by no means a right which a Plaintiff can claim: it is a mere fiction [471] invented by successive chancellors to strengthen the jurisdiction of the court. The party is taken on a supposed contempt of the court by non-appearance. But the chancellor may issue process of contempt or not, at his pleasure, may model and control the arrest, and may direct whether any bail, or to what amount shall be taken. The principle therefore of arrests in courts of common law

and equity, is totally different. If courts of law had adopted the same fiction, the statutes which extended the *capias* would have been unnecessary. The proceeding in equity is not directly for any demand either real or personal, it is not in rem but in personam. 4 Inst. 84. It is usually for relief where the law is harsh, as in cases of penalties; or defective, as in applications for specific performance, or for the discovery of fraud. It was originally a matter of grace and favour, and not to be demanded as a right. Incidentally indeed equity gives full relief; having once entertained jurisdiction of the cause, it will not send the parties to law again. The 19 Hen. 7, c. 9, being the first statute which gave a power to arrest in cases where no specific demand was made, it is obvious that at the time when the statute in question 23 Hen. 6, c. 9, was passed, there was no power to arrest in such cases. In this action therefore, which is to recover uncertain damages, there could have been no arrest of the person at that time. Consequently this action could not have come within the provisions of the statute, or have been in the contemplation of the Legislature. The subpoena in Chancery was not invented before the reign of Ric. 2, 3 Black. Com. 52. The attachment of contempt for disobeying it must of course be subsequent. In the reign of Hen. 6, great jealousies were entertained of the power of the Court of Chancery. Accordingly the 15 Hen. 6, c. 4, reciting that divers persons had been vexed and grieved by writs of subpoena, directed that "no writs of subpoena should be from thenceforth granted, until surety were found to satisfy the party so grieved and vexed for his damages and expences, if so be that the matter cannot be made good, which is contained in the bill." And the 31 Hen. 6, c. 2, which enacts that the Chancellor should issue proclamations against persons who refused to obey the king's writ and appear before the council, or in chancery, is particularly cautious that no pretence should on that account be made for increasing the jurisdiction of the Court of Chancery in other respects; it therefore provides "That no matter determinable by the law of the kingdom, should by that act be determined in [472] any other form, than according to the course of the same law in the courts of the king having the determination of the same law." At different periods then in the reign of Hen. 6, the Legislature shewed plainly an intention to restrain within certain bounds the authority of the Court of Chancery. It is hardly therefore to be conceived, at an intermediate time between the nineteenth and thirty-first, viz. in the twenty-third year of that prince, when the jealousy of the encroachments made by clerical chancellors was at its height, that if the process of attachment out of Chancery for disobeying a subpoena had been known, the Legislature would have omitted to regulate that process together with the subpoena. But if it were at that time known, it must be presumed, that it was purposely omitted in a statute which speaks of other kinds of attachment. If it were not known at the time of passing the act, it ought not to be brought within the meaning of the act by a forced construction. This is a penal statute, it gives treble damages and a penalty of 40l. and is therefore to be construed strictly. Though this is not an action for the penalty, yet the same construction must prevail. There cannot be two methods of construing the same words of a statute. The stat. 13 Car. 2, st. 2, c. 2, which is in *pari materia*, is in terms confined to process out of the courts of King's Bench and Common Pleas, and in the fourth section expressly excludes attachments of contempt. In personal actions at law, the object is to compel an appearance to answer the demand of the Plaintiff of a specific sum which is marked on the writ. The sheriff knows in what sum he is to take bail; his line of conduct is pointed out. The Plaintiff may take an assignment of the bail bond, if good bail be not put in to the action. But in the present case, there can be no such assignment, or justification of bail, or any other means by which the sheriff can relieve himself from the consequences of his disobeying the writ. There is no decision or authority whatever, to shew that this case is within the statute. If such there were, it would be against the first principles of the law of arrests. On the contrary, in *Blund v. Riccard*, 3 Leo. 208, it was determined, that a bond taken by a sheriff from a person arrested on an attachment out of Chancery, was void, because such person was not bailable, and in an *Anonymous case*, Stra. 479, it is stated to have been resolved by all the judges, that the sheriff could not take bail on an attachment. All the cases indeed on the subject turn on the question, whether the bond when taken were good [473] or not. The expression, that the bond is within the statute, is equivocal. In some cases it means that the bond is good, in others, that it is bad, according as it has reference to different parts of the statute, which in one clause prohibits bonds for ease and favour, and in another,

requires sheriffs to let to bail upon reasonable sureties. Com. Dig. tit. Bail, (F, 8), 2 Ventr. 238. Cro. Eliz. 647. Style, 234. Courts of law have rightly holden in many instances, the bond to be good, as being allowable within the equity of the statute. But there is a wide difference between allowing the bond to be taken, and compelling the sheriff to take it. Though when a statute says an officer may do a thing, the construction is that he must do it, yet at common law, the words may and must have a very different signification. There are many instances where officers have a discretionary power. If commissioners of rebellion take a man, they may bail him or not at their discretion. Com. Dig. tit. Chanc. (D, 5). If therefore the sheriff has it in his option to take bail or not on an attachment out of Chancery, clearly the present action cannot be maintained. But the true ground is, that if any remedy is wanting, it must be sought in Chancery, as the Chancellor issues the process to vindicate his court from contempt, it is for him to determine whether the sheriff ought to take bail. If the sheriff has acted improperly, that court will punish him. Courts of law are not to interfere with the Court of Chancery. In *Bailey v. Devereux*, 1 Vern. 269, an injunction was granted to restrain the Defendant from proceeding in an action at law against the Plaintiff, for an arrest on a commission of rebellion. So also, where trespass has been brought for going over the Plaintiff's land to execute process of the Court of Chancery, an injunction has been granted.

On the part of the Plaintiff it was argued as follows. The process of contempt being substituted by courts of equity in lieu of process at law, ought to be governed by the same rules. There is no ground for the argument, that the defect of jurisdiction in a court of equity should give it a greater power. Although the words "action personal" in a mere technical sense signify an action at law, yet in fact an attachment out of chancery is a writ in a personal suit. The statute in question is a remedial law. It was made to protect the liberty of the subject, and therefore ought to receive a liberal construction. As to the argument that no such action as this was ever brought, the reason is, that it has been the universal practice to take [474] bail, which no sheriff ever before thought of refusing. If he may take bail, he must on every principle of sense and law; the same construction ought in reason be put upon the words, whether they are used in a statute or in the language of the common law. If the case in Com. Dig. tit. Chanc. (D, 5) cited from 1 Chan. Rep. 262, be correct, it is contrary to the law of the land, and hostile to the common liberty of the subject. Admitting the authority of *Bailey v. Devereux* (1 Vern. 269), and of the case where the Court of Chancery granted an injunction in an action of trespass for going over the Plaintiff's ground, to execute the process of the Court, neither of those cases are applicable. In both, the injunction was properly granted; in the former, because it was clearly a matter for the Chancellor to determine, whether the commission of rebellion issued regularly or not; in the latter, because the Court had a right to support the execution of its own process. But in the present case there is no question concerning the regularity of the process, nor any obstruction to the execution of it. The attachment has been duly executed, and the question is, whether the sheriff can refuse to take bail after he has done his duty, and complied with the commands of the Court. As to the authority of 3 Leon. it is probably misstated, since it is not supported by the case of *Dire v. Manningham* (Plowd. 62) to which it refers, but which was on a question, whether the bond which was there taken was void by the Stat. 23 Hen. 6, not whether a bail bond could be taken. That it has been for a great length of time the practice to take bail in case of an attachment, appears from Com. Dig. tit. Bail, (F, 8), and the cases there cited, Style, 234. 2 Atk. 507. Hinde's Chanc. Prac. 107. And that on a refusal to take bail, the proper remedy against the sheriff is by an action on the case, and not an action of trespass, is plain from 2 Mod. 32, *Smith v. Hall*.

Cur. advis. vult.

LORD LOUGHBOROUGH, after stating the declaration and the nature of the action, proceeded thus. We have taken this case into full consideration, and have conferred with the other judges on the subject, and the result is, that we are all of opinion that the action as laid cannot be maintained. It being the case of process issuing out of the Court of Chancery, we think that it does not come within the statute 23 Hen. 6, c. 9, which directs [475] that sheriffs shall let all persons out of prison by them arrested, or being in their custody "by force of any writ, bill or warrant, in any action personal" which words are confined to actions at law. A subsequent statute

13 Car. 2, st. 2, c. 2, which was made on the same subject, is distinctly confined to actions in the King's Bench and Common Pleas, and it does not appear to have been the intent of the legislature to interfere with the process of a court of equity. It is extremely clear that the usage has been for the sheriff to take a bail bond in 40l. on an attachment, and it is so laid down. *Danby v. Lawson*, Eq. Ca. Abr. 351. But it does not appear that he is obliged to take it by the statute. The first process in the Court of Chancery is a subpoena, and if the party does not appear, then an attachment of contempt issues. If on this attachment he cannot be taken, and the sheriff returns non est inventus, they go on to a second attachment, and if the party be not taken on that, the next process is a commission of rebellion. On this the commissioners ought in all cases immediately to bring the party up into court. There is an inaccuracy therefore of expression in Harrison's Chanc. Prac.(a)¹ where it is said that the commissioners ought to take bail, and not keep the party lingering in prison in their houses. They certainly have no right to keep the person arrested in prison: their duty is to bring him up without delay to the Court of Chancery. There are cases indeed where they may not take bail. But in the present case, if the sheriff has done wrong, it is for that court to interfere, out of which the process came. I do not mean to say, that there are no cases of this kind where it would be right for the sheriff to take bail (a)²; but the question for us to determine is, whether he is bound to do it by the statute? And for the reasons I have stated, we are all of opinion that he is not bound to do it, and therefore there must be

Judgment for the Defendant.

[476] HOME *against* EARL CAMDEN AND OTHERS. Wednesday, June 23d, 1790.

[Discussed, *Gould v. Gapper*, 1804, 5 East, 364. Referred to, *R. v. Greenwich County Court Judge*, 1888, 60 L. T. 250.]

During the late war with the States General, a squadron of the king's ships having a detachment of the king's troops on board, was sent to attack a settlement belonging to the enemy; and secret instructions were given by his majesty to the commanders-in-chief, that all the booty which should be gained by the joint operation of the army and navy, at the attack of that settlement, should be divided in two shares, between the land and sea forces. The attack was not made, but the squadron, while the troops were on board, took as prize a ship and cargo belonging to the enemy, in an open unfortified bay, at a distance from the destined object of attack. This ship and cargo being condemned as lawful prize, the produce of it was to be distributed according to the provisions of the prize act, 21 Geo. 3, c. 15, and the subsequent proclamation. Under that act a legal right was vested in the officers and crews of the squadron to their shares, on the condemnation as lawful prize. Therefore, where the courts of Lords Commissioners of Appeals from the Admiralty, had issued a monition to the prize agent, to bring in the proceeds which were in his hands, a prohibition was granted to that Court because the monition was contrary to the legal vested right of the officers and crews of the squadron (a)³.

Prohibition to the Court of Lords of the Privy Council Commissioners of Appeals from the Admiralty in Prize Causes.

The Declaration was as follows:—

Middlesex (to wit).—The Right Honourable Charles Earl Camden, the Most

(a)¹ 315. Which states imperfectly the case of *Inglot v. Vaughan*, 1 Chan. Rep. 262.

(a)² [In *Philips v. Barret*, 4 Price, 23, it was held that the sheriff could not take bail on an attachment out of a court of law for non-payment of costs, on the ground that such process was in the nature of an execution; but see *Lewis v. Morland*, 2 B. & A. 63, that it is in the nature of mesne process only. See Tidd's Pr. 220 (n) 8th edit. In *Morris v. Hayward*, 6 Taunt. 569, 2 Marsb. 280, S. C. this court held that though the sheriff was not compellable, yet that he was justified in taking bail on an attachment out of chancery.]

(a)³ [The judgment in this case was reversed on a writ of error to the court of K. B., who refused to grant the prohibition, on the ground that the prize courts

Noble Francis Godolphin Duke of Leeds, the Right Honourable Charles Lord Hawkesbury, and Sir George Yonge, Bart. being commissioners of our lord the king, duly appointed for receiving, hearing and determining of appeals from the said lord the king's courts of admiralty, in matters of prize, and having privilege of parliament, were summoned to answer Rodham Home, Esq. who in this case sues as well for our said lord the king as for himself, of a plea, wherefore they have caused process to issue against John Pasley, in a certain business of appeal and complaint of nullity, from our said lord the king's High Court of Admiralty in England, promoted and brought by George Johnstone, Esq. commander-in-chief of a squadron of his said majesty's ships and vessels, lately employed in an expedition against the Cape of Good Hope, and its dependencies; and the several commanders, officers, and marines on board of, and belonging to the said ships and vessels, composing the said squadron, as the sole captors of the ship "Hoogskarpell," whereof ——— Hermeyer was master, and her cargo, against Major General William Meadows, and the officers, soldiers, and others of our said lord the king's land forces, and the officers, privates, and others of our said lord the king's royal artillery, and the engineers serving under the command of the said William Meadows, at the time of the capture and seizure of the said ship and goods, asserting themselves to be joint-captors of the said ship and cargo, contrary to his said majesty's writ of prohibition before directed and delivered to them.

And thereupon the said Rodham who sues as well for the said lord the king as for himself, by John Irving his attorney, com-[477]-plains, that whereas all, and all manner of pleas, of and concerning the validity, explanation, interpretation, construction, or exposition, of the laws and statutes of this realm, and the cognizance of such pleas, belong and appertain to the said lord the king, and his royal crown, and to the common law, and in the courts of the said lord the king of record ought, and have always been accustomed to be tried, and discussed, and not in any court proceeding by any law differing from the common law of this realm. And whereas the said lord the king did in the second year of his reign, by his commission under the great seal of Great Britain, nominate, constitute, ordain, and appoint, all and every of his privy counsellors for the time being, and others therein named, or any three or more of them, to be his commissioners for receiving, hearing, and determining of appeals from the said lord the king's courts of Admiralty, in matters of prize. And whereas the said court of commissioners of appeals, proceeds by some law differing from the common law of this realm, and therefore has no power or authority to try or discuss the validity, explanation, interpretation, construction, or exposition, of any act or acts of Parliament, or to expound them otherwise than is warranted and allowed by the common law aforesaid. And whereas a statute was made in the Parliament of the said lord the king held at Westminster in the said county of Middlesex, in the 21st year of his reign, intitled "An act for the encouragement of seamen, and for the more speedy and effectual manning his majesty's navy." And whereas by the said statute (reciting that his majesty by order in council dated the 20th day of December in the year of our Lord 1780, was pleased to order general reprisals to be granted, against the ships, goods, and subjects, of the States General of the United Provinces, and that as well all his majesty's fleets and ships, as also all other ships and vessels, that should be commissioned by letters of marque, or general reprisals, or otherwise, by his majesty's commissioners for executing the office of Lord High Admiral of Great Britain, should, and might, lawfully seize all ships, vessels, and goods, belonging to the States General of the United Provinces, or their subjects, or others inhabiting within any of the territories of the States General of the United Provinces, and bring the same to judgment in any of the courts of Admiralty within his majesty's dominions,) for the encouragement of the officers and seamen of his majesty's ship's

and courts of appeals have the sole and exclusive jurisdiction over the question of prize or no prize, and who are the captors, notwithstanding any of the prize acts; and if they pronounce a sentence of condemnation, adjudging also who are the captors, the courts of common law cannot examine the justice or propriety of it, even though perhaps they would have put a different construction on the prize acts. And that the same courts have power to enforce their decrees, 4 T. R. B. R. 382.

The judgment of the court of K. B. was affirmed in the House of Lords, though not altogether on the same considerations. See post, vol. ii. p. 533, and *Parl. Cases*, 8vo vol. vi. p. 203.]

of war, and the officers and seamen of all other British ships and vessels, having commissions and letters of [478] marque, and for inducing all British seamen who might be in any foreign service, to return to this kingdom and become serviceable to his majesty, and for the more effectual securing and extending the trade of his majesty's subjects, it was enacted, that the flag officers, commanders, and other officers, seamen, marines and soldiers on board every ship and vessel of war in his majesty's pay, should have the sole interest, and property, of and in all and every ship, vessel, goods, and merchandizes, which they had taken since the 20th day of December, in the year of our Lord 1780, or should thereafter take, during the continuance of hostilities against the States General of the United Provinces, after the same should have been finally adjudged lawful prize to his majesty, in any of his majesty's courts of Admiralty in Great Britain, or in his majesty's plantations in America, or elsewhere, to be divided in such proportions, and after such manner as his majesty by his proclamation of the 27th day of December, in the year of our Lord 1780, might have already ordered and directed, or as his majesty, his heirs and successors, should think fit to order and direct, by proclamation or proclamations thereafter to be issued for those purposes. And whereas the said lord the king did by his proclamation of the 27th day of December, in the year of our Lord 1780, among other things order and direct that the produce of all prizes, taken as aforesaid from the States General of the United Provinces, or their subjects, or any inhabiting within any of the territories of the said States General of the United Provinces, should be distributed as follows, that is to say, the whole of the neat produce being first divided into eight equal parts, "the captain or captains of any of his said ships and vessels of war, who should be actually on board, at the taking of any prize, should have three-eighth parts, but in case any such prize should be taken by any of his majesty's ships or vessels of war, under the command of a flag or flags, the flag officer or officers, being actually on board, or directing and assisting in the capture, should have one of the said three-eighth parts, the said one-eighth part to be paid to such flag or flag officers, in such proportions, and subject to such regulations, as were therein after mentioned: The captains of marines, and land forces, sea-lieutenants, and master on board, should have one-eighth part, to be equally divided amongst them: The lieutenants, and quarter-masters of marines, and lieutenants, ensigns, and quarter-masters of land forces, secretaries of admirals, or of commodores with captains under them, boatswains, gunners, pur-[479]-ser, carpenter, master's-mates, chirurgion, pilot, and chaplain on board, should have one-eighth part to be equally divided amongst them: The midshipmen, captain's clerk, master sail-makers, carpenter's-mates, boatswain's-mates, gunner's-mates, master at arms, corporals, yeomen of the sheets, cockswains, quarter-masters, quarter-master's-mates, chirurgion-mates, yeomen of the powder-room, serjeants of marines, and land forces on board, should have one-eighth part, to be equally divided amongst them: The trumpeters, quarter-gunners, carpenter's crew, stewards, cook, armourer, steward's mate, cook's-mate, gunsmith, cooper, swabber, ordinary trumpeters, barber, able seamen, ordinary seamen and marines and other soldiers, and all other persons doing duty and assisting on board, should have two-eighth parts to be equally divided amongst them." And whereas in the month of January, in the year of our Lord 1781, George Johnstone, esq. since deceased, was by the said lord the king appointed commander-in-chief of a squadron of the said lord the king's ships and vessels, in the pay of his said majesty, to be employed on an expedition against the Cape of Good Hope, the same being a colony or settlement on the coast of Africa, belonging to the said States General of the United Provinces; and Major General William Meadows was also at the same time appointed commander-in-chief of the said lord the King's land forces, to be employed on the said expedition, and the said Rodham was also appointed captain and commander of a certain ship of war of our said lord the king, called the "Romney," the same being one of the ships of the said squadron. And whereas secret instructions, dated at Saint James's the 29th day of January, in the year of our Lord 1781, were given by the said lord the king, to the said George Johnstone, and William Meadows, among other things directing, "in order to prevent any contests or disputes that might otherwise arise, concerning the distribution of such booty, as should be gained from the enemy, by the joint operation of his army and navy, at the attack of the Cape of Good Hope, that all such booty should be divided between his land and sea forces, into two shares, according to the numbers mustered in each service, that that share which should fall to the sea service, should be divided according to the regula-

tions established in the navy, and that out of the share which should fall to his majesty's land forces, his commander-in-chief of the said land forces should be entitled to a division equal, in proportion to that share, with what should fall to the commander-in-[480] chief of the sea forces, in proportion to the share so falling to the navy: the remainder to be distributed among the officers and men in proportion to their respective pay." And whereas the said squadron of ships and vessels, in the pay of his said majesty, whereof the said ship called the "Romney" was one, and whereof the said Rodham was captain and commander as aforesaid, under the command of the said George Johnstone, having on board the said William Meadows, and a body of land forces of the said lord the king, destined to land and attack the said Cape of Good Hope, under the command of the said William Meadows, did afterwards in the month of March, in the year of our Lord 1781, sail and proceed from England, on the said expedition, and on the month of July then next following, did arrive within a certain distance of the said Cape of Good Hope, but the said George Johnstone, with the said squadron under his command, and the said William Meadows with the said land forces under his command, did not, nor did either of them, at any time make any attack on the said Cape of Good Hope. And whereas on the 21st day of July in the year last aforesaid, the said squadron whereof the said ship called the "Romney" was one, and whereof the said Rodham was captain and commander as aforesaid, under the command of the said George Johnstone, having on board the said William Meadows, and the land forces aforesaid, did in a certain open and unfortified bay called Saldana Bay, on the said coast of Africa, at a great distance from the said Cape of Good Hope, attack, and seize as prize a certain ship or vessel, called the "Hoogskarpell," of which ——— Hermoyer was master, with divers goods, wares, and merchandizes, on board the same, being the property of and belonging to the subjects of the said States General of the United Provinces. And whereas on the 17th day of June, in the year of our Lord 1782, Philip Champion Crespigny, esq. procurator-general of the said lord the king, did in the name of the said lord the king, institute a suit against the said ship and goods so taken as aforesaid, in his majesty's High Court of Admiralty of England, before the worshipful Sir James Marriot, kn^t. Doctor of Laws, (Lieutenant of the High Court of Admiralty of England, and in the same court General Official Principal, Commissary General, and Special President and Judge thereof, and also to hear and determine all and all manner of causes and complaints, as to goods and ships seized and taken as prize, specially constituted and appointed,) and by a certain allegation by him exhibited to the said suit, among other thing did propound and allege, that the said ship "Hoogskarpell," and the goods on board [481] the same had been taken and seized as prize by the said George Johnstone, commander-in-chief of the said squadron, and were at the aforesaid seizure thereof belonging to the said States General of the United Provinces, their vassals or subjects, or others inhabiting within their countries, territories or dominions; and did thereby pray that the said ship "Hoogskarpell," and all and singular the goods, wares and merchandizes seized and taken therein, might be pronounced to belong at the time of the aforesaid seizure, to the States General of the United Provinces, their vassals or subjects, or others inhabiting within their countries, territories or dominions, and as such, or otherwise, liable to confiscation and condemnation; and might be adjudged and condemned, as lawful prize to our sovereign lord the king, as being taken by the said George Johnstone, commander in chief of the said squadron. And whereas the said Sir James Marriot did afterwards, to wit, on the 4th day of September in the year last aforesaid, condemn the said ship "Hoogskarpell," and the goods, wares and merchandizes laden on board her, and therewith taken and seized (except a packet of diamonds), as good and lawful prize generally, reserving the question who were captors; and having afterwards maturely considered the matter, did by his interlocutory decree, on the 28th day of May in the year of our Lord 1785, pronounce for the interest of the army, agreeable to the spirit of his majesty's instructions, and decreed the prize in question to be distributed according to the directions of the said instructions. And whereas the said George Johnstone and the several commanders, officers and mariners on board of and belonging to the said ships and vessels composing the said squadron, conceiving themselves to be thereby aggrieved, did duly appeal from the said decree to the said commissioners for receiving, hearing and determining of appeals in matters of prize. And whereas on the 30th day of June, in the year of our Lord 1786, the Right Honourable Charles Earl Camden, Lord

President of the Council of the said Lord the King, Richard Lord Viscount Howe and Fletcher Lord Grantley, three of the said commissioners, having heard full information by counsel on both sides, did by their interlocutory decree, reverse the decree appealed from, and pronounced the said ship "Hoogskarpell" and her cargo to have been taken by the conjoint operation of his majesty's ships and vessels, employed on an expedition against the Cape of Good Hope, under the command of the said George Johnstone, and of the army under the command of the said Wil[482]-liam Meadows on the same expedition; and condemned the said ship together with the unclaimed part of the cargo as good and lawful prize to the said lord the king. And whereas Edward Taylor since deceased, and John Pasley, were duly appointed agents by the officers and crews of the several ships' companies of the said squadron, and did soon after the said decree of the 4th day of September 1782, as such agents, cause the said ship called the "Hoogskarpell," together with the unclaimed goods, wares and merchandizes taken in and on board the same, to be sold, and did receive divers large sums of money, being the produce of the same, part of which said sums of money was distributed by the said Edward Taylor and John Pasley among the officers and crews of the said squadron under the command of the said George Johnstone, and the residue thereof now remains in the hand of the said John Pasley, and by him ought to be distributed to the captors aforesaid, in payment of their several shares, in pursuance of the said statutes, and of the said proclamation of our said lord the king. And whereas the said Rodham did in Easter Term in the 28th year of the reign of our lord the now king, in the court of our lord the king of the bench, here at Westminster, implead the said John Pasley in a certain plea of trespass on the case on promises, for the purpose of recovering from the said John Pasley his damages by him sustained by reason of the said John Pasley's having neglected and refused to pay to him his share of the produce of the said ship, and of the goods and merchandizes so as aforesaid condemned as lawful prize to our said lord the king; and which said plea is still depending in the said court of the bench here at Westminster. And whereas the said commissioners of appeals in matters of prize have not by the law of this realm any power or authority to take out of the hands and possession of any agent or agents, so constituted as aforesaid, the money arising from the sale or sales of any ship, vessel, goods, wares, or merchandizes, taken from the said States General of the United Provinces, or their subjects, during the said hostilities, by any ship or vessel of war in his majesty's pay, which have been finally adjudged lawful prize to his majesty in any of his courts of admiralty in Great Britain, or to compel them to bring in the same; yet the said Right Honourable Charles Earl Camden, Lord President of the Council of the said Lord the King, the Right Honourable Francis Godolphin Lord Osborne, commonly called Marquis of Carmarthen (to whom the title of Duke of Leeds hath descended), Fletcher Lord [483] Grantley now deceased, Charles Lord Hawkesbury, and Sir George Yonge, Bart. five of the said commissioners for receiving, hearing and determining appeals in matters of prize, not weighing the said laws and statutes of this realm, but contriving the said Rodham to aggrieve, injure and oppress, and to take out of the hands of the said John Pasley, the surviving agent of the captors of the said ship and the cargo thereof, the monies arising from the sale of the said ship and the cargo there, and thereby to prevent the said Rodham from recovering from the said John Pasley his damages aforesaid, did on the 3d day of May in the year of our Lord 1788, admonish the said John Pasley personally to bring in an account of the sales of the said ship and cargo, together with the proceeds of such part thereof as might be in his hands, power or possession, within fifteen days, contrary to the laws and statutes of this realm: And although his majesty's writ of prohibition in this cause, to the contrary, hath been directed and delivered to the said Charles Earl of Camden, Francis Godolphin Duke of Leeds, Charles Lord Hawkesbury, and Sir George Yonge, on the 10th day of February in the 29th year of the reign of our lord the now king, to wit, at Westminster aforesaid, in the county aforesaid; Nevertheless the said Charles Earl Camden, Francis Godolphin Duke of Leeds, Charles Lord Hawkesbury, and Sir George Yonge, as such commissioners of our lord the king as aforesaid, after his majesty's said writ of prohibition first directed and delivered to them to the contrary thereof, to wit, on the day and year last aforesaid, at Westminster aforesaid, in the county aforesaid, caused process to be issued against the said John Pasley, to bring in an account of the sales of the said ship and cargo, together with the proceeds of such part thereof as might be in his hands, power and possession,

in contempt of our said lord the king, and to the damage, prejudice and injury of the said Rodham; and contrary to the form and effect of the said customs and statutes; wherefore the said Rodham Home, who sues in this behalf, as well for our sovereign lord the king as for himself, saith that he is injured and hath sustained damage to the amount of 40*l.* and therefore as well for our said sovereign lord the king, as for himself, he brings his suit, &c.

The Defendants pleaded, in the usual form, that they did not issue process against the agent, &c. and concluded to the country.

But for having his majesty's writ of consultation, they demurred generally to the declaration.

This case was first argued in Trinity Term 1788, on a suggestion for a prohibition, by Adair and Lawrence, Serjts., for [484] the Plaintiff, and Hill, Rooke and Le Blanc, Serjts., for the Defendants; after which the Court ordered the Plaintiff to declare.

On the demurrer to the declaration, the second argument was in Trinity Term 1789, by Le Blanc for the Defendants, and Lawrence for the Plaintiff; the third, in Michaelmas Term following, by Rooke for the Defendants, and Adair for the Plaintiff; and the fourth, in the present term, by Hill for the Defendants, and Adair for the Plaintiff (a).

The substance of the three former arguments on the part of the Defendants was as follows:—

The ground of prohibition stated in this declaration is, that by the prize act, 21 Geo. 3, c. 15, the produce of captures made by his majesty's ships of war is given to the officers and crews belonging to those ships; that in the present case there has been a sentence condemning the "Hoogskarpell" as lawful prize to the king; and that after such condemnation, the Lords Commissioners of Appeals had no power to award a monition, calling upon the person in whose hands the proceeds of that ship were, to bring in an account of those proceeds, and pay the money into the hands of the registrar of the Court of Appeals. The question therefore arising on the demurrer is, whether under the prize act, such a legal right vested in the Plaintiff, that after the sentence was pronounced, the Defendants acted contrary to the common law of this country in issuing such a monition? For supposing a legal right to be vested in the captors by the prize act, yet unless the jurisdiction of the Court of Appeals be also taken away, there is no ground for a prohibition.

Before the passing of any of the prize acts, the whole property of captures made from an enemy vested in the crown; and the statute in question is a declaration of the legislature, in what manner those prizes which the crown had before the sole power of distributing, should in future be disposed of in the particular cases mentioned by the statute, and explained by the proclamation. But this act clearly refers only to the case of a sole capture made by the king's ships, as to the right which it vests in the captors. The first and second sections are those on which the claim of the navy is founded; but in the former, the sole right in all and every ship and goods taken by a king's ship is given to the officers and crews on board; and in the latter, in case of a prize taken by a ship having a letter of marque, the same right is [485] given to the owner of the privateer. The words of the act relating to the king's ships are, that the different persons on board shall have the "sole interest"; it has not therefore in contemplation the case of a capture made by any other persons than those whom it particularly describes: and being made to limit the prerogative of the crown (to which the right of all prizes before belonged), the Court is bound strictly to look to the act itself, to determine the cases to which that limitation extends. But in the present instance the sentence of the Court of Appeal declares that it was not a sole capture by his majesty's ships of war, since it expressly states, that the prize was taken by the joint operation of the fleet and army. Yet in order to entitle the Plaintiff, it must be contended that under this sentence the navy are the sole captors; otherwise they cannot come within the words of the act of parliament. It is said they are entitled to a part: let it be shewn to what part. If they are not entitled to the whole, can this court either from the act or proclamation say that the Plaintiff has a right to any particular definitive share? The proclamation to which the act refers, directs that the whole of the prize shall be divided into eight parts, and dis-

(a) Vide post, the fourth argument, and the reasons which induced the Court to require it.

tributed in certain shares among the officers and seamen, and other persons in different capacities on board the ship making the capture. No person therefore can claim a right to a share of any part, less than the whole: and though marines and soldiers on board are mentioned in the proclamation, yet the term on board means belonging to the ship. *Wemys v. Linzee*, Dougl. 324. A separate body of troops, not acting as marines, are not soldiers on board, within the meaning of the statute. Such then being the construction of the act and proclamation, and that court which has alone the cognizance of the question whether prize or no prize, having said that this was not a sole, but a joint-capture, the case is wholly out of the act; and no court of law can claim a right to enquire who shall share in the prize, or what has become of the produce of it, independent of the Court of Admiralty; more especially as the Court of Admiralty has directed it to be placed in the hands of their registrar, for the security and benefit of those who may be entitled.

This capture therefore not being vested by the prize act, and being made by a public armament, it belongs to the king as trustee for the public, and he has a right to distribute it in what manner he thinks fit. In the ancient authorities it is laid down, that what a man gains in battle from the king's enemies, is his own. Bro. Abr. tit. Property, pl. 38. This law was [486] adapted to the border wars with Wales and Scotland, as it encouraged the great landholders to collect their vassals together at their own expence, to repel the inroads of the enemy. But this was not law as to soldiers maintained at the public expence; they acted under the directions and in the name of the crown, to which all the booty which they took belonged. This was agreeable to the law of nations. Grot. de Jure Belli & Pac. lib. 3, c. 6, s. 8, & 14, and has been adopted by our Courts of Admiralty. *Rex v. Broom*, Carth. 398. 12 Mod. 134. In the case of *Brymer v. Atkins* (ante, 164), this court lately said, that before the sixth year of Queen Anne, all prizes taken in war were of right vested in the crown, and that questions concerning the property of such prizes were not the subject of discussion in courts of law. This position is a true one, and is decisive of the present case, this being a question concerning the property of a prize, and not falling within the prize act. Whether it belongs to the king or the captors, is indifferent as to the application for the prohibition; no fixed proportion being ascertained, the Court of Admiralty have a right to decide on the property, and to secure it till that decision takes place. Captures are either joint or sole. Of joint captures there are three kinds; 1. By a king's ship and a privateer having letters of marque; 2. By a king's ship and a privateer having no letter of marque; 3. By a fleet and army. In the first case (Dougl. 311, *Roberts v. Hartley*), the proportion between the king's ship and the privateer is settled by usage according to the number of persons on board: the share of the man-of-war belongs by the common law to the crown, and is vested by the prize acts in the man-of-war; that of the privateer also originally belongs to the crown, and is given to the privateer by virtue of the king's commission. In this case, the man-of-war is considered as the sole captor of the king's share. In the second case, the proportion is also ascertained; the king has the whole, but in two distinct capacities: that part which is taken by the ship having no letter of marque, belongs to him in his office of Admiral; the other, as owner of the man-of-war. Two different proctors attend to make the claim, the king's proctor, and the admiralty proctor. In this case also the man-of-war is the sole captor of the king's share. In the third case, the whole belongs to the king; both army and navy are paid by him, he has a right to the whole, and it depends on his pleasure whether they shall have any and what proportion.

[487] The prize acts were designed to encourage the navy, but not to discourage the army. The king gives up to the navy his share in the prizes which they take, that is, where they are the sole captors. But the acts do not extend to the case of a joint capture by a fleet and army. In this case nothing can vest; because it is not to be conceived that the king could design to give away all power of rewarding his army. He gives to the navy all prizes which they take; but this cannot mean all which they together with the army take; otherwise the king's grant would be extended beyond the meaning of the words, and most strongly against himself. If the whole were vested in the squadron, the instructions for the division of the booty would be nugatory. It cannot be supposed that these instructions rested on the acquiescence of the navy, and that it was to them, rather than the king, that the army were indebted for a share. If the whole be not vested, neither is any part, no proportion

being ascertained. Nothing is vested, till the royal pleasure is known. It is like the case of a lease to commence at Michaelmas, for so many years as J. S. shall name; though the period of commencement is fixed, yet the lessee has no right of entry till the number of years is named by J. S.; till he has named, the lease is void for uncertainty. 6 Co. 35 b. Co. Litt. 45 b. 2 Bac. Abr. 664. But even if the court should be of opinion that the navy have a vested right to such share as may belong to them, yet there are authorities to shew that in such case a court of common law will not prohibit the court of Admiralty from giving effect to their sentence, the subject-matter being within their jurisdiction, who having cognizance of the principal, shall also have cognizance of the incident. *Turner v. Cury*, 1 Lev. 243, cited Dougl. 604. *Ree v. Broom*, Carth. 398. *Brown v. Franklyn*, Cart. 474, also cited Dougl. 605, *Le Cause v. Eden*. If these principles be right, the declaration contains no ground for a prohibition. It is indeed full of contradiction and fallacy. It states, that the king's proctor applied to have the whole condemned, as taken by Commodore Johnstone; he therefore admitted the jurisdiction of the court as to the question, who were the captors? By the sentence, the ship was condemned as lawful prize, the question as to the captors being reserved. The court afterwards pronounced for the interest of the army agreeably to the spirit of the king's instructions, and decreed the prize to be accordingly [488] distributed. From this there is an appeal, and the lords commissioners of appeals, though they reversed the former decree, declared the prize to have been taken by the joint operation of the fleet and army. The competence of the court to make this decision cannot be doubted. It is made by those who have the exclusive jurisdiction of the questions, whether prize or no prize, and who were the captors, and by the tribunal to which the Plaintiff himself has resorted for the discussion of them; the king's proctor having prayed that the ship might be condemned as taken by the fleet. What then is the effect of this decree? Directly contrary to the allegation and prayer of the proctor. It declares the prize to have been taken by the joint operation of the land and sea forces. This therefore cannot possibly be considered as a sole capture; nor under these circumstances, can the prize act vest the sole interest in the navy. It is objected, that there is an averment which the Defendants might have traversed, of the prize being taken by the fleet having land forces on board. But this averment is contradicted by the sentence of the court. This sentence is conclusive. The Defendants cannot traverse the averment. After the question has been solemnly determined, no other judicature can try it. The king, the army, and the commissioners of appeals are interested in such an issue; there would be no end of litigation. The averment then is fallacious and nugatory.

The declaration goes on to state, that the navy agent, pending the dispute, while the question, who were the captors, was reserved and undecided, sold the whole, and distributed a share to the navy, i.e. to those who claimed to be sole captors, but whose claim was undetermined, and who were afterwards decreed not to be the sole captors: also, that the residue was remaining in the hands of the agent, "and by him ought to be distributed to the captors aforesaid;" i.e. to those who were decreed not to be the captors. But the agent had no right to distribute any part: it being a joint capture, nothing vested. Much less had he a right to distribute the whole. It is then stated that the Plaintiff had brought an action against the agent, to recover damages for his neglect in not paying the Plaintiff his share. But what share? what neglect? what pretence for an action against the agent till the balance in his hands is liquidated? A verdict in such an action could not bind the other claimants. This action is likewise stated to have been brought in Easter Term 1788, which ended on the 5th of May; but the monition [489] to have issued on the 3d of May in that year; so that the action was commenced subsequent to the monition, and was brought merely as an additional argument for a prohibition. The monition requires nothing more than an account of sales, and that the residue should be paid into court. This order is to be considered both as preparatory to the execution of the decree, and as a comment upon it. It is the same monition as is usual in all prize causes where there is a dispute. The court orders the property to be brought in to secure it for the right claimants, and for the payment of costs. If a prohibition be granted on such a monition, the prize court cannot proceed and do justice. It frequently happens that a man-of-war being too strong for a privateer, takes possession of a prize, denies the right of the privateer, and libels accordingly in the Court of Admiralty, but it turns out that the man-of-war has no right; if the court could not take the produce out of

the hands of the agent, the right of the privateer could not be secured: the agent, as in this case, might sell and distribute, and with more reason, since if it were a joint capture with a privateer, something would vest: but the share would be uncertain; and the ground of the prohibition would be, that something being vested, though it were uncertain what, therefore the agent should retain the whole. But if this were allowed, the court could afford no security to claimants. The present is a monition on an interlocutory sentence previous to final judgment, and while the matter remains uncertain, is highly proper. If the prize court cannot call upon the agent to account, no other court can. No court of common law can, for want of parties to the suit; and it would be a singular ground for a prohibition, that it is a matter of equitable jurisdiction for the Court of Chancery. It being the common practice of the court of prize to take the produce of sales out of the hands of the agent, even in the case of a disputed sole capture, that court must clearly have a right to do the same in a joint capture, where nothing is vested. But if it be doubtful whether any interest is vested or not, this court will not in a doubtful case grant a prohibition; nor will it forbid the inferior court to proceed, unless it is clear that such proceeding is contrary to law.

But supposing such a construction could be put upon the act, as to say, that the whole is given to the navy independent of the land forces, yet the act does no more than give a common law right to persons who before had no right, and therefore gives a [490] court of common law only a concurrent jurisdiction with the Court of Admiralty. That court therefore being already in possession of the cause, and having given that sentence which it was alone competent to give, shall not be prevented by a court of concurrent jurisdiction, from carrying their sentence into execution.

Upon the whole therefore it has been shewn, that, 1st. The act and proclamation do not extend to the present case, which by the decision of the court of appeals, is not that of a sole capture. 2d. If it should be construed to be a sole capture, still that court having the original jurisdiction of it, and having pronounced a sentence upon it, ought to be permitted to carry that sentence into execution. 3d. If it should be holden, that a vested right is given by the act to the navy, in such share as shall belong to them, yet as the court cannot determine what that share is, it cannot determine that any particular share vests in them, and therefore cannot prohibit the lords commissioners of appeals from directing the money to be placed in the hands of the registrar.

On behalf of the Plaintiff, the arguments took the following course.

With respect to the point made by the Defendants, that "as the original question whether prize or no prize belonged to the Court of Admiralty, therefore they had a right of enforcing their sentence," it is to be observed, that by the act in question a provision is made, that in case of captures made by the king's ships, the officers and crews shall be enabled to appoint an agent for the sale and appraisement of the prizes; that such agent shall give notice in the *Gazette*, when he means to distribute the money: that he shall not pay any share to those men who have deserted: but that the shares of deserters, and also the unclaimed parts, shall be appropriated to the use of Greenwich Hospital. Now if the court of prize can, as a necessary consequence of the cognizance of the original question, compel the agent to bring into court the produce of the sales, the provisions of the act would be rendered totally nugatory. The court is not obliged to give notice in the *Gazette*, and consequently the seamen would not know to whom to apply for their prize-money. Neither is that court bound to attend to the clause in favour of Greenwich Hospital. The monition therefore goes in direct contradiction to the act, and tends to defeat some of its most salutary provisions. Though [491] it may be true, that before any prize-acts were passed, that court had a right to inquire what became of the produce of the sales, yet it does not follow that this right now continues. The sole property of any prize taken by a privateer, having a letter of marque, is given to the owners, who have therefore a right to appoint their own agent to dispose of the ship, and the court of prize could not in such case take it out of his hands without some complaint being made against him. So in the present case, the law having vested the property in the officers and crews of his majesty's ships, and they having placed it in the hands of the agent, the lords commissioners of appeals can have no right to take it out of his hands, who is alone to sell and distribute it. Thus much being premised, the construction of the act is to be considered.

It gives to the flag and other officers, seamen, marines, and soldiers on board every ship in his majesty's pay, the sole interest and property of every ship taken from the

States General, after the same shall be condemned as lawful prize in such proportions as shall be directed by the proclamation. In order therefore for any person to intitle himself to any share of the prize, it is only necessary that he should fall within the description of the persons mentioned in the act, and that the ship taken shall be condemned as lawful prize to his majesty. On the condemnation, the right of every such person immediately attaches. In the present case it is admitted by the pleadings that the capture was made by a squadron of ships under the command of Commodore Johnstone, with the king's troops on board. The right therefore of the navy was vested by the act, and the troops are to share as persons doing duty on board, and assisting in the capture.

The facts admitted are these. A squadron, with an army on board, was detached to effect one given object. That object was the reduction of the Cape of Good Hope. For this purpose the army was put on board, but not to perform any other service in the course of the expedition, which might be the peculiar and proper business of the ships to perform. On the arrival of the armament at the place where the land forces were designed to act distinctly from the navy, it was likely that a considerable booty would be acquired: and as in that situation those forces would be expected to take a great share in the service, it was wise and politic that some provisions should be made for the distribution of the plunder. It was accordingly [492] ordered that there should be an equal division. But before the arrival of the expedition at the Cape, there were services which the fleet were very likely to perform, namely, the capturing the ships of the enemy, with which they might fall in; but in that interval there was no service to which the army was peculiarly destined. There was therefore no special provision made for the probable case of a capture made between the sailing of the fleet from this country and its arrival at the Cape of Good Hope: the reason of which is obvious, because it was understood by the crown that all such cases were already provided for by the prize-act. Unless the court were to suppose that the object of the crown was to take to itself all the prizes which should be made in the course of the voyage, they cannot but believe that this omission was designedly made: the probability of the event must have suggested itself to the minds of those who planned the expedition. As therefore it appears that the understanding of the crown was, that the prize-act would operate upon any capture made anterior to the arrival of the squadron at the Cape, the court will give that effect to the act and proclamation, if the words will bear such a construction. But the words are sufficiently large for this purpose. They give the prize to the officers, seamen, marines and soldiers on board, and all other persons who shall assist in the capture. And though when the act mentions soldiers on board, it may mean, as is contended, soldiers doing duty as marines, and to give them the same advantages as marines, yet still there is a general description of persons assisting on board, under which the army might take. In the case of *Wemys v. Linzee*, the situation of Captain Wemys was similar to that of General Meadows in the present; he and his troops were considered merely as passengers, they were on the supernumerary list, and he shared in the prize only in the fifth class, as a person assisting and doing duty on board. He was not under the command of the captain of the frigate, neither was General Meadows under that of Commodore Johnstone. In the one case it was a small detachment, in the other an army. But the question does not depend on the number of soldiers. So in the case of the ship "*La Charmante*," taken at Louisbourg in the year 1745, the court of appeals decreed (a), that captain Huston, who had the command of a company of troops sent to assist in the reduction of the island, and was actually put on board the king's ship [493] "*Princess Mary*," at the request of the commodore of the squadron, and assisting on board at the time of the capture, was not intitled to share in the class of lieutenants of the ship.

But if this be not the true construction of the act, it must be on the supposition that the sentence of the court of appeals in some measure controls the facts which are admitted on the pleadings, and that this court is bound only to look to the sentence. But the sentence is, that the prize was taken by the conjoint operation of the army and navy, and it is not necessary that any thing more shall be intended by the words conjoint operation, than that the capture was made by the ship with the troops on board. The court will presume that the sentence was given upon those facts, which

(a) Feb. 20, 1752, as appears from the register of the court of appeals.

are admitted by the pleadings to be true, (because it was in the power of the Defendants, if they had thought proper, to have taken issue, and denied those facts,) unless it necessarily follows, from the words of the sentence, that it is contradictory to the act.

This capture being made at sea, in an open unfortified bay, was clearly effected by the operation of the ships. There were but two ways in which the army could assist; either by remaining in the ships, and acting as part of the crew, or by being landed to prevent the escape of the enemy from the prize. Now it is consistent with the facts stated, to suppose that it was a capture made while the troops were on board the ships, and then it is obviously within the prize-act; and if they were landed to prevent the crew of the enemy's ship from getting on shore, or for any such purpose, it could not be contended that merely from that circumstance the case was taken out of the act. If an enemy's vessel were driven on shore, and a party of seamen landed to prevent the crew from escaping and removing the cargo, could it be said that this was not a capture by persons on board the ship making the prize? In *Lindo v. Rodney* (Dougl. 613), Lord Mansfield says, "It would be spinning very nicely to contend, if the enemy left their ship, and got ashore with money, were followed upon land, and stripped of their money, that this would not be a sea-capture; the prey is, as it were killed at sea, and taken upon land." And his lordship before says, "The original cause of taking is here at sea. The force which terrified the place into a surrender was at sea; if they had resisted, the force to subdue would have been from the sea." [494] So in the present case the capturing force was unquestionably from the sea; if the men had remained on board, it would be clearly within the prize-act, and their being put out of the ships to facilitate the enterprize, (supposing that to have been the case,) could not in reason take it out of the act. The strongest point relied on by the other side is, that the act is applicable only to the case of a sole capture, the words of it being, that the takers shall have the "sole interest" in the thing taken. But this, so far from being a necessary consequence of the words, is contrary to common experience. On the construction of the prize-acts it has been often decided, that a ship which is barely in sight of another making a capture has a right to share in the prize. If the interpretation contended for were the true one, no prize taken by a king's ship and a privateer could be condemned under the act: the first clause gives to the king's ship such prizes as they shall take: the second provides for privateers the same encouragement; but there is no clause which divides the prizes taken by both jointly: the consequence therefore would be, that such captures not being made solely by either, would not fall within the act; whereas the constant practice is to consider them as made by both, and to divide them accordingly between both. In the case of *Le Croas v. Hughes* (Park's Insurance, 269, last edit.), it clearly appears that Lord Mansfield does not consider the prize-act as being confined to the case of a sole capture. In the case of the "*Bienfaisant*," taken at Louisbourg in the year 1758, though the navy were not strictly the sole captors, yet they were decreed to have the sole right to the prize. That was an instance where there was undoubtedly a conjoint operation (a) of a land force acting on shore, and not on board the ships, yet by a sentence of the admiralty the prize was condemned to the navy alone (Feb. 24, 1759).

Cur. advis. vult.

After these arguments, the case stood for judgment. But on the last day of Hilary term, Lord Loughborough said, that [495] although he had formed a decided opinion, that as the ship and cargo in question were condemned as lawful prize, the prize-act attached upon it, which was an unlimited, universal grant of the interest of the crown to the navy; and although the sentence of the court of appeals evidently meant to

(a) The account of that co-operation as described in the despatches sent home by the commander of the troops, was as follows:

"The admiral sent word he intended to send in boats with 800 men, to take or destroy the '*Prudente*' and the '*Bienfaisant*' in the harbour. I ordered all the batteries at night to fire into the enemy's works, as much as possible to keep their attention to the land. The miners and workmen went on very well with their approaches to the covered way, though they had a continued and smart fire from it. We continued our fire without ceasing. The boats got to the ships at one in the morning, and took them both."

assert, that by reason of the conjoint operation of the army and navy, the property of the prize vested in neither, but in the crown, (a proposition which he thought directly contrary to the act of parliament,) yet his lordship was not then quite so clear, whether, as the case stood upon the record, it appeared that the court of appeals had exceeded their power in merely issuing a monition to the agent to bring in the proceeds, so as, in that stage of the proceedings, to afford a ground for a prohibition: and also whether there being many claimants concerned in appointing the agent, a single claimant should be permitted to object to the agent giving an account of the sales, and carrying in the proceeds.

On these two points therefore, his lordship desired to hear some further argument.

MR. JUSTICE WILSON said, he wished it to be considered on further argument what the jurisdiction of the court of admiralty was before the passing of the prize-acts. On the discovery and first settlement of America, commissions were granted to Sir Walter Raleigh, and other private persons, who were to have for their own benefit whatever they might take. In *Leonard* (2 Leon. 182, *Somers v. Sir Richard Buckley*) there was a case, he observed, which arose upon one of those commissions, where two ships belonging to different private adventurers took a prize. One had taken it, and the other was in sight. It became a question before the admiralty, whether the latter was intitled to any part? The court of Common Pleas took jurisdiction of it in that instance, and said that by the civil law each ship was entitled to a moiety; and a prohibition was granted, because those two parties had agreed on their return to England that whatever was taken should be divided by them in a certain proportion.

LORD LOUGHBOROUGH then said, that with respect to the jurisdiction of the court of Admiralty, he conceived that antecedent to the prize-acts, the only jurisdiction which the court of admiralty could have, was to pronounce whether the capture made were a legal capture or not, because the sole property of what was taken by the king's ships was in the crown, and [496] therefore there could be but one person intitled to any thing taken. In the reign of Queen Elizabeth, and at subsequent periods, but particularly in that reign, there were several commissions given to Sir Walter Raleigh, Sir Francis Drake, the Earl of Cumberland, and others who undertook at their own private expence, adventures to seek what they could get from the Spaniards in America, as appeared from the commission in *Rymer* (*Rymer's Fed.* vol. 16, p. 16, 22, &c. edit. 1715, London). It might probably have been a matter for the court of Admiralty determining upon the legality of a capture, also to determine between the grantees of the crown, as to the interest which a particular ship might have in a capture made by another ship. The court of Admiralty acting under the instructions of the crown might incidentally determine the question between the grantees of the crown. But the prize-act had introduced a new law as binding as the common law; it had vested, by force of a parliamentary grant, a title to all prizes taken at sea, in the navy. No jurisdiction therefore existing in the court of Admiralty previous to the prize-act, could intitle that Court, (the question of prize being decided) to decide the question of property in the prize contrary to the terms of the Act of Parliament.

In consequence of what was thus thrown out by the Court, a further argument was ordered, which came on in the present term; when

Hill, Serjt., in support of the demurrer, argued as follows: In order to entitle the Plaintiff to a prohibition, it is incumbent on him to shew in his declaration that some legal right is vested in him, either by the common or statute law of the kingdom, which has been violated by the Defendants. Now no such thing appears. If the facts stated in the declaration coupled with the prize-act were a sufficient answer to the monition, it ought to have been shewn below: it ought to have been alleged to the court of Admiralty, and perhaps they might have allowed it. If they had disallowed it, or determined contrary to it, then, and not till then, would have been the time to have applied for a prohibition. But supposing that the whole of the facts in the declaration had been shewn for cause to the lords of appeal, against their proceeding in respect to the agent, yet still they ought to have proceeded. It is admitted on all sides, that where the court of Admiralty has jurisdiction of the principal matter, if any collateral matter arises incidentally in the cause, [497] such incidental matter, (though if it had been the original cause of suit, would have been properly cognizable in the courts of Westminster-hall) may be determined in the court of Admiralty; and if that court determines that incidental matter according to the common or statute law of the land, then there is no ground for a prohibition. Now the first allegation contained in the

declaration is, that all and all manner of pleas concerning the construction and exposition of the laws and statutes of this realm belong to the king's courts of common law. But this is too large a proposition; since if the construction of the common or statute law arises incidentally in a cause in the courts of Admiralty, those courts, it is admitted, have a right to make that construction. The proposition therefore ought to have been qualified accordingly. This qualification of the general allegation of law is peculiarly applicable to the present case. For it is not alleged that the letter of attorney, by which the agent was instituted, was exhibited to the Lords of Appeal, and that they either would not admit it, or determined against it. The application now made to the Court, being to restrain the proceedings against Pasley, on the ground that he has an authority from those who have a legal right, (for without such authority he is a mere stranger,) that authority ought to have been shewn to the lords of appeal; and if they had acted with respect to that authority, contrary to the rules of the common law, (as for instance if they had required the letter of attorney to be proved by two witnesses,) then, and not before, there would be a sufficient reason for a prohibition. For then it would be a case, where a court of prize had determined an incidental matter, properly of common law cognizance, against the rules of the common law. Thus in the case of *Somers v. Sir Richard Buckley* (2 Leon. 182), it was part of the suggestion for the prohibition, that the agreement between the parties, which was the only matter cognizable at common law, had been alleged in the court of Admiralty, and there over-ruled, and on this ground the prohibition was granted. But afterwards it being stated by the other side, that the court of Admiralty would allow that plea and try it, a conditional consultation was granted. This shews in the strongest terms, that before the superior court will grant a prohibition, it must be fully satisfied that the matter of common law cognizance (for the miscon-[498]-struction of which the prohibition is prayed) has been clearly and plainly laid before the inferior court. On the same principle the case of *Shatter v. Friend* (1 Show. 158 & 172) was decided, where a prohibition was granted to the Ecclesiastical Court, on account of that Court having refused to admit proof of the payment of a legacy by one witness. It was there objected that the motion for the prohibition came too late, being after sentence; but Lord Holt said "they could not come till they were aggrieved by refusal of proof, and that was not known till after sentence." This shews the necessity of the matter, on the wrong interpretation or decision of which the prohibition is to be founded, being fully and plainly exhibited to the inferior court. Till that appears, there is no ground to prohibit them. The superior court will not presume, without due information, that the inferior court will act wrong in their decision, when such matter is brought before them. This court will not prejudice the court below.

But supposing that every thing, which ought to have been shewn to the lords of appeal, was shewn. In that case they would have acted perfectly right in issuing a monition. If they had not issued it, they might perhaps have been liable to a mandamus, to compel them to execute their sentence. They were bound to require the agent, for the navy to bring the money in his hands into their court, to see it distributed according to law. For a legal right was vested in the army to a share in the prize, whatever was the quantum of that share. Of this the court of Appeals was bound to take care. To the possession of this, the agent does not appear to have any right. The declaration in stating the appointment of Taylor and Pasley as agents, does not shew that they or either of them had a right to be possessed of the whole. The act (19 Geo. 3, c. 67, s. 31) directs, that all sales, &c. of any ship and goods, &c. taken by any of his majesty's ships of war, shall be made by agents or persons nominated and appointed in equal numbers, by the flag officers, captains, officers, ships' companies, and "others intitled thereunto." Those words are added to every different class of persons, to whom, in different proportions, the prize is given. But in the declaration those words are totally omitted. Now it is clear, not only from this omission, but from the whole declaration, that Pasley is not agent for the army as well as the navy. The contest is plainly between the navy and army, the former [499] claiming the whole, and the latter contending for a part. Pasley therefore not being appointed "by the others intitled thereunto," viz. the army, can have no right to keep their share in his hands. Now the proper way of taking that share out of his hands, was by directing him to come to an account, and deposit the proceeds of the ship and cargo in the court of Appeals. If his constituents have a right only to a

part, some one else must have a right to the other part, which it was the duty of the lords commissioners to protect. But an account could not be taken of a part, without an account being taken of the whole. The agent also having disposed of part of the proceeds before the final adjudication, the navy who appointed him, have forfeited their right.

By the act, the agent is to be appointed by a majority of those intitled. But it is not stated in the declaration that Pasley was appointed by a majority. It cannot be intended that he was appointed by them all, as they were very numerous, and many died before the appointment. And this objection may be made, though it be on a general demurrer. For a demurrer admits nothing but what is well pleaded. The constitution of the agent goes to the very root and foundation of the title to the prohibition; but it is defectively set forth, and therefore ill pleaded. It is likewise stated that Taylor and Pasley were appointed agents, (not that Pasley alone was,) and that Taylor is dead. Now the distinction in the books is this, that where an interest is conveyed to two, it will survive; but where an authority is so conveyed, it is to be taken strictly, and will not survive. Thus if a warrant to arrest be given to two, without saying jointly and severally, and one dies, there is an end of it. The principle upon which an executorship survives is, that an executor has an interest. But it was long doubted whether an administration could survive. The appointment also should have been by letter of attorney, according to the directions of the act. But there is no letter of attorney stated. Another objection is, that though there are many joint constituents of the agent, having a joint title in the prize, yet the action is brought by a single captain. It is also stated in the declaration, that part of the proceeds has been received, without saying what part. Now the Plaintiff is to recover by his own strength; and he has not shewn a right, not having averred that he had not received the whole of his share. Though in a plea in bar, certainty to a common intent is sufficient, yet a greater [500] certainty is required in a count. Co. Litt. 303 a. This was a matter within the Plaintiff's own knowledge, and is of the substance of his title. If he had made the proper averment, an issue might have been taken upon it. It has been argued on the part of the Plaintiff, that the whole right was in the navy, and that the army were entitled only to a part as *cestui que trusts*, or on a *quantum meruit*. But the contrary is most apparent upon the face of the declaration. Either the prize-act does not attach, and then the whole is in the crown, or it does attach, and then the same proclamation which gives a legal right to the navy, gives also a legal right to the army. The prizes are to be divided among the seamen, marines, and soldiers on board. These are distinct sets of men, regulated by different laws. Ever since the Restoration, there has been a standing law for the navy, so also there is a standing law for the marines; but there is no standing law for the soldiers, whose existence as an army depends upon an annual act of parliament. These different classes of men are accordingly the objects of the prize-act and proclamation, in certain proportions. The same sort of right which vests in one, vests also in the others, whatever may be the quantum of their respective shares. The case of *Wemyss v. Linzee* (Dougl. 324, last edit.), was referred to in a former argument, but the interpretation there put upon the words "on board," that they meant "belonging to the ship," was evidently as repugnant to Lord Mansfield's own opinion, (though he felt himself bound by the decision in the case of Lord Anson and the "Centurion,") as it was to former determinations. For in Tr. 1 Geo. 1, the Court of King's Bench determined in the case of *Santlow v. Walker (b)*, that an admiral who was appointed in England to supersede another in the command of a squadron at Jamaica, but had not arrived on that station, and so was not actually on board some ship composing the squadron, though he certainly belonged to it, was not entitled to share in a prize taken in the West Indies by one of the ships of the squadron, while he was on his passage.

It is therefore to be hoped that the Court will in this instance put a construction on the words "on board," contrary to that in *Wemyss v. Linzee*, upon the same principle, on which in *Garforth v. Flaron* (ante, 327) they decided, that the profits of an office ought not to be separated from the execution of it. The public good equally requires that those persons who perform military services should receive the reward of those services, as that they who execute civil offices should receive the profits of those offices.

(b) This case Mr. Serjt. Hill read from a MS.

[501] The Courts of Admiralty proceed by the rules of the civil law; Hale, Hist. C. L. 31 & 32, and according to the civil law (*d*) the property of prizes taken by private persons was in the captors. So also by the ancient law of England from the earliest times, the prizes which were taken by private persons belonged to them, subject to certain deductions. This appears from the Black Book (*e*) of the Admiralty, from many rolls of parliament (*a*), from the Year Books 2 Ric. 3, 2, pl. 4, & 7 Ed. 4, 14. 1 Roll. Rep. 175, Bro. Abr. Property, pl. 38. Clerke's Praxis Admiral, 174 & 175. Harg. Tracts, 247, and also from stat. 20 Hen. 6, c. 1, which, though made for a particular purpose, to provide for the case of neutral goods or those of a friend being taken in the ship of an enemy, yet proves what the law was in general. Thus the law stood in former times, when war was regularly declared, and the method of carrying on hostilities by making reprisals was not so frequent as at later periods. By subsequent regulations of the Admiralty, private ships are obliged to take out letters of marque, or are liable to be treated as pirates, which is also agreeable to the French ordinances (Code des Prises, vol. 1, p. 34, art. 7); but the property in what they take still remains in the captors, the several prize-acts having in this respect recognized the ancient law.

As therefore in case of a privateer, the share of the prize which the crew would have, would depend upon the agreement they had entered into with the owners by whom they were paid, so in the present case, if it be not within the prize-act, both army and navy must depend on the bounty of the king, in whom [502] the prize would be then vested, and by whom they are paid. But if it be within the act, then the army have a vested right to a share, and a prohibition ought not to be granted, unless the monition had issued against their agent as well as the navy agent.

In *Packman's case*, 6 Co. 18 b. it was holden, that an appeal in the Ecclesiastical Court suspended the former sentence, and to the same point is Gouldsb. 119. So it is of an appeal in a court of Admiralty. This is plain from all the proceedings in the Admiralty: and from the style which the Plaintiff himself uses in the declaration, which is, "a certain business of appeal and complaint of nullity," the decree appealed from, appears to be not only reversed, but rendered a nullity ab origine. The former sentence therefore was annulled, and that which remains expressly pronounces the capture to have been joint, by the fleet and army. The courts of Admiralty have an undoubted right to determine who were captors. They examine as to the capture, and decide whether it be lawful prize or not, and either reserve the question, who were captors, as in the present case, or decide that also. If they have not here determined it to be a joint capture, they have determined nothing on the subject: either

(*d*) Ea quæ ex hostibus capimus, jure gentium statim nostra sunt. Inst. lib. 2, tit. 1, s. 17.

(*e*) In this antient treatise, which is preserved among the other MSS. left by Lord Hale to the Society of Lincoln's Inn, are the following regulations.

"S'il avient desouz les gages du roy sur la mer, ou en ports, biens des ennemys estre gaignez par toute la flotte ou par parcelle d'icelle, donques aura & prendra le roy de toutes manieres d'iceulx biens la quarte partie, et les seigneurs des nefes une autre quarte partie; et l'autre moitie d'iceulx biens auront les gaigneurs d'iceulx, la quelle moitie doit estre entre eulx egalement parties; de la quelle moitie aura l'admiral en chacune nef deux shares, c'est a dire, autant comme deux mariners s'il est present au temps que la prise est faitte, et s'il est absent, donques il n'aura forsque de chacune vessel ung share: et iceulx de la Flotte, qui sont hors de veue au temps de la prise, n'auront nulle partie d'icelles s'ils ne sont seyglants vers la prise et dedens la veue, par ainsi qu'ilz soient semblables d'aider aux captours de la prise avec leur voilles, se mestier estoit." A. 19.

The next article contains a provision as to private ships.

"Si hors des gages du roy, aucuns biens par gallioters ou autres, soient pris sur la mer, donques le roy ne chalengera nul droit, ne proprement aura nul part: mais iceulx qui gaignez les auront, forsque l'admiral en aura deux shares." A. 20, and see Clerke's Prax. 175.

(*a*) Rot. Parl. 50 Ed. 3, No. 31, sect. 81. 5 Hen. 4, No. 59. 7 & 8 Hen. 4, No. 22. 20 Hen. 6, No. 13, sect. 30, in which last, there are rules for the division of prizes taken by ships in the king's pay, not totally unlike those in modern proclamations.

way therefore, the argument on the part of the Plaintiff, that the navy were the sole captors, is ill founded. And the Court of Appeals having pronounced their sentence, had clearly a right to issue process in execution of that sentence according to the old doctrine in *The King v. Broom*, and the modern authority of *Smart v. Wolff*, 3 Term Rep. B. R. 323. Then, if the Lords of Appeals had a right to issue the monition, this court have no right to prohibit them.

Adair, Serjt., for the Plaintiff. Admitting many of the principles laid down in support of the demurrer, the application of them to the present case may fairly be controverted. Allowing it to be clear law, that where matter properly belonging to a court of common law, comes incidentally before a court of Admiralty, an Ecclesiastical court, or any other court proceeding by a law different from the common law, the Court which has cognizance of the principal, has also cognizance of the incident, provided the incident be determined according to the rules of the common law; yet it is equally clear, that if the incident be determined contrary to those rules, a prohibition ought to be granted. It remains therefore to be seen, what the incident is in this case, and whether the Court of Appeals have not decided that incident in a matter different from the rules of the common law. The incident arises not upon the letter of [503] attorney by which the agent was appointed, but upon the construction of the prize act. Allowing then that the Court of Appeals have a right to construe the statutes which are made for their regulation, yet if they construe those statutes wrong, there is a clear ground for a prohibition. This doctrine was fully admitted by the Court in the late case of *Brymer v. Atkins* (ante, 164), and is not to be disputed: a fortiori therefore, if they act contrary to those statutes, they ought to be prohibited.

With respect to the objection, that the agent (who acted under the authority of the navy) having taken possession of the prize, and applied part of the proceeds before the final adjudication, the navy had forfeited their right, and therefore were not entitled to a prohibition; the answer is, that there has been an adjudication of lawful prize, from which adjudication there has been no appeal. The only part of the judgment of the court of Admiralty which is disputed, is that which was reserved upon the adjudication, namely, who were the captors. The second sentence, with respect to the capture, is that which the Plaintiff conceives to be contrary to the act. The adjudication of prize is questioned by no one, nor has it been opposed in any stage of the business. As to the objection to the statement of the appointment of the agents, that statement is, that they were duly appointed, which is admitted by the demurrer. Upon looking into the clause of the act, it will appear who those "others interested therein" are, who, it is objected, are not stated to have concurred in the appointment of the agents. They are the officers, marines and soldiers acting on board the ships, in whom an interest is unquestionably vested. And the Plaintiff, so far from opposing the interest of the army under the prize-act, admits that by the act they have a vested interest, but contends that they have no other interest than what is so vested. It is plain from adverting to the act and proclamation, in what capacity the officers, marines and soldiers claim any share of a prize taken upon the high seas. The proclamation stated in the declaration, and referred to by the prize-act, (and which makes as much a part of it, as if it were incorporated with it,) directs that three-eighths shall be given to the captains and flag-officer: one-eighth to the captains of the land forces and marines, and the lieutenants and certain other officers in the navy mentioned in that class: one-eighth to the lieutenants, quarter-masters, ensigns of the land forces, &c. and other naval officers mentioned in that class: another eighth to the [504] serjeants of marines and of land forces, midshipmen, &c.: and the remaining two-eighths to the marines, soldiers, seamen, and certain other persons enumerated. Now it is clear that in the distribution of these several shares, except the first three-eighths, the land forces on board have an interest. But it is equally clear that they have it not as a distinct body claiming a separate share by itself, but per capita, as individuals in the several classes in which they are placed. On the proclamation, no man can share beyond the rank of captain of land forces, as claiming under the prize-act, because the rank of field or staff-officer has no relation to that situation of land forces on board a ship which is marked out by the prize-act. The captain is the distinct commander of his company like a captain of marines. The land forces act on board the ships in no other capacity than as marines. The plain reason therefore of the prize-act and the proclamation engrafted on it is this: that the land forces while

they are on board the king's ships, shall share rateably per capita in the different classes in which they are placed with the crews of those ships. As to the acting against an enemy in battle, and as to the divisions of such prizes as may be taken, they are considered as part of the respective crews. With regard to the appointment of agents, the universal practice has been, that the marines and soldiers serving on board the king's ships have never separately had any part whatever in that appointment. From the manner indeed in which the agents are to be appointed, it is manifest that no such separate appointment can take place. The captains of the navy have a right to appoint one or more agents, nobody but a flag-officer can interfere with them: the officers have a right to appoint separate agents for themselves: but there is no provision for the marines or land forces to appoint agents; but they have a share in the appointment in the same manner as they have a share in the prize-money in the several classes to which they belong. The statement, therefore, that an agent is duly appointed by the officers and crews of the several ships, is a statement that he is appointed by the captain and sea officers, land officers, seamen, marines and soldiers who compose the crews of the ships at the time when the prize is taken.

Another objection has been made with respect to the agent, namely, that it is not averred that the authority given to Taylor and Pasley survived to Pasley. But this objection is evidently without foundation. Each class has a right to appoint separate agents, or they may concur in the appointment of the same, as [505] was here the case. But suppose that each had appointed several agents in different parts of the world; it would frustrate the end of the act of parliament, and be a gross absurdity, if the moment any one of them died, the authority of the others should cease. It might perhaps be a question, if there was only one agent appointed by each class, and he died, or if there were many, and they all died, so that any class should be altogether unrepresented by an agent, whether the others could act *ex parte* till that defect were supplied? But that is not the case here. Taylor and Pasley were appointed by all who by the act had a right to appoint.

With regard to the objection, that supposing there was an exclusive right in the navy, it ought to have been stated to the court of appeals, and that the superior court ought not to presume that the inferior court would have decided wrong if the matter had been brought before them; the answer is, that it is a public act of parliament on which the right of the navy is founded. The court of prize had not only a right to take that act into consideration, but were bound to do it. They were presumed in law to be as cognizant of that act as any court in Westminster Hall. It was therefore before the Court, and they have decided and acted upon it in such a manner as would render void the provisions of the statute. Thus much as to the objections made on the part of the Defendants to the several statements in the declaration.

In respect to the inquiry, how the law stood antecedent to the prize-acts, the result of that inquiry certainly is, as was stated on the other side in a former argument, that, by the antient law, captures made in war belonged generally to the captors, because the force employed was not paid by the crown; and that in case of prizes taken at sea, the captors were subject to a contribution to the lord high admiral, as an acknowledgment of the authority under which they acted. But when an alteration took place in the military state of the kingdom by the employment of mercenary troops, the principle was established, that where a capture was made by a force employed and paid by the State, the subject of the capture belonged to the State, and not to the captors. The law therefore, independent of the prize-acts, would be this, that where persons acting legally in war, and not employed and paid by the State, made a rightful capture from an enemy, part of the prize would belong to themselves; where they were employed and paid by the State, there [506] the prize would wholly belong to the State. The prize-acts then intervene in order to give an encouragement to persons commissioned and paid by the State, and accordingly create an equal interest in them with private adventurers, to annoy the enemy, as well for their own emolument as the public service. The policy of these acts seems to be, to put the force of the kingdom, in this respect, upon the same footing on which it stood by the antient law. The effect therefore of the prize acts is, that as soon as a ship taken is condemned as lawful prize, immediately the property of it is vested in the captors, which would, antecedent to those acts, have belonged to the king. That effect in the present instance is produced by the 19 Geo. 3, c. 67, and the 21 Geo. 3, c. 15, taken together.

It appeared after diligent inquiry (a)¹, sufficiently plain upon the former arguments, that in the practice of the courts of Admiralty, a mixed capture has never been holden to take the case out of the prize-acts: whether that capture were by a commissioned and a non-commissioned ship, a king's ship and a private ship of war, or even a joint capture by a naval and military force; a strong instance of which was the case of the ships taken at Louisburgh. So that it seems that no case can be put in which the king's ships are intitled to any share of a prize taken at sea, where it has not been uniformly holden to be either in part or in the whole within the provisions of the prize acts. Where any other body of men have a separate right to share, the whole should not be condemned as lawful prize to the king; for the instant that it is so condemned, by the terms of the act of parliament it becomes the sole property of the captors. In this case, therefore, notwithstanding the preamble, if it may be so called, of the sentence of the lords of Appeal, the legal effect of the sentence is what it ought to be, to vest the prize in the navy as the captors, subject to the individual right of those being on board the king's ship, who were to share by virtue of the proclamation.

It has been said, that as far as relates to the fact of the capture the Plaintiff is to be bound by the recital of the sentence. Admitting this, the defendants are also bound upon the demurrer, by every fact stated in the declaration, which is not inconsistent with the fact stated in the sentence. Now it is stated as a fact on the declaration, and admitted by the demurrer, that the capture was made upon the high seas by his majesty's ships having the land forces on board at the time of the capture. [507] But, says the sentence, it was made by the conjoint operation of the army and navy. Here then are two allegations on the record, which are, in one sense, binding upon the parties. The Plaintiff is, on his part, bound by the allegations of the sentence: the Defendants, on theirs, admit by the demurrer the facts stated in the declaration. The allegation therefore in the sentence is to be construed in such a manner, as shall be consistent with the admitted facts in the declaration. What then is the allegation? That the capture was effected by the conjoint operation of army and navy. What is the fact? That the army was on board the ships at the time of the capture. This explains the allegation. The capture then was made by the conjoint operation of the army and navy: which is the same as saying, it was made by the conjoint operation of seamen and soldiers on board the king's ships; by the seamen under the command of Commodore Johnstone, and the soldiers under that of General Meadows, composing at that time a part of the crews of the squadron. The question then is, what is the effect of the sentence? It is to vest the prize in the naval captors, preserving at the same time the right of the army as individuals, and as making a part of that naval force. The words of the act of parliament cannot have any other fair interpretation. But it is objected, that nothing appears by the sentence to shew why the act should not have this effect. A doubt was suggested by the court, whether there was a sufficient ground for a prohibition in any thing which the court of Prize had yet done. It was intimated, that supposing the operation of the act to be as the Plaintiff contends, yet the sentence ought to be construed so as to give it a legal effect, and not so as to make it illegal, for the purpose of obtaining a prohibition. Now it appears that the Court of Appeals have in fact done something contrary to the act of parliament. They have ordered the agent not only to bring in an account of the whole, but also to bring into court whatever is in his possession or power, of the produce of the prize. The order is not to bring in the residue, which perhaps might be construed to shew an acknowledgment that the former part had been properly distributed; but it is general, to bring in the "proceeds of such part of the ship and cargo as might be in his hands, power, or possession." And non constat, but that the court, upon bringing in the account, might hold that what had been in his power or possession, and which had been divided without their authority, was within the meaning of the monition. But in truth the court of appeals have no power over any part. By [508] their own condemnation of the prize, the whole belongs to the navy. They have therefore acted, in point of fact, contrary to the act of parliament, which directs that the produce of the prizes which shall be condemned, shall be placed in the hands of the agent. By looking at the several clauses (a)² of the act, there will be

(a)¹ After the first argument on the demurrer, the Court desired that enquiry to be particularly made.

(a)² Vide 19 Geo. 3, c. 67, s. 30, 31, 32, 33, 34, 35, 36, 37, 38, 39.

seen a regular system framed by the legislature, directing, both substantially and formally, the disposition of the whole of the capture. The appraisement and sale are to be made by, and the produce is vested in, the agent appointed under the directions of the act. The agent is bound to do certain acts by which notice shall be given to all parties interested. The agent is to make public notifications before the disposition of the prize. The agent is to make similar notifications to Greenwich Hospital. In the hands of the agent the shares of run men, and the unclaimed shares are to be deposited, the latter to remain there for three years. And on non-compliance with the terms of the act, a severe penalty is inflicted on the agent. It is the evident intention, therefore, of the Legislature, that the person appointed agent in the manner prescribed by the act, shall be responsible to the parties appointing him, shall be responsible to Greenwich Hospital, and shall be responsible to the public. It cannot, therefore, with any reason be contended that the court of Appeals have a right, *ad libitum*, to take the whole produce out of the hands of the agent legally constituted, and without any application for this purpose, on the part of any one interested in the business. The moment the Admiralty take the whole out of the hands of the agent, all the provisions of the act which have been enumerated, are rendered ineffectual. It therefore is most clear, that, consistent with those provisions, it is not in the power of the Court of Appeals, to act as they have done in this case, on the application of any person not interested in the prize. It is not stated that the monition was prayed for by any of the captors, or that on their part any objection was made to the appointment or conduct of the agent. There might perhaps be a ground for the court of prize to issue a monition to the agent to bring in the money of which he was possessed, if there were any charge of fraud or embezzlement made against him by any of the captors, or if for any other reason the money were unsafe in his hands. Possibly at the request of the captors, the court of prize would take such a [509] measure for security. But no ground is here stated, no complaint exhibited, nor any application made by the captors to that court, in order to induce them to issue a monition. It is the spontaneous act of the court, to take the money from the only person who can perform the directions of the statute, to whom it is given as a trustee both for the captors and the public, and place it in the hands of an officer, to whom the statute gives no power whatever.

As to the objection, that the motion for a prohibition is not made by the general body of persons interested, but by one captain alone; if that objection were to prevail, it would amount to a declaration, that in case of a capture by a king's ship, the court would never grant a prohibition, unless at the joint request of all parties concerned. But what they have all a right to do collectively, the same right has each to do individually. In the present case, indeed, it is almost a physical impossibility that they all should join. As, then, the Court of Appeals has already done some act contrary to the statute, there is ample ground for a prohibition. But it has been suggested that as the directory part of the sentence admits of a legal construction, this court ought not to infer, that if the money is brought into the Court of Appeals, that Court will apply it otherwise than the statute directs. But it is a good ground for a prohibition, if there appears reason to believe that the Court of Appeals will so apply the money, though they have not actually so applied it. Thus in the case of *Hill & Ux. v. Bird*, Aleyn, 56, a prohibition was granted to the Ecclesiastical Court, because it had threatened to repeal letters of administration without just cause. It was not granted *quia timet*, but because the Ecclesiastical Court had manifested an intention of acting contrary to the common law. The same doctrine is laid down 2 Roll. Abr. tit. Prohibition, 303, pl. 27 & 28. These cases establish the principle, that where an inferior court plainly shews a design to act contrary to the common law, it is not necessary to wait till they have really so acted, in order to have a ground for a prohibition. In the present case, the Court of Appeals have evidently shewn such an intention, both by that part of their sentence which holds the case to be out of the prize act, and by the order to bring in the money; for that order would be unnecessary unless they meant to dispose of the money in some manner repugnant to the disposition which the statute points out. Upon the whole then of the case it appears, that the Court [510] of Appeals have not only acted already in opposition to the 19 Geo. 3, c. 67, and 21 Geo. 3, c. 15, but have also manifested a clear intention of acting farther in opposition to those statutes. The plaintiff has therefore substantial ground to support, and is not too early in applying for a prohibition.

Hill, in reply, went over the general grounds which he before stated. With regard to the objection on the part of the plaintiff, that great inconvenience would follow, if the agency of Pasley had determined by the death of Taylor, he argued, that the appointment ought to have been made to them, and the survivor of them, or to them jointly and severally, which would have obviated all such inconvenience. The Plaintiff therefore ought not to rest on a possible inconvenience, which might easily have been avoided by a proper method of appointment. As to the argument, that the agent could not execute the several matters which he is required to do by the act, if he had appeared and brought in the proceeds, what is there required by the act that he might not do, and yet have obeyed that process? He might have given all the notifications: the possession of the Court would have been his possession, as much as the possession of a receiver: the interest of Greenwich Hospital would have been as safe in their hands as in his. There is not any one part of the act, but what might have been performed consistently with the obedience of the agent to the process. If so, the whole of the argument on the other side falls to the ground; and the Lords of Appeal have not contravened the act. The agent indeed need not have brought in the money, but he might have shewn cause upon the process. If he had shewn cause, and they had insisted upon his doing any thing inconsistent with his duty as agent, then, and not till then, they would have contravened the act. But it does not appear that the mere issuing of process could disable him to perform his duty as agent, even supposing he was agent, which is begging the whole question, and of which the Lords of Appeals had a right to be informed. Suppose Pasley had not been agent at all, a monition might then have issued against him; and why should it not, when he does not make his agency appear? The objection therefore, that this application for a prohibition is at least premature, remains unanswered. The application itself is directly contrary to *The King v. Broom*, and many other authorities. In that case there had been a sentence condemning a ship as lawful prize, and after the sentence a libel had issued against Broom to compel [511] him to bring in the produce. It appeared that Broom had taken the money, as Pasley has in this case, as agent for other persons, who were the African Company. It was argued in that case, that by the sentence of condemnation a legal right was vested in the king, which was the subject of an action at law, and therefore the Court of Admiralty had no right to issue process. The answer to that argument applies with its full force to the case now before the Court. The answer was, that notwithstanding the execution of the sentence depended on a legal right, yet it was incident to the jurisdiction of the Court of Admiralty, and on that ground the prohibition was refused. There the African Company had a right to take prizes: Broom derived his power from them: but the common law right which the company had to take did not protect Broom from the monition. Neither in this case can the parliamentary right of the captors exempt Pasley from a monition. The two cases are parallel. A right derived from an act of parliament is not stronger than a right derived from the common law. All the arguments and reasoning of the Court likewise in *Smart v. Wolff*, are fully applicable to this case (a).

(a) In the course of the argument, Mr. Serjt. Hill pointed out an inaccuracy in the Dutch prize act, 21 Geo. 3, c. 15, the third section of which, after reciting that by the 19 Geo. 3, c. 67, & 20 Geo. 3, c. 22, "Several provisions and regulations were established, for the better carrying on the salutary purposes by the said acts intended in the prosecution of hostilities against France and Spain," enacts, "that the several regulations and provisions respecting the grant of commissions or letters of marque, the persons acting, and the captures made, under the authority of such commissions or letters of marque, and all other clauses, provisoes, matters and things, contained in the said acts shall extend, and be construed and deemed to extend, to the grant of commissions or letters of marque to the persons acting, and the captures made, under the authority of such commissions or letters of marque, for general reprisals against the ships, goods, and subjects of the States General of the United Provinces, and all other matters or things whatsoever, in respect of the same, during the continuance of hostilities against the States General of the United Provinces, as fully, amply and effectually, to all intents and purposes, as if the same regulations, provisions, clauses, provisoes, matters and things had been particularly repeated and re-enacted in this act." It is plain, that this section is so worded as to leave it doubtful, whether it is meant to extend to any provisions of the two former acts respecting captures

Cur. advis. vult.

On this day judgment was pronounced as follows, by

LORD LOUGHBOROUGH. In this case the declaration states, first as a proposition of law, that the exposition of the statute laws of this realm appertains to the king's courts of record. It then recites the prize act, which passed upon the war against the States General, and his majesty's proclamation for a distri-[512]-bution of prizes, under the authority given by that act. It then states the appointment of Commodore Johnstone as commander of a squadron, of the plaintiff as captain of a ship in that squadron, and of General Meadows as commander-in-chief of the land forces, to be employed on an expedition against the Cape of Good Hope, a colony of the States General in Africa, and secret instructions given by his majesty directed to the two commanding officers Commodore Johnstone and General Meadows, in order to prevent disputes which might arise between the fleet and army. By these instructions it was provided, that such booty as should be taken from the enemy by the joint operation of the fleet and army, at the attack of the Cape, should be distributed among the land and sea forces into two shares; the share of the navy to be divided according to the regulations established for the service. The declaration then states, that the squadron with the land forces on board proceeded upon the said expedition, but did not make any attack upon the Cape of Good Hope.

It then states, that upon the 21st of July, the squadron, with the ship of which the plaintiff was captain, having the land forces on board, did in a certain open unfortified bay, called Saldahna Bay, at a great distance from the Cape of Good Hope, attack and seize as prize the ship "Hoogskarpell" and cargo, the property of the subjects of the States General. The declaration then states, a libel in the High Court of Admiralty, by his majesty's proctor, for the condemnation of the said ship as lawful prize, being taken by Commodore Johnstone and his squadron, and a sentence thereupon upon the 4th of September 1782, condemning the ship and cargo as good and lawful prize generally, reserving the question who were captors; and afterwards upon the matter reserved, on the 28th of May 1785, an interlocutory order of the Court of Admiralty, pronouncing for the interest of the army generally, agreeable to the spirit of his majesty's instructions, and decreeing the distribution of the prize according to such instructions, in equal shares. The declaration then proceeds to state an appeal from this last decree upon the 30th of June 1786, and a decree of the Court of Appeals, reversing the last mentioned decree of the Judge of the High Court of Admiralty, and pronouncing ship and cargo to have been taken by the conjoint operation of his majesty's ships employed on an expedition against the Cape of Good Hope, under the command of Commodore Johnstone, and of the army under the command of General Meadows upon the same expedition, [513] and condemning the ship with the unclaimed cargo, as good and lawful prize to the king. The declaration then states, that Edward Taylor and John Pasley were duly appointed agents by the officers and crews of the several ships' companies of the squadron, and as such agents, soon after the decree of the 4th of September 1782, caused the ship and her cargo to be sold, received the produce, distributed part thereof among the officers and crews of the squadron, and that the residue remained in the hands of Pasley, and ought to be distributed to the captors aforesaid, pursuant to the statute and proclamation. It then states, that the Plaintiff Home brought his action in the court of King's Bench, of trespass on the case on promises, against Pasley the surviving agent, (Taylor being stated to be dead,) for damages for the non-payment of his share. It then states, as a proposition of law, that the commissioners of appeals in prize causes have no authority by law to take out of the hands of any agent, so appointed, the money arising from any sale of prizes, finally adjudged lawful prize to his majesty in a court of admiralty. That the commissioners of appeals contriving to take out of the hands of Pasley the money, and to prevent the Plaintiff recovering at law his damages, did on the 3d of May 1788, issue a monition to Pasley to bring in an account of sales, together with the proceeds. This is the whole of the declaration. The Defendant traverses the last allegation of process issued against the prohibition, and demurs generally to the rest of the

made by the king's ships, though, in point of practice, it has been holden to include those provisions. The same ambiguity prevails in the third section of the Spanish prize act, 20 Geo. 3, c. 23.

declaration. This general demurrer consequently admits all such facts stated in the declaration as are well pleaded.

Upon the last argument, three objections were taken to the statement of the declaration, to shew that upon the face of the declaration the Plaintiff has not made out a case which entitles him to a prohibition. I shall mention these objections very briefly, because to each of them, as it seems to me, a very short and distinct answer occurs. The first I shall take notice of was, that, by the Plaintiff's own shewing, he and all the squadron have forfeited their share in the distribution of the prize, because part of it was distributed before final sentence of condemnation. It is of no moment to discuss whether there was any such cause of forfeiture, because the objection mistakes [514] the state of the declaration; which indeed states that part had been distributed, but also expressly states that it was after the sentence upon the 4th of September, against which sentence there is no appeal, and which was an adjudication, condemning the ship and cargo as lawful prize. The second objection is, that the appointment of Taylor and Pasley as agents for the officers and crews of the squadron, is not well set forth, from an expression in the statute which says that the officers and crews and others having interest in the prize, shall appoint agents, and then marks out the manner in which they are to be appointed. The subsequent part of that clause of the act sufficiently shews that no other persons but the officers and crews of the squadron can have any concurrence in the appointment of agents. There may be four agents: one appointed by the flag-officer, another by the captains, another by the lieutenants and other officers of that rank, and another by the private men and those who are, in the fifth class according to the proclamation, to share the amount of the prize. There is no other description of persons who can under the act concur in the appointment of agents. But that is rather going further than is necessary for an answer to the objection; for this is not a case where the agents are parties appearing as Plaintiffs setting out a title; but the Plaintiff Home, who is to make out his own title, distinctly states as a fact, that agents were duly appointed. This is undoubtedly sufficient upon a general demurrer. If there is any objection to the appointment of agents, and if that objection would be sufficient to turn round the Plaintiff in this case, it ought to have been set forth more particularly. Upon a general demurrer, the allegation that the agents were duly appointed, is certainly sufficient. Another objection was, that the authority of the agents was determined by the death of Taylor. Now though this too is of no moment upon a general demurrer, it is also not true; because this is not a mere authority given to Taylor and Pasley; they have an interest in the proceeds of the prize, and it is certain that where persons are appointed with an interest vested in them, the interest survives. The surviving agent Pasley being possessed as agent, he must continue to be accountable to those who have appointed him, in the character of agent. It was totally immaterial whether Taylor had remained; all the interest that was in Taylor, is now in Pasley; all that Pasley possesses, and all that Taylor together with him possessed, Pasley is chargeable with. He received it in the character of agent, and is answerable for it in that character. All these objections were overlooked in the former arguments; and for the reasons I have given, the Court are of opinion that they are of no weight.

Upon the three first, and the latter part of the last argument, [515] the case has been very fairly debated on its real merits. The Court has given all the scope to the question which the importance of it required; first on the motion of a prohibition, then upon three arguments on the demurrer; and we are all unanimously of the opinion which I shall close with delivering. The prohibition was prayed upon a ground which has never been disputed, that it belongs to the courts of common law to control the proceeding of all other courts, if they transgress the limits assigned to them; and the argument for the demurrer has fully admitted the proposition upon which the declaration is built to be good in law, namely, that the exposition of the statute law of the land appertains to the king's courts of record, and ought to be discussed and determined in those courts. The general grounds upon which the Courts of Westminster Hall proceed in matters of prohibition, were so fully discussed in a late case (a), and when the Court in that case disposed of the motion, that I avoid entering into them, and assume it to be a clear ground for overruling the demurrer

(a) Vide *Brymer v. Atkyns*, ante, 164.

in this case, if it shall appear, upon the face of the declaration, that the Plaintiff has a legal right founded on an act of parliament, and that the commissioners of prize are proceeding to deprive him of that right, or to obstruct him in the prosecution of it. On the other hand, if the Plaintiff has either no such right, or the commissioners of appeals are not proceeding to act in opposition to it, the demurrer must be allowed. It was admitted on both sides, and is certainly true, that the general question of prize does not belong to the courts of common law. By general question of prize, I mean a question, whether a ship or goods taken at sea be lawful prize or not. It was admitted also that when there is an adjudication of prize by the Court of Admiralty, the rights which an act of parliament gives respecting that prize, are the subject of actions at law, and are cognizable in the courts of common law.

The argument in support of the demurrer maintains these propositions. First, that this appears to be a case in which the king's ships were not the sole captors; 2dly, that the act of parliament vests a right to the prize in the king's ships, only in the case where they are the sole captors; 3dly, that the court of prize has a general authority in all cases to distribute the shares of the prize, and therefore that the proposition with which the declaration concludes, namely, that the commissioners of prize have not by law authority to take out of the hands of the agent [516] the money arising from the sale of prizes, is not a true proposition; but that, on the contrary, the commissioners have a right to order those possessed of the produce to bring it into that court. The first proposition then to be maintained on the part of those who support the demurrer, is a proposition of fact; namely, that this appears to be a case in which the king's ships are not the sole captors. This is founded upon the terms of the two sentences which are set forth in the declaration, together with the facts stated, that the fleet and army were destined upon a joint service, and were both concurring in the capture. From reading the declaration attentively, it certainly does not appear that the army as such gave any aid to the capture. When I say the army as such gave no aid to the capture, I mean to exclude the case of the army being stationed on board the fleet at the time of the capture. For though they are distributed amongst the ships, yet they are not acting there as an army, but are only part of the force that is on board each respective ship. In that situation, the soldiers and officers are concurring in the capture, but no otherwise concurring than as any passengers on board might be. When I speak of the army as such concurring in the capture, I am to be understood to mean a concurrence, in which the land forces acting under the command of their proper officers are carrying on some operation or other that may be conducive to the object in which the fleet acting as a fleet is concerned. It cannot be therefore taken from the facts stated in the declaration, that the army as such, was in any respect operating towards the capture of the ship in question. The statement of the declaration is, that the squadron of which the Plaintiff's ship was one, with the army on board took the prize. If therefore it was necessary for the Defendant to avail himself of this fact, it would have been proper for him to have stated by a plea the manner in which the army acted, and what was the co-operation of the army towards the reduction of this ship stated to be taken upon the high seas. But upon a demurrer we must take the fact as it stands upon the face of the declaration. I will now proceed to see whether the sentences will aid the demurrer in the assumption of the fact, that the king's ships were not the sole captors. The first sentence of the High Court of Admiralty holds the army, according to the spirit of the instructions, to be intitled to a share in the capture. But certainly in that sentence there is no conclusion whatever to be drawn, that the army was in fact, as an [517] army, active in the capture, or in any respect operating towards it. According to the spirit of the instructions, giving the utmost latitude to that expression, the judge might suppose the strength of the fleet increased by the accession of the army, and therefore, taking the case itself to be within the instructions, that the army was intitled to a share. The other sentence states, that the capture was made by the conjoint operation of the ships and troops. Now both these sentences are perfectly consistent with the allegation of facts stated in the declaration that the troops were on board the fleet. Being on board the fleet, it cannot be said that they had no share at all, were of no weight, or of no moment in the reduction of this particular ship. Therefore literally taken, it might be true that the capture was the effect of the general efforts of all that were on board, whether in the character of seamen or soldiers. But this by no means furnishes a state of facts to shew any accession of the army, as an army, to the reduc-

tion of the ship in question. Upon those grounds therefore I shall feel myself bound upon the demurrer to hold that the Plaintiff has shewn a title of sole captor in the squadron of which his ship was a part, and that he will of consequence be intitled to a prohibition, if, in the sequel of the declaration, he has shewn any act done by the court of prize contrary to his right.

In considering the second proposition, which is, that the act of parliament vests a right to the prize only in the case where the king's ships are the sole captors, I will go a little out of the record, and take for granted as a matter of supposition, what I think ought to have been introduced in a plea upon the record, if the Defendant wished to avail himself of it. I will take the supposition, that the army had landed, and given assistance from the shore, in any mode in which such assistance to a capture afloat could be given. Upon that supposition, the question will be, whether the consequence drawn from it is true, and can be maintained. The first sentence holds the army as such to be intitled to a share; which may be, though the right was vested in the king's ships; for there might be others concurring in the capture, who would be entitled either upon the ground of assistance, or upon some grounds, which it is not necessary for me to state, to have a concurrent interest with them in the produce of their share. But it by no means follows, that the fleet, because of another body concurring in assistance, shall have no vested right. The second sentence has been argued, and I believe it has been argued very justly and fairly according to the intent of it, to proceed upon this sup[518]-position, namely, that the case of a co-operation of another force besides that of the king's ships, takes the case entirely out of the prize act. That proposition undoubtedly is not stated in terms upon the face of the sentence. But it has been argued to be the ground of the sentence; and I take it that it was the ground. I take it according to the argument, which was insisted upon in support of that sentence, that when the sentence proceeds to say, that it shall be condemned as lawful prize to the king, it does not mean merely to pronounce that it is lawful prize, (for that is the form of the adjudication where the right is unquestionably in the captors where there is no controversy, nor any dispute made upon it,) but that it means that the right is vested in the king by his prerogative, and that it is at his majesty's disposal. Now the prize act says in distinct terms, that the officers, &c. of the king's ships shall have the sole interest and property in all ships and cargoes, &c. which they shall take, being first adjudged lawful prize. These are the terms of the statute. Antecedent to any statute upon the subject, there is no doubt but that by the law of the realm the property of prizes taken by the king's ships was in the king. The effect of the prize act is a parliamentary gift by the king of that interest which his majesty would have had in the prizes, to the officers and crews of the several ships of the fleet, and to the owners of the privateers which shall have been fitted out under the directions of the act. The expressions of the act are distinct and plain, and the operation of it is to transfer to those who are to take all the interest which antecedent to the act was in the king. It respects only prizes taken at sea; the expression is, that they shall have the sole interest and property; but certainly that mode of expression does not exclude the case of a joint capture; which joint capture may either be by a king's ship and a foreign allied force, (in a case where this country is carrying on war in conjunction with some other state of Europe,) by a king's ship and a private ship of war, or by a king's ship and a non-commissioned ship. In every one of which cases the property of what the king's ships take has uniformly and repeatedly been adjudged to the officers and crews of his majesty's ships. They are solely entitled to what they take, not to what they solely take; that is not the expression of the act. So far as they are the captors, no other power has any right to interfere with them. Where there are others, (whether an allied force, a private ship of war, or a non-commissioned ship,) [519] also captors, they have a right in some cases as for a quantum meruit for assistance given; in others, they have been holden to have a distinct and specific share in the capture. But that in no case destroys the right which the king's ships solely have, quoad that capture which they have made. They have a vested property in what they take. The second section of the act goes on and says, in like manner, ships taken by privateers shall wholly and entirely belong to the owners, to be distributed according to the contract they have entered into. That cannot be holden to exclude the privateer by any fair construction of the words, in cases of joint capture. Suppose this case to happen: a king's ship and a privateer are jointly and equally concerned,

and equal in point of force, in the reduction and capture of an enemy's ship. Would it be a reasonable construction of the act, to say to the king's ship, "the prize is not your sole property;" to the privateer, "it cannot wholly and entirely belong to you; it was taken by you both conjointly, therefore it shall belong to neither of you?" The proposition seems to me to be morally impossible. The interest of the king's ship, which would in that case be in a moiety of the prize, would be an interest to them solely: the interest of the privateer in the other moiety of which they would be the captors, would wholly belong to them, to be distributed according to the contract they might have entered into with their owners. These cases are perfectly clear, and have been determined in instances so numerous that it is quite unnecessary to enter into a detail of them: they have been referred to in the course of the argument. This is the case of a joint expedition by sea and land forces, and of an operation, whereby the enemy's ships are reduced; the ships being always supposed to be taken on the high seas. It varies the case, where the object has been the reduction of a part of the enemy's territory. The consequence of that reduction may be the acquisition of property afloat, of ships of war taken in a harbour, of ships coming into a harbour after the place has been reduced. In all these cases, perhaps it would be difficult to say that the capture was made by the king's ships. If a garrison town with an inclosed harbour had been reduced, and the ships had fallen with the place, and as a consequence of the taking of the place, or of the reduction of the country; these could not be deemed to be captures made by the king's ships. As such cases might possibly happen, where expeditions have been undertaken at sea in foreign parts, by the [520] naval and military forces of this country acting conjointly, instructions have been given for the distribution of such booty as might be taken, which is the phrase commonly used. But I do not apprehend that ever the instructions have been directly pointed, that the instructions referred to in this declaration are so pointed, or that they could by possibility be pointed, to give to any part of his majesty's subjects acting under his majesty's directions, prizes taken upon the high seas by the king's ships. A parliamentary grant cannot be controlled by the effect of any grant under the king's sign manual. The king has not the property to grant, he has parted with it all. Whatever is the proper matter of marine prize, whatever ships are taken afloat, and not as booty in consequence of the reduction of the country, are the subject of the act of parliament. The act of parliament attaching upon it, the right of the king's ships is to the entirety. In point of fact we very well know, that where such expeditions have been undertaken, agreements have been entered into by the different persons entitled under the king's proclamation, and the different divisions of the army, and they have put the whole together in order to avoid disputes.

In the case of the Pondicherry prizes, several actions were tried upon them before me. Those agreements had been made between the superior officers, between the captains of the navy and the officers of the same rank in the army, but had been refused to be made between the third class in the distribution, the lieutenants of the navy, and the captains of the army; the lieutenants of the navy had refused to concur in it. Though in the other classes the land forces were admitted to share, they were not admitted to share in that class, with respect to the prizes taken at sea; and a recovery was had against the agent on that ground. But I am arguing this case much further than there is occasion to go; for admit, for the purpose of the argument, that a co-operation might take effect so far as to give a right to the army to share, does it follow from the army being entitled to share, that the co-operation of the army should destroy and annul totally the right of the navy? That conclusion is a great deal beyond the premises. The interest in a prize taken at sea (of which I am always speaking) may by possibility (I do not say that it cannot) be shared or distributed, but it cannot be taken away. The interest which is vested, after the adjudication of lawful prize, in consequence of [521] a parliamentary grant, cannot be annulled or destroyed. If upon any merits, or upon any ground upon which assistance may give a right to share it, a share may be imparted to others, that share can be ascertained and supported. Yet the very supposition that it is a share, admits that it must be a share of something which is vested in somebody. The proposition contained in the sentence supposes that the right which the navy would have had by law to every thing that is taken afloat, is by the intervention of another power co-operating with the navy taken away and destroyed: which appears to me to be a proposition directly contradictory to the act, and not founded at all, in consequence of the parliamentary gift in

favour of the officers and crews of his majesty's ships. If it could be supported, it would undoubtedly reverse all the cases, where a co-operation by a non-commissioned ship, or a privateer, or a foreign allied force, intervenes. But in none of these cases could it be said, the king's ship was not solely entitled. The proposition must be either general, that the king's ships can take a vested right in no case where assistance is given them, or that they must in all cases, where they are captors, have a vested right, subject to such claim for assistance as any other party can make against them. I have in this part of the argument, as I said before, gone out of the record: it is now fit I should return to it.

When I say, that upon the facts stated in this declaration, and admitted by the demurrer, it does not appear that there was such assistance given by any other force as to make it a joint operation, but that the king's ships had reduced this prize, and taken it; it must be remembered that the subject of the capture has been adjudged to be lawful prize, taken by the ships having the king's forces on board; in which respect the king's forces are entitled to come in for a participation under the act and proclamation. But that does not prevent a right from vesting, but, on the contrary, establishes that the right is vested, for it is under the proclamation founded upon the act of parliament, that the troops are entitled to such share as upon the face of this declaration belongs to them. I now come to the terms of the sentence, and I own that for some length of time they raised considerable doubt in my mind what would be the result of this question, and what would be proper for the Court to do in disposing of this demurrer. It is possible to understand the sentence consistently with the right of the navy. For the premises assumed by the sentence do not appear to form a [522] conclusion that the navy are not entitled. It is not inconsistent with the supposition that the navy is entitled; and I might understand the sentence, where they adjudge it prize to his majesty (in the common way in which sentences are pronounced), not to be inconsistent with that right, if the Court had gone on to pronounce afterwards, that it should be distributed according to the terms of the proclamation, though it had contained this recital, that the prize was effected by the conjoint operation of the land forces as well as by the officers and crews of his majesty's ships. But then after the sentence passed, the declaration states that a monition issued upon it. Considering the terms of that monition, I am perfectly clear in opinion that it gives a different construction and a different effect to the sentence. The monition is not against the agent merely to account for what he has received, and to bring in their account of sales and disbursements; but it goes on, and directs the agent to bring into the court of appeals the proceeds of the cargo remaining in his hands. It was argued for the plaintiff, that the terms of the monition were large enough to extend to the effect of overhauling the partial distribution already made, and to oblige the agent to bring in all that had been in his hands. I do not think it could have that construction. I take it to be directed simply to bring in the residue, what is in his hands; but also that it directs the agent to bring into the court of prize the proceeds of the prize in his hands. Now such a monition is a very usual step taken either by the Court of Admiralty or by the Court of Appeal in prize causes, where the subject of the suit, the ship or goods are not deemed legal prize, and where of course they are not vested in the captors, in order to make restitution. The agent who has got the proceeds in his hands may be directed to bring in those proceeds, that they may be restored to those to whom they belong. But I do not find that any instance could be quoted where a monition had issued against the agents to bring in the proceeds of the prize, in a case where it had been adjudged lawful prize, and of course where upon that adjudication, it was to be distributed either to a privateer, or, according to the terms of his majesty's proclamation, to the officers and crews of the different ships entitled. And I think it cannot be; for the act has made very special provisions with respect to the payment of shares after adjudication; upon which adjudication a legal right is vested. The agents [523] are to be nominated by different classes of people entitled, as I have stated. Every step of the duty of the agents is under the directions of the act. They alone are to make the sales and appraisements. All the produce of the prize is to be put into their hands. They are then to give public notification of the times of payment, so many days before actual payment is made. They are directed after such notification, to make payment according to the prize lists, and in the proportions in which the parties are entitled. They are directed to give an account, from time to time, of all their proceedings. They are directed to furnish Greenwich Hospital, in which by law, in certain

cases, an interest in every prize vested in captors is also vested, with accounts in order to ascertain that interest. They are throughout the whole course of the act, supposed to be subject to actions at the instance of those who are entitled to share in the prize. It is a legal vested right, and the method of obtaining the effect of that right is by action against the agents. In particular cases they are furnished by the statute with a defence to the action. As in the case where men bring an action against the agent for a share having been marked run, it is by the statute a sufficient defence to the agent, and he is entitled to a verdict in his favour if the Plaintiff does not ground himself upon a certificate that the R. has been taken off. If he fails in any part of the duty imposed upon him by the act, a penalty, to be recovered in the Courts of Westminster Hall, meets him at every step. The intention of the act is obvious, and perfectly squares with the rules of law, that the prize being adjudged by the Court of Admiralty, distribution of the interest in that prize is to be managed as the distribution of any other legal vested right is according to the laws of the land, namely, by action in the courts of law. I do not care to lay it down, for I am not able to say that I am perfectly sure that I see the whole extent of all possible cases that may occur; I do not care to lay it down, that there is no possible case in which the agent of a prize may not be ordered by the Court of Admiralty, or Court of Prize, to bring in the actual proceeds of the prize. Yet I profess I have not been able to figure to myself what that case can be. Suppose a case in which it is suspected that the agents are insolvent, or likely to become insolvent, and that for the safety of those interested, it was desirable to take the money out of the agent's hands, and lodge it in some safe [524] custody. That appears to me, speaking conjecturally, to be a possible matter to be done by the Court of Prize; for I should doubt whether in such a case, an application could be made to the Court of Chancery to secure the money. The Court of Prize could not indeed make the distribution themselves, nor do I find that any such application has been made to them.

Could there then be a suit against the agents for distribution? A suit for distribution might be well maintained in the Court of Admiralty, or if the case were got into the Court of Appeals, in that court. But what would be the decree to be made upon that? It would be a personal decree upon the agent; the distribution would be directed, the shares allotted, and then upon that decree, the agents might be proceeded against personally. It would be a contempt of court if they did not make payment according to the order. Yet there would be a much better way, a more effectual one, by an action immediately grounded upon the right vested, and the quantum of that right ascertained by the order of distribution. But the Court itself cannot, as I conceive, take into their own hands to direct the proceeds of the prize to be paid over to their registrar, for the purpose of distributing it. The registrar is liable to none of the provisions of the act to which the agent is liable. The agent is liable to an action. But I am at a loss to conceive, if the agent is directed to pay over all the money, how the action for money had and received could be maintained in effect against him, that money having been taken out of his hands. I am still more at a loss to conceive how it could be maintained against the registrar. What sort of an officer is the registrar? Is he to make distribution? No. Is he to make notification? No. The act directs that to be made by the agent. Is he subject to any penalty? No, he is not the person to whom the act is directed, to whom the duty is enjoined, and who is answerable for the breach of that duty in an action to be brought. Would the agent be protected in an action for the penalty? It would be hard that the agent should be liable to it, but I do not see upon the face of the law how he could be furnished with a defence for the non-performance of the duty enjoined by the act. But none of these remedies can take place against the registrar. Therefore it seems the clear direction of the act, that the money is to remain in the hands of the agent, liable to the actions of those who have a legal vested right in it: that to those persons the agent is accountable, that against the primary in-[525]-terest of those persons, the money is not to be taken out of the hands of the agent by order of the Court of Prize. The construction which has been put upon the second sentence, is, that there was no vested right in this prize in the officers and crews of his majesty's ships, nor in the army; but that upon the ground stated in the sentence, the whole was vested in his majesty in his prerogative; and was to be disposed of to such uses as his majesty should think fit. With that construction of the sentence the monition which has issued is perfectly consistent; but not with the idea, which we take to be a well

founded idea, that by force of the act, after the adjudication of lawful prize, the Plaintiff and all other officers, and the crews of his majesty's squadron, have a vested legal right. The effect of the monition is directly in prejudice of the right of action of all other persons concerned; it interferes with the legal duty imposed upon the agent; and subverts and overturns the law with respect to the duty and situation of agents, where they are acting for persons having a vested right in prizes. It is not necessary to have recourse to those cases cited of Lord Anson and the others, because the proceeding in this case prevents the Plaintiff from recovering his legal vested right, at least it disturbs him in the recovery of that right, if not totally prevents him, and subjects the agent, and all others who are interested in the acts of the agent (Greenwich Hospital included), to the courts of prize. Whereas, according to the construction, which we are of opinion ought to be given to the prize act, all those rights are to be enforced in Westminster Hall, belong to the courts of Westminster Hall, and do not belong to the courts of prize. These are the grounds which I have gone through, without referring to the cases that have been cited by name. Those cases are very well known, are in the memory of every one, and will all be found in the recollection of the argument. The ground upon which we proceed is, that upon the face of this declaration the Plaintiff has a legal vested right in the subject of the monition; that the court of prize cannot deprive him of that right, cannot do an act prejudicial to that right, and cannot prevent or obstruct him in the recovery of that right. The demurrer therefore must be over-ruled, and

Judgment given for the Plaintiff in prohibition.

End of Trinity Term.

Mr. Justice Wilson was absent during the whole of the two following Terms, being under the necessity of going to Lisbon for the recovery of his Health.

[527] CASES ARGUED AND DETERMINED IN THE COURT OF COMMON PLEAS, IN MICHAELMAS TERM, IN THE THIRTY-FIRST YEAR OF THE REIGN OF GEORGE III.

GOOCH *against* PEARSON. Thursday, Nov. 18th, 1790.

Although notice has been given of a motion for judgment as in case of a nonsuit, for not proceeding to trial in due time after issue joined, on which the plaintiff enters into a peremptory undertaking to try, yet notice must also be given of the like motion for not proceeding to trial in pursuance of the undertaking (a).

On a former day Kerby, Serjt., moved for judgment as in case of a nonsuit, for not proceeding to trial in due time after issue joined, upon which the Plaintiff entered into a peremptory undertaking to try his cause. But this undertaking not being performed, on that ground Kerby now again moved for judgment as in case of a nonsuit. It was objected that this motion was irregular, because no notice of motion had been given according to the statute (14 Geo. 2, c. 17); in answer to which Kerby argued, that as notice of the original motion had been given, the terms of the statute were complied with, and no notice of the present motion was necessary. But the Court after looking into the statute were very clearly of a different opinion, and having inquired of the secondaries as to the practice, (who said that in this respect there was no difference between the two motions,)

Refused the rule.

[528] MARTIN AND UX, Administratrix of Norfolk, *against* NORFOLK, a Bankrupt. Saturday, Nov. 20th, 1790.

Where the Defendant pleads the general plea of bankruptcy, to an action brought by

(a) [See *Chessell v. Parkin*, 2 Taunt. 48. In the King's Bench such notice does not appear to be necessary, Tidd's Pr. 826, 8th edit.]

an executor or administrator, and obtains a verdict, the Plaintiff is not liable to costs on 5 Geo. 2, c. 30, s. 7 (a)¹.

To this action of assumpsit on promises made to the intestate, the Defendant pleaded the general plea of bankruptcy, and obtained a verdict. And now Le Blanc, Serjt., moved that the prothonotary might be directed to tax the Defendant his costs, on the ground that by the stat. 5 Geo. 2, c. 30, s. 7, if a bankrupt were sued for a debt due before the bankruptcy, "and if a verdict pass for the Defendant, or the Plaintiff shall become nonsuited, or judgment be given against the Plaintiff, the Defendant shall recover his full costs." He argued that this statute contained no exception in favour of executors and administrators; that if it had been the intention of the legislature to make such an exception, it would have been expressed, as in the stat. 8 & 9 W. 3, c. 11, the 5th section of which provides, that "Nothing therein contained should be construed to alter the laws in being as to executors and administrators, in such cases where they were not then liable to the payment of costs of suit." It could not indeed have been the design of the legislature in 5 Geo. 2, c. 30, to exempt any Plaintiff from paying costs to the bankrupt, who was divested of all his property, and had not otherwise the means of defending actions which might be brought against him.

Bond, Serjt., *contra*. The statute 5 Geo. 2, c. 30, must be construed in the same manner as others in *pari materia*. Now the 23 Hen. 8, c. 15, and 4 Jac. 1, c. 3, which first gave costs to defendants where they gained a verdict, are general in their expressions, and make no exception of the case of executors and administrators; and yet it has been uniformly holden that those statutes do not extend to executors and administrators. Cro. Eliz. 69. *Forde v. Rolls*, Id. 503. *Fetherstone v. Allybone*, Cro. Jac. 229. *Haywarth v. David*. They sue *en auter droit*, and are presumed to do the best for the estate of those whom they represent; but as they are not supposed to know precisely the rights of the testator or intestate, and the extent of his contracts, no malicious motives are to be imputed to them in bringing an action, and costs are given in lieu of the *amercement* [529]-ment *pro falso clamore*: the same doctrine is recognized in *Bligh v. Cope*, Barnes, 142 (last edition).

Le Blanc replied, that though it was true that executors and administrators were presumed not to be fully cognizant of the rights of the testator or intestate, and therefore not actuated by malicious motives, yet that rule was not applicable to the present case, a commission of bankruptcy being a matter of public notoriety of which the Plaintiffs might have informed themselves, and of which they could not be presumed to be ignorant. For the same reason the authority of *Bligh v. Cope* was not in point, since the fact of the Defendant in that case being a fugitive was not open and notorious. But.

The Court held the Plaintiffs not liable to costs, being clearly of opinion that the stat. 5 Geo. 2, c. 30, ought to be construed in the same manner as 23 Hen. 8, c. 15, and 4 Jac. 1, c. 3.

Rule refused.

DAWKINS *against* REID. Wednesday, Nov. 24th, 1790.

Where bail are put in in due time the Defendant is not bound to give notice, but the Plaintiff must search in the Filazer's book. Otherwise, if they be not put in in due time (a)².

Bail were put into the action in due time, yet the bail-bond was assigned and proceeded upon. In consequence of this, a rule was granted to shew cause why the assignment and all subsequent proceedings should not be set aside.

Bond, Serjt., shewed for cause that the Defendant had not given notice of bail, which he said was necessary. Adair, Serjt., answered, that the Plaintiff was bound

(a)¹ [Tidd's Pr. 1014, 8th edition.]

(a)² [But now by rule E. 49 Geo. 3, 1 Taunt. 616, when special bail is put in for the Defendant, a notice in writing of such bail being so put in must be forthwith given to the Plaintiff's attorney or agent, and special bail shall not be considered as put in until such notice shall be given. Tidd's Pr. 254, 8th edit.]

to search in the Filazer's Book, and that though notice in such case was frequently given, it was a matter of favor rather than of right: but he allowed that if the bail were not put in in due time, then notice must be given.

The Court were of this opinion, and therefore made the Rule absolute (b)¹.

ANDREWS *against* BLAKE. Thursday, Nov. 25th, 1790.

Where there is judgment by default on a bill of exchange, the Court will refer it to the prothonotary to ascertain the damages and calculate interest, without a writ of inquiry (a).

This was an action of assumpsit on a bill of exchange, in which the defendant let judgment go by default. In [530] consequence of which a rule was granted to shew cause why it should not be referred to the prothonotary to ascertain the damages and calculate interest on the bill, without a writ of inquiry. Kerby, Serjt., shewed cause, contending that the Court could not dispense with a writ of inquiry in an action of damages; and he stated the principle to be, that the intervention of a jury was necessary in all cases where the debt really due did not appear upon the face of the declaration.

Lawrence, Serjt., in support of the rule, relied on the case of *Rashleigh v. Salmon* (antè, 252) where on a judgment by default on a promissory note, the same reference was made to the prothonotary as was desired in the present instance. The Court said that as it would be the means of saving expence to the parties, as the amount of the bill appeared on the face of it, and the interest might be exactly calculated, they thought it right to make the

Rule absolute, which was accordingly done (b)².

THRALE AND OTHERS *against* THE BISHOP OF LONDON AND OTHERS.
Monday, Nov. 29th, 1790.

Though the Defendant have judgment on demurrer in quare impedit, he is not intitled to costs.

In last Hilary term, judgment was given for the Defendant on demurrer in quare impedit, and Le Blanc, Serjt., now moved on the part of the Plaintiff, that the prothonotary might be restrained from taxing costs to the Defendant; he argued, that as the Plaintiff would not have been entitled to costs if he had succeeded, neither was the Defendant, the right being mutual. The statute of Gloucester (6 Ed. 1, c. 1,) gave costs only where damages were recoverable at common law, but as there were no damages at common law in quare impedit, costs were not given by that statute. So also where double or treble damages were created, costs were not increased by that statute in the same proportion, unless in cases where single damages might have been recovered at common law. 2 Inst. 289. And though the stat. Westminster 2 (13 Ed. 1, st. 1) gave damages in quare impedit and darrein presentment, yet as those damages did not accrue at common law, the stat. Gloucester did not operate to give costs in those actions, 2 Inst. 362. *Pilfold's case*, 10 Co. 116 a. The [531] only ground then on which the Defendant can rest his claim to costs, is the 8 & 9 W. 3, c. 11. But this statute, though the words of it are general, cannot now be construed so as to entitle the Defendant to make good his claim against the authority of adjudged cases. In *Lomax v. The Bishop of London*, Barnes, 139 (last edition) it was holden that the plaintiff in a quare impedit (brought for the same advowson by the same family as in the present case) had no right to costs; and the case of *The King v. Millam*, 3 Burr. 1720, shews the right to be reciprocal. Formedon is, in this respect, in the same situation as quare impedit; (no damages being recoverable in it at common law, it does not fall within the statute of Gloucester;) and in Formedon costs are not allowed, *Miller v. Seagrave*, Cooke's Pract. 25, which case, being subsequent in point of time and fully considered, is sufficient to over-rule the

(b)¹ See Impey's New Instr. Cler. C. B. 3d edit. 156.

(a) [Vide ante, p. 252, note (a).]

(b)² Vide post, 541, *Longman v. Fenn*.

short anonymous note in Cooke's Pract. 4, where it is said that the Defendant in quare impedit shall have costs on demurrer. It is also of great weight, that no instance can be produced in the course of modern practice where costs have been in fact allowed in this action.

Bond, Serjt., contra. The Defendant having prevailed in the suit and had a writ to the Bishop, is entitled to the costs of that suit. The stat. 8 & 9 W. 3, c. 11, is general in its meaning and expressions, and includes quare impedit with other actions: by mentioning "demandant and tenant," it seems evidently designed to extend to real as well as personal actions. With respect to Cooke's Pract. 4, there is no reason why the anonymous case of quare impedit there stated, which is expressly in favour of the present Defendant, should be invalidated by the subsequent determination in *formedon*.

Cur. advis. vult.

LORD LOUGHBOROUGH. After having taken the construction of the stat. 8 & 9 W. 3, c. 11, and the cases cited into full consideration, we are of opinion that the Defendant is not intitled to costs on the demurrer. Soon after the passing that statute, namely, in the 10th year of King William, the case of *Thomas v. Lloyd* was decided in the King's Bench, which is reported 1 Salk. 194, and 1 Lord Raym. 336 (S. C. Comberb. 482. 12 Mod. 195) in which on a plea of privilege by the Defendant which was holden good on demurrer, it was contended that he was intitled to costs in consequence of the judgment, but the determination of the Court was, that costs were only given by the statute where the right [532] was reciprocal between Plaintiff and Defendant. In the second year of Queen Anne, the same question came before the Court of King's Bench in the case of *Garland v. Extend* (1 Salk. 194. 2 Ld. Raym. 992) on a plea in abatement, and costs were again refused. After these cases came the *Anonymous case* (Cooke's Cas. Pract. 4) in this Court, where it is stated that the Defendant was holden to be intitled to costs. But in the tenth year of George 1, the case of *Miller v. Seagrave*, Cooke, Pract. 25, underwent repeated argument and consideration, and though one of the judges differed at first from the rest of the Court, yet it was afterwards solemnly resolved that no costs should be allowed. The construction which was put on the statute in that case we think the true one, that the costs given by it are confined to cases where the Plaintiff as well as Defendant is intitled to them.

Rule absolute.

JORDAN against COLE. Monday, Nov. 29th, 1790.

[Referred to, *Mayor of London v. Cox*, 1867, L. R. 2 H. L. 257.]

Where judgment is signed against a Defendant in an inferior court of record, and he surrenders in discharge of his bail, but before he is charged in execution, is removed to the Fleet by habeas corpus, the Court will grant a certiorari to remove the record in order to charge him in execution in the Fleet, by virtue of the stat. 19 Geo. 3, c. 70, s. 4 (a)¹.

Judgment being signed against the Defendant in the Court of the Mayor of London, he surrendered himself to the Poultry Compter on the 19th of May last in discharge of his bail. On the 24th of July a ca. sa. issued out of that court to charge him in execution, but he had been previously removed by habeas corpus to the Fleet Prison on the 7th of June. And in this term Lawrence, Serjt., obtained a rule to shew cause why a certiorari should not issue to the Mayor's Court to remove the record of the judgment into this court, in order to charge the Defendant in execution on it in the Fleet, by virtue of stat. 19 Geo. 3, c. 70, s. 4 (a)². The only doubt was

(a)¹ [But a certiorari will not lie to remove the record of a judgment obtained against a Defendant in the County Palatine of Durham, for the purpose of enabling his bail to render him in K. B., he being a prisoner for debt in the custody of the Marshal. *Paterson v. Reay*, 2 D. & R. 177. The statute 19 Geo. 3, c. 70, does not extend to the case of a foreign attachment, *Bulmer v. Marshal*, 5 B. & A. 821.]

(a)² Which is as follows,—“And forasmuch as persons served with process issuing out of inferior courts where the debt is under ten pounds, may, in order to avoid

on the [533] construction of the statute, which does not in express terms extend to the case of a prisoner in actual custody. But the Court thought that the case was within the equity of the statute, and therefore made the

Rule absolute.

And the Defendant being afterwards brought up was committed in execution.

ABBEY *against* MARTIN. Monday, Nov. 29th, 1790.

Where process is returnable on the last return of a term, a declaration *de bene esse* may be filed with notice to plead within the four first days of the next term (a)¹.

The Defendant being arrested on a *capias ad resp.* gave bail in the usual manner to the sheriff, but not having perfected bail to the action in due time, the bail-bond was assigned, and process issued against the bail returnable on the last return of Trinity Term, viz. in three weeks of the Holy Trinity, with copies of which they were duly served. On the 23d of June, the last day of Trinity Term, a declaration was filed *de bene esse* until an appearance should be entered, and notice given to plead within the first four days of Michaelmas Term. No appearance being entered on the 26th of October following, on that day the Plaintiff entered appearances according to the statute, gave rules to plead on the first day of Michaelmas Term November the 6th, and on the 10th of November signed judgment for want of a plea.

In consequence of this Cockell, Serjt., obtained a rule to shew cause why all the proceedings should not be set aside, on the ground that no declaration could be filed *de bene esse* where the writ was returnable on the last return of a term, the rule 8 Geo. 3, expressing only the first, second, and third returns. But The Court, after consulting the secondaries, held the proceedings to be regular, due notice being given to plead in the present term.

Rule discharged. (a)²

execution, remove their persons and effects beyond the limits of the jurisdiction of such courts, be it enacted by the authority aforesaid, that in all cases where final judgment shall be obtained in any action, or suit, in any inferior court of record, it shall and may be lawful to and for any of his majesty's courts of record at Westminster, upon affidavits made and filed therein of such judgment being obtained, and of diligent search and inquiry having been made after the person or persons of the Defendant or Defendants, or his, her or their effects, and of execution having issued against the person or persons, or effects, as the case may be, of the Defendant or Defendants, and that the person or persons, or effects of the Defendant or Defendants, are not to be found in the jurisdiction of such inferior court, (which affidavit may be made before a judge or commissioner authorized to take affidavits in such superior court) to cause the record of the said judgment to be removed into such superior courts, to issue writs of execution thereupon to the sheriff of any county, city, liberty or place, against the person or persons or effects of the Defendant or Defendants in the same manner as upon judgments obtained in the said courts at Westminster; and the Sheriff upon every such execution shall, and he is hereby authorized to detain the Defendant or Defendants until the sum of twenty shillings be paid to him, or to levy the same out of the effects, according to the nature of the execution, for the extraordinary costs of the Plaintiff or Plaintiffs in the inferior court subsequent to the said judgment, and of the execution in the superior court, over and above the money for which such execution shall be issued."

(a)¹ [But now by rule of H. 35 Geo. 3 (post, vol. ii. p. 551) the declaration may be filed or delivered *de bene esse* upon process returnable the last return of any term or on the day next after such return, in case the same shall not happen, on a Sunday, in which case the Plaintiff shall have the whole of the Monday following to file or deliver his declaration *de bene esse*. This rule applies to Easter as well as to the other terms, *Crew v. Attwood*, 2 Marsh. 337, 7 Taunt. 71, S. C. See Tidd's Pr. 457 and 456, note (c). 8th edition.]

(a)² Barnes, 342. *Fotherby v. Lloyd*. Impey, New Instr. Cler. C. B. 199, 201.

[534] HOOPER *against* HARCOURT. Monday, Nov. 29th, 1790.

After verdict, the court will not compel an attorney to discover the place of abode of his client.

The Defendant in this action (which was for the penalty of the statute (5 Ann. c. 14, and vide 28 Geo. 2, c. 12) for exposing a hare to sale) having gained a verdict at the last assizes at Hereford, on the motion of Marshall, Serjt., a rule was granted to shew cause why the Plaintiff's attorney should not inform the Defendant's attorney of the place of abode of the Plaintiff, on an affidavit of the Defendant's attorney stating that the Plaintiff's attorney had declared at the assizes that the Plaintiff was in very indigent circumstances, and that he (the attorney) was employed by one Major Roberts. Watson, Serjt., shewed cause by producing an affidavit of the Plaintiff's attorney, denying that he was acquainted with the place of abode of the Plaintiff.

The Court were of opinion that the application ought to have been made in a more early stage of the cause, and came too late after verdict, an attorney not being obliged to expose his client to be taken in execution.

Rule discharged (b).

End of Michaelmas Term.

[535] CASES ARGUED AND DETERMINED IN THE COURT OF COMMON PLEAS, IN HILARY TERM, IN THE THIRY-FIRST YEAR OF THE REIGN OF GEORGE III.

DOE, ON THE SEVERAL DEMISES OF MATTHEW ROBERTS AND MARY his Wife, AND OF THE SAID MATTHEW ROBERTS, *against* ELIZABETH POLGREAN. Thursday, Feb. 3d, 1791.

[Applied, *In re Bellamy*, 1883, 25 Ch. D. 624.]

A. being possessed of lands for a term of 999 years, previous to his marriage with B. granted the term to "B. and her heirs immediately after the death of A. to hold the same to the said B. and her heirs to and for her and their own proper use for ever;" the marriage took effect, A. survived B., and died without issue, intestate, and without having taken out administration to B. his wife. The term upon the death of A. went to his administrator, and not to the administrator of B. [The Court being of opinion that the deed must be construed as a present gift to the wife in case she survived her husband, to take effect in possession on that event.]

This was an ejectment, brought to recover a leasehold tenement part of an estate called Lower Lariggan in the parish of Maddern in the county of Cornwall. At the trial of the cause before Mr. Justice Heath, at the last assizes for that county, a verdict was found for the Plaintiff, subject to the opinion of the Court on the following case.

John Honeychurch the elder of Higher Lariggan in the parish of Maddern, being possessed of the premises in question for the residue of a term of nine hundred and ninety-nine years then unexpired, by his will bearing date the 20th of May 1720, devised the said premises to trustees, from and immediately after his decease, for and during all the rest, residue, and remainder to come and unexpired of the said term, in trust for his wife Elizabeth Honeychurch for her life, and after her decease, then in trust for his daughter Mary Rawles, the wife of William Rawles, for her life, and after her decease, then in trust for his grandson William Rawles, son of the said William and Mary [536] Rawles, and the issue of his body lawfully begotten, and after his decease without issue, then in trust for the 2d, 3d, 4th, 5th, and all and every other son and sons by the said William Rawles on the body of the said Mary Rawles lawfully to be begotten, severally, successively and in remainder one after another, as they should be in seniority of age and priority of birth, &c. and for want of such issue, then in trust in like manner for all and every the daughter and daughters by the said William Rawles on the body of the said Mary Rawles lawfully to be begotten and their issue, &c. with remainder over.

Afterwards the said John Honeychurch on the 11th of August 1724, by indenture

(b) 1 Stra. 402, *Gynn v. Kirby*. Barnes, 126, *Shindler v. Roberts*.

of that date, made between the said John Honeychurch of the one part, and Mary Rawles widow and daughter of the said John Honeychurch of the other part, granted and assigned unto the said Mary Rawles immediately after the death of the said John Honeychurch and Elizabeth Honeychurch, his then wife, and not before, all the before-mentioned premises, To hold the same unto the said Mary Rawles, during her natural life, with remainder to her son William Rawles and his issue lawfully begotten, and in default of issue in the said William Rawles, then to Elizabeth Rawles now Elizabeth Polgrean (the Defendant) daughter of the said Mary Rawles during her natural life, with remainder over. John Honeychurch afterwards died, whereupon the said Mary Rawles his daughter possessed herself of the premises in question, and on the 24th day of April 1749, the said Mary Rawles having then survived her mother Elizabeth Honeychurch, by indenture of that date assigned and set over to her son William Rawles, his executors and administrators the said premises during the remainder of the said term. Afterwards, on the 29th April 1749, by indenture of that date, made between the said William Rawles of the first part, Margery Cole widow of the second part, and John Highman of the third part, reciting that a marriage had been agreed upon between the said William Rawles and Margery Cole, the said William Rawles for and in consideration of natural love and affection, did give, grant, assign, and make over "unto the said Margery Cole and her heirs immediately after the death of him the said William Rawles, all the premises therein before mentioned, to hold the same unto the said Margery Cole and her heirs to and for her and their own proper use for ever." The marriage between William Rawles and Margery Cole took effect, William Rawles survived his wife, and afterwards died, without issue living at the time of his death, intestate, and administration of [537] his rights and credits was in due form of law granted to the Defendant Elizabeth Polgrean. Mary Roberts the lessor of the Plaintiff the wife of Matthew Roberts, the other lessor of the Plaintiff was the daughter of Margery Cole (afterwards Margery Rawles,) by a former husband, and administration of all her goods, rights, and credits, was granted to the said Mary Roberts.

Rooke, Serjt., for the lessors of the Plaintiff. This question arises between the sister of William Rawles, who was possessed of the term, and the daughter of his wife by a former husband. What the general equity of the case is, cannot be doubted. William Rawles being about to marry a widow, and to possess himself of all her personal property, agrees, previous to the marriage, to settle the term on her and her family, as a provision for them after his decease. It was clearly his intention that her family should be benefited in preference to his own; which was a fair and reasonable intention, he having by the marriage become possessed of all his wife's personal property. The intention then of the parties is in favour of the lessors of the Plaintiff. It is also clear that William Rawles had a right to make the settlement. A term for years given generally, is given absolutely. Here the term was given to William Rawles and his issue; this was an absolute disposition of the whole. Having therefore exerted this right, and given the term to his wife after his death, her interest in contemplation of law was a mere possibility. A legal possibility has no existence till a certain event takes place. It differs from a contingency, inasmuch as in the latter an interest exists, though it depends upon some future circumstance whether that interest shall take effect in possession. This agrees with the logical distinction between a possibility and a contingency: a possibility being defined to be that which has no actual existence till a future event shall happen; a contingency, that which has a present existence, but which may or may not happen to take effect. Terms for years, however long, were in their origin of so precarious a nature as to the continuance of the tenure, that in contemplation of law if they are granted over by deed after an estate for life in them, such an expectant interest is not a vested right, but a mere possibility. 4 Co. 66 b. *Fulwood's case*, 8 Co. 95 a. *Mutt. Manning's case*, 1 Cas. in Canc. 131, *Wood v. Saunders*, Sir William Jones, 416, *Bery v. Burlace*. The question then is what right the husband has over a mere possibility settled on the wife? It is clearly to be distinguished from [538] a vested interest. If a chattel real is vested in the husband in right of his wife, he may dispose of it during the coverture; he shall have it if he survive her without taking out administration, because it has once vested in him. Plowd. 192. Co. Litt. 46 b. 1 Rol. Abr. 345, H. pl. 8. So if the husband die before the wife, she shall not again be possessed of what she has once disposed of; as if he has leased the whole chattel interest, the rent shall go to his executors, and

not to the wife. He may forfeit it. 1 Roll. Abr. 344, G. pl. 2. It may be extended for his debt, *ibid.* pl. 3. So outlawry and attainder are gifts in law. Co. Litt. 351 a. But if he grant only a part of the term, and die, the wife shall have the residue, because the husband, who had it in her right, did not dispose of it. Co. Litt. 46 b. 1 Roll. Abr. 345, G. pl. 10. Perk. 834. If she survive, and the husband has not disposed of it, she shall have it again. He cannot charge it, Co. Litt. 351 a. nor can he devise it, *ibid.* It is clear therefore that the husband shall have a chattel real if he is once possessed in right of his wife; and his executors shall have the rent if he once disposes of it. But it is equally clear that if it never vests in him (which a possibility has been shewn not to do) he acquires no power over it, nor can he dispose of it. He cannot assign it, *Lampet's case*, 10 Co. 51 a. nor release it, Salk. 326, *Gage v. Acton*, in which case the words of Lord Holt are exceedingly strong. "Where the wife hath any right or duty which by possibility may happen or accrue during the coverture, the husband may by release discharge it, but where the wife hath a right or duty, which by no possibility can accrue to her during the coverture, the husband cannot release it." If he does not dispose of it, it goes to the executor of the wife in case she should die first, and does not survive to the husband or his representatives. The words of Lord Coke are decisive of the question. "If a lease be made to a baron and feme for term of their lives, the remainder to the executors of the survivor of them, the husband grants away this term, and dieth, this shall not bar the wife, for that the wife had but a possibility, and no interest." Co. Litt. 46 b. and "if a feme sole be possessed of a chattel real, and be thereof dispossessed, and then taketh husband, and the wife dieth and the husband survive, this right is not given to the husband by the intermarriage, but the executors or administrators of the wife shall have it; so it is if the wife have but a possibility. Co. Litt. 351 a." A trust for the wife does not vest in the husband: [539] he shall not have it as husband if he survive the wife. 1 Roll. Abr. 345, pl. 13, though he may dispose of a trust in equity. 1 Eq. Cas. Abr. 58. A right of action or of entry in right of the wife, not exercised by the husband in her life-time, does not survive to him. A possibility cannot vest in the husband or in any other person, till the event takes place on which it depends; he has therefore no power over it, prior to that event. Co. Litt. 351 a. If then the husband has no power over it, if it does not vest in him, he cannot have it in his marital character if he survive, but ought to take out administration. In the present case, as the husband did not take out administration, the interest in the term could not go to his representatives, but is vested in the administratrix of the wife, the lessor of the Plaintiff. But it may be objected that the administratrix is a mere trustee, and therefore ought not to bring the ejectment. But an administrator has a legal interest while the administration remains unimpeached, and in a case like the present (of a married woman who dies before her husband, but to whom he does not take out administration,) is liable to her debts contracted before the coverture, from which the husband is discharged unless they were sued for during the life-time of the wife. 1 Roll. Abr. 351, G. pl. 2. The Court will not presume that there are no debts, nor create a trust by implication against the intent of the parties. That intent obviously was that the family of Margery Cole should be benefited rather than that of William Rawles. And it would be dangerous to say, that an administrator could not maintain an ejectment against the next of kin without giving an account of debts and assets. In the case of a clear trust, it is not settled that a trustee may not support an ejectment (a). But in case of a mere constructive trust (which this is) depending on equitable circumstances, courts of law will leave the law to take its course, and the parties to apply to equity, if necessary, on the special circumstances of their case.

Lawrence, Serjt., for the Defendant. There are two points in this case, either of which is sufficient to entitle the Defendant: the first, that she may take in her own right under the former deed, the limitation to her not being too remote; the second, that she may take as administratrix of her brother William Rawles. With respect to the first point, the limitation is "to William Rawles and his issue lawfully begotten, and in default of issue in the said William Rawles, then to Elizabeth Rawles [540] (the now Defendant) during her natural life." Now the limitation of a term is governed by the same rules as an executory devise. If it be on a general indefinite failure of

(a) See *Doe v. Pott*, 2 Dougl. 721, 8vo and the cases there cited in a note. [Vide ante, p. 461.]

issue, it is clearly bad ; but if the failure of issue be confined to the compass of one or more lives in being, it is good. Here the term is given, on failure of issue in William Rawles, to Elizabeth Rawles during her natural life ; the failure therefore of issue is restrained to the period of her life. That such a limitation is valid, appears from *The Duke of Norfolk's Case*, 3 Cas. Chan. 1 P. Wms. 432. *Target v. Gaunt*. Ib. 534. *Hughes v. Sawyer*. Ib. 564. *Pinbury v. Elkin*. Prec. Chanc. 528. *Nichols v. Skinner*, Salk. 225. *Lamb v. Archer*. As therefore William Rawles died without issue in the life-time of Elizabeth Rawles (now Polgreave the Defendant) she was entitled to the term in her own right. But, secondly, she is entitled as administratrix of her brother. It is argued, that this interest was but a possibility, which did not vest in the husband, and of which he could not dispose. But in truth it was not a possibility, unless it can be supposed that he would survive a period of 999 years. That such sort of remainders are considered as vested, appears from Hutt. 118, *Napper v. Saunders*, and Pollexf. 24, *Weale v. Lower*, in which last Lord Hale held that "if a feoffment be made to the use of A. for 99 years, if he shall so long live, and after his death to the use of B. in fee, this shall not be contingent, but it shall be presumed that his life will not exceed 99 years ; but otherwise it would have been if it had been made but for 21 years ;" this affords an answer to *Lampit's Case*, 10 Co. 51 a. where it is stated, that "a man made a lease to husband and wife for 21 years, the remainder to the survivor of them for 21 years, and the husband granted over this term ; and it was held by Wray, Chief Justice, and totam curiam, that the grant was void for the uncertainty of the person ; for although all chattels real which belong to the wife the husband may dispose of, yet in this case neither the husband nor wife has any thing till the survivor." In whatever light this subject was considered in the older cases, the law of executory interests is now more clearly settled, it being holden that they are assignable, transmissible and descendible (a)¹. The Court were of opinion that the deed in question, though inaccurately drawn, must be construed to be a present gift to the wife in case she survived her husband, to take effect in possession on that event. The right to the term therefore was in the husband, and passed to his representative.

Judgment for the Defendant.

[541] MEYER against RING. Monday, Feb. 7th, 1791.

Where a fi. fa. is sued out into a different county from that in which the venue is laid, and the party suing it afterwards takes out a fi. fa. into the proper county, and gets a return of nulla bona, in order to warrant the fi. fa. which first issued, the Court will permit the first writ to be amended by inserting the return of nulla bona and the testatum clause, though the second writ be returnable several days before the judgment was signed ; because judgments relate to the first day of the term (a)².

The venue was laid in London, and the plaintiff gained a verdict at Guildhall at the Sittings in this Term. On the first of February costs were taxed on the postea, and the next day a fi. fa. taken out into Middlesex, instead of London, as it ought to have been. In consequence of this, a rule was granted on the 4th of February, to shew cause why the execution should not be set aside, and the goods levied in Middlesex restored to the defendant. On notice of this motion, the Plaintiff's attorney on the same day sued out a fi. fa. into London, got a return of nulla bona entered on the roll, and on the 5th of February obtained a rule for the Defendant to shew cause why the fi. fa. which had first issued into Middlesex should not be amended, by inserting it in the return of nulla bona and the testatum clause (b).

Cockell, Serjt., now shewed for cause against the amendment, that the fi. fa. which the Plaintiff had sued out into London in order to do away the irregularity, was returnable in fifteen days of St. Hilary, January 27, which was five days before that on which judgment was signed, viz. February 1.

But the Court said, that as judgments relate to the first day of the term (except

(a)¹ Vide ante, 30, *Roe v. Jones*, affirmed by the Court of B. R. in error, 3 Term Rep. B. R. 88.

(a)² [Accord. *Cowporthwaite v. Owen*, 3 T. R. 657. *Shaw v. Maxwell*, 6 T. R. 450. Tidd's Pr. 1037, 8th edit.]

(b) Vide Impey, New Instr. Cler. C. B. 3d edit. 453.

in the case of bona fide purchasers for a valuable consideration (stat. 29 Car. 2, c. 3, s. 15), it was proper to make the

Rule absolute for the amendment.

LONGMAN AND ANOTHER *against* FENN. Wednesday, Feb. 9th, 1791.

Where there is judgment by default on a promissory note, the Court will refer it to the prothonotary to ascertain the damages and costs without a writ of enquiry.

Assumpsit on a promissory note. Plea, a former judgment recovered in B. R. Replication, nul tiel record, and issue thereon. Judgment by default against the defendant, in not producing the record.

On the motion of Marshall, Serjt., a rule was granted to shew cause, why it should not be referred to one of the prothonotaries [542] to ascertain the principal, interest and costs due to the Plaintiff, without a writ of enquiry.

Rooke, Serjt., shewed cause, arguing that though the Court had in some cases a right to make the reference required, yet that right ought to be confined to actions of debt where a specific sum was demanded: that it was the peculiar province of a jury to determine the quantum of damages arising from a breach of contract, and the fact whether any, and how much, interest were due: that the revenue would be greatly injured if the motion were allowed, inasmuch as it tended materially to the diminution of the stamp acts: that if this practice had prevailed, or if the legislature had supposed it would prevail, when those acts were passed, provisions would have been made to meet it; but that it was never conceived that the taxation of costs, in actions on simple contracts, would supersede the necessity of a writ of enquiry.

But the Court said, that as the practice was clear in actions of debt (a)¹, there seemed to be no good reason why it should not also prevail in those actions of assumpsit where the demand was precisely ascertained. In 3 Wils. 62, on a judgment by default in trespass, Wilmot, C.J., had gone so far as to hold, that the Court might, if they pleased, themselves assess damages (b). In the present case, if there were any fact which it was necessary for a jury to determine, it ought to have been stated by affidavit. But as no such fact appeared, as the sum was defined on the face of the note, and as the interest was capable of exact computation by the prothonotary, it was highly reasonable to save the parties the expense of a writ of enquiry.

HEATH, J., mentioned 3 Leon. 213, where the Plaintiff in replevin was nonsuited, it was holden that the Court might assess damages without a writ of enquiry, "because they are not in respect of any local matter, but accrued to the avowant for the delay in the non-payment of the rent: contrary, where judgment is given for the Plaintiff, there the Court shall not assess damages, for he ought to recover for the taking of his cattle, of which the Judges cannot take notice, and the damages may [543] be greater or less, according to the value of the cattle, and the circumstances of taking and delaying them."

Rule absolute (a)².

(a)¹ 2 Saund. 136, *Holdipp v. Otway*.

(b) On which point see Year Books, 14 Hen. 4, 9. 3 Hen. 6, 29. 18 Hen. 6, 10. 1 Roll. Abr. 573. Yelv. 152. *Goodwin v. Welshe*, 1 Brownl. 214, S. C. and 2 Wils. 373, *Hewit and Others v. Mantell*.

(a)² In *Mallory v. Jennings*, Fitzgib. 162, there was judgment by default in assumpsit in C. B., and error being brought, it was insisted upon, that there was no writ of inquiry, and therefore that damages were assessed by persons whom the sheriff had no authority to convene. But the Court of B. R. held that the omission of the writ of inquiry was cured by the statute for the amendment of the law. 4 Ann. c. 16, s. 2. In *Thelsson v. Fletcher*, Dougl. 315, in an action on a policy of insurance on a foreign ship, where there was a stipulation that the policy should be sufficient proof of interest in case of a loss, and judgment by default, it was holden that on the writ of inquiry, the Defendant's subscription was the only thing necessary to be proved. There Buller J., observed that "writs of inquiry were often sued out where they were not necessary, as, for instance, in actions of covenant for the non-payment of a sum certain. It does not follow, because a writ of inquiry has been awarded, that the amount of the demand is uncertain. In actions upon a bill of exchange or promissory note, nothing

THE KING ON THE PROSECUTION OF BOND, ESQUIRE, *against* BAKER AND NEWMAN, ESQUIRES late Sheriff of Middlesex. Friday, Feb. 11th, 1791.

A *fi. fa.* issued to the sheriff at the suit of A. against B., on the next day another *fi. fa.* issued at the suit of C. against B., a levy was made under the first writ, but notice was given to the sheriff by C. not to pay over the money to A. on the ground that the judgment obtained by him was fraudulent. The sheriff notwithstanding paid the money over to A., and the officer filed the second writ with a return of *nulla bona* in the King's Bench treasury, instead of the office of the *custos brevium* of this court. On this, an attachment issued against the sheriff for not returning that writ, to which attachment (after moving the court to discharge it, on the ground that the writ in question was filed in the wrong place by mere mistake of the officer, and that the mistake was corrected immediately on notice of the attachment, by filing it in the proper office, but with which motion the Court refused to comply chiefly on account of strong circumstances of fraud respecting the execution of A.) the sheriff put in bail, and was afterwards examined on interrogatories. The prothonotary, to whom the examination was referred, having reported that neither the contempt of the Court, nor the imputation of fraud appeared to him to be done away, the Court ordered the sheriff immediately to pay the whole debt and costs due to C. together with the costs of all the applications.

The proceedings in this case were as follow :—On the 14th of May, 1790, a *fieri facias* was delivered to the sheriff of Middlesex, on a judgment confessed on a warrant of attorney by one Purcell to one Anne Dempsey for 200*l.* and upwards, by virtue of which the whole of Purcell's effects were taken in execution. On the 15th of the same month another *fi. fa.* was delivered to the sheriff, on [544] a judgment confessed on a warrant of attorney by the same Purcell to Bond the prosecutor, for 141*l.* 8*s.* and upwards; which last warrant was given for a *bonâ fide* debt by Purcell to Bond, and long before that which Purcell gave to Anne Dempsey, though judgment on the latter was first entered up. On the 27th of May notice was given by Bond to the sheriff not to pay over the money which might be levied under the first execution, stating that the judgment obtained by Dempsey was voluntary, confessed without any consideration, and merely for the purpose of preventing the effect of the judgment confessed to Bond. Notwithstanding this notice, the sheriff's officer paid over the money to Dempsey, and the sheriff being ruled to return the second *fi. fa.* the officer filed it with a return of *nulla bona* in the King's Bench Treasury, instead of the office of the *custos brevium* of this court. In consequence of this, an attachment of contempt issued against the sheriff. Immediately on notice of the attachment, the officer filed the writ and return in the office of the *custos brevium*, and offered to pay the costs of the attachment, which the Plaintiff's attorney refused to accept. Late in Trinity Term a rule was obtained on the part of the sheriff to shew cause why the attachment should not be set aside on payment of costs, upon an affidavit stating that the writ and return were filed in the wrong office by mere mistake. On shewing cause, the last day of Trinity Term, strong circumstances of fraud were disclosed relating to the first execution at the suit of Dempsey, upon which the rule was discharged with costs. In the ensuing vacation the sheriff obtained Lord Loughborough's order to stay the execution of the attachment until the second day of Michaelmas Term, the object of which was to give the sheriff an opportunity of answering the allegations of fraud. On the first day of Michaelmas Term a motion was again made to set aside the attachment, on affidavits of the sheriff's officer denying any knowledge of fraud, and stating, as

but the instrument is to be proved before the jury, the sum being thereby ascertained. Though even in cases where there is no necessity for a writ of inquiry, that proceeding is of use, when the Plaintiff goes for interest, which the jury assesses in the nature of damages." By a subsequent determination, *Green v. Hearne*, 3 Term Rep. B. R. 301, it is laid down, that on judgment by default against the acceptor of a bill of exchange, on executing a writ of inquiry, the bill need not be proved, and that the only reason for producing it is to see whether any part of it has been paid; which agrees with 2 Sra. 1145, *Bevis v. Lindsell*. See also *Rashleigh v. Salmon*, ante, 252, and *Andrews v. Blake*, ante, 529. [See also ante, 252, n. (1).]

before, that the writ and return were filed in the wrong office by mere mistake; but to this motion the Court again refused to consent, the affidavits of the officer not being satisfactory. Upon this the sheriff obtained a rule that the attachment should remain in the office one week longer unexecuted, and on the 10th of January put in bail to the attachment, who on the 13th, on the usual affidavit of the service of notice, justified themselves in court.

In the following vacation, interrogatories were exhibited to the sheriff, which, together with the answers, were referred to [545] the prothonotary, in order for him to make his report. Accordingly, in this term, on the 10th of February, Mr. Prothonotary Mainwaring, reported to the Court that the High Sheriff had in their answers (as of course) denied all knowledge of the circumstances stated in the interrogatories, and upon due examination nothing appeared to him to lessen the imputation of fraud upon the execution sued out by Dempsey, or to clear the contempt of which the officer had been guilty in not making a proper return of the writ.

Adair, Serjt., then moved, that the sheriff who were both in court, should be committed to the Fleet Prison, till the debt and costs recovered on the second judgment by the Plaintiff Bond, together with the costs of all the applications, should be paid by them. In answer to this, Bond, Serjt., contended, that the Court had no power to imprison the sheriff in such a case as this; that the regular method of proceeding was to amerce them for the contempt, that the amercement should be estreated into the Exchequer, and then the Plaintiff ought to apply to the crown for satisfaction of his debt out of the amercement; to establish which propositions he cited *Laycock's case*, Latch, 187, Dalton, Office of Sheriff, 176, and *Woodgate v. Knatchbull*, 2 Term Rep. B. R. 148 (a) and to shew that the Court ought not to impose a fine on the sheriff, to the whole amount of the debt, but ascertain by the intervention of a jury what were the actual damages sustained, he mentioned the opinion of Buller, J., thrown out in Dougl. 464 (3d Edit. 1790, 8vo), *Rex v. Adderley*.

The Court said, that if the practice, now the subject of complaint, were to prevail, there would be numberless opportunities afforded to fraud and collusion, and persons who had recovered a just debt would be, in great measure, in the power of sheriffs' officers. It would be absurd to drive the Plaintiff to the circuitous mode of application to the crown for relief, after an estreat into the Exchequer, when they were themselves fully competent to afford him satisfaction. However, they would permit the matter to stand over to the next day, in order to see if any thing further could be alleged to do away the suspicion of fraud in the execution at the suit of Dempsey. On the next day, February 10th, no attempt was made to prove the validity of the judgment and execution obtained by Dempsey, but Bond, Serjt., proposed that the Plaintiff should bring an action for a false return, the sheriff pay all the costs of the applications, [546] and in the mean time the attachment stand as a security. But the Court refused to consent to this, and ordered that the sheriff should immediately, without further delay, pay the whole debt and costs due to the Plaintiff Bond, together with the costs of all the applications (c), there was no hardship, it was said, on the sheriff themselves in this, as they were indemnified. With respect to the question of imprisonment, the Court said in general, there could be no doubt of their power to commit for a contempt.

Upon hearing this, the sheriff thought proper to comply with the terms prescribed, and accordingly soon after paid the whole debt and costs, and the costs of all the applications.

(a) See also Salk. 54, *Eyres v. Smith*.

(c) The rule for this purpose was drawn up on the same day in the following words, "Let the sheriff pay this day the debt and all the Plaintiff's costs in the cause and in this prosecution, to be taxed by the prothonotary, or in default thereof a fresh attachment to issue against the late sheriff, and their recognizance of bail to be estreated."

By the Court.

BALLS, QUI TAM, *against* ATWOOD, Clerk. Friday, Feb. 11th, 1791.

In an action of debt for non-residence on 21 Hen. 8, c. 13, an affidavit that the offence was committed in the county where, and a year before, the action is brought, is not necessary, the stat. 21 Jac. 1, c. 4, s. 3, not being applicable to such action (a)¹.

A declaration having been delivered in this action of debt on the statute 21 Hen. 8, c. 13 (s. 26), for non-residence, Adair, Serjt., obtained a rule to shew cause why all the proceedings should not be set aside, on the ground that upon searching in the office no affidavit appeared to be filed that the offence was committed in the county where, and within a year before the action was brought; which he contended was made necessary in actions of this kind by stat. 21 Jac. 1, c. 4, s. 3.

Le Blanc, Serjt., shewed cause, arguing that the stat. 21 Jac. 1, c. 4, could not possibly be applied to this case, because by 21 Hen. 8, c. 13, s. 26, the penalty for non-residence was to be recovered in the King's, i.e. the superior courts. The authority of *Leigh, qui tam, v. Kent*, 3 Term Rep. B. R. 362, was directly in point, and decisive of the question; there the court of King's Bench over-ruled a former case of *White, qui tam, v. Boot* (2 Term Rep. B. R. 274), and held that no such affidavit was necessary: this indeed was after verdict, but the court of B. R. laid it down as a general proposition, that the stat. 21 Jac. 1, c. 4, was not ap[547]-plicable to those statutes on which penal actions were to be brought in the superior courts.

The Court were clearly of this opinion, and
Discharged the rule.

RUDDER *against* PRICE, one, &c. Saturday, Feb. 12th, 1791.

An action of debt will not lie on a promissory note payable by instalments, till the last day of payment be past (a)².

This was an action of debt on a promissory note payable by instalments, brought in a former term by the payee against an attorney the maker, by bill of privilege. The first count, on which the question before the Court arose, after stating the debt to be 452l. 10s. which the Defendant owed to and unjustly detained from the Plaintiff, went on "For that whereas the said Stephen on the 30th day of March in the year of our Lord 1790, to wit, at Westminster in the county aforesaid, made his certain note in writing, commonly called a promissory note, his own proper hand and name being thereto subscribed, bearing date the day and year aforesaid, and then and there delivered the said note to the said Richard, by which said note the said Stephen promised to pay to the said Richard by the name of Mr. Richard Rudder or order, fifty-two pounds ten shillings for value received by him the said Stephen, the same to be paid in manner following, (that is to say,) twenty pounds on the first day of July then next, twenty pounds on the first day of October then next, and twelve pounds ten shillings on the first of January next, by reason whereof, and by force of the statute in such case made and provided, the said Stephen became liable to pay to the said Richard the said sum of money in the said note specified, according to the tenor and effect of the said note, whereby an action hath accrued to the said Richard to demand and have of and from the said Stephen the said sum of money in the said note mentioned, parcel of the said sum of four hundred and fifty-two pounds ten shillings above demanded, &c." There were also the common money counts for the residue of the sum of 452l. 10s. above demanded.

Special demurrer to the first count, the causes of which were, "That in and by the said first count of the said declaration it appears that the said sum of 52l. 10s. in the said notes mentioned is not yet due or payable, nor can the same be sued for by the said Richard Rudder till after the first day of [548] January in the year of our Lord 1791,

(a)¹ [See *Shipman v. Henbest*, 4 T. R. 109. 1 Saund. 312 b. (n). 5th Edit. Tidd's Prac. 566. 8th Edit. Willes, 635 (n).]

(a)² [Debt lies against the payee of a promissory note, expressed to be for value received. *Bishop v. Young*, 2 Bos. & Pul. 78. So against the acceptor of a bill of exchange by the drawer, the bill being drawn payable to his own order for value received in goods. *Priddy v. Henbrey*, 1 B. & C. 674.]

and also for that no cause of action whatsoever is in the said first count of the said declaration stated or alleged against the said Stephen," &c. To the other counts the Defendant pleaded nil debet, on which issue was joined.

In Michaelmas Term, in support of the demurrer, Lawrence, Serjt., contended that the law was clearly settled, that an action of debt could not be maintained on a contract to pay money by instalments on different days, before the last day was expired, whether the contract were simple or by specialty. For which he cited the following authorities. Fitz. N. B. 304 (4to Edition). Co. Litt. 47 b. & 292 b. 4 Co. 94 b. *Slade's case*. Cro. Eliz. 807. Cro. Car. 241. Owen, 42. And though in 1 Wils. 80, *Coates v. Hewitt*, an action of debt on a bond conditioned for the payment of money by instalments was holden to lie before the last day, yet the Court in that case said, "there was a difference between debt on such a deed and an action on a contract for paying several sums at several times."

Marshall, Serjt., contra. The objection made to this declaration may be divided into three parts: 1st. That no action will lie on the note before the last day be past. 2d. That if any action will lie before that day, it must be assumpsit and not debt. 3d. Supposing debt will lie, the Plaintiff ought to have declared only for the instalments actually due. With respect to the first objection, it is said in Co. Litt. 292 b. "If a man be bound in a bond or contract to another, to pay 100l. at five several days, he shall not have an action before the last day be past." This is only applicable to deeds under seal, and those single bonds, for where there is a penalty, the condition is broken by failure of payment on either of the days, and debt will lie before the last day be past. Buller, N. P. 168. "But" (says Lord Coke) "if a man be bound in a recognizance to pay 100l. at five several days, presently after the first day of payment he shall have execution for that sum, and shall not tarry till the last day be past, for it is in the nature of several judgments." "So it is of a covenant or promise; after the first default, an action of covenant, or an action on the case, doth lie, for they are several in their nature." In *Coates v. Hewitt*, the obligee sued on a bond payable by instalments before the last day was past, and recovered: and this was long since the stat. 4 & 5 Anne (C. 16, s. 13), which relieves the Defendant [549] from the penalty on bringing the principal, interest, and costs into court, yet the Defendant was obliged to pay the whole debt. In *Beckwith v. Nott*, Cro. Jac. 504, Assumpsit on a promise to pay a debt by instalments was holden well to lie before the last day, and for the whole debt. In *Ashford v. Hand*, Andr. 370, Assumpsit was brought by the indorsee for a note of hand payable by instalments, and the Plaintiff counted only for such sums as were due: it was objected, 1st. That the action could not be maintained till all the days were past, the contract being for an entire sum, though to be paid at different times; 2dly. That the Plaintiff ought to have declared for the whole sum. But the Court held that the Plaintiff might bring an action to recover damages for every default, and that he was not obliged to declare for the whole sum.

With respect to the second objection, that if any action will lie, it must be assumpsit and not debt; it is indeed laid down in Cro. Eliz. 807. *Taylor v. Foster*, Cro. Car. 431, *Milles v. Milles*, that though assumpsit will lie before the last day, yet debt will not, because the contract is entire, yet this reason (which is also stated, Owen, 42, *Hunt's case*) is founded on the supposition that in debt the Plaintiff must recover the precise sum demanded, and no more or less. But as it is now clearly settled that in debt the Plaintiff may recover the sum justly due, though it be less than the sum demanded, the reason of the distinction between debt and assumpsit has ceased. As to the third objection, that, supposing debt will lie, the Plaintiff ought only to have declared for the instalments really due; the declaration sets forth the note, and states that the Defendant became liable to pay him the sum specified according to the tenor and effect of the said note, and concludes that the Defendant has not paid the sum demanded or any part thereof. It appears therefore that the Plaintiff declares for no more than he is by law intitled to recover according to the tenor and effect of the note. If he be intitled to the whole, it is demanded; if only to the instalments due, no more can be recovered. But supposing the declaration not to be correctly right, and that it ought to have shewn that two instalments were due, and demanded them; yet as this is a mere defect of form, it cannot be taken advantage of but upon special demurrer. The Defendant ought to have shewn that the Plaintiff had demanded the whole debt, whereas he had only a right to demand

the amount of the two instalments due at the commencement of [550] the action. Now though the first cause of demurrer is special, yet it states no more than this "that the sum of 52l. 10s. is not yet due or payable, nor can be sued for till after the 1st of January 1791." As to the second cause of demurrer, it amounts to a general demurrer.

Cur. advis. vult.

On this day the opinion of the Court was thus delivered by

LORD LOUGHBOROUGH. I take it, that at the time when *Slade's case* was decided, an action of debt could not be brought on a debt due by instalments, till all the days of payment were past. But this was certainly not on the ground that the Plaintiff could not recover less than the amount of the sum demanded: for though long before that time the demand in an action of debt must have been for a thing certain in its nature (a), yet it was by no means necessary that the amount should be set out so precisely that less could not be recovered. In ancient times it was the common action for goods sold and delivered, and for work and labour done, in which cases, though the sum to be recovered is to be ascertained by a jury, and is given in the form of damages, still the demand is for a thing of a certain nature. The opinion indeed, which was erroneously entertained, that in an action of debt on a simple contract the whole sum must be proved, has been some time since corrected. The idea that an action of debt could not be brought till all the days of payment were past, was founded on a good ground of law, that for one contract there should be but one action; and as a contract to pay a certain sum on several days of payment was considered as one contract, it followed that no action could be brought till all the days of payment were elapsed. The construction perhaps has been too literal, for between a contract to pay five sums of 20l. on five different days, and a contract to pay 100l. by five sums of 20l. on different days, the distinction is merely verbal, and consists in form: the substantial meaning is the same in each. This construction however has long prevailed. The objection indeed, is only to the construction, not to the rule of law which is evidently a just one if the contract be really entire, as to do a series of acts under a certain penalty. The history of the action of assumpsit given by Lord Coke in the second resolution in *Slade's case* is incorrect: the cases which he there cites shew [551] that the manner in which that action was brought prior to *Slade's Case*, was by stating, not a general indebitatus assumpsit, for it was not brought merely on a promise, but special damage for a non-feasance, by which a special action on the case arose to the Plaintiff (b). Thus in the case of *Norwood v. Reed*, Plowd. 180, particularly referred to in *Slade's Case*, which was on a contract to deliver corn at several times, and at a stated price, the Plaintiff declared that by the non-performance of that engagement at a particular time he had sustained this special damage, namely, that relying on the engagement of the Defendant to deliver him the corn he had contracted with A. and B. to deliver to them particular quantities out of the quantity of corn

(a) In *Walker v. Witter*, Dougl. 6, Lord Mansfield says "Debt may be brought for a sum capable of being ascertained, though not ascertained at the time of the action brought."

(b) Accordingly in the case 20 Hen. 7, 9, as cited by Fitz-James, Dyer, 22.b. the action was brought for the special damage on account of the non-performance of the contract to deliver corn to the Plaintiff, by which he was obliged to buy other corn at a higher price. So *Tatam's Case*, 27 Hen. 8, 24 & 25, was on a collateral undertaking to pay the debt of another, if the Plaintiff in the original action would discharge him from execution; it was there holden that debt would not lie, for the Defendant had not quid pro quo, but case or covenant, if there had been a specialty. In 20 Hen. 7, 8, the action was case on a conversion by the vendee against the vendor who had not delivered a quantity of malt, and three justices held against the opinion of Frowicke, that case would not lie, but that it should have been debt. The case 21 Hen. 6, 55, was trespass on the case for not delivering two pipes of wine sold by the Defendant to the Plaintiff; there a discourse was holden in what cases trespass on the case would lie, but no decision took place, the parties having compromised their suit. Thus too, 12 Ed. 4, 13, was an action on the case against a bailee for using and spoiling goods; and in the same page there is a similar action for so negligently keeping a horse, kept for a certain reward, that it died. So likewise 13 Hen. 7, 26, was an action on the case for stopping a watercourse.

which he was to receive, and was greatly injured in his credit by not being able to make good that contract with them. *Slade's case* appears to me to be the first where general damages for the non-performance of a contract were laid as the cause of action. But not long after, the action of assumpsit was brought following the course in which the Court had supported the action in *Slade's case*, and declaring generally without stating any special damage. The Plaintiff was permitted to recover in assumpsit, yet he was obliged to demand the whole damages for the whole contract: and it seems to have been clearly understood by Lord Coke when he was reporting *Slade's case*, that this was the law with respect to the action of assumpsit, for he [552] states in the fourth resolution in that case that a recovery in assumpsit would be a bar to an action of debt on the same contract; the necessary result of which is, that in an action of assumpsit brought after the first default the Plaintiff was obliged to go for damages for non-performance of the whole contract. Accordingly in *Beckwith v. Nott*, Cro. Jac. 504, the action was brought on a promise to pay four pounds by five shillings a month, and after a default of four months, the whole four pounds were given to the Plaintiff in damages. In reading the report of that case, the singularity of permitting the Plaintiff to recover the whole sum, when only four months were in arrear, is very striking; but the Court held that the jury had a right to give, if they thought fit, the whole damages for the non-performance of the contract: and the reporter adds, as a note of his own, "that where a man brings such an action for breach of an assumpsit upon the first day, it is best to count of damages for the entire debt, for he cannot have a new action." So in a case in 9 Car. 1, *Peck v. Ambler*, in the margin of Dyer, 113, Berkley held, that if an action of assumpsit be brought on the first default, the Plaintiff should recover damages for the whole time, and should never have another action for another default; for the contract was determined, et transit in rem judicatam by the first action. This seems to have been understood to be the law till the case of *Cooke v. Whorwood*, 2 Saund. 337, where the Court determined, that in assumpsit to perform an award, whereby the Defendant was awarded to pay the Plaintiff several sums of money at several times, the action might be brought for such sum only as was due at the time when the action was brought, and that the Plaintiff should recover damages accordingly, and have a new action as the other sums became due, toties quoties. Antecedent to that time, the distinction between an action of assumpsit and an action of debt, with regard to money payable by instalments, rested on this, that the action of debt would not lie at all, till after the expiration of all the times of payment, but the action of assumpsit might be brought on the first default; but then that one action exhausted the whole contract, and the Plaintiff was to recover damages for the whole, as he could not have a fresh action. It seems from the fifth resolution in *Slade's case*, that the action of assumpsit was considered as being more advantageous than the action of debt, because it might be brought after the first default, and there is something in Lord Coke's reasoning in that part of the case which would lead one to suppose, what he certainly could not mean, that he thought the action might be repeated. The two authorities which he there cites, viz. Dyer, 113, *Peck v. Redman*, and Bro. Abr. tit. Action on the Case, pl. 108, by no means confirm the position that assumpsit would lie after the first default of payment, for that default: the note in Broke is, "that in Trinity Term in the fifth of Queen Mary it was agreed in the Common Pleas that if a man undertake to pay 20l. annually for the marriage of his daughter for four years, and fail in the payment of two years, the Plaintiff might have an action of assumpsit for the non-payment of the annuity for two years, although the other two years were not come." But this note is evidently an interpolation, for it appears from Dyer, 163 b. that Broke died upon the circuit in the vacation between Easter and Trinity Terms, in the 4th and 5th of Philip & Mary; and besides this, the determination was directly the contrary; for the case to which the note refers, was *Joscelin v. Shelton*, reported 3 Leon. pl. 11, Moore, 13, Bendloe in Keilway, 209, and was this, "assumpsit was brought on an agreement by the Defendant to pay to the Plaintiff 400 marks in seven years by annual portions, in consideration of the marriage of the Plaintiff's son with the Defendant's daughter, and after verdict the judgment was arrested because the whole seven years were not expired, one of them being to come when the action was brought." The other case, cited by Lord Coke, of *Peck v. Redman*, Dyer, 113, was of an agreement by the Defendant to deliver to the Plaintiff twenty quarters of barley every year during their lives, for which the Plaintiff was to pay four shillings for each quarter,

and the breach of the agreement was that the Defendant had failed in the delivering of eleven quarters for three years, by which the Plaintiff (the special damage being similar to that stated in the case which I mentioned from Plowden) was injured in his credit, and the profit he would otherwise have made, to the value of 30l. ; but it would have been a very singular thing if the rule of construction, which was laid down in actions of debt, had been applied to such a contract as this, the proof of which, in all the terms of it, was not complete as long as both the parties were alive. The jury gave damages for three years, and the question was whether these damages were for the whole con-[554]-tract or not: Dyer states that three judges were of opinion that this recovery was a discharge of the whole contract, but that the other three held (which seems much more reasonable) that it was not: however, as the Court was divided, no determination was given, and the case ends with *ideo quare*. In the older cases it is admitted that an action of debt could not be brought for the payment of money due by instalments till all the days were past: the meaning of this was that no action would lie. The inconvenience of this rule puts the judges upon a method of getting rid of the supposed difficulty, by having recourse to the action of *assumpsit*, which, where the *assumpsit* proceeds in demand of money, is in truth and substance, and so taken to be in some of the cases, a more special action of debt; for where the demand is for the payment of a sum of money, it is a technical fiction to call the sum recovered damages: it is the specific debt, and the jury give the specific thing demanded. In *Owen*, 42 (*Hunt's Case*), the inconvenience of the rule which the Chief Justice, Anderson, was about to proceed upon, though the determination was contrary to his opinion, is so very obvious, that I mention it as a striking instance of the mischief which would have arisen, if a method had not been found out to remedy it. It was an action on the case on an agreement in consideration that the Plaintiff would permit the Defendant to occupy certain lands for five years, to pay 20l. a year: by equal half-yearly payments of 10l.: after a year and a half were expired the action was brought for the rent then in arrear, and Anderson was of opinion that the Plaintiff could recover no rent till the five years were elapsed, but the other judges were of a different opinion. In the cases in *Cro. Eliz.* 807. *Cro. Jac.* 504, and *Cro. Car.* 241, *assumpsit* was brought for money due by instalments, and so attentive were the Court to the rule at that time, that the Plaintiff in the two latter cases recovered in damages the whole sum, including a payment not due, and the Court supported the recovery, and gave judgment for him, saying in one of the cases (*Milles v. Milles*, *Cro. Car.* 241), (where the sum to be paid was 20l., viz. 10l. in one year, and 10l. in another, and the whole 20l. given as damages for the non-payment of the first 10l.) that they would intend that the damages of 20l. were given only for the first 10l. There is so little reason in this that there is some difficulty to follow it; but the foundation of the opinion fails, when it is admitted that the sum really due may be recovered, notwithstanding more is demanded than can be made good in [555] evidence. I cannot indeed devise a substantial reason why a promise to pay money not performed, does not become a debt, and why it should not be recoverable, *eo nomine*, as a debt. But the authorities are too strong to be resisted. Though the law has been altered with respect to actions of *assumpsit* ([see *Gray v. Pindar*, 2 Bos. & Pul. 429)], no alteration has taken place as to actions of debt. The note in question is for the payment of a sum certain at different times, must be considered as a debt for the amount of that sum, and being so considered, no action of debt can be maintained upon it till all the days of payment be past.

Judgment for the Defendant.

Afterwards the Plaintiff had leave to amend

TAYLOR *against* COLE AND ANOTHER IN ERROR. Friday, Feb. 11th, 1791.

(In the Exchequer Chamber. See 3 Term Rep. B. R. 292.)

In trespass for breaking and entering the Plaintiff's house and expelling him from it: a justification as to the breaking and entering will cover the whole declaration; for the expulsion is to be considered as mere matter of aggravation, and not as

making the Defendant a trespasser ab initio, unless the Plaintiff insist upon it as a substantive trespass by a replication or new assignment (a)¹.

In this action of trespass, the first count of the declaration stated that the Defendants, with force of arms, broke and entered a certain house of the Plaintiff called the King's Theatre or Opera House, and expelled, put out and amoved him from the occupation, possession and enjoyment of the same, and kept and continued him so expelled, &c. by means of which the Plaintiff was prevented from performing operas, &c. and was deprived of the service of the several performers, &c. with other circumstances of special damage. The second count was, that the Defendants, with force and arms, expelled, put out and amoved the Plaintiff from the possession and occupation of a certain other house of the said Plaintiff, called the King's Theatre or Opera House, &c. stating special damage, but not so particularly as in the first count. The Defendant pleaded. 1st. The general issue, not guilty. 2d. A justification of the breaking and entering in the first count, as sheriff of Middlesex, under a fi. fa. at the suit of one Joseph Hayling. 3d. A justification of the expulsion in the second count under a fi. fa. at the suit of R. B. Sheridan, Esq.: that the Plaintiff at the time of the execution of the writ, was possessed of a certain interest in the residue of a certain term of years then to come and unexpired in the said house, &c. that by virtue of the said writ the Defendant seised the said interest of the Plaintiff in the term, and sold and assigned it to T. Harris, who afterwards entered into the said house, the door of the said house being then open, and peaceably and quietly expelled the Plaintiff. [556] Issue was joined on the plea of not guilty, and there was a demurrer to each of the justifications.

The entry of the verdict on the issue was that the Defendant (a)² was "guilty of the premises in the first count of the said declaration laid to his charge, except the coming with force and arms therein mentioned, in manner and form as the within named Plaintiff within complains against him, and the jurors aforesaid assess the damages of the said Plaintiff by him sustained on occasion thereof, in case judgment should be therein given for the said Plaintiff, besides his costs and charges by him laid out about his suit in this behalf, to 500l. and for his said costs and charges to forty shillings: and as to the coming with force and arms in the first count of the said declaration mentioned, and as to the premises in the last count of the said declaration mentioned, the jurors aforesaid, upon their oaths aforesaid, say that the said Defendant is not guilty thereof, in manner and form as he hath in pleading alleged." The judgment was, "that it appears to the said Court, that the said plea of the said Defendant by him secondly above pleaded, as to the breaking and entering the said house of the said Plaintiff in the said first count of the said declaration mentioned, and the matters therein contained, are sufficient in law for the said Defendant to bar the said Plaintiff from having and maintaining his aforesaid action thereof against him the said Defendant in manner and form as the said Defendant hath above in pleading alleged. Therefore it is considered that the said Plaintiff take nothing by his said bill, but that he and his pledges of prosecuting, to wit, John Doe and Richard Roe, be in merey, and that the said Defendant go thereof without day, &c. And it is further considered by the court of our said lord the king now here, that the said Defendant recover against the said Plaintiff 78l. 10s. for his costs and charges, &c."

(a)¹ [Accord. *Monprivatt v. Smith*, 2 Campb. N. P. C. 176. And see *Warrall v. Clare*, ibid. 629. *Lambert v. Hodgson*, 1 Bingh. 317. 1 Saund. 300 d. (n) 5th edit. Where the declaration was for breaking and entering the Plaintiff's house, and without probable cause, and under a false and unfounded charge, that the Plaintiff had stolen property in her house, searching and ransacking the same, and making disturbance, &c. it was held that the trespass was the substantive allegation, and that the rest was laid as matter of aggravation, and that the jury might give damages for the trespass as aggravated by those accompanying circumstances. *Bracegirdle v. Orford*, 2 M. & S. 77. As to what is to be esteemed matter of aggravation, see also *Bennett v. Alcott*, 2 T. R. 166. Where the Plaintiff declares for a trespass in entering his dwelling house, and also for an assault and battery in the same count, a justification under process which covers the entry only is no answer to the assault and battery, and the Plaintiff need not new-assign. *Phillips v. Howgate*, 5 B. & A. 220.]

(a)² There was a suggestion of the death of one of the Defendants.

The assignment of errors was, "that judgment is given for the said Defendant against the said Plaintiff on the first count of the said declaration generally, whereas by the law of the land judgment ought to have been given for the said Plaintiff, to recover against the said Defendant the damages, costs and charges assessed by the jury on that count, together with his costs and charges of increase, inasmuch as the plea of the said Defendants by them severally pleaded in bar to part of that count, and the matters therein contained are not sufficient in law to bar the said Plaintiff from having and maintaining [557] his said action against the said Defendant. Therefore in this there is manifest error. There is error also in this, that judgment is given for the said Defendant against the said Plaintiff on the first count of the said declaration generally, whereas by the law of the land judgment ought to have been given for the said Plaintiff, to recover against the said Defendant the damages and charges assessed by the jury on that account, together with his costs and charges of increase, inasmuch as the subsequent expelling, putting out and amoving the said Plaintiff from the occupation, possession and enjoyment of the said house, in the first count of the said declaration mentioned, and keeping and continuing the said Plaintiff so expelled, put out and amoved from the said possession, occupation and enjoyment thereof, whereof the said Defendant is found guilty, and which is not attempted to be justified, after entering into the said house under colour of the said writ of fieri facias, by the law of the land make the said entry tortious, and the said Defendant a trespasser from his said entry into the said house, being one continued act of trespass. In this therefore there is manifest error. There is also error in this, that judgment is given generally that the said Plaintiff take nothing by his said bill, whereas judgment ought at least to have been given that he should recover his damages by reason of the expelling, putting out and amoving the said Plaintiff from the occupation, possession and enjoyment of the said house in the first count of the said declaration mentioned, and keeping and continuing the said Plaintiff so expelled, put out and amoved from the possession, occupation and enjoyment thereof, and the consequential damages thereon, the said Defendant having been found guilty thereof, and the same not being justified, and a new writ of venire ought to have been awarded to assess such damages; therefore in this there is manifest error, &c."

This was twice argued in the Exchequer Chamber; on the first argument, by Wood for the Plaintiff in error, and Gibbs for the Defendant; on the second, by Lawes for the Plaintiff, and Chambre for the Defendant. The following was the substance of the arguments on the part of the Plaintiff.

As the expulsion in the first count is not covered by the first justification, but denied only by the plea of not guilty, and as the jury have found the Defendant guilty of the trespasses charged in that count, the Plaintiff must be entitled either to the whole damages given on the first count, or at least to a venire de novo to sever and assess them. Though the entry of [558] the sheriff was lawful, yet he had no right to expel and keep the Plaintiff out of possession of his house: having done this, he was guilty of a trespass, and that trespass commenced from his entry, it being clear law that a person abusing a legal authority becomes a trespasser ab initio. 8 Co. 146 a. *Sir Carpenters' case*. In *Reed v. Harrison*, 2 Black. 1218, it was holden that an officer who continued an unreasonable time in possession had so abused his authority as to become a trespasser ab initio. It is plainly to be collected that the entry and expulsion as stated in the first count, were done at one and the same time; the Court therefore will presume that they were one continued act, though the words "then and there" be omitted. Cro. Jac. 41. But if the expulsion should be considered as a distinct and substantive trespass, then the Plaintiff ought to have a venire de novo to sever and assess the damages. It has been said that as part of the trespass was justified, the other part, viz. the expulsion was mere matter of aggravation; and that if the Plaintiff had designed to insist upon that as a distinct injury, he ought to have pointed out his design by a new assignment. But a new assignment would have been unnecessary and improper in this case. The object of a new assignment is to explain that more fully which was before apparently answered. Here the justification is totally silent as to the expulsion, which is denied only by the general issue. A new assignment therefore of the expulsion could not be applied to any thing disclosed in the plea of justification, but merely to the plea of not guilty, and therefore could only be a repetition of the charge. Where the plea covers the whole trespass but mistakes it, there the Plaintiff must new assign to explain; but not where part

is justified and part denied. Where indeed the whole trespass is justified, and the justification may be avoided by a new circumstance, the Plaintiff may introduce that circumstance in his replication; as in trespass for taking cattle and detaining them, if the Defendant pleads a distress the Plaintiff may reply an abuse of the distress: this avoids the plea, but would be very improperly called a new assignment. A new assignment is as a new declaration, but that is only necessary where the first declaration is denied. This has been compared to an action of trespass and conversion, in which, if the trespass be justified, there is no necessity to answer the conversion; but the reason is that the conversion is not a trespass, and would not of itself be a ground of an action of trespass. A count in trespass is divisible, the whole need not be proved; as if it be for an [559] assault and taking the Plaintiff's goods, there, though the assault be not proved, yet the Plaintiff may recover on the *asportavit*. So in trespass *quare clausum fregit* and imprisonment of the person; so in assault and imprisonment. The true criterion by which mere matter of aggravation is distinguished is this, that if the preceding charge be taken away the aggravating circumstances will not, by themselves, be sufficient to support an action of trespass. Now here the contrary is evidently the case: expulsion is a trespass of itself, and might be alone the subject of an action of trespass. It is in its nature a distinct act from the entry. There may be an entry without an expulsion, though there cannot be an expulsion without an entry. The Plaintiff might in the first count have entered a *nolle prosequi* as to the entry, and proceeded on the expulsion alone. The second count indeed states the expulsion without the entry. If the subsequent acts accompanying a trespass were merely matters of aggravation, they would not have been stated in the writ; but the writ comprehends many distinct causes of action according to the ancient forms. Registr. Brev. 92. Neither would the entries and precedents in pleading justify all the circumstances of trespass, as in the common case of *liberum tenementum* pleaded as well to an expulsion as to a breaking and entering: nor would judgment ever be arrested on account of additional matter of trespass being improperly charged, as in 5 Co. 34 b. *Playter's case* (S. P. Stra. 637), where in trespass for breaking the Plaintiff's close and taking his fish, the Defendant pleaded not guilty, and was found guilty and damages given generally, judgment was arrested because it was not stated of what kind the fish were, and how many were taken; in which case the Court also said that as the jury had found the Defendant guilty generally, that without question extended to the whole declaration, and they could not intend that the jurors found him guilty only for breaking the close, for which the declaration was good; but if the Plaintiff's counsel had done wisely, they would have caused the damages to be severed. Neither would the doctrine of discontinuance have ever prevailed where the Plaintiff in a subsequent part of the pleadings abandons the circumstances attending the first act of trespass; nor would a plea be bad on account of its not answering the whole declaration, if the charge, not pursued in the one case and not answered in the other, could be deemed mere matter of aggravation. In Cro. Eliz. 268, a justification [560] to a charge of assault, battery, and wounding, was holden to be bad, because it only covered the assault and battery, and not the wounding. So in trespass for breaking the Plaintiff's close and destroying his hop-poles, the Defendant pleaded *liberum tenementum*, and that he took the hop-poles damage feasant which was decided to be bad, because the destruction of the hop-poles was not answered. The judgment therefore of the King's Bench is erroneous on one of these two grounds, either that the Plaintiff was entitled to the whole damages, or to a venire *de novo* to sever them.

On the part of the Defendant in error, the material arguments were these. The expulsion was merely a matter of aggravation, and the consequence of the entry. The justification goes to the whole charge except the matter of aggravation, and if the Plaintiff had designed to rely on that which is stated as a mere aggravation, he ought to have given the Defendant notice of it by a replication or new assignment. 1 Ventr. 211 and 217, *Sir R. Borey's case*, 2 Wils. 313, *Gates v. Bailey*, 3 Wils. 20, *Dye v. Leatherdale*, and *Fisherwood v. Cannon*, cited 3 Term Rep. B. R. 297, by Buller, J., in this case. There cannot be an expulsion without an entry. But an expulsion is not *ex vi termini* a trespass; there are many instances where an expulsion alone is not a trespass. It is like a conversion to which no answer need be given in the plea, and is not so connected with the entry that they cannot be separated. The common words "then and there" are omitted. An exclusion is an expulsion, but may or may not be

a trespass, according to circumstances. No case has been cited to shew that trespass could be brought for an expulsion alone. It is admitted that the entry and expulsion are divisible acts. Under this count, evidence might have been given of an expulsion at a different day: the finding therefore of the jury does not necessarily imply that the Defendant was a trespasser *ab initio*. The Court cannot say that it appears on the record that he was such a trespasser. No instance can be produced where it was inferred from any thing stated in the declaration, that the Defendant was a trespasser *ab initio*. In Cro. Jac. 147, it was alleged in the replication. So in the Year Book 11 Hen. 4, 75 b. where in an action of trespass for breaking and entering the Plaintiff's close and house, the Defendant pleaded that he had leased the premises to the Plaintiff for a term of years, and being informed that waste had been committed, entered to see if it were so, [561] and the Plaintiff replied that the Defendant staid a day and a night in the house against the will of the Plaintiff. As therefore it does not appear on the record that the expulsion was not a matter of aggravation, and as the Plaintiff has not stated any thing by way of replication to shew that the Defendant was a trespasser *ab initio*, the court below were well warranted in the judgment which they have given.

On this day the judgment of the court was thus given by

LORD LOUGHBOROUGH. The Plaintiff in this case declares in the first count, that the Defendants broke and entered his house, and expelled him from the possession of it, whereby a special damage accrued to him; in the second count, that they expelled, put out, and amoved him from his house, whereby he also sustained special damage. The Defendants after pleading not guilty, justify the breaking and entering in the first count under a writ of *feri facias* directed to them as sheriff of Middlesex, to levy for the debt of Joseph Hayling; they justify the expulsion in the second count under another *feri facias*, by which they sold the Plaintiff's term in the house to Harris, who entered and expelled him. Issue is joined on the plea of not guilty, and there is a demurrer to the two justifications. The issue is found for the Plaintiff as to the first count with contingent damages, and for the Defendant as to the second, and judgment is given for the Defendant on the demurrers.

On the argument of the writ of error the Plaintiff insists, 1. That the verdict on the general issue intitles him to judgment, for the expulsion as a trespass not covered by the justification, and that he is intitled to all the damages, the Defendants becoming by the expulsion trespassers *ab initio*. Or 2dly. That he is intitled to damages for the expulsion, and to have a *venire de novo* to assess those damages. The first point was not much laboured, for the damages assessed by the jury on a supposition that the Defendant had broke and entered the house, and expelled the Plaintiff, can never be the just measure of damages when the principal part of the acts imputed to the Defendants are found to be legal. On the second point, it is evident that the Plaintiff would be intitled only to nominal damages if a new *venire* were awarded; for where the expulsion was stated as a substantive trespass, the jury found the Defendant not guilty, and one must suppose that they would have done the same on the first count, had the expulsion been stated as an actual independent trespass. It is not necessary to consider in what cases expulsion may be a substantive tres-[562]-pass. Undoubtedly to enter into a house and to expel the possessor may be distinct acts, and they may be also connected. But when the Plaintiff charges them as parts of one trespass, as is the case in this declaration, and the Defendant sets forth a justification to the principal act, the entry, it is just that the Plaintiff should either by replication or new assigment state that he insists on the expulsion as a substantive trespass, supposing the entry should be lawful. If he does not, it is just to consider it only as matter of aggravation. The Plaintiff complains that the Defendant broke and entered his house and expelled him: the Defendant shews a justification of the entry: if the expulsion makes him a trespasser *ab initio* it takes away his justification, and therefore should be replied. If it be not replied, the Plaintiff can take no advantage of it, for by demurring he admits that the whole trespass is met by the plea. So in *The Six Carpenters' case* it is plain, that if the Plaintiff would make the Defendant a trespasser *ab initio*, he must shew in reply that which makes him so. On these grounds therefore we think that the judgment ought to be affirmed.

Judgment affirmed.

RUSSELL *against* STOKES, in Error, in the Exchequer Chamber.

Friday, Feb. 11th, 1791.

(For the Pleadings and Judgment in this Case, see 3 Term Rep. B. R. 678, and also the Case of *Webb v. Russell*, Ibid. 393.)

A. being possessed of a term for years conveys it by way of mortgage, and then joins with the mortgagee in a lease for a shorter term according to their respective estates and interests, and the lessee covenants with the mortgagor and his assigns to pay rent and keep the premises in repair during the lease; the term with all the estate and interest of mortgagor and mortgagee becomes vested in the assignee of the reversion, yet the mortgagor may afterwards maintain an action of covenant against the lessee, the covenants being in gross (*a*).

The assignment of errors was, "That by the declaration aforesaid it appears that the several covenants therein mentioned and thereby alleged to have been made by the said George (the Plaintiff in error) with the said William (the Defendant in error) were so made by him the said George with the said William in respect of the estate and interest of the said William in the said demised premises with the appurtenances, and it does not appear thereby that the said covenants were made with the said William, or that the action was brought by him in trust for any other person or persons whatsoever: and although it is stated and appears in and by the several pleas of the said [563] George by him secondly, thirdly, fourthly, and lastly above pleaded in bar, that the estate and interest of the said William in the said demised premises, with the appurtenances in respect of which the said covenants were so made as aforesaid, became and was wholly ended and determined before the supposed breaches of covenant in the said declaration mentioned, yet by the record aforesaid it is adjudged that those pleas and the matters therein contained in manner and form as the same are above pleaded and set forth, are not sufficient in law to bar the said William from having and maintaining his aforesaid action against him the said George: therefore in this there is manifest error, &c.

This man argued by Maryatt for the Plaintiff in error, and Shepherd for the Defendant (see 3 Term Rep. B. R. 393 & 678 above referred to); and on this day, after consideration, the judgment of the Court of Exchequer Chamber was given, as follows, by

LORD LOUGHBOROUGH. The Plaintiff in this case declares on a demise to the Defendant for eleven years of a messuage, &c. made by the Plaintiff and Richmond Webb, by which the Plaintiff and Richmond Webb, according to their respective estates and interests, did demise lease and confirm to the Defendant Russell the premises for the term of eleven years, yielding and paying to the Plaintiff Stokes, his executors, administrators, and assigns, a rent of 200l. per annum, and Russell covenants with Stokes to pay the rent to Stokes, and to keep the premises in repair. The breach assigned is the non-payment of rent for two years and a half, and not repairing.

The Defendant after pleading the general issue, non est factum, by his special plea in bar says, that Webb at the time of the demise was possessed of the premises for a term of 99 years subject to an equity of redemption in Stokes, on payment of a certain sum of money; that the covenants were made by him with Stokes in respect of the several estates and interests of Stokes and Webb, or one of them in the demised premises, and not otherwise. The plea then introduces a recital of a conveyance of the inheritance of the premises from one George Medley to Stokes and one Morgan Thomas, in trust for Stokes; a conveyance by Thomas and Stokes to one Makepeace Thackeray, in trust for Webb and his heirs, subject to redemption by Stokes on payment of a certain sum to Webb, his executors, administrators or assigns. It then states that Russell being possessed of the term for eleven years, the reversion of the term for ninety-nine years, and also the reversion in fee, belonging respectively as aforesaid, subject to such equity of redemption, (that is, the reversion of the term and also the reversion of the inheritance as cestui que trust being in Webb as mortgagee) Webb died, by will having bequeathed all his worldly estate to Sarah his wife, and appointed her executrix; that she proved the will and assented to the bequest, by virtue whereof she became possessed of the residue of the rent for 99 years,

(a) [See *Milnes v. Branch*, 5 M. & S. 411.]

the reversion of the inheritance being in Thackeray subject to such trust as aforesaid (that is for Webb as cestui que trust in fee, subject to an equity of redemption in Stokes); that Thackeray and Stokes afterwards conveyed to Sarah Webb the reversion discharged of the equity of redemption; and the plea concludes, that by virtue thereof the respective estates and interests of Webb and Stokes in the said demised premises, in respect whereof the covenants were made by Russell with Stokes became merged, extinguished, and determined. The second and third pleas contain an abridgment of this state of the title, with the same conclusion. To the plea there is a special demurrer.

If it were material to enter into discussion of the defects of the plea, it seems liable to every objection of uncertainty and contradiction. The first and capital averment, viz. "that the covenants by Russell and Stokes were made in respect of the estates and interests of Stokes and Webb or one of them," is a proposition merely vague, on which no one issue can be joined, nor one traverse taken. The same defect occurs in the conclusion drawn by the plea from the statement of the title. The plea itself is an inconclusive, imperfect, and vague argument. The merger, the extinguishment, and the determination of a term are separate and distinct propositions. A term may be merged in the inheritance; it is determined by the effluxion of time or by the act of the parties; it is extinguished by the re-entry of the lessor on an act of the lessee forfeiting his term. But it cannot be both merged and determined: nor would it be quite accurate to say that it was extinguished and determined; but it is certainly absurd to say that it was extinguished and merged. To state it then to have been merged, extinguished, and determined is manifestly incongruous. And these various conclusions are not warranted by the premises. The term of 99 years could not merge in Webb by the conveyance to Thackeray under which Webb became cestui que trust of the inheritance in fee, the legal estate being in Thackeray. As little could it merge by the conveyance from Thackeray to Mrs. Webb, for it does not appear by any thing stated in the plea that the [565] equitable estate in fee passed to her by the will of Webb. A bequest of all his worldly estate to his executrix, which is all that is stated, would not vest the estate in fee of which he was seised in equity by the conveyance to Thackeray, and Mrs. Webb, if she took no more than the plea discloses under her husband's will, was as much a trustee of a legal reversion as Thackeray. That the term was not determined, the possession of the Defendant shews.

The opinion of the Court however has not been formed on objections to the form of the plea. We are for affirming the judgment on reasons which apply directly to the merits of the case. The Defendant, a lessee in possession, objects to the payment of rent sued for under an express covenant in the lease, that the person to whom he had bound himself to pay the rent was the mortgagor in possession of the estate demised, that he covenanted to pay the rent in respect of the interest or estate which at the date of the demise the Plaintiff had in the land, and that the Plaintiff has since assigned over that interest to the mortgagee. In this lease the mortgagee is also a party joining in the demise. Now it is obvious on this state of the defence, that the Defendant would likewise object to the mortgagee, that he had not covenanted to him to pay the rent, and that his interest or estate was not the same (though better) as it was at the time of the demise. The Defendant has in fact done this with the mortgagor (a). It would be a strange reproach to the law, if it were to allow such a defence as this, "I have contracted with both of you in respect of your estates, you have each of you performed your part, and I hold the possession; but I will pay neither, because between yourselves you have transferred your estates without any prejudice to me:" but no such absurd injustice is to be imputed to the law of England. The present case is the demand of that lessor to whom the Defendant is bound to pay for the occupation of the land, I will add, in respect of his interest in the land. Can there be any discharge of that obligation, but that he has been evicted, or that the obligation has been transferred to another? The first is not pretended; the second is the aim of the plea, but is totally groundless, because on the Defendant's own shewing, that other person is the representative of the party to the demise who has assented to the payment to the Plaintiff. The defence now made is as absurd as if the Defendant had set up a right in Webb against the first payment of rent to Stokes. There

(a) [Mortgagee? See *Webb v. Russell*, 3 T. R. 393.]

would then be little difficulty in deciding this plain question, whether Russell holding under this demise [566] could set up the right of Webb against the action of Stokes. But shutting out every consideration of justice, and taking law for a moment to be an abstract system of positive rules, the defence set up is as unscientific as it is unjust. Webb and Stokes demise according to their respective estates and interests: Russell covenants with Stokes to pay the rent to him. What was the estate and interest of Stokes? The argument does not require me to state that in a court of law Stokes had no estate, that his interest was only a possession as tenant at will to Webb, and that the covenant in respect of such an interest must continue as long as the possession, which was ceded by him, continued; otherwise it would cease the moment it could begin to operate. I will state his interest to be more than the plea explicitly states, and all that a court of equity takes it to be. Let him be cestui que trust of the land subject to the mortgage to Webb: I then apply to that state of the case the known and established rule of the common law, that "if cestui que use and his feoffees join in making a feoffment, it shall take effect as the feoffment of the feoffees by the common law, and not of cestui que use by the statute 1 Ric. 3, c. 1, Co. Litt. 49 a." So it is of a demise by cestui que use and his feoffees, the term of the lessee shall take effect out of the estate of the feoffees, though cestui que use had by the statute full power to demise by himself. 2 Co. 35 b. *Heyward's case*. The term then in this case took effect out of the estate of Webb: the covenant with Stokes could not be incident to that estate nor run with the land; it must be a covenant in gross, and consequently not assignable. In strict law therefore as well as substantial justice, the judgment of the court of King's Bench must be affirmed.

Judgment affirmed.

WILLIAMS AND ANOTHER, Executors of Braham, *against* RILEY, in the Exchequer Chamber, in Error. Friday, Feb. 11th, 1791.

Executors and administrators are liable to costs in error in cases where they would be liable in the original action.

Judgment de bonis testatoris (a) having been given in the court of King's Bench against the Plaintiffs in error, [567] on a verdict in an action of assumpsit against them as executors, and that judgment affirmed (without argument) in the Exchequer Chamber, the clerk of the errors allowed costs to the Defendant in error.

In consequence of this Wilson moved for a rule to shew cause why the costs should not be disallowed, on the ground that where executors and administrators were Plaintiffs in error, especially on a judgment de bonis testatoris, they were not liable to costs; and the authorities he cited were Cro. Jac. 352. *Goldsmith v. Platt*, 1 Sid. 368. *Fitzwilliams v. Moore*, 1 Lev. 245. S. C. 1 Vent. 166. *Legg v. Richards*, 2 Stra. 1072. *Saltern v. Wynne*, Rep. temp. Hardwicke, 307, S. C. & Stat. 16 & 17 Car. 2, c. 8, s. 2.

Le Blanc, Serjt., opposed the motion in the first instance, contending that where executors and administrators were liable to costs in the original action, they were also liable if error were brought on the judgment: that as they were Defendants in the original action, in the present instance they were liable to costs in that action, and that liability continued in error. The judgment here as to the costs is de bonis testatoris si, et si non, de bonis propriis; with respect to costs therefore the executors stand in the same situation as any other person. The statutes on the subject make no exception as to executors and administrators. 3 Hen. 7, c. 10, the first statute which gave costs in error contains no such exception, nor 3 Jac. 1, c. 8, nor 13 Car. 2, st. 2, c. 2, s. 9 & 10. The 16 & 17 Car. 2, c. 8, s. 5, means only that executors and administrators shall not be obliged to find bail in error. The case cited of *Goldsmith v. Platt* decides only that they need not put in bail, which is totally different from the question of costs, bail being to answer the debt, to which executors and

(a) The entry of the judgment was in the usual form, the damages and costs "to be levied of the goods and chattels which were of the said ——— (the testatrix) at the time of her death, in the hands of ——— the said (the executors) to be administered, and if they have not so much in their hands to be administered, then the costs and charges to be levied of the proper goods and chattels of the said ——— (the executors,) &c."

administrators are clearly not liable on such a judgment as this, though they are to costs. The distinction, that where executors and administrators would be liable to pay costs in the original action they are also liable in error, but that where they are not liable in the original action they are not liable in error, is clearly to be collected from 3 Lev. 375. *Gule v. Till*, 4 Mod. 244. Comberb. 228, S. C. (in which case the administrator was Plaintiff in the original action), and also from *Caswell v. Norman*, 2 Barnardist. 450, (imperfectly reported, 2 Stra. 977 (a)¹ where the Chief Justice expressly takes the distinction.

Cur. advis. vult.

[568] On this day LORD LOUGHBOROUGH declared the unanimous opinion of the Court, that the distinction taken in the argument by Le Blanc was well founded, and conformable to a case on the same subject which the Court of Exchequer Chamber decided about three years ago: and therefore the clerk of the errors had done right in allowing costs in the present instance.

Rule refused.

[569] IN THE HOUSE OF LORDS. Monday, Feb. 14.

(The Reporter has been honoured with Copies of the opinions of the Judges, delivered Feb. 3, on the following Case, each from the highest authority.)

GIBSON AND JOHNSON *against* MINET AND FECTOR. In Error (a)².

[Referred to, *Vagliano v. Bank of England*, 1888-91, 22 Q. B. D. 114; 23 Q. B. D. 253; [1891] A. C. 107; *Chamberlain v. Young*, [1893] 2 Q. B. 211.]

If a bill of exchange be drawn in favour of a fictitious payee with the knowledge as well of the acceptor as the drawer, and the name of such payee be indorsed on it by the drawer with the knowledge of the acceptor, which fictitious indorsement purports to be to the drawer himself or his order, and then the drawer indorses the bill to an innocent indorsee for a valuable consideration, and afterwards the bill is accepted, but it does not appear that there was an intent to defraud any particular person: such innocent indorsee for a valuable consideration may recover against the acceptor as on a bill payable to bearer. Perhaps also in such case, the innocent indorsee might recover against the acceptor as on a bill payable to the order of the drawer; or on a count stating the special circumstances.

(London to wit.)—Thomas Gibson late of London, merchant, and Joseph Johnson late of the same place, merchant, were attached to answer Hughes Minet and James Peter Fector, in a plea of trespass on the case. And thereupon the said Hughes and James Peter, by Edwin Dawes, their attorney, complain, For that whereas, certain

(a)¹ I have been favoured with the following authentic note of that case. *Caswell v. Norman*, East. 2 Geo. 2 B. R. The Defendant was sued as executor, and judgment was given against him *de bonis propriis*, and on error brought, the Court thought fit to affirm the judgment, but now the question was, whether it should be with costs or not? Yates cited the following cases, to shew that executors bringing writs of error should not pay costs, because what they do is in *auter droit*, 3 Lev. 375. 1 Mod. 76. 4 Mod. 244. But in those cases the executors were Plaintiffs in the original actions. The Court called on him to shew any cases where an executor had been Defendant in the original action, and judgment given against him *de bonis propriis*, and after judgment on error affirmed had not been obliged to pay costs: but he could shew none. Parker cited 1 Sid. 368, as an authority to shew that on error in such cases the executor should put in bail. But Lord Hardwicke, Ch. J., said, the case of bail would not govern this case, because the bail are to answer the action; and there is no distinction between executors and other persons when Defendants as to costs in original actions, though where the executor is Plaintiff he is distinguished out of the statutes. Here in the first judgment he is to pay damages out of his own estate, then why shall he not on writ of error? Per Curiam. The Master must tax the costs on error brought, the judgment against the executor being affirmed.

(a)² See 3 Term Rep. B. R. 481. [See also page 321 of this vol. and the note there.]

persons using trade and commerce as copartners, in the copartnership name and firm of Livesay, Hargreave and Co. on the 18th day of February, in the year of our Lord 1788, at Manchester, to wit, at London, aforesaid, at the parish of St. Mary-le Bow, in the ward of Cheap, according to the usage and custom of merchants, made their certain bill of exchange in writing, the hand of one of the said copartners on their joint account, and in their copartnership name and firm, to wit, Livesey, Hargreave and Co. being thereunto subscribed, bearing date the same day and year aforesaid, and directed the same bill of exchange to the said Thomas Gibson and Joseph Johnson, by the names and description of Messrs. Gibson and Johnson, bankers, London, and thereby required the said Thomas Gibson and Joseph Johnson, three months after date, to pay to Mr. John White, or order, 721l. 5s. value received, with or without advice; they the said Livesey, Hargreave and Co. then and there well knowing that no such person as John White in the said bill of exchange mentioned, existed. Upon which said bill of exchange, afterwards, to wit, on the same day and year aforesaid, at London aforesaid, at the parish and ward aforesaid, a certain indorsement in writing was made, purporting to be the indorsement of John White named in the said bill, and to be subscribed with his hand and name, and which said indorsement purported to require the said sum of money in the said bill of exchange contained, to be paid to the said Livesey, Hargreave and Co. or their order. And the said bill of [570] exchange being so indorsed as aforesaid, they the said persons using trade and commerce in the name and firm of Livesey, Hargreave and Co. as aforesaid, afterwards, to wit, on the same day and year aforesaid, at London aforesaid, at the parish and ward aforesaid, by a certain indorsement in writing made upon the said bill of exchange; and subscribed with the hand and name of one Absalom Goodrich, by procurator of the said Livesey, Hargreave and Co. according to the usage and custom of merchants, appointed the said sum of money in the said bill of exchange contained, to be paid to the said Hughes and James Peter, and then and there delivered the said bill of exchange so indorsed as aforesaid, as well with the name of the said John White, as with the name of the said Absalom, to the said Hughes and James Peter; which said bill of exchange, afterwards, to wit, on the same day and year aforesaid, at London aforesaid, in the parish and ward aforesaid, according to the usage and custom of merchants, was shewn and presented to the said Thomas Gibson and Joseph Johnson for their acceptance thereof; and the said Thomas Gibson and Joseph Johnson then and there, according to the usage and custom of merchants, accepted the same, they the said Thomas Gibson and Joseph Johnson, then and there well knowing that no such person as John White in the said bill of exchange named, existed; and that the name of John White so indorsed on the said bill of exchange, was not the hand-writing of any person of that name; by reason whereof, and by force of the usage and custom of merchants, the said Thomas Gibson and Joseph Johnson became liable to pay the said Hughes and James Peter the said sum of money in the said bill of exchange contained, according to the tenor and effect of the said bill of exchange, and their acceptance thereof, as aforesaid. And being so liable, they the said Thomas Gibson and Joseph Johnson afterwards, to wit, on the same day and year aforesaid, at London aforesaid, at the parish and ward aforesaid, undertook and to the said Hughes and James Peter then and there faithfully promised to pay them the said sum of money in the said bill of exchange contained, according to the tenor and effect of the said bill of exchange, and their acceptance thereof, as aforesaid. And whereas also, the said persons using trade and commerce as copartners in the copartnership name and firm of Livesey, Hargreave and Co. on the said 18th day of February, in the said year of our Lord 1788, at Manchester, to wit, at London aforesaid, in the parish and ward aforesaid, according to the usage and custom of merchants, made their certain other bill of ex-[571]-change in writing, the hand of one of the said copartners on their joint account, and in their said copartnership name and firm, to wit, Livesey, Hargreave and Co. being thereunto subscribed, bearing date the same day and year aforesaid, and then and there directed the said last mentioned bill of exchange to the said Thomas Gibson and Joseph Johnson, by the names and description of Messrs. Gibson and Johnson, bankers, London; and thereby required the said Thomas Gibson and Joseph Johnson three months after date to pay to Mr. John White, or order, 721l. 5s. value received, with or without advice; they the said Livesey, Hargreave and Co. then and there well knowing that the said last named John White was not a person dealing with or known to the said Livesey, Hargreave

and Co. and using the name of the said John White in the same bill as a nominal person only, and intending not to deliver the same to him or to procure the same to be actually indorsed by him; upon which said last mentioned bill of exchange afterwards, to wit, on the same day and year aforesaid, at London aforesaid, at the parish and ward aforesaid, a certain indorsement in writing was made, purporting to be the indorsement of John White named in the said bill, and to be subscribed with his hand and name; and which said last mentioned indorsement purported to require the said sum of money in the said bill of exchange contained, to be paid to the said Livesey, Hargreave and Co. or their order: And the said last mentioned bill of exchange being so indorsed as aforesaid, they the said persons using trade and commerce in the name and firm of Livesey, Hargreave and Co. as aforesaid, afterwards, to wit, at the same day and year aforesaid, at London aforesaid, at the parish and ward aforesaid, by a certain indorsement in writing made upon the said last mentioned bill of exchange, and subscribed with the hand and name of one Absalom Goodrich, by procuration of the said Livesey, Hargreave and Co. according to the usage and custom of merchants, appointed the said sum of money in the said last mentioned bill of exchange contained, to be paid to the said Hughes and James Peter, and then and there delivered the said last mentioned bill of exchange so indorsed as aforesaid, to the said Hughes and James Peter, without having delivered the same bill to the said John White, and without any actual indorsement or assignment of the same bill by the said John White; which said last mentioned bill of exchange, so indorsed as aforesaid, afterwards, to wit, on the same day and year aforesaid, at London aforesaid, at the parish [572] and ward aforesaid, according to the usage and custom of merchants, was shewn and presented to the said Thomas Gibson and Joseph Johnson for their acceptance thereof: and the said Thomas Gibson and Joseph Johnson then and there well knowing that the said Livesey, Hargreave and Co. had made and delivered the same bill in manner aforesaid, and with such intention as aforesaid, and that the name of John White indorsed upon the said last mentioned bill of exchange was not the proper handwriting of John White in the same bill mentioned, then and there accepted the same: By reason whereof, and by force of the usage and custom of merchants, the said Thomas Gibson and Joseph Johnson became liable to pay to the said Hughes and James Peter the said sum of money in the said last mentioned bill of exchange contained, according to the tenor and effect of the said last mentioned bill of exchange, and their acceptance thereof, as aforesaid. And being so liable, they the said Thomas Gibson and Joseph Johnson, afterwards, to wit, on the same day and year aforesaid, at London aforesaid, in the parish and ward aforesaid, undertook, and to the said Hughes and James Peter then and there faithfully promised to pay to them the said sum of money in the said last mentioned bill of exchange contained, according to the tenor and effect of the same bill, and their acceptance thereof as last aforesaid. And whereas also, the said persons using trade and commerce as copartners in the copartnership name and firm of Livesey, Hargreave and Co. on the said 18th day of February, in the year of our Lord 1788, at Manchester, to wit, at London aforesaid, at the parish and ward aforesaid, according to the usage and custom of merchants, made their certain other bill of exchange in writing, the hand of one of the said copartners on their joint account, and in their said copartnership name and firm, to wit, Livesey, Hargreave and Co. being thereunto subscribed, bearing date the same day and year aforesaid, and then and there directed the said last mentioned bill of exchange to the said Thomas Gibson and Joseph Johnson, by the names and description of Messrs. Gibson and Johnson, bankers, London; and thereby required the said Thomas Gibson and Joseph Johnson three months after date, to pay to them the said Livesey, Hargreave and Co. by the name and description of Mr. John White, or order, 721l. 5s. value received, with or without advice. And the said persons so using trade and commerce in the name and firm of Livesey, Hargreave and Co. as aforesaid, afterwards, to wit, on the same day and year aforesaid, at London aforesaid, in the parish and ward aforesaid, by a certain in-[573]-dorsement in writing made upon the said last mentioned bill of exchange, subscribed with the hand and name of one Absalom Goodrich, by procuration of the said Livesey, Hargreave and Co. according to the usage and custom of merchants, appointed the said sum of money in the said last mentioned bill of exchange contained, to be paid to the said Hughes and James Peter, and then and there delivered the said last mentioned bill of exchange so indorsed as aforesaid, and also having the name of John White indorsed upon the same to the said

Hughes and James Peter ; which said last mentioned bill of exchange afterwards, to wit, on the same day and year aforesaid, at London aforesaid, in the parish and ward aforesaid, according to the usage and custom of merchants, was shewn and presented to the said Thomas Gibson and Joseph Johnson for their acceptance thereof : and the said Thomas Gibson and Joseph Johnson then and there according to the usage and custom of merchants, accepted the same : By reason whereof, and by force of the usage and custom of merchants, the said Thomas Gibson and Joseph Johnson became liable to pay to the said Hughes and James Peter the said sum of money in the said last mentioned bill of exchange contained, according to the tenor and effect of the said last mentioned bill of exchange, and their acceptance thereof, as aforesaid. And being so liable, they the said Thomas Gibson and Joseph Johnson, afterwards, to wit, on the same day and year aforesaid, at London aforesaid, at the parish and ward aforesaid, undertook, and to the said Hughes and James Peter then and there faithfully promised to pay to them the said sum of money in the said last mentioned bill of exchange contained, according to the tenor and effect of the same bill and their acceptance thereof, as last aforesaid. And whereas also, the said persons using trade and commerce as copartners, in the copartnership name and firm of Livesey, Hargreave and Co. on the said 18th day of February, in the said year of our Lord 1788, at Manchester, to wit, at London, aforesaid, at the parish and ward aforesaid, according to the usage and custom of merchants, made their certain other bill of exchange in writing, the hand of one of the said copartners on their joint account, and in their said copartnership name and firm, to wit, Livesey, Hargreave and Co. being thereunto subscribed, bearing date the same day and year aforesaid ; and then and there directed the said last mentioned bill of exchange to the said Thomas Gibson and Joseph Johnson, by the names and description of Messrs. [574] Gibson and Johnson, bankers, London ; and thereby requested them the said Thomas Gibson and Joseph Johnson three months after date, to pay to Mr. John White, or order, 721l. 5s. value received, with or without advice ; and then and there delivered the said bill of exchange to the said John White ; and the said John White afterwards, to wit, on the same day and year aforesaid, at London aforesaid, in the parish and ward aforesaid, according to the usage and custom of merchants, indorsed the said bill of exchange ; and by that indorsement appointed the said sum of money in the said last mentioned bill of exchange contained, to be paid to the said Hughes and James Peter, and then and there delivered the said last mentioned bill of exchange so indorsed to the said Hughes and James Peter ; which said bill of exchange afterwards, to wit, on the same day and year aforesaid, at London aforesaid, in the parish and ward aforesaid, according to the usage and custom of merchants, was shewn and presented to the said Thomas Gibson and Joseph Johnson for their acceptance thereof ; and the said Thomas Gibson and Joseph Johnson then and there, according to the usage and custom of merchants, accepted the same : By reason whereof, and by force of the usage and custom of merchants, the said Thomas Gibson and Joseph Johnson became liable to pay to the said Hughes and James Peter the said sum of money in the said last mentioned bill of exchange contained, according to the tenor and effect of the said last mentioned bill of exchange, and their acceptance thereof, as last aforesaid. And being so liable, they the said Thomas Gibson and Joseph Johnson, afterwards, to wit, on the same day and year aforesaid, at London aforesaid, in the parish and ward aforesaid, undertook, and to the said Hughes and James Peter then and there faithfully promised to pay them the said sum of money in the said last mentioned bill of exchange contained, according to the tenor and effect of the said last mentioned bill of exchange, and their acceptance thereof, as last aforesaid. And whereas also, the said persons using trade and commerce as copartners, in the copartnership name and firm of Livesey, Hargreave and Co. on the said 18th day of February, in the said year of our Lord 1788, at Manchester, to wit, at London aforesaid, at the parish and ward aforesaid, according to the usage and custom of merchants, made their certain other bill of exchange in writing, the hand of one of the said copartners on their joint account, and in their said copartnership name and firm, to wit, Livesey, Hargreave and Co. being thereunto subscribed, bearing date the same day and year aforesaid, and then and there directed the said last mentioned [575] bill of exchange to the said Thomas Gibson and Joseph Johnson, by the names and description of Messrs. Gibson and Johnson, bankers, London ; and thereby required them the said Thomas Gibson and Joseph Johnson, three months after date, to pay to the bearer of

the said last mentioned bill, 721l. 5s. value received, with or without advice: And the said Hughes and James Peter in fact say, that afterwards, and before any payment of the said last mentioned bill of exchange, to wit, on the same day and year aforesaid, at London aforesaid, at the parish and ward aforesaid, they the said Hughes and James Peter became and were the bearers and owners of the said last mentioned bill of exchange; of which last mentioned premises the said Thomas and Joseph then and there had notice. And the said Hughes and James Peter further say, that afterwards to wit, on the same day and year aforesaid, at London aforesaid, at the parish and ward aforesaid, the said last mentioned bill of exchange was presented and shewn to the said Thomas and Joseph, who thereupon then and there duly accepted the same, according to the usage and custom of merchants aforesaid: By reason whereof, and according to the usage and custom of merchants, the said Thomas and Joseph became liable to pay to the said Hughes and James Peter the said sum of money in the said last mentioned bill of exchange specified, according to the tenor and effect of the same bill. And being so liable, they the said Thomas and Joseph, in consideration thereof, afterwards, to wit, on the same day and year aforesaid, at London aforesaid, at the parish and ward aforesaid, undertook, and to the said Hughes and James Peter then and there faithfully promised to pay to them the said sum of money in the said last mentioned bill of exchange specified, according to the tenor and effect of the said last mentioned bill of exchange. And whereas also, the said persons using trade and commerce as copartners in the copartnership name and firm of Livesey, Hargreave and Co. on the said 18th day of February, in the said year of our Lord 1788, at Manchester, to wit, at London aforesaid, at the parish and ward aforesaid, according to the said usage and custom of merchants, made their certain other bill of exchange, in writing, the hand of one of them on their joint account, and in their said copartnership name and firm of Livesey, Hargreave and Co. being thereunto subscribed, bearing date the same day and year aforesaid; and then and there directed the said last mentioned bill of exchange to the said [576] Thomas Gibson and Joseph Johnson, by the names and description of Messrs. Gibson and Johnson bankers, London; and thereby requested the said Thomas Gibson and Joseph Johnson, three months after date, to pay to Mr. John White, or order, 721l. 5s. value received, with or without advice. And the said Hughes and James Peter aver, that when the said last mentioned bill of exchange was so made as aforesaid, or at any time afterwards, there was not any such person as John White the supposed payee, named in the same bill of exchange, but that the same name was merely fictitious, to wit, at London aforesaid, at the parish and ward aforesaid: By reason whereof, the said sum of money mentioned in the said last mentioned bill of exchange, became and was payable to the bearer thereof, according to the effect and meaning of the said Bill. And the said Hughes and James Peter aver, that they the said Hughes and James Peter, afterwards, to wit, on the same day and year aforesaid, at London aforesaid, in the parish and ward aforesaid, in due form of law became, and were, and still continue the bearers and proprietors of the said last mentioned bill of exchange. And the said Hughes and James Peter further say, that afterwards, to wit, on the same day and year aforesaid, at London aforesaid, at the parish and ward aforesaid, the said last mentioned bill of exchange was presented and shewn to the said Thomas Gibson and Joseph Johnson, who then and there duly accepted the same according to the usage and custom of merchants: By reason whereof, and according to the said usage and custom of merchants, they the said Thomas Gibson and Joseph Johnson, then and there became and were liable to pay to the said Hughes and James Peter the said sum of money in the said last mentioned bill of exchange specified, according to the tenor and effect thereof: And being so liable, they the said Thomas Gibson and Joseph Johnson, in consideration thereof, afterwards, to wit, on the same day and year aforesaid, at London aforesaid, at the parish and ward aforesaid, undertook, and to the said Hughes and James Peter then and there faithfully promised to pay them the said sum of money in the said last mentioned bill of exchange specified, according to the tenor and effect of the same bill. And whereas also, before and at the time of the making and indorsing of the bill of exchange hereinafter mentioned, there was a certain partnership or house of certain persons using trade and commerce, as well in the names and firm of Livesey, Hargreave and Co. as in the name and firm of John White, to wit, at London aforesaid, at the parish and ward aforesaid. And whereas the said last mentioned per-[577]-sons on the said 18th day of February in the year

of our Lord 1788 aforesaid, at Manchester, to wit, at London aforesaid, at the parish and ward aforesaid, according to the usage and custom of merchants, made their certain other bill of exchange in writing, the hand of one of the said last mentioned copartners on their joint account and in their copartnership name and firm of Livesey, Hargreave and Co. being thereunto subscribed, bearing date the same day and year aforesaid; and then and there directed the said last mentioned bill of exchange to the said Thomas Gibson and Joseph Johnson by the names and description of Messrs. Gibson and Johnson bankers, London; and thereby required the said Thomas Gibson and Joseph Johnson three months after date, to pay to them, the said last mentioned copartners by the name of Mr. John White, or order, 721l. 5s. value received, with or without advice. And the said last mentioned copartners, afterwards, to wit, on the same day and year aforesaid, at London aforesaid, at the parish and ward aforesaid, by a certain indorsement in writing, by them made upon the said last mentioned bill of exchange according to the usage and custom of merchants, appointed the said sum of money in the said last mentioned bill of exchange contained to be paid to the said Hughes and James Peter, and then and there delivered the said last mentioned bill of exchange so indorsed as aforesaid to the said Hughes and James Peter: which said last mentioned bill of exchange afterwards, to wit, on the same day and year aforesaid, at London aforesaid, at the parish and ward aforesaid, according to the usage and custom of merchants, was shewn and presented to the said Thomas Gibson and Joseph Johnson, for their acceptance thereof: And the said Thomas Gibson and Joseph Johnson then and there, according to the usage and custom of merchants, accepted the same: By reason whereof, and by force of the usage and custom of merchants, the said Thomas Gibson and Joseph Johnson become liable to pay to the said Hughes and James Peter the said sum of money in the said last mentioned bill of exchange contained, according to the tenor and effect of the said last mentioned bill of exchange and their acceptance thereof, as aforesaid. And being so liable, they the said Thomas Gibson and Joseph Johnson, afterwards, to wit, on the same day and year aforesaid, at London aforesaid, at the parish and ward aforesaid, undertook, and to the said Hughes and James Peter then and there faithfully promised [578] to pay to them the said sum of money in the said last mentioned bill of exchange contained, according to the tenor and effect of the same bill and their acceptance thereof, as last aforesaid.

The eighth count was for money had and received. The ninth for money paid, laid out and expended. The tenth for money lent and advanced.

Plea. Non assumpserunt, on which issue was joined. This issue was tried at Guildhall, Nov. 3, 1789, by a special jury before Lord Kenyon, when a verdict was found for the Plaintiffs.

A motion was afterwards made in the court of King's Bench, by Erskine for a new trial, which was withdrawn, it being agreed on both sides that the following special verdict should be put upon the record, for the purpose of having the question finally decided in the House of Lords (a).

That the said persons using trade and commerce as copartners, in the copartnership name and firm of Livesey, Hargreave and Co. on the 18th day of February, 1788, at the place within-named, made a certain instrument in writing (the hand of one of the said copartners, on their joint account, and in their copartnership name and firm of Livesey, Hargreave and Co. being thereunto subscribed) and directed the same instrument to the said Thomas Gibson and Joseph Johnson, by the names and description of Messrs. Gibson and Johnson bankers London; and which said instrument is in the words and figures following, to wit:

Manchester, Feb. 18th, 1788.

721l. 5s.

Three months after date, pay to Mr. John White, or order, seven hundred twenty-one pounds five shillings value received, with or without advice.

LIVESEY, HARGREAVE AND CO.

To Messrs. Gibson and Johnson, Bankers, London.

G. & J.

And the jurors aforesaid, upon their oaths aforesaid, further say, That the said Livesey, Hargreave and Co. at the time of making the said instrument, well

knew that no such person as John White, in the said instrument mentioned existed. And the jurors aforesaid, upon their oaths aforesaid, further say, that afterwards, at the day and place within-mentioned, a certain [579] indorsement in writing was made by the said Livesey, Hargreave and Co. upon the said instrument, purporting to be the indorsement of John White named therein, and to be subscribed with his hand and name: And that the said indorsement purported to require the said sum of money in the said instrument contained to be paid to the said Livesey, Hargreave and Co. or their order. And the jurors aforesaid upon their said oaths further say, that the said instrument being so indorsed as aforesaid, they, the said Livesey, Hargreave and Co. afterwards, at the day and place within-named, by a certain indorsement in writing made upon the said instrument, and subscribed with the hand and name of one Absalom Goodrich, by procuration of the said Livesey, Hargreave and Co. appointed the said sum of money in the said instrument contained, to be paid to the said Hughes Minet and James Peter Fector; and then and there delivered the same so indorsed, as well with the name of the said John White, as with the name of the said Absalom Goodrich, to the said Hughes Minet and James Peter Fector, for a full and valuable consideration in money therefore then and there paid by the said Hughes Minet and James Peter Fector to the said Livesey, Hargreave and Co. And the said Hughes Minet and James Peter Fector then and there became, and were, and still are, the holders of the said instrument. And the jurors aforesaid, upon their oaths aforesaid, further say, that the said instrument was afterwards, at the day and place within-mentioned, presented to the said Thomas Gibson and Joseph Johnson for their acceptance thereof, and that the said Thomas Gibson and Joseph Johnson, then and there accepted the same; they the said Thomas Gibson and Joseph Johnson then and there well knowing that no such person as John White, in the said instrument named, existed: and that the name of John White, so indorsed thereon, was not the hand-writing of any person of that name. And the jurors aforesaid, upon their oaths aforesaid, further say, that the said Thomas Gibson and Joseph Johnson, at the time of making and accepting of the said instrument as aforesaid, had not, nor had they at any time since, any money, goods or effects whatsoever, of, or belonging to the said Livesey, Hargreave and Co. or of the said Hughes Minet and James Peter Fector in their hands. And the jurors aforesaid, upon their oaths aforesaid, further say, that the said Thomas Gibson and Joseph Johnson, although often requested, have not paid the said sum of money contained in the said instrument, or any part thereof, to the said Hughes Minet and James Peter Fector, or either of them, and that the [580] same still remains unpaid; but whether upon the whole matter aforesaid, found by the said jurors in manner aforesaid, the said Thomas Gibson and Joseph Johnson are liable to the payment of the said sum of money in the said instrument mentioned, or not, the said jurors are altogether ignorant, and pray the advice of the Court here in the premises. And if upon the whole matter aforesaid, found by the said jurors in manner aforesaid, it shall appear to the Court here that the said Thomas Gibson and Joseph Johnson are liable to the payment of the said sum of money in the said instrument mentioned, then the said jurors upon their oaths say, that the said Thomas Gibson and Joseph Johnson did undertake and promise in manner and form as the said Hughes Minet and James Peter Fector by their declaration have declared against them. And they assess the damages of the said Hughes Minet and James Peter Fector, on occasion of their not performing the promises and undertakings within specified, over and above their cost and charges, by them about their suit in that behalf expended, to 721l. 5s. And for those costs and charges to 40s. But if from the whole matter found by the jurors, in manner aforesaid, it shall appear to the Court here, that the said Thomas Gibson and Joseph Johnson are not liable to the payment of the said sum of money in the said instrument mentioned, then the said jurors upon their oaths say, that the said Thomas Gibson and Joseph Johnson did not promise and undertake in manner and form as they have within by their plea alleged.

In Michaelmas Term, Nov. 24, 1789, the Court of King's Bench gave judgment on this special verdict for the Plaintiffs upon the fifth count of the declaration, and for the Defendants on the other counts (3 Term Rep. B. R. 481).

Upon this judgment a writ of error was brought, returnable in Parliament; and the Plaintiffs in error having assigned general errors, and the Defendants in error having pleaded that there was no error in the record of the proceedings, the Plaintiffs

in error hoped that the said judgment would be reversed, for the following (among other) Reasons.

First. Because by the law and custom of merchants there are two species of negotiable instruments or bills of exchange, essentially different in their natures, the one payable to order, and the other to bearer; the former being only negotiable by indorsement, and the property in the latter being transferable by mere delivery.

[581] Second. Because instruments of this description are in the nature of specialties, and are by law permitted to be declared upon as such; and the count upon which the Court have given judgment, setting forth and stating a bill payable to bearer, when the bill or instrument produced in evidence purports to be a bill payable to order, is not supported by the evidence.

Third. Because the legal effect of every instrument must arise out of, and be collected from the words of it, and no parol evidence or extrinsic circumstances can give to it a meaning or operation contrary to, or different from that which appears on the face of the instrument itself.

Fourth. Because in the case of instruments the property of which passes by indorsement, it is peculiarly necessary that there should be persons in existence answering to the names indorsed upon such instruments, inasmuch as additional credit is derived to them from the number of indorsements made upon them, the consequent appearance of their having passed through an extensive circulation, and the apparent liability therefore of a greater number of persons to the payment of the money contained in them.

Fifth. Because the facts found by the jury, amount to the statement of a fraud and forgery, which can never give legal effect to an instrument, nor be the foundation of a contract within the custom of merchants; which custom must be founded in convenience, be consistent with reason, and sanctioned by usage; and consequently, as the count on which the judgment for the Defendants in error is given, declares on a bill drawn according to the usage and custom of merchants, the evidence does not support such declaration.

Sixth. Because judgment being given for the Plaintiffs in error, on those counts which specially state the circumstances that have been found by the jury, it follows, that they are entitled to it on that count, to the support of which the facts so found are the only evidence; otherwise it must be decided, that a transaction, which stated upon the record in an action upon the case, is not sufficient to found a contract, or to make the party charged liable, will, when found specially by a jury, and put upon the record in the shape of a special verdict, be sufficient to found a contract, and to support a count stating a contract of a different nature.

T. ERSKINE.

F. BOWER.

[582] The Defendants in error hoped that the judgment of the Court of King's Bench would be affirmed, with costs, for the following (among other) Reasons:—

First. It appears by the special verdict that the Defendants in error are fair bonâ fide holders of the bill in question, for a valuable consideration; and Livesey, Hargreave and Co. the drawers, at the time when they drew the bill, as well as the Plaintiffs in error, Messrs. Gibson and Johnson, when they accepted it, are found to have been perfectly informed of the non-existence of White, to whom, or to whose order, the form of the bill makes the contents of it payable. The Defendants in error therefore, are in a situation which entitles them to all the aid which, consistently with established legal principles, can be given by a court of justice. And the Plaintiffs in error having acted under no mistake or misrepresentation, and not being in any respect interested in the existence or non-existence of White, have no equitable claim to be released from the effect of their engagement, or to prevent the application of any favourable rule of construction to support the demand of the Defendants in error.

Second. It is not necessary to the validity of deeds or contracts, that they can in all cases operate according to the words in which they are expressed: when the rules of law prevent such operation, the instrument may legally operate in a different manner, to give effect to the legal intent of contracting parties. Thus words of demise may operate by way of confirmation, and vice versâ(a): words of grant by way of covenant; and so in many similar instances. The intent of the

drawers and acceptors of the bill in question, was to make a negotiable instrument, and if for want of an actually existing payee, nominated in the bill, it could not be so indorsed as to be put into a state of negotiability by indorsement, it is humbly conceived that there is no rule of law to prevent its being transferred by delivery, and having the effect of a bill expressed to be made payable to bearer, that being the only other method of negotiating bills of exchange: and it is also conceived that the fifth count of the declaration, which states the bill according to its legal effect and operation, is properly adapted to the case, and that the judgment thereon is warranted by the verdict. By thus giving effect to the bill, justice is done betwixt the parties, and the rule affords protection to the fair holder of bills of exchange against frauds, by which they might otherwise be injured; with-[583]-out which protection the currency of bills of exchange would be greatly obstructed, and great inconveniences would arise in commercial transactions.

Third. It is objected, that the Defendants in error make title to the bill through the medium of a felony; but supposing the indorsement of the name of White to have been a felonious act, the present action is not brought against the person who committed the felony, or for the felonious act; and it has been decided (*Pearcock v. Rhodes and Another*, Dougl. 632, 8vo) that the bonâ fide holder of a stolen bill of exchange might maintain an action upon the bill, though it had been negotiated to him through the hands of the person who stole it. In the present case however the question does not arise; for the verdict finds no intent to defraud, and consequently no felony is found, nor can be intended.

E. BEARCROFT.

J. MINGAY.

A. CHAMBRE.

This case was argued at the bar of the House by Erskine and Bower, for the Plaintiffs in error, and by Bearcroft, Mingay and Chambre, on behalf of the Defendants in error.

After which, on the 26th of April 1790, the following questions were put to the Judges:—

I. Whether the making of the instrument declared upon appears upon the special verdict to be so criminal that the policy of the law will not suffer an action to be founded on such an instrument?

II. Whether upon the matter found in the special verdict, the bill mentioned in the fifth count can be deemed in law a bill payable to bearer?

III. Whether the matter of the special verdict will sustain any other count in the declaration?

On the 3d of February 1791, the Judges thus delivered their respective opinions.

HOTHAM, Baron.—In answer to the first question proposed to us, “Whether the making the instrument declared upon appears to be so criminal that the policy of the law will not suffer an action to be founded upon such instrument?” I am of opinion that no such criminality can be distinctly inferred from this verdict.

To constitute that degree of criminality, the facts found must amount to this, that the parties have uttered the bill or have [584] forged it with intent to defraud some person in particular. Now in the first place, acceptance does not import, ex vi termini, an utterance. Acceptance may be by writing or by parol. If it be by parol, it would be difficult to maintain that to be such an utterance as would amount to the crime supposed; and if it would not, it seems extremely questionable, whether on any principle the mode of acceptance can change the colour of the act. It is true that the refusal to pay may afford a strong presumption of the original intent; and yet that fact standing alone can hardly be decisive. It may admit of different interpretations; and if by any fair reasoning it can receive an innocent construction, that will always be presumed, unless it be excluded by the finding of the jury. As to the bare writing of the name of a non-existing person, that will not amount to a forgery unless some representation be made to give the instrument effect and operation; whereas it is not found by this verdict that any such representation was made. It is necessary therefore for the jury to do more than merely to find the insertion of a false name in the instrument: of itself that is no crime; but it becomes one by being done with a design of defrauding some person in particular. But in this special verdict so far from that being found, it is neither found nor alleged that there was an intention to defraud any person. That I take to be a radical and insurmount-

able defect in the special verdict; and therefore that enough does not appear upon it to warrant the House in saying, that the facts found amount necessarily to a felony; without which the making of the instrument declared upon is not so criminal, as that the policy of the law will not suffer an action to be founded upon it.

With regard to the second question, "Whether upon the matter found in the special verdict, the bill mentioned in the fifth count can be deemed in law a bill payable to bearer?" it is impossible to lay out of the case any of the facts stated in the declaration, and found by the special verdict; the answer to this question must embrace them all. It is equally impossible not to feel that the Plaintiffs in error avow themselves to be in this situation, namely, of palpably endeavouring to avail themselves of their own fraud; an attempt, which the law will in no case endure, much less assist. Unless therefore some stubborn rule of law stand in the way of the present judgment of the Court of King's Bench, it ought to be supported; and I am of opinion that no such rule does impeach it. It is admitted that many [585] cases may be put, such as are mentioned in Co. Lit. 45 a. and in many other books, in which deeds and solemn instruments are not always to be construed or to have effect according to their technical or literal import, but that they shall have such an operation as will carry the intent of the parties into execution, though contrary to the strict letter of the instruments themselves. That principle will in my apprehension apply directly to the present case. The bill in question, on the face of it, imports to be a bill of exchange payable to John White or his order; but in truth, and in fact, it is not so, it never was, nor ever can be so, because there is no such person existing as John White, which is found to be a fact known to the acceptors as well as to the drawers. Is then the bill so vitiated as (contrary to the principle which operates on deeds and other instruments) to lose all its efficacy and become mere waste paper? To answer that question we must resort to what the law never overlooks, the intention of the parties, which in the present case was clearly otherwise. The Plaintiffs in error, as well as Livesey and Co., meant to give the bill a credit by the acceptance, and to put it into circulation; and they all thought the most convenient way of doing it was by inserting in it this fictitious name. It having been found then, that the Plaintiffs in error knew at the time of their acceptance that the name of John White was a mere fiction, they must be presumed to have known more, namely, that no regular or formal title could ever be traced through him by any holder of the bill. If therefore they have accepted a bill which they knew was so framed as to be incapable of being proved in the shape it bore, they shall nevertheless be held to their undertaking to pay it, though it be presented to them in another, because they themselves have induced such necessity; for it is a known rule of law, that no man shall take advantage of his own wrong;

— Nec lex est justior ulla,
Quàm necis artifices arte perire suâ.

It is impossible not to consider the drawers and acceptors here as one and the same, linked together for the purpose of giving colour and effect to this fraudulent transaction. The difficulty on the form of the bill arises from no mistake or accident, but from the deliberate and concerted act of the acceptors as well as the drawers. But it is still in their power to give effect to the bill; shall they not then be obliged to do so. Perhaps it may not be too much to say, that on this finding a presumption will arise that the intention of the acceptors was, that it should be payable to the bearer; for they knew that the bill, virtually, had [586] no indorsement upon it by John White; they knew that it came into the hands of Minet and Fector by the delivery of Livesey and Co., and that in truth, whatever semblance it bore, it was nothing but a bill payable to bearer. I contend that it is not competent to these partners in the fraud to say, "It is true we did accept the bill, but we meant nothing, by that acceptance, but to cheat all mankind, let the bill get into what hands it might." As little shall they be permitted to say, after having fabricated this paper, that it is not according to the law and custom of merchants, which I conceive will attach on the bill, notwithstanding the fraud used in its original formation. The great principle that I go upon is, that parties to a bill shall not, any more than parties to any deed or instrument, take advantage of their own fraud. In truth what is the end and effect of acceptance but a liability to pay? The acceptors having given this bill a currency

when they knew that it never could be paid to the order of White, the law will presume that they intended that formality should be waived. If it be waived, what does it remain but a bill payable to bearer? Knowing that it was impossible to pay it in the shape it bore, they accepted it, but knowing at the same time that it was possible to pay it in another. The law will conclude then that such was their intent: and I conceive that such a construction will be most conformable to the policy which affects, and the principles which operate on all commercial transactions. That policy and those principles are bottomed in liberality. Bargains shall be enforced, undertakings shall be executed, and promises to pay shall be performed. The rule of law, that a man's own acts shall be taken most strongly against himself, obtains not only in grants, but extends in principle to all other engagements and undertakings. I conceive therefore that the acceptors of this bill shall not be heard to say in a court of justice, that as they never intended to pay it, so because they have inserted White's name in it they never shall be compelled to pay it. On the contrary, the law will hold them more strictly to a compliance with their engagement, on the single ground of their own fraud, and will therefore still consider the bill as capable of transfer by delivery. A bill of exchange, in its own nature, amounts to nothing more than an authority, on one hand, to pay to the order of the person to whom it is made payable, and, on the other, to an undertaking on the part of the acceptor that he will pay it. By his acceptance he puts himself into a situation that makes it obligatory on him to pay the bill, either in the [587] very terms of it, or as nearly as possible to its literal import; and as soon as he has made himself the principal debtor for the sum contained in it, the law raises a presumption against him. But the presumption here cannot be that the acceptors will pay it to the order of White, because the fact found makes that to be impossible, and impossible in their own knowledge. The name of John White then must be considered as if it were not on the bill at all, as no name, as a mere non-entity. To whom then must the presumption arise that it was intended to be payable, but to the only person it could, namely, to the bearer? And I am of opinion that the great ends of circulation, the support of credit, and the extension of commerce, would be in constant danger of fatal checks, if bills were permitted to be so made as to enable confederate acceptors to set up their own fraud, as a justification for refusing payment to a fair and honest holder of them for a *bonâ fide* valuable consideration, which these Defendants are found to have given. On this question therefore I am of opinion, that upon the matter found in the special verdict, the bill mentioned in the 5th count may be deemed in law a bill payable to bearer. But if the bill cannot be sustained as a bill payable to bearer, then on the third question.

"Whether the matter of the special verdict will sustain any other count in the declaration?" I am of opinion that it will also sustain the first, by considering the bill as a new bill from the time of the subsequent indorsement of Livesey and Co. For every indorser charges himself in the same manner as if he had originally drawn the bill. From the moment therefore of that second indorsement by their procuration, they gave the Plaintiffs a new title to the bill, and they gave a fresh authority to Gibson and Johnson, namely, to pay it to their own order; and to that authority Gibson and Johnson must be taken to have acceded, because it is expressly found that their acceptance was subsequent to such indorsement; which acceptance then made must be coupled with the knowledge, which they are found to have had, of the antecedent fiction. I conceive therefore that having accepted it after Livesey and Co. had so indorsed it, and knowing at the same time that although there was on the bill a fictitious indorsement, there was also a real one, the law will presume them to have given credit to that, and thereby to have accepted a good and a valid bill. In this view of it, I consider them as liable to pay the bill under the first count in the declaration, which I am of opinion may also be sustained by the special verdict.

[588] PERRY, Baron. With respect to the first question, namely, "Whether the making of the instrument declared upon appears upon the special verdict to be so criminal that the policy of the law will not suffer an action to be founded on such instrument?" the law where a felony has been committed, will not permit the party injured to proceed against the offender in a civil suit, but for the sake of the public he must seek his remedy by a criminal prosecution, and the civil action shall merge in the felony. This is certainly so against the person who commits the felony. The main ingredient to constitute the crime of forgery, is an intention to defraud; it must

be so laid in the indictment and proved. In the cases of *Wilkes at Launceston* (a)¹, *Tuft's case* (Leach's Crown Law, 182), and *Bolland's case* (Ibid. 83), cited at the bar, there was a false representation made, a false name put upon the several bills in each case, and in all an intention to defraud particular persons was charged expressly and found. Putting a fictitious person's name on a bill of exchange, will not, I conceive, amount to felony, unless done with intent to defraud; and I believe it has not been an unusual practice amongst merchants to draw bills in favour of fictitious payees without any intention to defraud. But however that may be, it does not appear, nor is it found by the special verdict, that there was in this case an intention to defraud: that, as I think, ought to have been found as a fact by the verdict to merge the civil action; and therefore I am of opinion that the making of the instrument declared upon, does not appear upon the special verdict to be so criminal that the policy of the law will not suffer an action to be brought on such instrument.

As to the second question, viz. "Whether upon the matter found in the special verdict, the bill mentioned in the 5th count can be deemed in law a bill payable to bearer?" these facts appear in the special verdict; that the name of John White indorsed on the bill was done by the drawers previous to the receiving the full value from the Defendants in error; that Gibson and Johnson afterwards, with full knowledge that John White was a non-entity, and that no person with that name had indorsed the bill, accepted it. This circumstance being [589] known to the acceptors, there was no imposition upon them, they have, with their eyes open, ratified and confirmed the acts of the drawers, guaranteed the payment of the bill, and undertaken to discharge it. In the case of drawing bills of exchange to the order of a fictitious payee, the drawer and acceptor, knowing the fact, have no reason to complain of any injury to them. The acceptor, either upon the credit, or for the honour of the drawer, engages to pay the bill when due, and can never be discharged from that engagement except by satisfying the bill, which if he once does to the bonâ fide holder, he can run no risk of any claim from a fictitious payee. Every person whose real name and signature appears on a bill of exchange, is responsible to the extent of the credit he gives to it in the negotiation of it. It is contrary to justice, and not to be endured, that fraudulent drawers and acceptors should receive benefit by their own acts, and their estates be exonerated from the demands of their just creditors. The claim of the Defendants in error certainly in justice and equity ought to be supported, and I think it may in law be maintained upon the 5th count, as on a bill payable to bearer. The intent of the drawers and acceptors of the bill seems to be, to have made a negotiable instrument; and if for any defect, it cannot be made so by indorsement, it is reasonable it should be made valid in any way in which that effect can be produced: and there does not occur to me any rule of law to prevent its being made good by delivery. If a bill be made payable to a person not existing, it operates as a bill payable to bearer. Where the bill is in the hands of a purchaser for a full and valuable consideration bonâ fide, and the acceptor, before his acceptance, is privy to the non-existence of the payee, and who cannot give an order, it is in effect and in point of law the same thing as if made payable to the holder, namely, the bearer. Many instruments may be enforced contrary to the words, Co Litt. 45 a. 301 b.; words of demise may operate as a grant, covenant to stand seised, confirmation, and in other ways: at one time they may operate as a lease, at another time as a confirmation, in order to preserve right and do justice, the law being anxious and astute to obtain those purposes. In the case of *Stone v. Freeland*, cited 3 Term Rep. B. R. 176 (a)², Lord Mansfield said, in bills of exchange names of payees were often used of persons not having existence, and such bills indorsed by the drawer; and if with knowledge of that fact a bill is accepted and put in [590] circulation, it shall not lie in the acceptor's mouth to say the bill is a bad one. And in that case Lord Mansfield held that the acceptor was

(a)¹ In this case one Wilkes drew a bill in a fictitious name upon a fictitious drawee, in favour of a real payee in payment for goods sold. He was first indicted for the cheat at Launceston, and acquitted. The case being stated to the judges, they were all of opinion that the transaction was a forgery within stat. 2 Geo. 2, c. 25. He was afterwards indicted again for forgery, having drawn another bill under the same circumstances, and tried before Mr. Justice Yates at Bodmin, August 1767, but again acquitted.

(a)² Vide ante, p. 316, a note of that case.

liable, though there was a fictitious payee, and that such acceptor should not be at liberty to deny the validity of the bill, which by lending his acceptance he had put in circulation. In *Peacock v. Rhodes*, Dougl. 632, Lord Mansfield in giving the opinion of the Court, said, "the law was settled, that the holder of a bill coming fairly by it, has nothing to do with the transaction between the original parties, except in the single case of a note for money won at play." *Price v. Neale*, 3 Burr. 1354, was the case of a forged bill, which had been accepted and paid to the Defendant in the course of trade; there Lord Mansfield held, that the acceptor having given credit to it by his acceptance, should not recover back what he had paid to a bona fide holder. In *Collis v. Emmett*, Term Rep. C. P. 313 (ante, 313), where a bill was made payable to a fictitious payee or order, it was holden that the indorsee might maintain an action against the drawer, as on a bill payable to bearer. Under the circumstances stated in this special verdict, I see no distinction that can be made between the drawer and acceptor of such bill. The bill indeed in this case, as in *Collis v. Emmett*, is payable to John White or order, but before the Plaintiffs in error accepted it, they knew that John White was not in existence, and could not make an order: the indorsees, ignorant of that fact, pay a full value for the bill; the acceptors have, by lending their name, given circulation to the bill, and have, as I conceive, undertaken to pay the bill to such person as shall be the bona fide holder: their engagement is to pay the bill in any way in which it can take effect. Upon the whole therefore I concur with the judgment of both the courts of King's Bench and Common Pleas, and my answer to the second question is, that upon the matter found in the special verdict, the bill mentioned in the 5th count may be deemed in law a bill payable to bearer.

The third question is, whether the verdict can be sustained upon any other count in the declaration? If the verdict could not be supported on the fifth, I conceive it may be sustained upon the first count in the declaration, and that this transaction will stand, or may be considered in this way, viz. that by Livesey and Co. making the bill payable to John White or order, there being no such person existing by that name, they have themselves assumed and taken the name of White for the purpose of indorsing and negotiating the bill, with the consent and [591] by the authority of the persons, who afterwards, knowing the fact, accepted the bill; that this was truly and substantially making the bill payable to their own order, and that the case may be considered as if every thing respecting John White and order, so far as regards the drawers and acceptors, was struck out of the bill, and that by the indorsement by Livesey and Co. it will operate as a new bill, Salk. 125. Upon the third question, therefore, the best opinion I can form is, that the verdict may be sustained upon the first as well as upon the fifth count of the declaration.

THOMPSON, Baron. Before I proceed to state the questions which have been proposed to the Judges, it may be proper to recall the attention of the House to the declaration in this case, and to the facts disclosed in the special verdict. This is an action of assumpsit. The first count of the declaration states, that certain persons carrying on trade as parties under the firm of Livesey and Co. on the 18th of February 1788, according to the custom of merchants made a bill of exchange, directed to the Defendants Gibson and Johnson, requiring them three months after date, to pay 721l. 5s. to John White or order, value received, Livesey and Co. well knowing that no such person as John White existed; upon which bill an indorsement was afterwards made, purporting to be the indorsement of John White named in the bill, and to be subscribed by him, and purporting to require the contents to be paid to Livesey and Co. or order; that Livesey and Co. afterwards (by indorsement on the bill subscribed by one Absalom Goodrich, by procuration of Livesey and Co.) appointed the money contained in the bill to be paid to the plaintiffs, and delivered the bill so indorsed to them, and that the Defendants afterwards accepted the bill, they well knowing that no such person as John White named in the bill existed, and that the name of John White so indorsed was not the hand-writing of any person of that name.

The second count after stating the drawing of the bill as above, added "Livesey and Co. well knowing that John White was not a person dealing with, or known to Livesey and Co., and using the name of John White in the bill as a nominal person only, and intending not to deliver the same to him, or to procure the same to be actually indorsed by him. Upon which bill a certain indorsement was made purporting to be the indorsement of John White, requiring the payment to be made to Livesey and Co. or order; and that Livesey and Co. indorsed [592] and delivered the bill to

the plaintiffs, without having delivered the bill to John White, and without any actual indorsement or assignment of the bill by White."

The third count states, that the bill was made payable to themselves, Livesey and Co., by the name and description of John White.

The fourth count states it is a common bill payable to John White or order, and that John White indorsed it to the Plaintiffs.

The fifth count states the bill as payable to bearer, and that the Plaintiffs were the bearers: on which judgment has been given for the Defendants in error.

The sixth count states it as payable to John White or order, with an averment that when the bill was made, there was no such person as John White the supposed payee, but that the name was merely fictitious; by reason whereof the sum mentioned in the bill became and was payable to the bearer thereof, according to the effect and meaning of the bill; averring also that the Plaintiffs were the bearers and proprietors thereof.

The seventh count states that there was a partnership of certain persons using trade, as well in the name and firm of Livesey and Co. as in the name and firm of John White; that the last-mentioned persons made the bill, (the hand of one of them on their joint account, and their copartnership name and firm of Livesey and Co. being thereto subscribed,) and directed it to the Defendants, requiring them three months after date, to pay to the said last-mentioned copartners by the name of John White or order, 721l. 5s., and that the said last-mentioned copartners afterwards by a certain indorsement in writing, appointed the contents to be paid to the Plaintiffs, and delivered the bill so indorsed to them, &c. The other counts are for money had and received by the Defendants to the Plaintiffs; for money paid, laid out and expended by the Plaintiffs to the use of the Defendants; and for money lent and advanced by the Plaintiffs to the Defendants.

The Defendants having pleaded the general issue, the jury have found a special verdict to this effect; "That Livesey, Hargreave and Co. on the 18th day of February 1788, made a certain instrument in writing with their partnership name subscribed, directed to the Defendants, (and which is set out in the words,) requiring them three months after date, to pay to John White or order, 721l. 5s. value received: That Livesey and Co. at the time of making it, well knew that no such person as John White in the instrument mentioned existed.

[593] "That an indorsement was afterwards made by Livesey and Co. on the instrument, purporting to be the indorsement of John White named therein, and requiring the money contained in the instrument to be paid to Livesey and Co. or their order; that Livesey and Co. afterwards by an indorsement on the instrument, subscribed by Absalom Goodrich, by procuration of Livesey and Co., appointed the money to be paid to the Plaintiffs, and delivered the bill so indorsed to the Plaintiffs for a full and valuable consideration in money, and that the Plaintiffs became and still are the holders of the instrument: That the instrument was afterwards accepted by the Defendants, they well knowing that no such person as John White named in the instrument existed, and that the name of John White indorsed thereon was not the hand-writing of any person of that name." The verdict then finds that Gibson and Johnson, at the time of making and accepting the instrument, had not, nor had they at any time since, any money, goods, or effects whatsoever belonging to Livesey and Co. or to Minet and Fector in their hands, and that Gibson and Johnson have not paid the bill. Upon this special verdict the Court of King's Bench has given judgment for the Plaintiffs below, the now Defendants in error, upon the fifth count of the declaration, and for the Plaintiffs in error on the other counts. And your Lordships having heard the arguments, have been pleased to propose the following questions to the Judges.

1st. Whether the making of the instrument declared upon appears upon the special verdict to be so criminal that the policy of the law will not suffer an action to be founded upon such instrument?

2dly. Whether upon the matter found in the special verdict, the bill mentioned in the fifth count can be deemed in law a bill payable to bearer?

3dly. Whether the matter of the special verdict will sustain any other count in the declaration?

The first question proposed does not proceed on any objection to the form of this particular action, but to the maintaining of any action whatsoever against Gibson and

Johnson in respect of the bill in question, supposing that there may have been disclosed by the special verdict such a degree of criminality on the part of Gibson and Johnson in the share they have had in the transaction relating to this bill, as is sufficient to involve them in the guilt of felony, and consequently such as calls for a public prosecution, instead of a private action by the party [594] complaining of the breach of a contract so constituted. Undoubtedly there have been cases in which the indorsement of a fictitious name upon a bill of exchange has been determined to be a forgery; for it is not essential to constitute that crime, that there should be a person in existence whose name is forged, though it is essential that it should be done with intent to defraud some person who must be particularly specified. In the present case there is nothing stated by the verdict to charge Gibson and Johnson with the fact of assisting Livesey and Co. in the false making or counterfeiting this indorsement, even supposing it had been expressly found to have been done by Livesey and Co. with intent to defraud Minet and Fector. If therefore there is any ground for imputing to Gibson and Johnson a felony in respect of this bill, it must be the offence of uttering and publishing the indorsement knowing it to be forged. I am at present by no means prepared to say, that the mere undertaking of a man to pay a bill drawn upon him by his correspondent in favour of a person who has no existence, is of itself an uttering and publishing of the indorsement knowing it to be forged, within the meaning of the statute. But whatever may be the determination of such a case, if ever it should come before a court of criminal judicature, the question cannot arise unless the fact be stated to be committed with intent to defraud some particular person, which is not the present case. And indeed it here appears, that Minet and Fector had parted with their money to Livesey and Co. for the bill, before it was accepted by Gibson and Johnson. If therefore this preliminary objection to the Plaintiff's cause of action be not well founded, which I conceive it not to be, it is next to be considered whether this action can be maintained on the fifth count of the declaration, which treats the bill as payable to the bearer, and deduces a title to the Plaintiffs in the action in that character; on which count judgment has been given for them by the Court of King's Bench. To consider the bill in question as a bill payable to bearer, is undoubtedly to treat it as an instrument in a different form from that in which it appears; and yet it is certain that the bill is not in reality what it imports to be. The construction which has been put upon this instrument by the Court below, is that which will give effect to it, and compel the defendants there to do what in justice they are bound to do, viz. to make good the engagement they entered into by accepting the bill; viz. to pay the amount of it. In order to support this construction, recourse must be had to the facts dis-[595]-closed by the special verdict; and there it appears that Livesey and Co. when they made, and Gibson and Johnson when they accepted the bill, knew that there was no such person as John White, the supposed payee of the bill, in existence to receive the money, or authorize any other person by indorsement to receive it, and that the bill was incapable of being negotiated in that form. But it was meant to be a negotiable bill of exchange, and has actually been delivered for a valuable consideration; and therefore to give effect to it, and to what we must take to be the intention of the parties, it seems requisite to construe it (as between those parties) a bill payable to bearer, and consequently assignable by the delivery which has taken place. It is clear, (as was said by the Court of King's Bench in giving judgment in the case of *Tatlock v. Harris* (3 Term Rep. B. R. 174) in Easter Term 1789,) that many instruments may be enforced contrary to the wording of them; as if B. tenant for the life of C., and he in remainder or reversion in fee having several estates in the same land, join in the same lease by deed; during the life of C. it shall be considered as the lease of B. and confirmation of him in reversion or remainder, and after the death of C. it is the lease of the remainder man, and the confirmation of B. according to Co. Litt. 45 a. The case of *Collis v. Emmett* determined by the Court of Common Pleas in Hilary Term 1790, which is reported in the Term Reports of that Court (ante, 313), and which has been referred to in the argument, appears to have been decided on the same principle with the present case. There the defendant wrote his name on a blank paper, and delivered it to Livesey and Co. for the purpose of drawing a bill of exchange for such sum, and payable to such person as they should think fit. Livesey and Co. drew a bill on the paper over the defendant's name for 1551l. upon themselves, payable to George Chapman or order, which a clerk of Livesey and Co. accepted for

them; and with the authority of Livesey and Co. the name of George Chapman was indorsed upon the paper. This bill was then delivered for a valuable consideration to a person on behalf of one Jeffery, who negotiated it with the Plaintiffs: there was no such person as Chapman the supposed payee. In an action brought by the Plaintiffs against Emmett as the drawer of the bill, the Court held upon a special verdict that the Plaintiffs might recover against him as the drawer of a bill payable to bearer, on a count to that effect. Upon the whole therefore I conceive, on this [596] special verdict, that the bill mentioned in the fifth count may be deemed in law a bill payable to bearer.

But supposing that it cannot properly be so deemed, then I conceive that the matter of the special verdict will sustain the first count in the declaration, and in this way, viz. the request contained in the bill directed to Gibson and Johnson to pay the money to John White or order, inasmuch as no such person existed, and that was known both to the drawer and drawee, may be considered (as between those parties) as a request to pay so much money, without mentioning any payee; and the indorsement of the fictitious name a mere nullity, conveying no interest to Livesey and Co. as indorsees. It is material then to consider what, under these circumstances, may be the effect of the indorsement from Livesey and Co. on the bill, whereby they direct the contents to be paid to Minet and Fector. In such case it seems no forced construction of that indorsement to say, that Livesey and Co. speak by it this language to Gibson and Johnson, "We have on the face of this bill required you to pay 721l. 5s. without mentioning any real person to whom it can be paid (and which you know); we now direct you to pay that sum to Minet and Fector." After which direction, the acceptance is made by Gibson and Johnson. Thus the names of Minet and Fector may be incorporated in the bill, instead of the fictitious name of John White; and they will be intitled to maintain their action on the first count of the declaration, which has stated the special circumstances of the case, and which are verified by the special verdict.

The result of the whole is, that the opinion which, with all deference, I have to submit to the House on the questions proposed is,

1. That the making the instrument declared upon, does not appear upon the special verdict to be so criminal, that the policy of the law will not suffer an action to be founded on such instrument.

2. That upon the matter found in the special verdict, the bill mentioned in the fifth count can be deemed in law a bill payable to bearer. Or if it cannot, then

3. That the matter of the special verdict will sustain the first count of the declaration.

GOULD, J.—As it appears in the first count, and by the verdict, that the drawers Livesey and Co. and the drawees Gibson and Johnson knew that no such person as John White existed, [597] and therefore that it was impossible there should be such an indorsement as the bill literally seems to require, and consequently that it could never have been intended there should be such an indorsement, I think that must be rejected as surplusage and repugnant. The bill then will stand as a direction to pay to order, and supposing it to have been drawn in that form, to pay to order, I consider the word *our* must have been supplied by a necessary subintelligitur; and then the bill being indorsed to the Plaintiffs for a full and valuable consideration, they became the *bonâ fide* holders, and upon this construction clearly intitled to recover against the acceptors. Nor would the law allow them or the drawers to say that they intended to cheat and defraud the holders who should purchase it as a fair bill, which the acceptors ratified as such, and on whom (the bill being directed to them to pay) the Plaintiffs could not but have a principal reliance for payment in case they should accept it, which from the nature of the transaction was to be expected. For *Lex est sanctio justa, jubens honesta, prohibens contraria*. I therefore conclude that this bill is to be considered as a bill drawn on the Defendants payable to the order of the drawers, and in that view is no more than in the ordinary course of a bill payable to order within the custom of merchants; in which case, whether the acceptor had effects of the drawer or not is immaterial.

Upon the supposition that the opinion I entertain and have delivered on the first count should be conceived not to be tenable, the next consideration will be whether the ground taken by the Court of King's Bench to construe it to be a bill under the circumstances of the case payable to bearer, is right, *ut res magis valeat quam pereat*;

whether when it is impossible for the instrument to operate literally, the equity of the law will not put such a sense upon it as will answer the intention of the parties and give it effect. It would be enough to say to give it effect to the innocent party, but I do not hesitate to speak plurally, the intention of the parties, since it appears that both drawers and acceptors knew it could not have effect literally in the form in which it was fabricated, and as I have already observed, the law will not endure that they should allege that their intention was fraudulent; for *allegans suam turpitudinem non est audiendus*. It is a rule of law, that every instrument shall be construed in the most forcible manner against the maker. The argument then results to this: it was in the power of the drawers and acceptors (for it is evident they acted in [598] concert) to have framed the bill to be payable to a real person or order, or to bearer, and in either case it would have been effectual to charge the drawers, and after acceptance the drawees. But they do not choose to take the first course; and it is highly probable (I might say apparent) that the reason was, they knew that no substantial payee would indorse the bill, and so their purpose in that form would be defeated. They therefore resort to an elusory form, which could not in that shape have any force or effect. It remains then that it should be construed that they meant the bill should be payable to bearer, as being the only way in which, in its original formation, it could take effect and oblige them as a bill of exchange.

No violence is done; it follows and enforces what must be presumed to be their intention, the payment to the person justly intitled to the money. No inconvenience can ensue, because by the satisfaction of the bill all farther circulation of it is at an end. For these reasons I am of opinion that the Court of King's Bench had sufficient foundation to decide for the Plaintiffs on the fifth count.

LORD CHIEF BARON EYRE.—This is an action on the case, and the Plaintiffs' declaration consists of ten counts. In the first they state, that certain persons using trade and commerce as copartners, in the copartnership name and firm of Livesey, Hargreave and Co. according to the usage and custom of merchants, made their bill of exchange in writing, (the hand of one of the said copartners on their joint account, and in their copartnership name and firm being thereunto subscribed,) and directed it to the Defendants by the name, &c. and thereby required them, three months after date, to pay to Mr. John White or order, 721l. 5s. value received, with or without advice; they the said Livesey, Hargreave and Co. then and there well knowing that no such person as John White in the said bill of exchange named existed: upon which bill afterwards an indorsement was made, purporting to be the indorsement of John White named in the said bill, and to be subscribed with his hand and name, and purporting to require the sum of money in the bill contained to be paid to the said Livesey, Hargreave and Co. or their order. That afterwards the said persons using trade, &c. in the name and firm of Livesey, Hargreave and Co. by an indorsement subscribed with the name and hand of Absalom Goodrich, by procuration of the said Livesey, Hargreave and [599] Co. according to the usage and custom of merchants appointed the contents of the bill to be paid to the Plaintiffs, and delivered the bill so indorsed with the names of White and Goodrich to the Plaintiffs; which bill was afterwards according to the usage and custom of merchants shewn and presented to the Defendants for their acceptance, who according to the usage and custom of merchants accepted the same, knowing that no such person as John White in the bill named existed, and that the name John White indorsed on the bill was not the handwriting of any person of that name. By reason whereof, and by force of the usage and custom of merchants, the Defendants became liable to pay to the Plaintiffs the contents of the bill according to the tenor and effect of the bill, and of their acceptance, &c.

The sum of this count is, that Livesey, Hargreave and Co. drew a bill on the defendants, payable to a non-existing payee, which was indorsed by somebody, in the name of such payee, to Livesey, Hargreave and Co. and by them by procuration indorsed and delivered to the Plaintiffs; which bill was afterwards accepted by the Defendants, knowing the payee to be non-existing, and the indorsement by the payee not to be the hand-writing of any person of that name.

The second count states the making the bill, as before, by Livesey, Hargreave and Co. they knowing that the said John White was not a person dealing with, or known to them, and using his name as a nominal person only, and intending not to deliver the same to be actually indorsed by him. This count then states the indorse-

ment as before, and the subsequent indorsement by Livesey, Hargreave and Co. by procuration to the Plaintiffs, and that Livesey, Hargreave and Co. delivered the bill so indorsed to the Plaintiffs, without having delivered the same to the said John White, and without any actual indorsement or assignment thereof by the said John White. It then states the presenting the bill for acceptance as before, and that the Defendants well knowing that Livesey, Hargreave and Co. had made and delivered the bill as aforesaid, with such intention as aforesaid, and that the name John White indorsed was not the proper hand-writing of John White in the bill named, accepted the same, &c.

This second count does not seem to differ essentially from the first.

The third count states the bill, as before, to be made payable to them Livesey, Hargreave and Co. by the name and description [600] of Mr. John White or order, and so, dropping the indorsement in the name of John White, states that the persons using trade, &c. in the firm of Livesey, Hargreave and Co. by indorsement under the hand of Absalom Goodrich by procuration, &c. appointed the contents of the bill to be paid to the Plaintiffs, and delivered it to the Plaintiffs so indorsed, and also having the name of John White indorsed upon the same. The count then states that it was presented for acceptance and accepted, in the common form, by reason whereof, &c.

In this count nothing is imputed to the acceptors.

The fourth count states the drawing the bill, as before, delivery to John White, a regular indorsement by White to the Plaintiffs, (dropping Goodrich's indorsement by procuration,) the presenting for acceptance, and the acceptance. By reason whereof, &c.

This count is in the form in which the declaration ought to be conceived, in real transactions.

The fifth count, upon which the Plaintiffs had judgment, states the bill drawn as before, payable to the bearer thereof; that the Plaintiffs before any payment made, became and were the bearers and owners thereof; of which premises the Defendants had notice: that the bill was presented for acceptance, and accepted. By reason whereof, &c.

The sixth count states the special matter *ratione ejus* the bill became payable to bearer. It states the bill drawn and payable as in the first count; then the Plaintiffs aver that there was no such person as John White the supposed payee, but that the name was merely fictitious; by reason whereof the contents of the bill became and were payable to the bearer thereof, according to the effect and meaning of the said bill, and that the Plaintiffs afterwards became the bearers and proprietors of it in due form of law. The count then states the presenting the bill and the Defendant's acceptance. By reason whereof, &c.

The seventh count is a mere amplification of the third, stating that at the time of making the bill, there was a partnership or house of certain persons using trade, as well in the name and firm of Livesey, Hargreave and Co. as the name and firm of John White. That the said last mentioned persons made their bill in their copartnership name and firm of Livesey, Hargreave and Co. payable to them the said last mentioned copartners by the name of Mr. John White or order: and that the last mentioned copartners by an indorsement in writing, [601] appointed the contents of the bill to be paid to the Plaintiffs, and delivered the bill so indorsed to the Plaintiffs. The presenting and acceptance are then stated, by reason whereof, &c.

The eighth, ninth, and tenth counts are for money had and received, money paid, laid out and expended, money lent and advanced. The general issue is pleaded, and upon the trial the jury find this special verdict; namely,

"That the persons trading under the firm of Livesey, Hargreave and Co. made a certain instrument in writing, the tenor of which they set forth, of the purport and effect of the bill of exchange as stated in the first count. That at the time of making the said instrument, they well knew that no such person as John White therein named, existed. That an indorsement was made by them upon the instrument, purporting to be the indorsement of John White named therein, and to be subscribed with his hand and name, and to require the sum in the instrument contained, to be paid to them or their order. The indorsement is then found by them, in the name of Goodrich, by procuration to the Plaintiffs, and that the instrument so indorsed was delivered by them to the Plaintiffs for a full and valuable consideration in money paid to them by the Plaintiffs, and that the Plaintiffs then and there became and are the holders

of the said instrument. That they presented it for acceptance to the Defendants, who accepted it well knowing that no such person as John White, in the said instrument named, existed; and that the name of John White so indorsed thereon was not the hand-writing of any person of that name. That the Defendants at the time of making and accepting the said instrument, had not, nor had at any time since, any money, goods or effects whatsoever, of Livesey, Hargreave and Co. or of the Plaintiffs in their hands," &c.

Upon this record three questions are made; the last is in substance, Whether this special verdict will sustain any one of the ten counts in the declaration, except the fifth? In order to narrow this question, and to introduce what appears to me to be the real point, it may be proper to observe in this place, that five of the ten counts in the declaration, namely, the third, seventh, eighth, ninth, and tenth, seem to be laid out of the case by the special verdict. The bill is not made payable to Livesey, Hargreave and Co. by the name of John White, which is stated in the third count; nor is it made payable to them by the medium stated in the seventh count, that there was a partnership trading in both firms; and the fact found, that the acceptors had no money in their hands either of the drawers or [602] of the Plaintiffs, seems to exclude the three last counts. As to those three last counts it is to be observed, in addition to the effect of the finding in the negative, that if there had been no such negative finding, still the special verdict would not have supported those counts, the finding amounting at best to nothing more than evidence of the fact of money had and received, which, according to the rules which govern the application of special verdicts to the matters in issue, is always deemed an insufficient finding. I have said that I object to the three last counts, one of which is for money paid, &c. that they are not found. I go farther, and say that the evidence which might have supported either of those counts is not found, and particularly the evidence which might have supported the count for money paid, &c. The theory of a bill of exchange is, that the bill is an assignment to the payee of a debt due from the acceptor to the drawer, and that acceptance imports that the acceptor is a debtor to the drawer, or at least has effects of the drawer's in his hands. But in an action wherein the declaration is upon the bill itself, creating a duty by the custom of merchants, this is all out of the case. In any other action of assumpsit at common law founded upon a bill of exchange, the bill is offered as evidence only of the duty. It has been expressly determined (*a*) that a general indebitatus assumpsit will not lie upon a bill of exchange; but the indebitatus must be for some duty, such as money lent, &c. and the bill is offered as evidence of that duty (*b*). Now when it is offered as evidence of the duty, it is but

(*a*) 1 Salk. 125. *Hodges v. Steward*.

(*b*) [In what cases the holder of a bill of exchange or promissory note can give it in evidence under the money counts, appears not to be well settled. It seems that between immediate parties a bill or note is evidence either of money had and received by the Defendant to the use of the Plaintiff, or of money paid or lent by the Plaintiff to the use of the Defendant. Thus an acceptance importing that the acceptor is a debtor to the drawer (*vide supra*), the drawer may give in evidence a bill payable to his own order under the count for money had and received, in an action against the acceptor. *Thompson v. Morgan*, 3 Campb. N. P. C. 101. So a bill of exchange is *primâ facie* evidence of money lent by the payee to the drawer, and may be given in evidence under the money counts in an action by the former against the latter. *Bayley on Bills*, 286, 4th Edit. So also an indorsement is *primâ facie* evidence of money lent by the indorsee to the indorser, *ibid.* 164.

But where the parties are not immediate it has been doubted whether the common counts can be resorted to. It is indeed said that a bill is *primâ facie* evidence of money had and received by the acceptor to the use of the holder. *Le Sage v. Johnson*, Forrest, 23. *Bayley on Bills*, 287, 4th Edit. 2 Phill. Ev. 30, 6th Edit. So also of money had and received by the drawer to the use of the holder, and of money paid by the holder to the use of the drawer. *Bayley on Bills*, 286. On the other hand, it is contended that there is no privity between these parties, upon which an action of indebitatus assumpsit can be maintained. See *Cowley v. Dunlop*, 7 T. R. 571. *Eron v. Russell*, 4 M. & S. 507. *Wapnam v. Bend*, 1 Campb. N. P. C. 175. *Bennett v. Farrel*, *ibid.* 130. If however the bill is evidence of money had and received between original parties, may not the transfer of the bill carry with it all the rights which the

evidence; and any of the presumptions which the writing affords may be contradicted by evidence, and from the whole of the evidence the jury must draw the conclusion of fact that so much money was lent, so much had and received, &c. The presumptions of evidence which the writing affords, have no application to the assumpsit for money paid by the payee or holder of a bill to the use of the acceptor: it must be a very special case which will support such an assumpsit. I can conceive a case, in which an acceptance might be evidence of money paid by the payee to the use of the acceptor. I may borrow of one man to lend to another, and if the person of whom I borrow the money pays it by my order into the hands of him to whom I mean to lend it, this might be a ground upon which a jury might find that the money was paid to my use. A bill of exchange may be the medium, by which I the [603] acceptor borrow the amount of the bill of the payee to lend to the drawer; and when the payee with the privity of me the acceptor, and at my request, pays to the drawer the amount of the bill, the money so paid may be said to be paid to the drawer to the use of me the acceptor. But upon this special verdict, neither the fact, nor the evidence of the fact is found. The payee's money is not found to have been advanced to the drawer at the request of the acceptor, with his privity, or with any sort of communication with him. No man will deny that before the acceptance it was a loan to the drawer, for which the drawer was debtor to the payee. The mere acceptance, without any communication of the circumstances attending that loan, could not alter the nature of the acceptor's engagement, nor amount to a ratification of any thing which had passed between the drawer and the payee, nor charge the acceptor beyond the ordinary effect of his acceptance.

But further, ratification supposes something which may be ratified: but there is nothing found by this special verdict to have passed between the drawer and the payee, in any manner involving the acceptor, or which the acceptor could ratify. We are not first to presume a transaction between the drawer and payee, which could charge the acceptor, and then make his acceptance a ratification of that transaction. There are only two facts stated which in any manner concern the acceptor. He had no effects in his hands of the drawer's, and he knew that the payee was fictitious. The acceptance, the acceptor having in fact no effects in his hands, approaches nearer to an undertaking for the debt of another which had been previously contracted, than to any other species of contract at the common law. The acceptor's knowledge that the payee was fictitious may infect the contract he has entered into with fraud, but cannot alter the nature of the contract itself. I remain therefore of opinion that the three last counts, which are general indebitatus assumpsit for duties, cannot be supported by this special verdict. And upon the discussion of the question, it appears to me that the argument is more conclusive against the ninth count, for money paid to the use of the acceptor, than against the others.

The fourth count, which is in the common form of declaring by an indorsee of an inland bill of exchange against the acceptor, and supposing the original payee to have indorsed immediately to him, striking out the intermediate indorsements, must also be laid out of the case, because in the first place there [604] is an intermediate indorsement found, and in the next place it is found that the original payee did not indorse to any body.

The general question upon the matter found in the special verdict, will then be

party transferring it possessed? *Edie v. East India Company*, 1 W. Bl. 299. Where A. is indebted to B. for money had and received, and B. to C. in the same sum, and it is agreed amongst all the parties that A. shall pay C., C. may maintain assumpsit for money had and received against A. *Wilson v. Coupland*, 5 B. & A. 228, ante, p. 239, note. Why, therefore, may not the demand for money had and received be transferred with the bill according to the custom of merchants, as well as by the agreement of the parties?

The bill or note is only *prima facie* evidence of money had and received, and therefore if it appears that there have been no other transactions between the parties, as if the Defendant has signed the note as a surety only, it cannot be given in evidence under the common counts. *Wells v. Girling*, 3 B. Moore, 79.

As to giving promissory notes in evidence under the money counts, see *Harris v. Huntback*, 1 Burr. 375, *Dimsdale v. Lanchester*, 4 Esp. N. P. C. 201.]

reduced to the question, Whether the matter of the special verdict will support any one of the four remaining counts, (viz.) the first, second, fifth, or sixth?

There is a preliminary question, viz. "Whether the making of the instrument declared upon, appears upon the special verdict to be so criminal that the policy of the law will not suffer an action to be founded upon such instrument?" which will be disposed of by observing, that (although the transaction stated in the special verdict appears to be of a very criminal nature, perhaps sufficient to have warranted a charge of forgery against both the drawers and acceptors of this bill, and also to have warranted the finding of all that is necessary to constitute the crime of forgery, in both) the crime does not appear upon this special verdict so constituted. There is no fraudulent intention found, which is of the essence of the crime; consequently, the question whether the policy of the law would suffer an action to be founded upon the crime, does not arise. Upon this question there is no difference of opinion, and therefore I forbear troubling the House with any particular discussion of it; and I return to the question, Whether the special verdict will support any, and which of the four counts before enumerated, viz. the first, second, fifth, or sixth, which will include all that remains to be answered of the second and third questions proposed to the Judges.

And upon the first view of the case, and comparing the facts stated in the special verdict with the state of the Plaintiffs' case in his first count, they tally so exactly, that I am obliged to acknowledge that the matter in the special verdict is a direct proof of the fact stated in this count: and one might have expected, that the Plaintiff would have had judgment upon that count in his favour, if on any. I agree likewise that the special verdict finds all the material facts, upon which the second and sixth counts proceed. It is a mere conclusion of law from the facts, that in the first and second counts, by reason of the premises, the acceptor became liable to pay the contents of the bill to the Plaintiffs; and in the sixth count, that by reason of there being no such person as John White, the contents of the bill became payable to the bearer. The real question therefore with regard to those three counts is, not whether the facts found [605] will sustain them, but whether the counts themselves are sufficient in law to maintain the Plaintiffs' action? Why was not the judgment taken upon one or the other of these three counts? I can imagine but one reason, namely, that the Plaintiffs did not dare to risk their judgment upon either of them, supposing that they entered up the judgment at their peril; or if it was the deliberate act of the Court, that the Court were of opinion that neither of those three counts could be sustained in point of law. I do humbly conceive, that they cannot be sustained in point of law, and that this will be material to the argument upon the second question which applies to the fifth count, I may say decisive of it. For if it be not a just conclusion of law in the sixth count, that by reason of the bill being made payable to a fictitious payee, the contents of the bill became payable to the bearer, I apprehend it will be extremely difficult to find any other ground in law, upon which the bill mentioned in the fifth count can be deemed in law a bill payable to bearer: and I need not observe that the Plaintiffs have nothing but a conclusion of law to rely upon, for maintaining this fifth count; the mere fact found by the special verdict being in direct opposition to the fact stated in the fifth count.

I shall make a few introductory observations, which I apprehend will apply to all these counts. And first I observe, that the questions which arise upon this record are questions which relate to the Plaintiff's declaration, and not to the Defendant's plea; to the Plaintiff's title to sue, and not to the defence set up against that title. I presume it must be admitted to me, that a Plaintiff who sues upon a bill of exchange must shew a title to sue upon it, in the same manner as every other Plaintiff must shew a sufficient title to enable him to maintain the action which he brings. Bills of exchange being of several kinds, the title to sue upon any one bill of exchange in particular, will depend upon what kind of bill it is, and whether the holder claims title to it as the original payee, or as deriving from the original payee, or from the drawer, in the case of a bill drawn payable to the drawer's own order, who is in the nature of an original payee. The title of an original payee is immediate, and apparent on the face of the bill. The derivative title is a title by assignment, a title which the common law does not acknowledge, but which exists only by the custom of merchants. As it is by force of the custom of merchants, that a bill of ex-[606]-change is assignable at all, of necessity the custom must direct how it shall be

assigned; and in respect to bills payable to order, the custom has directed that the assignment should be made by a writing on the bill called an indorsement, appointing the contents of that bill to be paid to some third person; and in respect of bills drawn payable to bearer, that the assignment should be constituted by delivery only. This is simple and obvious; every man who can read can discover whether the holder of a bill claims to be the assignee of it as indorsee, or as bearer. If it should be questioned whether a bill payable to bearer passes by assignment, or whether every bearer is not an original payee, as being within the description in the bill itself of the original payee, it does not appear to me to be necessary to this argument that this question should be decided. I am content that it should be taken either way. In either case the title of a bearer is self-evident, the title of an indorsee appears by the indorsement itself, the truth of which is guaranteed by the highest penal sanctions. Every thing which is necessary to be known, in order that it may be seen whether a writing is a bill of exchange, and as such by the custom of merchants partakes of the nature of a specialty, and creates a debt or duty by its own proper force, whether by the same custom it be assignable, and how it shall be assigned, and whether it has in fact been assigned agreeable to the custom, appears at once by the bare inspection of the writing; with the circumstance, in the case of a bill payable to bearer, of that bill being in the possession of him who claims title to it. The wit of man cannot devise any thing better calculated for circulation. The value of the writing, the assignable quality of it, and the particular mode of assigning it, are created and determined in the original frame and constitution of the instrument itself; and the party to whom such a bill of exchange is tendered has only to read it, need look no further, and has nothing to do with any private history that may belong to it (a)¹. The policy which introduced this simple instrument demands that the simplicity of it should be protected, and that it never should be entangled in the infinitely complicated transactions of particular individuals, into whose hands it may happen to come. Hitherto that policy has prevailed. We shall all agree, that if a man claims to be entitled to a bill of exchange drawn payable to a real payee or order, and has not an indorsement by the payee, he cannot count upon it as upon a bill of exchange, though he should have paid to that payee the full value of it, and though it were [607] bargained, sold, assigned and conveyed to him, by every form of conveyance which courts of law and equity in this country have recognized. This policy has lately prevailed so authoritatively, that two juries under the direction of a noble and learned judge have established, as far as their verdict could establish, a title by indorsement from one of the name of the payee, who was not the real payee in whose favour the bill was drawn, but into the hands of whom the bill fell by some accident or negligence in the drawer (a)². Possibly, as names are but designations of persons, and that bill was in fact not made payable to that person, these verdicts may not be acquiesced in, and the question as to that indorsement may be considered as not finally settled. While I am speaking I hear from authority that the question is not finally settled, for that the last verdict, which I had understood to be general, is a special verdict; but the very question is an illustration of the proposition that a bill of exchange is what it imports to be upon the face of it. The Plaintiffs in this cause have taken upon themselves to count, in that part of their declaration which I am now examining, upon a bill of exchange, and to state a title to that bill by assignment. In their fourth count they state a strict title to it by indorsement from John White the nominal payee. The special verdict has found the writing upon which the question arises, to be an instrument in writing purporting to be a bill of exchange, drawn payable to Mr. John White or order; but the special verdict has directly negatived the supposed indorsement by John White, and I think we all agree that upon the fact the Plaintiffs have failed to make out that title. If my introductory observations are well founded, it should seem that the Plaintiffs can make no other title to a bill of exchange so constituted. At the common law it was not assignable at all; it is assignable by the custom of merchants only; and the custom of merchants directs

(a)¹ [This proposition appears to be too broadly stated. See *Gill v. Cubitt*, 3 B. & C. 466.]

(a)² Vide *Mead v. Young*, 4 Term Rep. B. R. 28. [Where the Court held, contrary to the opinion of Lord Kenyon, that as the indorsement was a forgery it conferred no title.]

that the assignment should be by indorsement from the person to whom it is drawn payable; and I have supposed it to be agreed, that if the payee were a real person, it could by no possibility be transferred in any other manner. But the Plaintiffs have stated a title of a different kind in their first and second counts, adapted to the truth of the case as it stands established by this special verdict. They agree that this bill was drawn payable to John White or order, but they say the name John White is a fictitious name, and his indorsement consequently fictitious; that this was known to the acceptors when [608] they accepted, that they, the Plaintiffs, received the bill from the drawer with his indorsement upon it by procuration; and by reason of all this they insist, that though they have no indorsement from John White, yet that according to the usage and custom of merchants the acceptors became liable to pay the value of the bill to them. Where the traces are to be found of the usage and custom of merchants applying to such a case, I have not yet discovered. This conclusion is a conclusion of the law merchant, or it is nothing. How is it to be deduced? Surely no logician would draw such a conclusion from such premises so stated. If it be the arbitrary rule of positive law governing a case so stated, I ask where is that rule to be found? If no such rule is to be found expressly laid down in the law merchant, is it to be collected by inference from any of the known rules of that law? Is it not a monstrous absurdity to suppose that the usage and custom of merchants can have any thing to do with a case which upon the bare state of it is only fit for the Old Bailey to give the rule upon? What is the proposition of the Plaintiffs, reduced to the fewest words possible: "We are not the assignees of this bill of exchange by the indorsement of the payee, it is impossible we should be, because in truth there was no payee in existence; therefore according to the usage and custom of merchants we are entitled." Whereas the conclusion which the custom makes, must be, "therefore you are not entitled." The common law must say the same thing. It must say, "it is only by force of the custom of merchants that this chose in action can be claimed by an assignee; you have not made yourselves assignees according to the custom of merchants, therefore the common law cannot recognize your title." These Plaintiffs, instead of shewing themselves assignees according to the custom, have confessed that they are not such assignees, and in doing this they have furnished another argument against their title, to which I could never find an answer, viz. that this supposed bill of exchange was in its original conception a mere nullity, a piece of waste paper, upon which the custom of merchants never attached, in which no man ever had an interest, and in which, consequently, no interest could be transferred under any pretence of indorsement by any body, or by delivery of possession, or in any other manner whatsoever. This argument may require a little more examination and discussion. I will go by steps. If I put in writing these words, "I promise to pay 500l. on demand, value received," without saying to whom, it is [609] waste paper. If I direct another to pay 500l. at some day after date for value received, and not say to whom, it is waste paper. Will it mend the matter if I say, "I promise to pay 500l." or if I direct another "to pay 500l. to the pump at Aldgate?" I use that vulgar expression because it has been used, and because it forcibly expresses the idea I wish to convey; what is a fictitious payee but the pump at Aldgate? If I add, "or order," what difference does it make? If I add, "or bearer," there is a very sensible difference. There may be a bearer, but in the nature of things there can be no order. The bill therefore cannot be transmitted by order: the fictitious payee can no more order than the pump at Aldgate can order. Such a bill then is a mere nullity in its original conception, and must ever remain a mere nullity. It is impossible ever to animate it, or give it motion or transmissibility. The drawers of this declaration saw these difficulties in the title of the Plaintiffs claiming to sue on a bill of exchange payable to John White, a fictitious payee, or order; and therefore in the fifth and sixth counts they made a bold attempt to manufacture the bill anew. But they seem not to have made the best use of their materials. If they had declared upon a bill drawn by Livesey and Co. (the indorsers by procuration) payable to the Plaintiffs or their order, they might have alleged that our books say that every indorsement is a new bill; and if that be so, this bill is a new bill, wherein the indorsers are drawers and the indorsees the payees(a). But they have not chosen to take this ground. In the fifth count they say simply, that

(a) [Vide *Gibson v. Hunter*, post, vol. ii. pp. 187, 288.]

the bill was drawn payable to bearer; in the sixth, they say, that the bill was drawn payable to Mr. John White or order, but that the payee was fictitious, and therefore the contents of the bill became payable to the bearer, according to the effect and meaning of it. This last statement has the merit, at least, of being very distinct; and though it determines the construction of the bill by a fact dehors the bill (for it cannot appear on the face of the bill itself that the payee is fictitious), it is a fact existing at the moment when the bill was fabricated; whereas in arguing the special verdict as applied to the fifth count, to shew that this bill, though purporting to be drawn payable to order, was, in the eye of the law merchant, a bill payable to bearer, it becomes a very complex case. The subsequent indorsement in the name of John White, the indorsement by procuration from Livesey, Hargreave and Co., and the acceptors' knowledge of the circumstances, are all called in to assist in the demonstration that this [610] is a bill payable to bearer. With the drawers of this declaration I am at issue, with respect to the sixth count, upon a very short point. They say that a bill drawn to a fictitious payee is a bill payable to bearer, according to the effect and meaning of it: I say that such a bill is a mere nullity. To my apprehension it is not a very sound argument that it must be payable to bearer because it cannot be payable in any other manner. I observe that it is not even stated in the sixth count, that by reason of the payee being fictitious the bill became payable to bearer according to the usage and custom of merchants; but the words, "according to the effect and meaning of the bill," are substituted in the room of those other words. Upon what authority was it said that such was the effect and meaning of this bill? It is directly contrary to the purport of it. If the intention of the drawers, the acceptors, or the Plaintiffs themselves, will assist us to find out the intent, which the purport of the bill is to be supposed not to have sufficiently conveyed, they all consider this bill as a bill not payable to bearer, but as a bill to pass by indorsement in strict conformity to its purport; and there are in fact indorsements upon it. Where then is the authority for the averment, that it was according to the effect and meaning of this bill that the contents should become payable to bearer? Is there any better proof of this averment, than it must be so because it could not be payable to order?

Thus far I have considered this bill simply as a bill drawn to a fictitious person or order, without more, with a view to the allegations in the sixth count. If we go a step further, we get into the particular circumstances stated in the special verdict, and the general proposition in the sixth count is then abandoned. I am now to enter upon a discussion of those circumstances. In examining the argument upon the particular circumstances of the case of these Plaintiffs, as stated in the special verdict, with a view to the application of them to any of the counts, and particularly to the fifth count, to which they have been supposed capable of being applied, I confess I have great difficulties to encounter. Transactions are stated which arose subsequent to the making of the bill: how they can affect the construction of the instrument at all, what the chain of reasoning is, how they conclude to make a bill, drawn payable to John White or order, a bill payable to bearer rather than a bond, I confess myself absolutely at a loss to comprehend. The sixth count supposes this metamorphosis to have been the immediate effect of the payee being fictitious; then this was a bill payable to [611] bearer before the delivery of it to the Plaintiffs, before the acceptance, and before the false indorsement of the name of John White, and the real indorsement of the drawers by procuration; then an honest acceptor, who did not know the fact of the payee being fictitious, became bound to pay this bill to any man who brought it, without an indorsement. Is an honest acceptor to be put into that predicament? When he requires an indorsement as the title of the holder to demand payment of him, agreeable to the purport of the bill, is he to be answered with an action and a recovery against him by the bearer, upon proof made at the trial of a fact (of which he knew nothing) that the payee was fictitious, by reason whereof, according to the effect and meaning of the bill, the contents became payable to the bearer? This surely is too strong to be insisted upon (a). The sixth count must therefore be abandoned, and the knowledge of the acceptor must be taken in aid to eke out this extraordinary proposition. The fact, as it is stated in the special verdict, is, that the acceptors at the time of their acceptance knew that the payee was fictitious. The argument which is built upon this fact, if I understand it, is argumentum ad hominem,

(a) [Acc. *Bennett v. Farnell*, 1 Camp. N. P. C. 130, 180 c.]

that he shall never be permitted to defend himself by alleging that the payee was fictitious, and therefore that the Plaintiffs have no title. The argument is pushed one step further, it is said, as against him it shall be a bill payable to bearer. We have legal principles which govern the argumentum ad hominem; as far as they will lead me I am content to follow them; but I dare not go further. I am ready to admit that beyond the strict legal estoppels by deed and in pais, we have received into the law of England a sort of moral estoppel. We say, no man shall be heard to allege his own crime or turpitude in his defence. And in that sense I agree that no man shall take advantage of his own fraud, and he shall not set up his own fraud by way of defence.

But a Plaintiff must always recover upon his own strength. He must state and he must prove a case, which is *prima facie* sufficient. When that is done, a Defendant shall not set up his own fraud by way of answer and defence. As against him, the Plaintiffs' case, though defective if the whole truth could come out, shall prevail. That this is the rule of law which governs legal estoppels, will appear by a reference to two cases reported by Lord Raymond, *Hermitage v. Jenkins*, 1 Lord Raym. 729. *Palmer v. Ekins*, 2 Lord Raym. 1550. In the last, Lord Raymond says in giving the judgment of the Court, "There [612] upon the very face of the declaration it appeared to the court that the lease from the Defendant was only a lease by estoppel, and nothing of an interest could pass thereby, and consequently nothing could pass by the assignment to the Plaintiff; but here, upon the face of this declaration, a good title appears in the Plaintiff, and that being so, the declaration itself is good, and the Defendant by her plea pleads a fact, which by her indenture she is estopped from pleading, which makes the plea ill." As to the moral estoppel, I will cite the concluding words of a judgment (3 Term Rep. B. R. 403) pronounced against a Plaintiff by a noble and learned Judge in the name of the whole Court of King's Bench. "The defence which is made is of a most unrighteous and unconscientious nature, but, unfortunately for the Plaintiff, the mode which she has taken to enforce her demand cannot be supported, and consequently there must be judgment for the Defendant." The noble and learned Lord was perfectly correct when he delivered this opinion. Where the Plaintiff himself cannot shew a *prima facie* case, the Defendant is not driven to plead any thing; he demands the judgment of the Court upon the Plaintiff's own case. A Defendant may be estopped to plead, but was it ever seen in our law that a Defendant was estopped to demur? As to some of the counts in this declaration, and among them the sixth, we are in effect now arguing a demurrer to the declaration. With respect to such of the counts as are to be maintained by the facts in the special verdict, and among them the fifth, I agree with Mr. Justice Heath, that those facts, which in the shape of allegation or averment upon record would make a count ill upon demurrer, must have the same effect in evidence when proved; and it is to be observed, that the facts which destroy the Plaintiff's title to put this bill in suit, this leading fact in particular, "that the payee was fictitious," are found by a jury, and a jury are never estopped to find the truth of a matter in pais, even in cases where a Defendant would be estopped to plead it.

The argument in favour of the Plaintiffs, founded upon the knowledge of the acceptors, divides itself into two branches. 1st. The Defendants shall not set up the fictitious payee by way of defence (which I agree to be a fair argument, and only dispute the application of it). 2dly. That as against them, the bill shall be taken as a bill payable to bearer. This I controvert; I say unless it can be proved that it is a bill payable to bearer against all the world, it never can be shewn to be a bill payable [613] to bearer against them. Let the Defendants' knowledge evidence everything it can evidence; infer from it every thing you can infer; you cannot infer from it, nor will it evidence that the bill is a bond. No more can you infer, no more will it evidence that a bill payable to order is a bill payable to bearer. This is absolutely turning one thing into another, instead of making reasonable intendments and inferences from premises which fairly warrant them. It is also to be observed, that we are not now directing juries what inferences of fact they ought to make from the facts in evidence before them, where there will be a certain latitude which an honest indignation, in a case of great fraud, may sometimes enlarge to its utmost verge. But we are applying rules of law to a precise state of facts in a special verdict, where no latitude at all can be admitted. I said that the first branch of this argument was inapplicable. The defect in the Plaintiffs' title arises upon their own shewing in the declaration, and

in evidence. Having no title, they are obliged to state, in the place of title, that the Defendant has been party to a fraud on them, by which they have been robbed of their title. Every court of justice may and ought to say this is a wrong, for which there ought to be redress. But what court can say, that by reason of such premises the Plaintiff is not robbed of his title but has a title; or if they are obliged to admit that he is robbed of the title for which he bargained, can say, "true, but we will make another for him?" This is what is here insisted on, and this is what I cannot comprehend. I trust that I have a proper detestation of fraud, but I conceive that it would be much better to punish fraud when we meet with it in the direct way, either criminally or by the action *ex delicto*, than to refine too much in order to correct it at the hazard of shaking general rules and disturbing land-marks. This is a sort of countermining, which I think a very delicate and a very dangerous operation. I have not forgot that an argument has been drawn from a supposed analogy between bills of exchange and deeds, to prove that a court of justice ought to new-mould a bill of exchange, and construe a bill drawn payable to order to be a bill payable to bearer, *ut res magis valeat quam pereat*. I discover no analogy between deeds and bills of exchange. Deeds are at the common law, they have their operation and their construction by the rules of the common law, they are contracts of a more solemn nature than other contracts; between particular parties, respecting particular interests, in particular subjects. Bills of exchange are instruments taking [614] effect by the custom of merchants, intended to circulate visible property according to their apparent purport, entirely detached from, and independent of all particular interests, particular subjects, and the private transactions between the original parties to the instrument. And I think I may fairly argue from the different nature of the instruments, that upon the very same general principles which have disposed the common law of England to mould deeds by construction, so as to effectuate the intent of the parties, *ut res magis valeat quam pereat*, the law merchant must restrict bills of exchange to the precise mode of negotiation determined by the language of the bills themselves, without regard to any thing *dehors*. But let it be supposed for the sake of the argument, that there may be some analogy between deeds and bills of exchange; I ask what are the instances in which construction and interpretation have taken so great a liberty with deeds as to afford an argument by analogy, for construing in this case a bill drawn payable to order, to be a bill drawn payable to bearer? The instances which had occurred to me as likely to be insisted upon, do in my apprehension afford no argument in support of this position. A deed of feoffment upon consideration without livery, may enure as a covenant to stand seised to the use of the intended feoffee. A deed importing to be a grant by two, one having a present, the other a future interest, may enure as the grant of the former and the confirmation of the latter. A feoffment without livery operates nothing as a feoffment, is in truth no feoffment, but is a deed, under which circumstances may operate as a covenant to stand seised to uses; why? The feoffor has by the deed agreed to transfer the seisin and his right in the subject to the feoffee. If the consideration is a money consideration, or a consideration of blood, which is more valuable than money, the law raises out of the contract an use in favour of the intended feoffee. The seisin which remains in the feoffor because the deed is insufficient to pass it, must remain in him bound by the use. This is the effect of the feoffor's own agreement plainly expressed upon the face of this deed. His agreement by his deed is in law a covenant, and by this simple process does his intended feoffment become, in construction of law, his covenant to stand seised to uses. It is a construction put upon the words of his deed, which his words will bear. So a deed importing a grant of an interest by two, one intitled in possession, the other in reversion, is in consideration of law [615] the grant of the first, and the confirmation of the second; why? The deed imports to be the grant of a present estate by both, and it is the apparent intent of both that the grantee shall have the estate so granted; but the deed of the latter having no present interest to operate upon as a grant, nothing can pass by it as a grant. But this party has a future interest in the subject, out of which he may make good to the grantee the estate granted to him by the first grantor. This is to be done by a particular species of conveyance, called a confirmation. The words which are used in this deed, in their strict technical sense are words of confirmation as much as they are words of grant. In the mouth of this party the law says that they are words of confirmation, and shall enure as words of confirmation in order to give effect to his deed, *ut res magis valeat quam pereat*. Here again the construction which

the law puts upon the words of the deed, is a construction which the words will bear. The words have several technical senses, of which this is one, and the law prefers this, because it carries into execution the clear intent of the parties, that the estate and interest conveyed by that deed shall pass. In both those cases we find words interpreted, not in their most general and obvious sense it is true: but if they are interpreted in a manner which the *ius et norma loquendi* in conveyances will warrant, there is nothing of violence in such construction. Indeed I do not know how it would be possible to read a single page of history in any language, without using the same latitude of construction and interpretation of words. To go one step beyond these instances: I venture to lay it down as a general rule respecting the interpretation of deeds, that all latitude of construction must submit to this restriction, namely, that the words may bear the sense which by construction is put upon them. If we step beyond this line, we no longer construe men's deeds, but make deeds for them. Sir Edward Coke in his comment upon one of the sections of Littleton's chapter on Confirmation, has a passage which is at once an authority for this rule and an illustration of it. "Here it is to be observed, that some words are large and have a general extent, and some have a proper and particular application. The former sort may contain the latter, as *dedi* or *concessi* may amount to a grant, a feoffment, a gift, a lease, a release, a confirmation, a surrender, &c. and it is in the election of the party to use them, in pleading, to which of these purposes he will. But a release, confirmation, or surrender, &c. cannot amount to a grant, &c.; nor [616] a surrender to a confirmation, or to a release, &c. because these be proper and peculiar manner of conveyances, and "are destined to a special end." Co. Litt. 301 b. or in other words, "they are narrow words, and have a particular sense only, and a proper and particular application only." Having read this passage to the House, I begin to think that I should do well to claim the benefit, on my part of the argument, of the analogy between deeds and bills of exchange, and of the analogy between the rules of construction which govern those instruments respectively. For surely a surrender and a grant are not more unlike each other, than a bill of exchange payable to order and a bill of exchange payable to bearer. And if bills of exchange payable to order and bills of exchange payable to bearer, are each of them in the nature of proper and peculiar manner of conveyances, and are destined each to a special end, the analogy requires that the one should never be deemed to amount to the other. At least this passage by putting the construction and operation of deeds, and particularly the deed of grant operating as a confirmation, upon a rational and intelligible footing, will help to clear away a part of the argument which having the countenance of great authority deserved great attention on my part, and which has very much perplexed my mind; because after all the pains I have taken in examining it, I could never see distinctly its application to this case. Indeed I think it must generally happen that there will be a fallacy in an argument built upon the application of the rules and principles of the common law, more especially the law concerning real property to the law merchant, or to any other local or limited law. And I am much inclined to think that the fallacy of the argument on the part of these plaintiffs, if there be a fallacy, consists in this, that the distinction between the common law and the law merchant has not been sufficiently attended to. I can very well understand how the common law, though it refuses its sanction to the acceptance of a bill of exchange merely as such, (as being in the eye of the common law *nudum pactum* only,) may interpose between the acceptor, drawer, and payee, to regulate engagements which they may have entered into for a valuable consideration respecting such acceptances: may in a very particular case indemnify an acceptor in paying a bill, or even oblige him to pay such a bill to a person not intitled by the law merchant to demand it, and to pay it in a course not warranted by that law. We have seen that bills of exchange may become evidence to support the several sorts of *indebitatus assumpsit*. But what I [617] insist upon is, that if a man will demand payment according to the law merchant he must bring his case within that law, and, in my apprehension, can pray in aid nothing of which the law merchant will not take notice, though it should happen that the common law might take notice of it. Thus in this case, the Plaintiffs supposing them to be innocent indorsees, may perhaps (I use the word perhaps, because this point is not the point now in judgment) upon the ground of this bill, have a remedy at the common law for the wrong done to them in passing upon them a bad bill, where they had a right to expect a good one. But it would be the grossest absurdity in the

world for them to insist that because a bill which is bad by the law merchant was passed upon them for a good one, therefore it became a good one by the same law merchant, or that it could be made good by the common law *eo nomine*, as a bill of exchange. Another, a different remedy they may have by the common law, and I have no doubt but that the Plaintiffs would have sought their remedy in that mode, if bankruptcies and insolvencies had not intervened, which would probably defeat a suit of that nature. This will not be a reason with the House of Lords for straining any point in order to reach this case, inasmuch as it must be at the expence of creditors who have now vested interests in the fund and estates of their debtors, which ought not to be divested or diminished but in the strictest course of law.

I have hitherto purposely avoided touching upon the supposed hardship of the particular case of these Plaintiffs, or upon the magnitude of the question in respect of the property which may be affected by it, or as it may affect the interests of commerce. In general, considerations of hardship interest our feelings too much. It may be a hard case, but the law ought not to be strained, much less altered, in order to reach this hard case. I have already observed, that it becomes a hard case only from the accident of the insolvency of the parties, admitting it to be a hard case. But where is the hardship? The Plaintiffs say that the acceptors were informed that this bill was drawn to a fictitious payee. Were the Plaintiffs themselves informed of it? It is not so found by the special verdict, but I think there is great reason to apprehend that they were informed of it. They take the bill under an indorsement by procuration from the drawer. A bill drawn payable to a real payee, and coming fairly back again into the hands of the drawer has done its duty, and would be cancelled unless the [618] opportunity of cheating the public of the stamps be admitted to be a good reason for throwing it back again into circulation. Surely the circulation of such a bill by indorsement from the drawer, upon discount, is not a regular mercantile transaction, but gives the party, to whom such a bill is offered, ground to suspect what the real truth is. If he had such ground to suspect, why should he not take the consequence? I understand that there are a great number of other bills which wait the event of this cause: I am afraid to say to what amount; to so enormous an extent has the false credit of these drawers and acceptors been pushed. This circumstance has had its weight, all the weight it ought to have; it has produced the most careful investigation of the claim.

I confess myself to be a very imperfect judge of the interests of commerce, and probably I am mistaken in my notions of the effects which this cause may produce in the commercial world. But I will venture to state what has passed in my mind upon this subject. I take the interests of commerce to be deeply concerned to support fair, and to discountenance false credit. I take it that the interests of gentlemen who trade in the discount of paper money, and the interests of commerce are not exactly the same. I apprehend that the commerce of the kingdom may receive a deep wound from the failure of a capital house for half a million, when the persons who have been discounting the paper of such a house shall receive not less than twenty shillings in the pound, by proving their debts under twenty commissions of bankrupt. That gentlemen of this description should loudly complain of any check or interruption given to the circulation of fictitious bills of exchange, I can conceive. They may like them the better for being fictitious. He who has circulated a forged bill, will for very obvious reasons move heaven and earth in order to raise money to take up that bill when it becomes due, when he can pay no other creditor. That the merchant should join in the complaint, is to me incomprehensible. He ought not to forget the original and true use of bills of exchange; that they are bottomed in real mercantile transactions, that they are then the signs of valuable property and equivalent to specie, enlarging the capital stock of wealth in circulation, and thereby facilitating and increasing the trade and commerce of the country. Such are the bills of exchange which the usage and custom of merchants originally introduced into the commercial world, and intended to protect. Let the merchant contrast such bills of exchange with that false coinage [619] of base paper money which has been of late forced into circulation; the use of which is to encourage a spirit of rash adventure, a spirit of monopoly, a spirit of gaming in commerce, luxury, extravagance and fraud of every kind, to the ruin and destruction of those whose credulity can be practised upon by a false appearance of regular trade, carried on upon a solid bottom; and then let him say whether he dreads the reversal of this judgment.

I confess I thought that a fortunate occasion did now present itself, for interposing a most salutary check to a growing evil; an evil already swollen to a most enormous bulk, the weight of which must necessarily cramp and depress every man who trades upon his own capital, and which threatens to overwhelm the fair trader. Let us not deceive ourselves. There is but one remedy for the evil. If such bills may be recovered upon, if they may be proved under commissions of bankrupts, there are persons enough interested to give them circulation, let the hindmost fare as he may. To check them, and oblige men to deal fairly, as far as real names go to constitute fairness, the recovery must be stopped. If the real parties can keep back their own names by using fictitious names, they can cover this false credit in impenetrable darkness. This Lord Mansfield saw very distinctly in the case of *Stone v. Freeland*. But that which I do not understand in that case is, how it happened that for the first time in his life he expressed no disapprobation of an apparent fraud, but assisted to give it effect. Touching the effect and application of that case to the present, I refer to Mr. Justice Heath's observations upon it. I have only to add, that knowing that I had the misfortune to differ from many of my learned brothers, in the opinion I have entertained of this case, I had too much reason to apprehend that I had totally misunderstood it, and have very reluctantly committed myself in this unequal contest. But Mr. Justice Heath's argument will be an apology for my giving this House so much trouble. The answer to the second and third questions, which it is my duty to submit to your Lordships, thinking as I do of the case, is, that upon the matter found in the special verdict, the bill mentioned in the fifth count cannot be deemed in law a bill payable to bearer; and that the matter of the special verdict will not sustain any other count in the declaration.

HEATH, J. I shall take the liberty to decline answering the first question proposed to us, because as I am of opinion that the Plaintiff is not entitled to recover on any count in this [620] declaration, the first question cannot arise in my mode of considering it. The second question is, whether this may be declared on as a bill payable to bearer? Every instrument must derive its operation from the powers of the grantor and the legal effect of the instrument, and no extrinsic evidence can be adduced, unless it be to explain a latent ambiguity, which is not the present case. This purports on the face of it to be a bill of exchange payable to order. The drawer had power to give it that form, the Defendants have so accepted it, and no evidence can be received to give it a different operation. It has been insisted on in argument, and indeed it was the ground of the decision in the court of King's Bench, that if the contract of the party cannot, consistently with the rules of law, operate in the way intended, that it shall operate according to his power at the time of making it. And this has been attempted to be supported by a passage cited out of Co. Lit. 45 a. concerning a lease granted by tenant for life and a remainder-man, where it was held that the deed should operate, during the life-time of tenant for life, as his lease, and the confirmation of him in remainder, and after the decease of tenant for life, as the lease of the remainder-man: and it has been urged, that the difference between a bill of exchange payable to bearer and payable to order, is not greater than between a lease and confirmation. To this I answer, that I freely admit, if a deed or instrument cannot operate in such manner as was intended by the parties, it shall operate as by law it may; but then apt words must be inserted for that purpose. As to the instance cited, I answer, there are no technical words necessary to make a deed operate as a confirmation: it is sufficient if the party confirming ratifies the estate, which another had granted. Co. Lit. 301 b. has accurately taken the distinction concerning the operation of deeds, viz. "Some words are large, and have a general extent, as *dedi* or *concessi*, which may amount to a feoffment, a grant, a gift, a lease, release, confirmation, &c. But a release, confirmation, or surrender, cannot amount to a grant, nor a surrender to a confirmation, or release, because these be proper and peculiar manner of conveyances, and are destined to a special end." From this passage, as well as from common experience, the following conclusions are to be drawn:

1st, That the operation of a conveyance is not to take effect simply from the power of the grantor, but conjointly from his power and the legal operation of the instrument. If each single mode of conveyance could operate in all possible ways, and to [621] every purpose, it would be nugatory and useless to have several modes of conveyancing, and conveyancing itself no longer governed by any principle, would cease to be a science. To make the analogy perfect between a deed and a bill of exchange, in respect

to the rule of construction that must govern them, it must be shewn that the present bill contains such apt and operative words, that it may be construed either as made payable to order, or bearer; so that if it cannot operate as a bill payable to order, it must be taken as a bill payable to bearer. But the contrary manifestly appears on the face of the two instruments: and if this construction were to prevail, it would raise a contract beside the intention of the parties; for the drawer of a bill payable to bearer, in adopting that form, exonerates the drawee from certain inconveniencies attending bills payable to a certain person or order, such as a danger of the hand of the first payee being forged. The drawer of a bill payable to order consults the convenience and security of the first payee and the subsequent purchaser of the bill, without whose authority the drawee is not safe in paying the bill, so that if the bill be stolen or casually lost, the true owners of the bill may be safe. As these instruments are so different in their operation and destined purposes, they are not convertible; and it may as well be contended, that a release will operate as a grant, as that a bill payable to order can be declared on as a bill payable to bearer. To consider this in another point of view. A bill to bearer is more comprehensive than a bill to order, inasmuch as it comprises all the special appointees to whom a bill of the latter sort may be directed. It was however decided in the case of *Hodges v. Steward*, 1 Salk. 125, at a time when a bill payable to bearer was not deemed to be within the custom of merchants, that a bill payable to a certain person or bearer, could not, by an indorsement of the first payee, be converted into a bill payable to order, so as to charge the drawer. The obvious reason is, that it was the intention of the drawer to frame a bill payable to bearer, and he could not be charged beyond his original undertaking. It seems to be a just and necessary inference, if the more comprehensive bill which is payable to bearer, cannot be changed into the less comprehensive which is payable to order, that the reverse cannot take place. It is repugnant to every principle of law, that specialties, or instruments in the nature of specialties, should receive a construction from extrinsic circumstances, which their import [622] does not warrant; and if they were to be construed not according to their legal operation, but according to the power of the person from whom they move, as is now contended, this novel principle would have the wonderful effect of curing all defects in deeds and instruments, provided that the maker of them had but sufficient power for the purpose.

In order to prove that a bill may receive a construction different from its tenor, a bill has been supposed payable to the pump at Aldgate or order, and it has been demanded whether this would not be a bill payable to bearer? I answer in the negative without hesitation. It is a bill payable to an inanimate thing, under whom no title can be derived. It is not the province of the law to assist folly; recourse must be had to the drawers. There is another essential difference between different conveyances concerning the same subject, and bills payable to order and bills payable to bearer, which is, that in respect to conveyances the contract is the same, and the only question is, in what legal form it shall take effect. In respect to bills the contract is different, and one species of contract cannot be substituted in the place of another. Arguments drawn from the inconvenience of the decision are strong and forcible. It is the object of the drawers of bills, that the bills should pass in circulation, and the interest of commerce requires it. The law of England, which generally discountenances the assignments of debts and choses in action, has in this instance submitted to the custom of merchants. It is the essence of a custom, that it be certain and reasonable. If it be defective in either of these particulars, it must yield to the common law, concerning which there can be little doubt. To construe this bill to be payable to bearer, on account of the latent circumstance of a fictitious payee, unknown to the purchaser at the time, is to introduce infinite confusion and perplexity. Suppose the purchaser of a bill not finding the payee of a bill, declares on it as being payable to bearer, the acceptor might defeat the action by setting up some obscure person bearing the name of the payee. If the attesting witnesses to a bond could not be found, or if there were none, so that the delivery could not be proved, and therefore a recovery could not be had on it as such, it cannot be contended that in an action of assumpsit the bond might be given in evidence as a note of hand. The reason is evident; the creditor has taken his security in a certain determined form, he cannot at his pleasure alter it against the stipulation of the debtor, and yet the obligation includes a promise to pay the money.

[623] In this case the jury have found that there was a fictitious payee; but can

the holder of the bill be always prepared with that evidence? If it be doubtful on the face of the instrument what is the legal operation and effect of it, where is the certainty? If it be founded in fraud, where is the reasonableness?

The counsel for the Defendants in error have given up all the other special counts except the third, wherein it is stated that Livesey, Hargreave and Co. directed the bill to be paid to them by the name of John White. I answer, that the custom of merchants as little applies to this count as to the other special counts, for no custom can warrant the drawing of a bill payable to one man by the name of another. But it has been urged at the bar, that the acceptors shall not be received to annul their own acceptances, and that it does not lie in their mouths to insist on the proof of the hand-writing of the first payee, when they knew at the time of their acceptance that he was merely fictitious, and no such person as John White really existed. And in support of this argument, they cited the case of *Stone v. Freeland*, which was determined at Guildhall Sittings after Easter Term 1769. The circumstances of that case were the same as the present, and Lord Mansfield, after observing that the bill was drawn to enable the drawer to raise money, told the jury that the Defendant had enabled the drawer to do this by lending his acceptance, and when he had by so doing put the bill in circulation, it should not lie in his mouth to make the objection that he had nothing to do with it. On this decision I first observe, that the noble and learned Lord did not mean to controvert the general rule, that it is necessary in order to recover against the acceptor to prove the hand-writing of the first payee, but only in the particular circumstances of the case dispensed with the proof. In the same manner, if the obligor of a bond should fraudulently remove a witness, and it should so appear at the trial, the bond is established by the acknowledgment of the party, without farther proof of the hand-writing. Suppose in the case of *Stone v. Freeland* the jury had found a special verdict, they must have found the indorsement of the first payee, considering the Defendant as being estopped from requiring the proof of it; but here the contrary is found. In order to examine how far the authority of this case is applicable, it ought to be considered, whether the circumstance of its being known to the acceptors that the payee was fictitious, will enable the Plaintiffs who were in-[624]-dorsees to recover on any of the counts in this declaration. It will not support those special counts where it is so expressly stated, because such instrument is founded on fraud, and not on the custom of merchants. Those counts are radically bad, and will not warrant a recovery on them by the Plaintiff. If this allegation will vitiate the counts, in which it is stated, it must necessarily follow that the proof of them will have the like effect in respect to the other special counts where no such allegation is inserted. The fourth count is the only special one that may be supported in point of law, to which it may be applied. That count states the first payee to be a real person, and his indorsement to be a real transaction. But the finding of the jury directly contradicts it, by stating it to be a fiction. It seems to me, that the Plaintiffs below should have availed themselves of the authority of the case of *Stone v. Freeland*, if it be law, at the trial; they should have insisted that the indorsement of the first payee ought to have been received as proved; but having missed that opportunity, they are now too late. The cases of *Tallock v. Harris* decided in the King's Bench, and *Collis v. Emmett* decided in the Common Pleas, are against my opinion. I was prevented by sickness from attending my duty in court when the last case was decided; if I had been present, I could not have concurred in that decision notwithstanding the great deference I have for the superior learning and abilities of the other judges. But this case is brought before your Lordships in order to review those decisions. Your Lordships have a right to call on me for my best opinion on this subject, and it is my duty to give it. It is agreed on all hands, that the circulation of these bills is extremely mischievous, and ought to be restrained. It is the great commercial evil of these days, which has grown to a gigantic height. It has enabled needy adventurers to engage in desperate undertakings, relying on the money which they raise on this fictitious credit. On the present question, a million of property now depends. No wonder that this traffic has spread poverty, distress, and bankruptcy, through large districts which it has pervaded. To enable the holders of such bills to recover against the acceptors without proving the hand-writing of the first payee, is to stamp a credit on the bills themselves. The acceptors without effects are tempted by a large commission to lend their credit. The obvious reason of inserting the name of a fictitious payee is, that too many bills should not appear [625]

in circulation in the same name at the same time. Make it necessary for the purchaser of the bill to look to the first payee, and it will be impossible to defraud mankind in the manner and to the extent that has been practised. In order to administer an effectual remedy to this evil, it is not necessary to stretch the common law beyond the known and temperate decisions of former times. It is not necessary to introduce subtle inventions and new modes of reasoning, unknown to the plain sense and understanding of our ancestors. Let the ancient law be adhered to, and the evil must in a great degree cease. Nor is the Plaintiff without remedy; for he may sue the drawer, and probably by another, differently framed from any of the present counts, or by an action differently conceived, he may recover against the acceptors; but on that I give no opinion.

After the Judges had thus delivered their opinions, the House adjourned. On Monday February 14, a debate took place, in which Lords Kenyon, Loughborough, and Bathurst spoke in favour of the judgment, and the Lord Chancellor [Thurlow] against it. The several grounds of argument taken by their Lordships respectively, were nearly the same as those above stated in the opinions of the Judges.

The debate being concluded, the Lord Chancellor put the question whether the judgment of the Court of King's Bench should be reversed, which passed in the negative without a division.

Judgment affirmed.

End of Hilary Term.

[627] CASES ARGUED AND DETERMINED IN THE COURT OF COMMON PLEAS, IN EASTER TERM, IN THE THIRTY-FIRST YEAR OF THE REIGN OF GEORGE III.

BARWICK *against* READE. Monday, May 16th, 1791.

The full pay of a military officer cannot be assigned.

The Defendant, who was a lieutenant of marines, assigned his full pay to the Plaintiff, in trust, first of all to pay and satisfy himself (the Plaintiff) an annuity of 20l. per annum, and then to pay over the surplus to the Defendant, and also gave a bond and warrant of attorney as a further security. In the last term a rule was granted to shew cause why the deed of assignment, bond, and warrant should not be given up to be cancelled on several grounds (*a*), the most material of which, was, that the full pay of a military officer could not be legally assigned. When the motion was made, the Court intimated a very clear opinion that such an assignment was illegal, it being contrary to the policy of the law that a stipend given to one man for future services, should be transferred to another who could not perform them. However the rule was enlarged till this term, when on the motion of Kerby, Serjt., it was made absolute, no cause being shewn, but the Court seeming to retain their former opinion (*b*).

(*a*) The other grounds were, that the assignee was a trustee for one Kendrick, which was not stated in the memorial, and that the names of the witnesses to the deed were not mentioned according to the directions of the stat. 17 Geo. 3, c. 26.

(*b*) When the rule was granted, Lord Loughborough said, he recollected a similar decision in the Court of Chancery, in the case of Ross the army agent; and Mr. Justice Gould referred to Dyer, 1 b. as confirming the general principle which the Court [628] laid down. The case in Dyer was "Replevin brought by John Oliver against T. Ensonne, who set forth that a stranger was seized in fee of a manor, of which the locus in quo was part, and by deed granted to him an annual rent of 20s. for the term of his life, pro bono consilio suo impendendo, with a clause of distress within the manor, and avowed the taking for one year's rent in arrears. To which the Plaintiff pleaded in bar, that Ensonne was attainted of treason before certain justices, who committed him to the Tower, by force of which he remained in prison for a year next ensuing, within which time the grantor, pro diversis negotiis suis, consilio ejusdem T. indigebat, et ad eum accedere voluisset pro consilio suo habendo, quorum judicii et imprisonamenti pretextu, idem O. (the grantor) ad eundem T. accedere pro consilio suo in eâ parte habendâ et requirendâ impeditus fuit, et sic consilium præfati T. in causâ prædictâ, in

[628] MORGAN against JOHNSON. Monday, May 16th, 1791.

[Distinguished, *Oulton v. Radcliffe*, 1874, L. R. 9 C. P. 195.]

Service of notice of declaration on a Sunday, is bad, though the defendant accept it, knowing it to be irregular.

In this case notice of declaration was served on the Defendant on Sunday Feb. 6th, which he accepted, knowing at the same time it was irregular, as appeared by the affidavit of the attorney who served him with it. A rule having been granted to shew cause, why the declaration and all subsequent proceedings (a) should not be set aside on account of the irregularity, Cockrell, Serjt., shewed cause, arguing that the stat. 29 Car. 2, c. 7, s. 6, directed, "that no person upon the Lord's Day should serve or execute any writ, process, warrant, order, judgment [629] or decree, &c." but that service of notice was not within the provisions of the act. In *Walgrave v. Taylor*, 1 Ld. Raym. 705, though Holt, Ch. J., was inclined to think that the act intended to restrain all sorts of legal proceedings, yet the other judges held, that the delivery of a declaration was but quasi notice, and not process, and therefore good on a Sunday.

defectu ipsius T. habere non potuit. To which the avowant demurred in law. And by the opinion of the whole Court he had a return, for by the attainder the rent was not forfeited to the king, because it was incident to the cause for which it was given, (namely the trust and confidence which the grantor had in him for his advice) which he could not grant to another person, and which for the same reason he could not forfeit. As if a man be created a duke, and for the maintenance of his dignity the king grants an annuity of 20l. to him, he cannot grant this to another, for it is incident to his dignity. And notwithstanding the attainder and imprisonment, he might have given advice if he (the grantor) had gone to him; and in the plea no default was alleged in him, &c." See also the authorities cited in the margin of Dyer. In *Stuart v. Tucker*, 2 Black. 1137. "A., a lieutenant of marines assigned his half pay to B. in trust for C., and constituted B. his attorney to receive it; and it was holden that A. could not maintain an action for money had and received to his use against C. after his discharge on an insolvent act; because in equity the half pay of an officer might be assigned, and this was an equitable action for money received to the plaintiff's use, but he had already transferred the use of it." A distinction is there taken between whole and half pay, the former being given pro servitio impendendo, the latter pro servitio impenso. But in *Flarty v. Odium*, 3 Term Rep. B. R. 681, the Court held that the half pay of a lieutenant in a reduced regiment was not the subject of a sale, and therefore that his creditors could not compel him to include it in his schedule, under the lord's act. In that case Lord Kenyon was clearly of opinion that the half pay could not legally be assigned; and Mr. J. Buller distinguishes between payments actually due and future accruing payments. And this case of *Flarty v. Odium*, was recognized and confirmed by the Court of B. R. in this present Easter Term. 4 Term Rep. B. R. 248. *Lidderdale v. The Duke of Montrose*. I have also been informed, that a similar decision took place about four years ago, in the Court of Exchequer, in a case of *Prentice v. Mackie*.

[The principle upon which the above case of *Lidderdale v. The Duke of Montrose* was decided at law, has been recognized also in equity, see *Stone v. Lidderdale*, 2 Anstr. 533, in which the Court of Exchequer held that the assignment of the half pay of an officer in the army is bad in equity, as well as at law. Upon the same principle, viz. that a salary paid for the performance of a public duty ought not to be perverted to other uses than those for which it is intended, it was held in *Arbuckle v. Cowtan*, 3 Bos. & Pul. 321, that the profits of an ecclesiastical benefice do not pass to the assignees under the insolvent act of 37 Geo. 3; and this principle prevails in the new insolvent act, 7 Geo. 4, c. 57, s. 28, 29. So in *Palmer v. Bate*, 2 Brod. & Bing. 673, it was decided that an assignment of all the emoluments of clerk of the peace, after deducting the salary or allowance of his deputy for the time being, was invalid. But an assignment of the profits of the office of private secretary to a nobleman is good. *Harrington v. Kloprogge*, 2 Chitty's Rep. 475. 2 Brod. & Bing. 678, S. C.]

(a) Judgment was signed for want of a plea, in the vacation after Hilary term.

And in Comb. 286 & 462, the Court held that the delivery of a declaration in ejectment on a Sunday was good (b). But,

The Court were clearly of opinion that the service of notice being on a Sunday was bad within the statute, and that the Defendant could not by his acceptance waive the irregularity. Therefore the

Rule was made absolute, on payment of half the costs, in pursuance of an agreement entered into by the parties, which was stated by affidavit.

MEEKINS against SMITH. Monday, May 16th, 1791.

A sheriff who is ruled, on the last day of a term, to bring in the body, but goes out of office before the next term, is liable to an attachment for not bringing in the body.

In Hilary Term last, the then Sheriff of Surrey made a return of *cepi corpus*, and was ruled the last day of the term peremptorily to bring in the body. In the following vacation he went out of office, and a new sheriff was appointed. In this term, bail being put in, but not justified, Clayton, Serjt., moved for an attachment against the late sheriff for not bringing in the body. The Court doubted whether the late sheriff was liable to an attachment, as it was not in his power to bring in the body, he having, as usual, made over all the prisoners to the succeeding sheriff. To this Clayton answered, that a special return ought to have been made, if that were a sufficient excuse: and a rule to shew cause was granted, which was afterwards made absolute, no cause being shewn (a)¹.

[630] SUMNER against BRADY AND OTHERS. Saturday, May 21st, 1791.

Notice subscribed to process, to appear on the 4to die post, is good (a)².

The Defendant was served with a *clausum fregit* returnable in fifteen days of Easter (i.e. the eighth of May); but the notice to appear was "at the return thereof being the eleventh day of May 1701" (i.e. the 4to die post). A rule was granted on the motion of Bond, Serjt., to shew cause, why the proceedings should not be set aside on the ground that the notice to appear ought to have been on the return day of the writ, viz. May 8th, which, he urged, was the constant and undoubted practice, Barnes, 293 (last 8vo edition) *Alsop v. Nicholls*; and to shew that the notice ought to be to appear on the real return day, even though that day should be a Sunday, he mentioned Barnes, 294. *Green v. Watkins*, Cooke's Cas. Pract. 97. *Jenner v. Williamson*, id. 98. *Green v. Watkins*, and Rules and Orders C. B. Hil. 7 Geo. 2. There was also another ground he said, for setting aside the proceedings, which was, that it appeared by affidavit that the action was brought on a bond payable by instalments, but that the only instalment which had become due was paid into court.

Marshall, Serjt., shewed cause, arguing that the notice was good, it being to appear "at the return of the writ," the words therefore, "being the 11th day of May," might be rejected as surplusage. But supposing those words not to be surplusage, still

(b) But see *Walker v. Towne and Lee*, Barnes, 309, and the authorities cited in the margin of 1 Ld. Raym. 705, last edit. 8vo, which shew clearly that the Court, in the present instance decided according to the known practice.

(a)¹ The date of the rule to bring in the body was Saturday, Feb. 12th, previous to the then sheriff's going out of office; it could not therefore be directed to the late sheriff, as such rules usually are. But it was served on the under-sheriff, as was also the rule to shew cause. Indeed in these cases care should always be taken to serve the rule on the under-sheriff. That the late sheriff is liable to the attachment, seems clear from 3 Co. 72 a. *Westby's case*, Cro. Eliz. 365. S. C. 1 Bulst. 70. *Egerton v. Morton*, Barnes, 102. *Price and Another v. Street*, and *Leigh v. Turner*, Mich. 24 Geo. 3, cited *Impey's Pract.* C. B. 185, 3d edit. See also stat. 20 Geo. 2, c. 37, s. 2, & Dougl. 462, *Rex v. Adderley*. [See R. T. 31 G. 3, 4 T. R. 379. *R. v. Sheriff of Middlesex*, 4 East, 604. *Fonseca v. Magnay*, 6 Taunt. 231.]

(a)² [But in *Rushton v. Chapman*, 2 Bos. & Pul. 340, the Court, notwithstanding the above case, ordered that in future the return day should be inserted in the notice. Tidd's Pr. 166, 8th edit.]

the notice was good, as it was to appear at the true time when the Defendant ought to appear, namely the 4^{to} die post, the essoign day not being in reality the time of appearing. If it should be objected, that by allowing the 4^{to} die post to be the day of appearance, the Defendant would have twelve instead of eight days to appear in (a)¹; the answer is, that it does not lie in the Defendant's mouth to make this objection, to whom it would be a benefit. But in truth the notice is good either way, whether on the essoign day or the quarto die post.

The Court said, they were clearly of opinion that the notice to appear on the quarto die post was good, that being the day when in point of fact the Defendant was to appear. They also directed a search to be made in the treasury, to see if there were any such rule as that above cited from the "Rules and Orders of C. B. Hil. 7 Geo. 2^d" when the prothonotary reported that [631] there was no such rule to be found. The rule to shew cause was therefore discharged.

N.B. The old practice of giving notice to appear on the essoign day the return of the process, is not done away by this determination.

NEWMAN AND BAKER, late Sheriff of Middlesex, *against* FAUCITT, one &c.
Tuesday, May 24th, 1791.

The sheriff may sue on a bail bond, in a different court from that in which the original action was (a)².

The Defendant, who was an attorney of this court, gave bail to the Sheriff of Middlesex for the appearance of one Wellington who was sued in the King's Bench by bill of Middlesex. Wellington made default, and now, the bail-bond not having been assigned, the sheriff brought an action upon it in this court.

A rule was obtained to shew cause, why all the proceedings on the bond should not be set aside on the ground that this action ought to have been brought in the same court in which the original action was. Le Blanc, Serjt., shewed cause, arguing that though the assignee of the sheriff must sue upon the bail-bond in the court where the original action was brought, according to stat. 4 Anne, c. 16, s. 20, which gives him the right of action, yet no such restriction was imposed on the sheriff himself, who did not sue by virtue of that statute, but by the common law. The Court admitted this distinction without hesitation, and the

Rule was discharged.

WITTERSHEIM *against* THE COUNTESS DOWAGER OF CARLISLE.
Saturday, May 28th, 1791.

Where a bill of exchange is drawn payable at a certain future period, for the amount of a sum of money lent by the payee to the drawer at the time of drawing the bill, the payee may recover the money in an action for money lent although six years have elapsed since the time when the loan was advanced; the statute of limitations beginning to operate only from the time when the money was to be repaid, i.e. when the bill became due (a)³.

This was an action of assumpsit brought against the Defendant as the drawer of several bills of exchange, by the Plaintiff as payee. The declaration contained seven counts. The first stated that the Plaintiff, Defendant, and certain persons using

(a)¹ This objection was made and holden on consideration to be a good one, in *Alsop v. Bagot*, Prac. Reg. C. P. 346.

(a)² [But the Court of King's Bench has held that the action on the bail-bond, whether by the sheriff or his assignee, must be brought in the court in which the original action was. *Donatty v. Barclay*, 8 T. R. 152. But the objection cannot be taken upon the plea of non est factum. *Wright v. Walmsley*, 2 Campb. N. P. C. 396. See 2 Saund. 61 (n), 5th edit.]

(a)³ [That the statute begins to operate from the time the breach took place, see *Short v. McCarthy*, 3 B. & A. 631. 2 Saund. 63 b. (n), 5th edit. See also *Savage v. Aldren* 2 Stark. N. P. C. 232.]

commerce under the style and firm of Eschenaver, Hay and Co. were persons respectively trading and using commerce, and residing at Strasburg; that on the 5th of March 1783, at [632] Strasburg, the Defendant drew a bill of exchange on Eschenaver, Hay and Co. for 360 livres, payable to the order of the Plaintiff on the 10th of the then next month; that the bill was presented for acceptance, that acceptance was refused, and that it was protested for non-acceptance, &c. The second count stated, that on the 31st of July, 1783, at Strasburg, the Defendant drew another bill of exchange on one Abel Jenkins, who was resident in this kingdom, for 12,000 livres of France, payable to the order of the Plaintiff at the end of the month of September then next; that it was presented for acceptance, which was refused, and that it was protested for non-acceptance, &c. The third count stated, that on the 4th of January 1785, at Orleans, the Defendant drew another bill of exchange on one Mr. Gregg, who was resident in this kingdom, for 2040 livres of France, payable to the order of the Plaintiff on the 13th of January 1786, that this bill was also presented for acceptance, and acceptance being refused, protested for non-acceptance. The fourth count was for money lent and advanced; the fifth, for money paid, laid out and expended; the sixth, for money had and received; and the seventh, on an account stated.

The Defendant pleaded the general issue, and the statute of limitations, viz. that the said several causes of action did not, nor did any or either of them first accrue at any time within six years before the suing out of the original writ, &c. On which issue was joined. At the trial, which came on before Lord Loughborough, at the sittings in last Hilary Term, at Guildhall, the jury found a special verdict as to the second, third and fourth counts (a), as follows, viz. that the Defendant on the 31st of July 1783, at Strasburg, for and in consideration of the sum of 12,000 livres of France, then and there lent to her by the Plaintiff, drew the bill stated in the second count for 12,000 livres, and farther, that the Defendant on the 4th of January 1785, at Orleans, for and in consideration of 2040 livres of France, drew the bill stated in the third count; that the said bill of exchange bearing date the 31st day of July 1783, was, on the 4th day of March in the year 1784, presented to Abel Jenkins on whom it was drawn, for payment; that the said Abel Jenkins was then and there requested to pay the said sum of money therein mentioned, which he refused to do; and the same was not, nor was any part thereof, then and there, or at any time, paid; and the Plaintiff thereupon caused the said bill of exchange to be protested for non-payment thereof: and [633] farther, that the said bill of exchange bearing date on the 4th of January 1785, was, on the 6th of February 1786, presented to Francis Gregg, on whom it was drawn, for payment; and the said Francis Gregg was then and there requested by the Plaintiff to pay the said sum of money therein mentioned, which he then and there refused to do; and the same was not, nor was any part thereof then and there, or at any time, paid; and thereupon the Plaintiff caused the said bill of exchange to be protested for non-payment thereof. And further that the said Isabella the Defendant, at the several times of the making of the said bills of exchange respectively, and of the lending the several sums of money therein respectively mentioned, was, and long before had been, and still is married to, and under coverture of one Sir William Musgrave, Bart. her present husband; and that the said Isabella at those several and respective times, and long before, and from thence hitherto lived, and does now live separate and apart from her said husband; and that during all the time she has so lived separate and apart from her said husband, the said Isabella has always had, and been allowed, and paid from her said husband a sufficient separate maintenance to herself; and that at the respective times when the said bills of exchange were made by the said Isabella, the persons upon whom the same were respectively drawn, had not, nor had they at any time afterwards, until, or at the times when the said bills of exchange respectively became due and payable, and were presented as aforesaid, any effects of the said Isabella in their hands, wherewith to answer and pay the said bills of exchange, or either of them; and that the said Seligman (the Plaintiff) sued out his original writ in this suit against the said Isabella, on the 26th day of September, in the year of our Lord 1789; but whether upon the whole matter in form aforesaid found, the said Isabella undertook and promised in manner and form as in the 2d, 3d and 4th counts of the said declaration is mentioned, or any of them; and whether, at any time within six years next before the suing out

(a) And a verdict for the Defendant on the other counts.

the original writ of the said Seligman, the cause of action in the said 2d, 3d and 4th counts mentioned, or any of them, first accrued or not to the said Seligman, the jurors aforesaid are wholly ignorant, &c. This was argued by Bond, Serjt., for the Plaintiff, and Le Blanc, Serjt., for the Defendant. On the part of the Plaintiff, Bond said, he presumed, the first point of the argument would be admitted, viz. that the Defendant living apart from her husband, and having a *sepa*[634]-rate maintenance, was liable to be sued as a feme sole; to which Le Blanc assented; saying, that as that point had been fully considered by the Court in the late case of *Compton v. Collinson* (a), he should not now dispute it. Bond then observed, that as there was a variance between the special verdict and the declaration, with respect to the 2d and 3d counts (the declaration stating that the bills were presented for acceptance, and protested for non-acceptance, but the jury finding that they were only presented for payment, and protested for non-payment), the Plaintiff certainly could not recover on either of these counts, but must resort to the count for money lent. The question therefore was, whether the statute of limitations would prevent him from recovering on that count, or in other words, whether the cause of action accrued on the 31st of July 1783, when the bill for 12,000 livres was drawn, and the money lent; or, on the 30th of September, when the bill was payable? Now the money being actually lent to the Defendant as the consideration of the bill, on payment being refused by the drawee, the Plaintiff had his choice of three remedies: he might either have brought an action of debt, an action on the case for money lent, or an action on the bill itself, which he has in fact chosen. But if he had relied on the bill itself, the statute of limitations would not have operated till after it became payable, for, according to Lord Holt, a bill of exchange "must be sued for within six years after it becomes payable," 3 Bac. Abr. 602. Neither then did the statute operate on the count for money lent, which it was agreed should be paid at the end of September, before that time; the prohibitions of it being equal, and not affecting one sort of action on the case more than another. As therefore an action on the bill itself would be within the time limited, the writ being sued out on the 29th of September 1789, an action for money lent is also within the time: the right of action was suspended till the bill became payable. In *Dagglish v. Weatherby*, 2 Black. 747, it is holden, that no action will lie against the drawer of a bill of exchange, till some default has been made by the drawee. And, though in *Bright v. Purrier*, 3 Burr. 1687, B. N. P. 269, where a bill drawn payable 120 days after sight was refused acceptance, an action lay against the drawer before the time was expired, yet there acceptance was refused, and the party [635] was conscious that he had a right of action before the expiration of the 120 days. But here the Plaintiff could not be conscious of any right to sue before the time when the bill was payable: he lent his money with a stipulation to be repaid at the end of September by means of the bill: and he thought he had a valid pledge in his hands. In 3 Burr. 1281, Lord Mansfield says, speaking of the statute of limitations, "no one can doubt but that the bar only takes place from the time when the right accrued, and not from the time of making the promise." In like manner a fine and five years' non-claim will not bar an annuity granted to a third person. *Goodright on dem. Hare v. Board*, Cruise on Fines, 249, nor the interests of mortgagor and mortgagee, *ibid.* 310. Wherever also there is a fraud, the statute of limitations is no plea, unless the fraud be discovered within the time, 3 P. Wms. 143, nor even if the fraud be discovered within six years, unless the Defendant were conscious of it. Dougl. 655, *Bree v. Holbech* (8vo Edit.). But there was a fraud in the present case in the Defendant drawing bills without having effects in the hands of the drawee.

Le Blanc, Serjt. *contra*. The question is, whether the right of action accrued to the Plaintiff within six years, since the statute of limitations begins to operate from the time that such right accrues. But it is clear that the Plaintiff had a right of action as soon as the bill was refused acceptance, without waiting for the time of payment, *Milford v. Major*, Dougl. 55, Bull. N. P. 269. The Defendant is not to be deprived of his plea because the Plaintiff chose to defer bringing his action till September 1789. It might with equal justice be said, that the statute should be no

(a) Ante, 334. But there the Court gave no positive opinion on that point. [Vide ante, 350, n. (a).]

bar at any indefinite distance of time. The Plaintiff might also have brought an action on the implied assumpsit, at any time after the money was lent. But

The Court held, that though on a mere loan of money the time of limitation might commence from the date of the loan, yet where the money was lent on a special contract for repayment, it was the time of the repayment that ought to fix the period of the limitation. Here a sum of 12,000 livres was advanced on the 31st of July, to be repaid in England on the last day of September; and the contract was, not to repay the identical sum, but the value of it according to the course of exchange. Now until that contract was broken, there was no cause of action. As the suit therefore was commenced on the 26th of September, it saved the limitation; especially as no [636] laches was to be imputed to the Plaintiff, it not being found that he knew that the drawee of the bill had no effects of the drawer in his hands.

Judgment for the Plaintiff.

MEEKINS *against* SMITH. Tuesday, May 31st, 1791.

All persons who have relation to a cause which calls for their attendance in court, and who attend in the course of that cause, though not compelled by process so to do, (such as bail,) are privileged from arrest, eundo et redeundo, provided their attendance be not for any unfair purpose; such as in the case of bail, for an insolvent person to justify (a).

In this case, one Davis was arrested by an officer of the sheriff of Middlesex as he was returning from Westminster-Hall, where he had been to justify himself as bail for the Defendant, but was rejected. Upon this, a rule was granted to shew cause why he should not be discharged out of custody, on the ground that he was entitled to privilege from arrest, both in going to and returning from the court, his attendance being in the course of the cause, and the administration of justice. Adair and Clayton, Serjts., shewed cause, contending that as bail were not compelled to attend by process, (as witnesses were) but came voluntarily into court, they had no claim to such a privilege. It was holden in the case of *The King v. Fielding*, Comb. 29, that a person coming to court to swear the peace was liable to be arrested, and in an *Anonymous case*, Salk. 544, a person who came to confess an indictment, had no privilege eundo et redeundo, because there was no process against him. Although it was stated in *Impey's Pract. C. B.* 125, that bail are privileged, the case there cited from *Barnes* was this: "The Defendant being arrested in returning from attendance on the Court to justify his bail, was ordered to be discharged." *Johannet v. Lloyd*, *Barnes*, 27. Besides, it was highly improper that any man should become a security for the debts of another, while his own were unpaid.

The Court seemed much inclined to think that not only witnesses, but all persons who were coming to or returning from it, either directly on the business of the Court, or in any manner relative to that business, were entitled to a freedom from arrest, and that to arrest them was a contempt of the Court. Several cases were also mentioned of barristers, who were arrested, on the circuit being discharged by the Judge.

GOULD, J., recollected the instance of a Mr. Hippisley, a barrister, who was discharged from an arrest on the circuit by Mr. Justice Bireb at Salisbury. And

[637] HEATH, J., mentioned a similar thing having been done by the late Mr. Baron Burland.

At length it was agreed that the rule should be enlarged till this day, when Davis was brought up by Habeas Corpus, which issued in the mean time, and offered again to justify as bail, but was again rejected, it appearing that he was an uncertificated Bankrupt, and in desperate circumstances. The Court, therefore, ordered him to be remanded, and at the same time laid down this general rule, viz. that all persons who had relation to a suit which called for their attendance, whether they were compelled to attend by process or not, (in which number bail were included,) were intitled to privilege from arrest eundo et redeundo, provided they came bonâ fide. But here

(a) [Accord. *Walpole v. Alexander*, Tidd's Pr. 199, 8th Edit. *Rimmer v. Green*, 1 M. & S. 638.]

there was a manifest intention on the part of Davis to impose upon the Court, and on that account he was not to be permitted to avail himself of the exemption.

Rule discharged.

GOULD, J., referred to the year book, 11 Ed. 4, 3, where it is said by Choke, that a mainpignor shall have the privilege of the Court.

SULLIVAN *against* MAGILL. Wednesday, June 1st, 1791.

The Court will not receive the affidavit of an attorney's Clerk, to put off a trial, unless it be stated that the clerk was particularly acquainted with the circumstances of the cause, and had the management of it.

Kerby, Serjt., shewed cause against a rule for postponing the trial of this cause on account of the absence of a material witness, by objecting to the affidavit; 1. That it was made by the clerk to the Defendant's attorney, not by the attorney himself or the Defendant; 2. That it did not state that the clerk was acquainted particularly with the nature of the action, and that the business had gone through his hands. He was proceeding to make further observations on the affidavit, when the Court interrupted him, saying the objections were fatal, and that it would be dangerous to permit Attorneys to make their clerks swear in their stead. Clayton, Serjt., in support of the rule insisted, that no one could have made the affidavit with so much propriety as the clerk, because the whole management of the cause was entrusted to him. To this the Court answered, that the clerk might certainly have made the affidavit, if he had stated that he had in fact the management [638] of the cause, and was particularly acquainted with all the circumstances of it; but as it was, the rule must be discharged.

Rule discharged.

LORD LOUGHBOROUGH then directed the secondaries to inform the Court, in future, whenever an affidavit should be made by the clerk of an attorney to ground a motion upon to put off a trial.

HALL *against* WALKER. Thursday, June 3rd, 1791.

Though a rule to bring in the body has been served, bail may render the Defendant without justifying (a).

On the 11th of May notice of bail was given, on the 17th, an exception was entered, and a rule obtained on that day to bring in the body, which was served on the under-sheriff of Middlesex on the same day. On the 19th, notice of justification was given for the 21st; on the 21st the bail were rejected, on which day, the rule to bring in the body (being a four day rule) expired. Before the rising of the Court on the 21st, the Defendant's attorney applied to the Court for leave to put in other bail immediately, for the purpose of rendering the Defendant, who was then in Court. Leave was accordingly given, and in a few minutes other bail were produced, who rendered the Defendant, and he was, at the rising of the Court, committed to the Fleet.

On the 23d an attachment issued against the sheriff for not bringing in the body. To set aside which, a rule having been obtained, Runnington, Serjt., shewed cause, contending that it was the known practice of the court, that where a rule to bring in the body had been served, bail must not only be put in, but justified, in order to render the principal: but where there was an exception only, and no rule to bring in the body served, there the principal might be rendered without justification: 2 Black. 1206, *Postle v. Peate*, Impey, Pract. C. B. 2d Edit. 136. But

The Court said, there was no good reason for the distinction, and that any bail were sufficient for the purpose of rendering the Defendant, without justifying.

The rule therefore was made absolute to set aside the attachment.

(a) [The practice in K. B. is the same, R. T. 33 G. 3. 5 T. R. 368. *Ashton v. King*, Tidd's Pr. 284, 8th Edit. See also *R. v. Sheriff of Middlesex*, 7 T. R. 527. So also the bail may render without justifying, though the bail-bond has been assigned, *Edwin v. Allen*, 5 T. R. 401.]

[639] ROUSE *against* BARDIN, AND OTHERS (ante, 351).
Thursday, June 3rd, 1791.

Where a cause having been once tried, a new trial is granted, but a juror withdrawn, on the party, who gained the verdict at the first trial undertaking generally to pay the other his costs, such an undertaking includes only the costs of the second trial.

At the first trial of this cause the Plaintiff had a verdict. A new trial was granted, but a juror withdrawn, the Plaintiff undertaking "to pay the Defendant his costs" (which were the words of the order of *Nisi Prius*). On the taxation, the prothonotary refused to allow the Defendant the costs of the first trial, though the verdict obtained by the Plaintiff had been set aside. In consequence of this, Runnington, Serjt., moved for a rule to shew cause why the taxation should not be reviewed, and the costs of the first trial allowed to the Defendant. But

The Court held clearly, that the undertaking of the Plaintiff extended only to the costs of the second trial, and on that ground refused the rule (*b*).

[640] BROOKS *against* ROGERS. Monday, June 7th, 1791.

[Over-ruled, *Cowley v. Dunlop*, 1798, 7 T. R. 577.]

A. draws a bill of exchange on B. in favour of C., who indorses it to D., who discounts it. Before the bill is due, A. becomes a bankrupt and obtains his certificate. When the bill is due, payment is refused: upon which C. refunds the money to D. which was advanced in discount, and takes back the bill. To an action brought by B. against A. on the bill, A. cannot plead his bankruptcy (*a*).

Assumpsit by the indorsee of a bill of exchange against the drawer, with the usual money counts. Non assumpsit, and the general plea of bankruptcy. The facts of the case, as stated in the argument, were these. The Defendant on the 7th of May 1788, drew the bill in question for 100l. on one Hughes, payable 45 days after date,

(*b*) This determination was founded solely on the terms of the undertaking of the Plaintiff. But the practice of the Court is, that where the same party who gains the first verdict, has also the second, the prothonotary allows the costs of both trials; but where the first verdict is for one party, and the second for the other, there the costs of the former trial are not allowed. I have been favoured with the following case, which illustrates this rule of practice. *Parker v. Wells*, East, 25 G. 3^{*1}. This action of trespass was tried at Croyden, by a special jury, and a verdict found for the Defendant. In the next term, a motion was made for a new trial, on the ground of the verdict being contrary to evidence, and a new trial granted, the rule being silent as to costs. It was tried a second time in Middlesex, by a special jury, and a verdict again found for the Defendant. An application was again made for a new trial, in order to have a special verdict, to take the opinion of the Court of King's Bench on the point of law which arose. The Court, with the consent of the parties, and to save expence, instead of granting a new trial, made a rule that judgment should be entered for the Plaintiff with 1s. damages, and that a special verdict should be agreed upon. In taxing the costs on the postea, the prothonotary disallowed the costs of the first trial, and of the rule granting a new trial, with which the Plaintiff's attorney being dissatisfied, applied to the Court for a rule to review the taxation. Lord Loughborough at first seemed to think the costs of the first trial ought to have been allowed, but directed the prothonotary to inquire, and report what was the practice in the King's Bench. Upon inquiry it appearing that in the King's Bench, the costs of the first trial were not allowed, even where the second verdict followed the first^{*2}, the Court said the prothonotary had done right, and refused the rule. [See Tidd's Pr. 947, 5th edit. and post, p. 641.]

(*a*) [See the observations of Mr. J. Lawrence on this case, *Cowley v. Dunlop*, 7 T. R. 572, and see also *Buckler v. Buttivant*, 3 East, 82.]

^{*1} 1 Term Rep. B. R. 34. Cooke's Bankrupt Law, 52.

^{*2} See *Mason v. Skurray*, Dougl. 438, and *Hankey v. Smith*, 3 Term Rep. B. R. 507. [Summers v. Formby, 1 B. & C. 100.]

in favour of the Plaintiff, merely for the purpose of raising money. This bill the Plaintiff indorsed in blank, and without tendering it for acceptance, discounted it at the Olney Bank on the credit of his own name, and paid the money over to the Defendant. On the 16th of May, the Defendant committed an act of bankruptcy. On the 23d a commission issued, and on the 18th of June, the certificate was allowed. When the bill became due, Hughes having no effects of the drawer in his hands, refused to pay it, upon which the Olney Bank, in whose possession it remained, called on Brooks for repayment of the money which had been advanced in discounting the bill. Brooks accordingly repaid the money, took back the bill, and now brought this action against the Defendant. At the trial which came on at Westminster, at the sittings after Hilary term 1790, before Lord Loughborough, a verdict was taken, subject to the opinion of the Court, whether the action was barred by the certificate.

In Easter term following, a rule was granted to shew cause why the verdict should not be entered for the Defendant. Against which, Adair and Lawrence, Serjts., shewed cause, arguing, that though the holders of the bill might have proved a debt under the commission, yet the Plaintiff Brooks could not, till he actually paid the money, which was after the allowing of the certificate; that this could not be considered in any other light than as a contract of indemnity, it not being certain when Brooks indorsed the bill to the Olney Bank, that the drawee would refuse payment. In support of these positions, were cited the following authorities; 3 Wils. 13, (*Chilton v. Whiffin*, id. 262. *Goldard v. Fanderheyden*, id. 346. *Young v. Hockley*, Cowp. 525. *Taylor v. Mills and Magnall*, and *Johnson v. Spiller*, Dougl. 167, last edit.

In support of the rule, Le Blanc, Serjt., contended, that the drawer of a bill of exchange immediately contracted a debt [641] upon drawing the bill, it was debitum in presenti, solvendum in futuro. If it were a debt owing by the bankrupt to any one at that time, who might have proved it, it is barred. The bankrupt ought not to be injured by the bill being indorsed over to another. The cases cited on the other side were upon promises to indemnify.

The cause having stood over to this term, The Court were unanimously of opinion, that the Plaintiff was intitled to recover, notwithstanding the certificate. The cases cited were not confined to an express indemnity, but were decided on the ground that the Plaintiff could prove no debt till he had actually paid the money, and the payment was after the bankruptcy (a)¹.

Rule discharged.

TRELAWNEY against THOMAS (a)². Monday, June 7th, 1791.

Where a cause is twice tried, and the verdict is found on each trial for the same party, he is intitled to the costs of both; but where the verdicts are found for different parties, the costs of the first trial are not allowed (c).

In this cause there were two trials; in both a verdict was found for the Plaintiff, and the costs of both were allowed him by the prothonotary, the rule for the second trial being entirely silent as to costs. But now Watson, Serjt., moved for a rule to shew cause why the taxation should not be reviewed, on the ground that Mr. Justice Wilson (b), before whom the first trial was had, when the second trial was moved for, stated his opinion that he ought to have nonsuited the Plaintiff, and that the second trial was granted under that impression on all parties. But,

The Court held that ground to be insufficient, and refused the rule; at the same time confirming the practice above mentioned in *Parker v. Wells* (ante, 639, n.), that where there are two trials, and the verdicts are the same way in each, the party in whose favour they are found, is intitled to the costs of both trials; but where the verdicts are different ways, there the costs of the former trial are not allowed.

Rule refused.

End of Easter Term.

(a)¹ See *Hancock v. Entwistle*, 3 Term Rep. B. R. 437.

(a)² Ante, 303.

(c) [Accord. *Bird v. Appleton*, 1 East, 112. *Worcester Canal Company v. Trent Navigation Company*, 2 Marsh. 475, and see *Payne v. Bailey*, 3 Brod. & Bing. 304.]

(b) Who sat for Lord Loughborough at Guildhall.

[643] CASES ARGUED AND DETERMINED IN THE COURT OF COMMON PLEAS IN TRINITY TERM, IN THE THIRTY-FIRST YEAR OF THE REIGN OF GEORGE III.

PICKWOOD *against* WRIGHT. Monday, July 4th, 1791.

Where a verdict is given for a greater sum than the amount of the damages laid in the declaration, and for that cause a writ of error is brought, the Court will permit the plaintiff to enter a remittitur of the excess above the sum laid in the declaration, on payment of the costs of the writ of error (a)¹.

In this action of assumpsit the Plaintiff took a verdict for 611l. which was really the sum due to him, and entered up judgment for that sum beside costs, but the damages laid in the declaration were but 600l. A writ of error was brought on this judgment, and Kerby, Serjt., obtained a rule to shew cause why a remittitur of the 11l. should not be entered. Adair and Le Blanc, Serjts, argued against the rule, saying, that after judgment signed and error brought, it was too late to enter a remittitur for the sum which caused the error; and they cited the case of *Sandiford v. Bean*, B. R. Hil. 13 Geo. 3 (b), as an authority in point. Kerby, on the other side, insisted, that as long as the record remained in Court, it might be amended.

The Court thought it was reasonable to allow the amendment, and therefore made the rule absolute, upon payment of the costs of the writ of error (a)².

[644] SMITH, ON THE DEMISE OF LORD STOURTON AND OTHERS, *against* HURST. Friday, July 8th, 1791.

Service of a declaration in ejectment, before the essoign day of the term, on the daughter of the tenant in possession, in the absence of the tenant and his wife, is good, provided it appears that the daughter delivered it to the wife, though it should not appear that such delivery was before the essoign day (a)³.

Adair, Serjt., moved for judgment against the casual ejector, on the following circumstances. On the 18th of June last, the attorney went with the declaration in ejectment to the house of the tenant in possession, but not finding either him or his wife at home, left it with his daughter, and at the same time acquainted her with the contents and meaning of it. On a subsequent day, the attorney called again at the house, when he saw the tenant's wife, (the tenant himself being then also from home) and inquired of her whether she had received the declaration which was left with her daughter: she answered she had received it, and shewed it to the attorney, who read it over to her, and explained it. She then said, that her husband had not been at

(a)¹ [The amendment may be made after the term of the judgment, and after joinder in error, *Usher v. Dansey*, 4 M. & S. 94. Indeed in the principal case the application to amend was made in the term subsequent to that in which the judgment was entered, *ibid.* 98, 100. The record in a penal action, in which the jury have given damages by mistake, may be amended after error brought in K. B. by entering a remittitur, and the transcript may be made conformable thereto. *Hardy q. t. v. Cathcart*, 1 Marsh. 180.]

(b) Cited in 2 Bac. Abr. 5, last Edit. and is as follows. "If the jury give more, the Plaintiff must relinquish the extra damages, for if he enters up the judgment for the whole which the jury give, it is error, and cannot be amended or helped in any manner. So determined in B. R. H. 1773, *Sandiford and Bean, Esq.*"

(a)² The Defendant pleaded the statute of limitations, and the time was so far elapsed, that a fresh action could not have been brought, if the judgment had been reversed on the writ of error.]

(a)³ [But in *Goodtitle, d. Read, v. Baultile*, 1 Bos. & Pul. 384, it was held that an acknowledgment by the wife that she had received a copy of the declaration which had been served upon her niece was not sufficient; and see *Anon.* 2 Chitty's Rep. 182. That there must be an admission of the receipt of the declaration before the essoign day, see *Roe, d. Hambrook, v. Doe*, 14 East, 441. *Doe, d. Tivdale, v. Roe*, 2 Chitty's Rep. 180. *Doe, d. Macdougall, v. Roe*, 4 B. Moore, 20.]

home since the paper was delivered to her daughter; but that she would send it to him.

The Court were at first much inclined to refuse the rule, because it did not clearly appear from the affidavit, that the declaration came to the hands of the wife before the essoign day of the term; but the case of *Goodtitle v. Thurstout*, Barnes, 183 (last Edit.), being cited, on the authority of that case they made the

Rule absolute.

HARVEY against RICHARDS. Monday, July 11th, 1791.

[Referred to, *Beresford v. Geddes*, 1867, L. R. 2 C. P. 289.]

Where in an action of assumpsit on a bill of exchange with the usual money counts, the Defendant pleads nil debit to the count on the bill, but does not plead at all to the other counts, after a verdict for the Plaintiff, the Defendant shall not take advantage of his own mispleading in arrest of judgment.

Assumpsit by the indorsee against the acceptor of a bill of exchange for 49l. 16s. 9d.: the second count was for money lent and advanced; the third for money paid, laid out and expended; the fourth for money had and received; and the fifth, on an account stated. Plea, that the Defendant "does not owe to the said John (the Plaintiff) the said sum of 49l. 16s. 9d. above demanded, by virtue of the said bill of exchange or any part thereof, in manner and form as the said John hath above thereof complained against him, and of this he puts himself upon the country, &c." but no notice was taken of the other counts. On this plea, the Plaintiff joined [645] issue and gained a verdict. And now, Marshall, Serjt., obtained a rule to shew cause why the judgment should not be arrested, on the ground that the plea of nil debet to the first count was bad, and that as there was no plea to the other counts, there was a discontinuance.

Adair, Serjt., shewed cause, arguing, that supposing these objections were well founded in themselves, they were cured by the verdict, for which purpose he cited the following authorities, viz. Aleyu, 76. 1 Brownl. 8. *Glover v. Taylor*. Cro. Eliz. 470, *Corbyn v. Brown*. Stat. 32 Hen. 8, c. 30. Cro. Eliz. 455, *Chamberlayn v. Nichols*. Cro. Car. 25, *Knight v. Harvey*. 1 Lev. 142, *Elrington v. Doshant*. 3 Lev. 374, *Sedgwick v. Richardson*. Salk. 218, *Carter v. Davies*. 2 Stra. 1022, *Marshall v. Gibbs*.

Marshall, Serjt., in support of the rule, contended, 1. That this was a discontinuance of the whole action, by which the Plaintiff was out of court.

2. That it was not cured by the verdict.

1. It is a settled rule of law, that every suit, whether civil or criminal, ought to be continued from its commencement to its conclusion without any gap or chasm, 2 Hawk. P. C. 298. If the Defendant plead to part, he must traverse the other part, because the other matter remains still a fact to be tried by a jury, there being no question of law moved concerning it. But if the Plaintiff do not pray judgment for the part unanswered, it is a discontinuance by him, because he does not insist on the judgment of the court for want of an answer, nor has he put the matter unanswered into any proper way of examination. The matter then not being put in a way of examination by the Defendant, nor prayed by the Plaintiff to be adjudged as admitted by the Defendant, it is a question out of court, since the Plaintiff by not following it to a proper determination has discontinued it. Gilb. Hist. C. P. 61, 134, 158. If the plea begins with an answer to the whole, but the matter pleaded is in truth only an answer to part, the whole plea is nought, and the Plaintiff may demur: but if the plea begin only as an answer to part, and is in truth only an answer but to part, the Plaintiff must not demur, but take judgment by nil dicit for the part unanswered, for if he demur or plead over, the whole action is discontinued. 1 Salk. 179, 180, *Weeks v. Peach*, and *Market v. Johnson*. But if the Plaintiff take judgment by nil dicit, it must be in the same term. Stra. 302, *Woodward v. Robinson*. If one penny be left unanswered, it is a discontinuance; Ibid. 303, *Nichols v. Backhouse*. If a trespass in one of three closes be left unanswered, it is a discontinuance, and not cured by any of the statutes of jeofail, Carter, 51, *Ayre v. Glossam*. The venire was returnable the 23d of October, and the distringas tested the 24th, by which there

was a chasm of one day in the process: On motion in arrest of judgment, it was holden to be a discontinuance and not amendable. 1 Salk. 51, *The Queen v. Tutchin*.

2. This being then a clear discontinuance, the next question is, whether it is cured by the verdict? By stat. 32 Hen. 8, c. 30, after verdict judgment shall proceed notwithstanding any discontinuance, &c. But the verdict which will cure a discontinuance, must be a perfect one, such as the Court may give judgment upon between the parties. Gilb. Hist. C. P. 155, 156. For if the verdict itself make a discontinuance by finding only part of the declaration and nothing to the other part, this is a discontinuance not cured by the statute: because the intent of the issue is, that the whole event of the matter in issue shall be determined, and the answering to part does not answer the precept of the Court nor to the design of the issue, which is to determine the whole cause, that so it may be a bar to any other action. Gilb. Hist. C. P. 156. It would therefore be absurd to suppose that a verdict as to part of the declaration, on which the Court can give no judgment even for that part which does not go to the whole merits of the case contained in the declaration, should cure a discontinuance. The verdict here is, that the Defendant does owe to the Plaintiff 49l. 16s. 9d. above demanded by virtue of the said bill of exchange. But it is not alleged in the first count that the Defendant was indebted. This being an action at the suit of an indorsee, debt would not lie; there is therefore no colour for the plea of nil debet, or to say that it is an answer to the count. The verdict in assumpsit is, that the Defendant "did undertake and promise in manner and form as the Plaintiff hath declared," and the damages are assessed by occasion of the "not performing the within promises and undertakings," &c. The judgment there is that the Plaintiff do recover his damages by the jury assessed: But how can judgment be given that the Plaintiff recover his damages by the jury assessed, when the jury have assessed no damages? If the jury on this issue find any damages, those damages must be for the detention of the debt due on the bill, and not for the sum itself, as is the course on the plea on non assumpsit. Upon [647] the whole then, as there is no verdict on which the Court can give judgment for the Plaintiff, the discontinuance is not cured, and the cause is out of court, the judgment therefore must be arrested; for if one of the parties is out of court, there cannot be a replader. 2 Ld. Raym. 923.

The Court held that the defect was cured by the verdict; for the Defendant should not take advantage of his own mis-pleading to defeat the Plaintiff's suit, when the jury had found that he owed the debt due on the bill of exchange.

Rule discharged.

SUMNER *against* BRADY, CARTWRIGHT, AND FENTON. Monday, July 9th, 1791.

A bond given to a creditor of a bankrupt, in order to induce him to withdraw a petition which he had preferred to the Chancellor against the allowance of the certificate, is void by stat. 5 Geo. 2, c. 30, s. 11 (a).

Debt on bond for 400l. Plea of the Defendant Brady, non est factum, on which issue was joined. 2. That he ought not to be charged with the said debt by virtue of the said writing obligatory, because he says, that he before the suing out of the commission hereafter mentioned, to wit, on the 1st of December, 1789, at Westminster aforesaid, being a dealer and chapman, and seeking his trade of living by buying and selling, and being also indebted to one Edward Francis Burke in the sum of 100l. and upwards, became and was then and there a bankrupt within the intent and meaning of the several statutes concerning bankrupts; and that thereupon a certain commission under the Great Seal of Great Britain, bearing date at Westminster aforesaid, the 21st of December in the same year, grounded upon the said several statutes or some or one of them, was then and there duly awarded and issued upon the petition of the said Edward Francis Burke against him, directed to certain commissioners therein named, thereby giving full power and authority to the said commissioners, four or three of them, to execute the same as in and by the said commission (relation being thereunto had) will more fully appear. By virtue of which said commission and by force of the statutes aforesaid the Defendant was afterwards, to wit, on the 26th December in the year aforesaid, at Westminster aforesaid, duly adjudged and declared to be a bankrupt;

(a) [Similar provision, 6 Geo. 4, c. 16, s. 125.]

that afterwards, to wit, on the day and year last aforesaid, at Westminster aforesaid, due notice was given and published in the *London Gazette*, that such commis-[648]-sion had been awarded and issued against him, and that he had been declared bankrupt, and certain times were duly appointed by such notice for admitting the proof of any of his creditors' debts at the Guildhall, in the city of London. That afterwards, to wit, on the 1st October, 1790, at Westminster aforesaid, three of the commissioners named in the said commission certified in writing under their hands and seals to the Lord High Chancellor of Great Britain, that the Defendant had made a full discovery of his estate and effects, and in all things conformed himself to the several statutes made and then in force concerning bankrupts; and particularly to the directions of the statute in that behalf made in the 5th year of his late majesty's reign, and that there did not appear to them any reason to doubt of the truth of such discovery, or that the same was not a full discovery of all the estate and effects of the Defendant. That before the making of the said certificate by the said commissioners, four parts in five both in number and value of the creditors of the Defendant who were creditors for not less than 20l. respectively, and had proved their debts under the said commission, had duly signed the said certificate and testified their consent thereto and to the discharge of the Defendant, in pursuance of the said last mentioned act of parliament; which was also in due manner certified by the said commissioners, to wit, at Westminster aforesaid. And the Defendant having afterwards, to wit, on day and year last aforesaid, at Westminster aforesaid, made oath that such certificate and consent of the said creditors thereunto had been obtained fairly and without fraud, the said certificate was then and there laid before the Lord Chancellor for allowance and confirmation. That the Plaintiff being a creditor of the Defendant, afterwards, to wit, on day and year last aforesaid, at Westminster aforesaid, preferred a petition (a) to the said Lord Chancellor against the allowance and confirmation of the said certificate of the Defendant, who before and at the time of preferring the said petition was detained in prison, and in execution there by and at the suit of the Plaintiff: and thereupon, afterwards and whilst the Defendant was so detained in prison as aforesaid, and before the allowance and confirmation of the said certificate, to wit, on the day and year in the said declaration mentioned, at Westminster aforesaid, it was unlawfully consented [649] to and agreed by and between the Defendant and the Plaintiff that such writing obligatory as is mentioned in the said declaration should be sealed and executed, and together with certain other securities should be delivered to the Plaintiff, and that the Plaintiff in consideration thereof should thereupon discharge the Defendant from his said imprisonment, and also withdraw the petition so preferred by him against the certificate as aforesaid, to the intent that the allowance and confirmation thereof by the Lord Chancellor might be obtained: that the said writing obligatory was afterwards, to wit, on the day and year last aforesaid, at Westminster aforesaid, sealed, executed, and delivered to the Plaintiff, and by him accepted, taken, and received in pursuance of the said agreement and for the considerations aforesaid before the allowance of the said certificate of the Defendant, (which has since been obtained accordingly) whereby the said writing obligatory in the said declaration mentioned is wholly void and of no effect, and this the said Defendant is ready to verify, &c. &c. 3. That the said writing obligatory was executed and delivered to the Plaintiff for securing the payment of a certain debt or sum of money due to him from the Defendant at the time of his so becoming a bankrupt, with intent to persuade the Plaintiff to consent to the allowance and confirmation by the Lord High Chancellor of a certificate from the major part of the commissioners, that the Defendant had conformed himself in all things to the said statutes, and to withdraw a certain petition preferred by the Plaintiff to the said Lord Chancellor, against the allowance and confirmation of such certificate, to wit, at Westminster aforesaid, and that the said writing obligatory was accordingly there taken and accepted by the Plaintiff upon the occasion and for the considerations aforesaid, and for no other consideration whatever, &c. &c.

Plea of the Defendants Cartwright and Fenton. That the Defendant Brady, before the making of the said writing obligatory had become and was a bankrupt

(a) It was stated in the petition, that many of the persons who signed it were not creditors of the bankrupt, but had made false affidavits of debts in order to make up the number of four fifths, and had received money for so doing.

within the several statutes concerning bankrupts, to wit, at Westminster aforesaid, and that at the time of the making thereof no certificate from the commissioners named in the commission against the Defendant Brady, or from the major part of them, of his conformity to the said statutes had been allowed and confirmed according to the provisions therein contained in that behalf; and further, that the said writing obligatory was executed and delivered to the Plaintiff for securing the payment of a certain debt or sum of money due to him from the Defendant Brady [650] at the time of his so becoming bankrupt, with intent to persuade the Plaintiff to consent to the allowance and confirmation by the Lord High Chancellor of a certificate from the major part of the said commissioners, that the Defendant Brady had conformed himself in all things to the said statutes, to wit, at Westminster aforesaid, and that the said writing obligatory was accordingly there taken and accepted by the Plaintiff upon the occasion, and for the considerations aforesaid, &c. &c.

Replications to the Defendant Brady's pleas. To the second, that the said writing obligatory was sealed and delivered by the Defendant Brady, upon and for a certain good and valuable consideration, to wit, at Westminster aforesaid, in the county of Middlesex, without this, that it was unlawfully consented to and agreed by and between Defendant Brady and Plaintiff, in manner and form as in said second plea is above in that behalf alleged, to the intent in said second plea in that behalf also alleged, and this the said Plaintiff is ready to verify, wherefore, &c. &c. To the third, that the said writing obligatory in the said declaration mentioned, was executed and delivered to the Plaintiff upon and for a certain good and valuable consideration moving from him the said Plaintiff to the Defendant Brady, and not for securing the payment of a certain debt or sum of money due to the said Plaintiff from the Defendant Brady at the time of his becoming bankrupt, with the intent in the said last plea in that behalf above mentioned, in manner and form as the Defendant Brady hath above in his said last plea in that behalf alleged; and concluded to the country, whereupon issue was joined.

Replication to the Defendants Cartwright and Fenton's plea, that the said writing obligatory was executed and delivered to the Plaintiff upon and for a good and lawful consideration, and not for securing the payment of a certain debt or sum of money due to the Plaintiff from the Defendant Brady at the time of his becoming bankrupt, with the intent in the plea of the Defendants Cartwright and Fenton in that behalf above alleged, in manner and form as they have above in their said plea in that behalf alleged, and concluded to the country, whereupon issue was joined.

Rejoinder by Brady to the replication to his second plea, that it was unlawfully consented and agreed by and between the Defendant Brady and the Plaintiff in manner and form as in the said second plea is above in that behalf alleged, to the intent [651] in the said second plea in that behalf also alleged, and concluded to the country, whereupon issue was also joined.

This cause came on to be tried at the sittings in the present term, when a verdict was found for the Plaintiff on the first issue, for the Defendant on the second, and with respect to the other issues, the verdict was to be entered as the Court should direct.

A rule having been granted to shew cause, why judgment should not be entered generally for the Plaintiff, Bond and Le Blanc, Serjts., were going to shew cause, when they were stopped by the Court, who desired to hear what could be said in favour of the rule. Upon this Adair, Serjt., urged that the withdrawing an opposition to a certificate was not such an act as was necessary for the bankrupt's discharge within the stat. 5 Geo. 2, c. 30, and relied on the case of *Lewis v. Chase*, 1 P. Wms. 620, which, he said, had never been expressly denied, though in some degree shaken by subsequent decisions. And Marshall, Serjt., argued in the following manner.

The question is, whether under the circumstances stated in the first special plea, the bond given by the Defendants to the Plaintiff be void, as being within the 5 Geo. 2, c. 30, s. 11. If it be void, it must be either within the words or the meaning of the statute. 1. It is not within the words. The statute provides, that every security given by a bankrupt, for a debt due at the time of his bankruptcy, "as a consideration or to the intent to persuade him, her, or them to consent to or sign any such allowance or certificate, shall be wholly void and of no effect." It is said, that consent must mean something different from signing, and that withdrawing the petition was a consent. But all the cases shew, that the consent meant by the statute

is that which is expressed by the signature of the creditor to the certificate. In this manner the statute has been interpreted by different judges; by Aston, J., in *Trueman v. Fenton*, Cowp. 550, and by Lord Mansfield in *Browning v. Morris*, Cowp. 792, and *Smith v. Bromley*, Dougl. 698 (last Edit.). The 24 (Geo. 2, c. 57, s. 9, explains the meaning of the word consent. It recites that "many abuses have been committed by bankrupts and persons, who, with their privity, have attempted to prove fictitious and pretended debts under commissions of bankruptcy, in order that such persons might be enabled to sign their consent to the certificates for discharging such bankrupts from their debts, &c." If indeed there were any other [652] mode of consenting to a bankrupt's certificate than that which is expressed by the signature, then the word consent must refer to that mode. But the law knows of no other mode, by which a creditor can give his consent to the certificate but by signing it. It follows therefore, that "consent or sign" must mean "consent and sign." When the certificate is before the Chancellor for his confirmation, it does not stand in need of the consent of more of the creditors than four fifths in number and value, who have already signed it. If the Chancellor, on the petition of a creditor, refuse to confirm the certificate, it is not because that creditor refuses his consent to it, but because it is discovered that the bankrupt ought not to have it. Unless, therefore, a security be given in consideration of signing the certificate, it is not within the words of the statute. 2. This bond is not within the meaning or spirit of it. To be within the meaning of the statute, it must appear to be either a fraud on the creditors, or an oppression, or undue advantage taken of the bankrupt. But it is not a fraud on the creditors. Signing a certificate is like signing a deed of composition. If one creditor, in consideration of signing, insists on more than his fair dividend, this is a fraud on the other creditors, and perhaps an oppression of the bankrupt. But in this case, there is no fraud on the other creditors. The Plaintiff has done no act to mislead or impose upon them. He does nothing that tends to their disadvantage. On the contrary, though a creditor to a large amount for a just debt, he relinquishes all advantage under the commission; for though he proved his debt, he did it that he might oppose the certificate, but took no dividend. Knowing that the bankruptcy was contrived principally to defraud him, he had a right to take every legal step to frustrate this design, in order to save his debt. This debt being secured, he had a right to desist from his opposition to the certificate, either by withdrawing his petition if he had presented one, or not presenting any petition at all. As the Plaintiff was not obliged to present a petition, neither was he obliged to prosecute it when presented. The object of petitioning is to prevent the bankrupt from obtaining his certificate, merely because that certificate when obtained would bar the petitioner's claim on the bankrupt. That claim being satisfied, the end of the petition is answered. A certificate is a bar against all creditors, whether they have signed it or not. But they shall not be deprived of their remedy against the bankrupt, unless it be ob-[653]-tained agreeably to the directions of the statute. This is no hardship on the bankrupt; the certificate would not have existed, if it had not been obtained by means which the Legislature has reprobated. If it be an injury to the public, to withdraw a petition, then every man might petition. But no man is allowed to petition without swearing to a debt. The creditors therefore are the only persons interested in such a petition: but as every creditor has an equal right to petition, and no one obliged to petition for the others, any creditor may either prefer or withdraw a petition without injuring the others. Suppose the object of the bankruptcy were to defeat a particular creditor, and that creditor the only one who had not signed the certificate; suppose too that a number of fictitious creditors had signed it in order to make up the four-fifths in number and value: in such a case the only remedy would be by petition. That petition could affect the interest of none but himself, since all the other creditors had signed and consented to the certificate. Why then, if it be not within the strict letter of the statute, deprive an honest creditor of the means of compelling the bankrupt to be honest? All the creditors may agree not to examine a bankrupt touching a particular sum with which he is charged, in consideration of a promise to pay that sum to the assignees for their benefit, because all the creditors are all the persons interested, according to Lord Kenyon in *Nerot v. Wallace*, 3 Term Rep. B. R. 23. If a creditor signs his consent to a certificate, he holds out to the world, that the bankrupt has demeaned himself honestly, and that he has agreed to take his share of the dividend publicly made. Any thing done privately contrary to that declaration, is a

fraud on the other creditors and on the public at large. But withdrawing a petition after the creditor is satisfied, is merely ceasing to oppose a measure from which he has no longer any reason to apprehend an injury to himself. Suppose a statute were passed which made it penal to do any act "to the intent that a bankrupt might obtain his certificate," and in an action for the penalty the declaration were to state, that the bankrupt's certificate was before the Chancellor for confirmation, and that the Defendant had prepared a petition against it, but afterwards in consideration of a sum of money, desisted from presenting the petition, this would be clearly a bad declaration; the conduct of the Defendant being merely negative, could never be construed into an act done to the intent that the bankrupt might obtain his certificate. [654] The present Plaintiff did an act to obstruct the Defendant in obtaining his certificate, which he was not bound to do, and afterwards desisted from obstructing it, which he had a right to do. Suppose a man attempts to rob me, and I secure him, and I am afterwards prevailed upon to let him go, having at the same time no doubt but that he will return to his former courses; can it be said that I let him go, to the intent that he might rob others?

The bond was not obtained by any oppression or undue advantage taken of the bankrupt. If the bankrupt had fairly conformed and had a right to his certificate, the petition, whatever might be contained in it, could not prevent his having the certificate. But if, on the other hand, the petition was well founded, and shewed that the bankrupt being guilty of fraud was not entitled to his certificate, and he gave the Plaintiff a new security for his whole debt to induce him (the Plaintiff) to withdraw the petition; this is a confession that the allegations of the petition were true. The bankrupt then being clearly convicted of fraud by his own plea, and that he was not intitled to his certificate, he has only given a new security for a debt which he was bound in conscience to pay, and which he must have paid before he could be freed from prison. It follows therefore, that instead of being an oppression on the bankrupt, it was a benefit to him, by releasing him from a gaol, and giving him farther time for the payment of his debt. But if this case be not within the letter of the act, and if it appear that the bankrupt must have been guilty of fraud towards the Plaintiff, the Court will not extend the statute in his favour, nor give it an equitable construction in order to relieve him. The case of *Small v. Brackley*, 2 Vern. 602, shews that even a court of equity would not do this, and still less will a court of law do it. On the contrary, a court of law ought not, in such a case, to go beyond the letter of the statute. If the case be within the equity of the statute, the Defendant may have recourse to a court of equity, and the Plaintiff will there have an opportunity of shewing such circumstances as will satisfy the Court that the bond ought strictly to be enforced. But the case of *Lewis v. Chase* (1 P. Wms. 620) is directly in point, and shews that both in law and equity this is a good bond. That case, it is said, has been over-ruled or shaken. But if the cases in which it is mentioned be examined, it will be found to be neither [655] over-ruled nor shaken. Lord Mansfield always distinguishes it from those cases which it seemed to resemble, and in some instances directly acknowledges its authority. In *Trueman v. Fenton* (Cowp. 544) it was strengthened, and Lord Mansfield partly relies on it. The case of *Smith v. Bromley* (Doug. 696, last edit.) was a case of money taken for signing the certificate. *Jones v. Barkley* (Doug. 696, last edit.) went on the idea that the money was paid for signing. In *Spurrel v. Spiller* (1 Atk. 105) and *Cockshot v. Bennett* (2 Term Rep. B. R. 763) a security was taken for the residue, for signing a deed of composition.

LORD LOUGHBOROUGH. There could not be a more unfavourable case than the present come before a Court. There is an enormous fraud evident upon the face of it, a number of persons having committed perjury by swearing to debts, who were not real creditors of the bankrupt. The plaintiff presented a petition against them which he ought to have pursued. Instead of that, he is induced to suppress his petition in order to gain his own debt, while all others are barred by the certificate which is procured by his suppression; and this under a law made to prevent fraud, and to secure an equal advantage to all the creditors. But whether the case be favourable or unfavourable is quite out of the question; the Court is bound to declare what is the true construction of the law. The argument on the part of the Plaintiff rests on the case of *Lewis v. Chase*; but the impression on my mind is that this case has been long exploded, and upon considering it with reference to the statute, it seems

to me to be a case totally unprincipled, and directly contrary to the true construction of the act. That case cannot stand unless some words be erased from the statute, or a meaning assigned to them entirely repugnant to the whole principle of the act. A distinction is attempted to be made from that case, between the act of giving money for the consent of the creditor to sign the certificate, and that of giving him money to withdraw his opposition to it; as if the former act were only to be condemned. But see how the act of withdrawing an opposition stands, compared with the actual signing the certificate. The argument urged is, that as it is a voluntary act, the creditor may do as he pleases. But the law feels it a mischief and a subversion of the bankrupt laws, to traffick with them and the power given by those laws. See the consequences. [656] A bankrupt labours to get a sufficient number of creditors to procure a certificate: a principal creditor, knowing what will prevent the certificate, stands by and petitions: now if the argument were allowed, it would fetch more at the market, it would be a more valuable traffic to withdraw an opposition to the certificate than to sign a consent to it, as one out of four-fifths of the creditors in number and value. See too how the act expresses itself (sect. 10.) No persons becoming bankrupt shall be intitled to the benefit of the act unless the certificate be allowed by the Great Seal, and unless four parts in five in number and value of the creditors "shall sign such certificate and testify their consent to such allowance and certificate." And after a power given to any creditor to oppose the certificate, comes the clause in question; that every bond, bill, &c. given as a consideration, or to the intent to persuade him, her, or them "to consent to or sign any such allowance or certificate, shall be wholly void and of no effect." Now according to the argument, the act ought to have left out the words "consent to" as being idle words at best, and retained only the word "sign." But being in the statute, do they mean any thing? I think they clearly mark the cases of signing the certificate and of an opposition made to it, as distinct cases in the contemplation of the legislature. Where words may have an operation, they ought not to be rejected. Lord Maclesfield (*Lewis v. Chase*, 1 P. Wms. 620), seems to me to have taken a liberty with the statute which was totally unfounded, for he argues as if it were to be applied to no case but that of signing the certificate. But I have no scruple in saying that any case is not law, which I think is contrary both to the words and the true spirit and policy of an act of parliament. When a case is merely cited in argument, perhaps a court may not directly decide it not to be law, unless the very point of it is in discussion; but the oftener the case of *Lewis v. Chase* has been cited, the more it has been doubted, and I think it entirely inconsistent with *Cockshott v. Bennett* (2 Term Rep. B. R. 763), which I hold to be a right determination (*c*). The reasoning also in *Robson v. Calze* (Doug. 227, last edit.) is applicable to the present case. I do not enter more at large into the general argument, because I think the case is directly within the act of parliament.

GOULD, J., of the same opinion.

HEATH, J., of the same opinion. If this transaction which is admitted to be fraudulent, affected only the parties, it would [657] be a different question. But this is a fraud affecting the other creditors, and against the policy of the law. It is a matter of choice whether a creditor will prefer a petition, but having preferred it, he ought not to withdraw it so as to injure the other creditors. So it is competent to any man, unless bound in a recognizance, to prefer an indictment for felony, or not, at his option; but when he has preferred it, he cannot stipulate for his own private advantage and compound. The reasoning upon which the cases go is, that the money either comes out of the bankrupt's own fund, and then there is fraud on the other creditors, or it is raised by his relations, and then an undue advantage is taken of the situation of the bankrupt to extort money from them. This cuts up by the roots the case of *Lewis v. Chase*.

WILSON, J., of the same opinion. I think this case within the act of Parliament: but if it were doubtful, the general principle of the bankrupt laws ought to induce the Court to adopt the construction now put upon the act (*a*). The intent of the

(*c*) [The case of *Cockshott v. Bennett* has been repeatedly recognized, see *Jackson v. Lomas*, 4 T. R. 166. *Leicester v. Rose*, 4 East, 372. *Wells v. Girling*, 1 Brod. & Bing. 447.]

(*a*) [So upon the general principle of the policy of the insolvent acts it has been held that securities given for the purpose of inducing a creditor to withdraw his opposition to the discharge of the insolvent, are invalid. *Jackson v. Davison*, 4 B. & A. 691. *Rogers v. Kingston*, 2 Bingh. 411.]

Legislature was, that all the bankrupt's property should be equally distributed among his creditors, and that being done, that he should have a full discharge. The statute directs in what manner the certificate shall be allowed, that four fifths of the creditors in number and value shall sign it and testify their consent to its allowance: that the commissioners shall certify that it was without fraud; and then that any of the remaining creditors may petition against the confirmation of the certificate. After this comes the general clause, which makes any security void, given as a consideration, or to the intent to persuade a creditor to consent to or sign any such allowance or certificate. Now, I think this clause, by a fair construction of the words, includes the present case: the statute says, "consent to or sign," and I construe the withdrawing the petition to be a consent.

Judgment for the Defendant (*b*).

O'CONNOR *against* MURPHY. Wednesday, July 13th, 1791.

A. brings an action against B., the expences of defending which are borne by C. and D., but A. is nonsuited. Afterwards C. brings an action against A., in which D. is interested as well as C., and C. is nonsuited. The costs of the cue nonsuit may be set off against the other.

A rule was obtained by Adair, Serjt., to shew cause why the costs of a nonsuit in an action of trover, brought by Murphy the present Defendant, against one O'Loughlin, should not be [658] set off against the costs of a nonsuit in this cause. It appeared that the action of trover had been brought for a ship claimed by Murphy, but which proved to be the joint property of O'Connor, the present Plaintiff, and one O'Sullivan (who were partners in trade), and of which O'Loughlin was the master. The present action was brought by O'Connor as indorsee of a promissory note against Murphy as drawer, in which O'Connor was non-suited: and he now made this application upon the ground that the action against O'Loughlin was defended at the joint expense of O'Connor and O'Sullivan, and that O'Sullivan was interested together with O'Connor in the promissory note, on which the present action was brought.

Marshall, Serjt., shewed cause; he said, the Courts had in several instances (2 Stra. 1203), after the statute of set off, refused to allow the costs of one action to be set off against those of another; and the reason then given was, that it required the assistance of an act of Parliament to enable the defendant in an action to set off a mutual debt, and that act did not extend to the case of costs. Afterwards however, by a sort of equitable interpretation of the statute, the Courts allowed the costs of cross actions to be set against each other. But they had never allowed this to be done, where the costs were not mutual debts, and for the recovery of which there were not mutual remedies: for had they gone beyond that, they would have extended this equitable construction of the statute farther in a case for which it was evidently not intended, than in those cases for which it was expressly made. As O'Sullivan did not join in the action on the promissory note, he ought not now to be permitted to say that he was interested in it, merely to intitle himself to the benefit of a set-off: and as Murphy had a remedy only against O'Connor for the costs of the present nonsuit, those costs were a debt due from O'Connor alone, and not jointly from O'Connor and O'Sullivan. Therefore supposing the costs of the action of trover could be taken as a debt due from Murphy to O'Connor and O'Sullivan jointly, yet even then the costs of the two nonsuits could not be deemed mutual debts. This, he said, distinguished this case from *Nunez v. Modigliani*, ante, 217, and *Schoole v. Noble*, ante, 23. Besides, Murphy could not bring an action against O'Connor and O'Sullivan jointly for the costs of the present nonsuit, neither could any person but O'Loughlin sue Murphy for the costs of the former one. The costs therefore, of the two nonsuits could not by [659] any means be taken to be mutual debts. The cases of *Paynter v. Walker*, C. B. East. 4 Geo. 3, Bull. N. P. 179. *Ryal v. Larkin*, 1 Wils. 155, and *Ridoubt v. Brough*, Cowp. 133, shew that, under the statutes of set-off, where the Defendant has an equitable claim on the Plaintiff, however clear and just, yet if an action will not lie for it, at

(*b*) [See *Holland v. Palmer*, 1 B. & P. 95, that the certificate is void if any one creditor is induced by money to sign it; though without the privity of the bankrupt.]

the suit of the Defendant alone, and in his own right, against the Plaintiff alone and in his own right, it cannot be deemed a mutual debt, and therefore cannot be set off (*a*).

LORD LOUGHBOROUGH stopped Adair, who was going to reply, and said, that without any regard to O'Sullivan's interest in the promissory note, O'Connor was equitably intitled to the costs of the nonsuit in the action of trover against O'Loughlin, and therefore he ought to be permitted to set them off, as far as they would go, against the costs in the present action.

Rule absolute.

HAYNES against HARE. Wednesday, July 13th, 1791.

A. grants an annuity for his own life to B., to secure which, a bond and warrant are given, and judgment entered. B. dies. After his death, the Court will not admit evidence of a parol agreement between the parties that A. should be at liberty to redeem the annuity on certain terms (especially if it be the evidence of the attorney concerned), as a ground to order the securities to be given up, and satisfaction entered on the judgment.

The facts of this case were as follow:—In July 1780, Robert Hare, and Francis his son, in consideration of 300*l.* then paid to them by William Haynes, joined in a bond in the penalty of 600*l.* conditioned for the payment of an annuity of 50*l.* per annum to Haynes, his executors, administrators or assigns, during the life of Francis Hare. This bond was drawn in the usual form, without mentioning in the condition any agreement to redeem the annuity. A warrant of attorney was also given by the obligors to Haynes, to confess a judgment on the bond, and another warrant of attorney by Francis Hare, to enable Haynes to receive the annuity out of an allowance of 200*l.* per annum, which his father Robert Hare made him. Judgment on the bond was entered up in this court as of Trinity Term 1780. Some time after Haynes died, and Francis Hare applied to his acting executor, for the purpose of redeeming the annuity, and tendered the principal sum, together with all arrears of the annuity and interest up to that time, amounting to 313*l.* 19*s.* This the executor refused to accept, alleging as a reason for his refusal, that his testator had specifically bequeathed the money arising from his annuities, and had given no power to the executors to redeem them: the executors therefore thought, [660] that they could not safely consent to the redemption of the annuity in question, without the sanction of a court of law or equity. In consequence of this, Robert and Francis Hare preferred a petition to the Lord Chancellor (a bill being then depending in Chancery respecting the will of Haynes) to redeem; which was founded on the deposition of Richard Harborne (the attorney who transacted the business of the annuity between the two Hares and Haynes), stating, “that he the deponent was first applied to by Francis Hare in July 1780, to raise the loan of 300*l.* which he was unable to procure without better security than was offered: that Francis Hare being informed of this, directed him to raise 300*l.* by way of annuity on his (Hare's) life at six years' purchase, and said that he would get his father, Robert Hare, to join in the annuity bond, and himself give the purchaser a power of attorney to receive the annuity out of an allowance of 200*l.* per annum, which was made him by his father, but, that the annuity should be granted on the express conditions, that Francis Hare should at any time be at full liberty to pay off and discharge it on giving 14 days' notice of his intention, and that on payment of 300*l.* and interest up to the day of the discharge, the bond and all papers relating to the annuity should be given up to be cancelled: that in consequence of this direction, the deponent applied to Haynes to purchase the annuity, informing him at the same time of the conditions mentioned by Francis Hare, to which Haynes agreed: that when the bond and warrants of attorney were executed, the conditions were recapitulated, and again consented to by Haynes.” This was dismissed, on the ground of the mode of the application being improper, as the question could not be decided on a petition. They then filed a bill for the same purpose in Hilary Term 1789, in answer to which the executors of Haynes denied all knowledge of any conditions to redeem the annuity; and the cause afterwards coming on to be heard before Mr. Justice

(*a*) But see those cases, and qu. whether they support this proposition in its full extent?

Buller (who sat for the Chancellor) he dismissed the bill, on the ground that parol evidence could not there be received in contradiction to the annuity bond, but recommended an application to the Court in which the judgment was entered.

These proceedings having been had, a rule was granted in Hilary Term last, by this court, for the executors of Haynes to shew cause why upon payment of the sum of 313l. 19s. the annuity should not be vacated, the bond and warrants of attorney given up to be cancelled (a)¹, and satisfaction entered on the re-[661]-cord of the judgment. This rule was obtained on an affidavit of Harborne, of the same purport as the deposition in Chancery above stated. It was afterwards enlarged till the present term, when Kerby and Bond, Serjts., shewed cause. After stating and observing upon the particular circumstances of the case, they argued that it was a known principle of law, that matter dehors a deed could not be pleaded in contradiction of it. *Preston v. Merceau*, 2 Blac. 1249. *Meres v. Ansell*, 3 Wils. 275. *Lord Ingham v. Child*, 1 Brown, Rep. Chanc. 92. *Lord Portmore v. Morris*, 2 Brown, Rep. Chanc. 219. Here the agreement for redemption stated in the affidavit, is contradictory of the condition of the bond: the condition is for the payment of an annuity during the life of Francis Hare, but if the agreement takes place, the payment will be only during his pleasure. Though it is true, that there are many cases where matter may be pleaded which does not appear upon the face of the bond itself; such as duress, infancy, usury, gaming, stock-jobbing, and the like, yet in all those cases the averment goes to prove that the contract was originally void, and therefore that the instrument had no obligation from the beginning. *Collins v. Blantern*, 2 Wils. 347. But where a bond has once taken effect as a bond, it cannot be defeated by pleading a matter dehors, as is observed by Eyre, Ch. J., *Andrews v. Eaton*, Fitzgib. 76.

In support of the rule, Adair and Runnington, Serjts., contended, that this was not an application to alter a deed by matter dehors, but merely to prevent a judgment continuing in force contrary to the agreement of the parties. The Court has an equitable jurisdiction over its own judgments, and will inquire into the consideration on which they are founded; and it is the daily practice, if a judgment be entered up for a greater sum than is really due, for the Court to interfere and order satisfaction to be entered on the roll for so much. The question then is, whether they will not exercise that equitable jurisdiction in this case, according to the intent and agreement of the parties? And Haynes being dead, the next best evidence is that of Harborne. Neither can there be any hardship on the executors, who may now sell the annuity, after it has run ten years, at the same price for which it was originally purchased.

Cur. advis. vult.

On this day, Lord Loughborough delivered the opinion of the Court. After stating the circumstances of the case, and the affidavit of Harborne, his Lordship proceeded thus:—

[662] Under these circumstances, the application was made to this court, on the ground that the security being a judgment entered on a warrant of attorney, it was in its nature made under the sanction of the Court, that the Court had therefore a control over it, would examine into the consideration on which it was entered up, and not permit the party to avail himself of it, so as to receive more than in justice he is intitled to take. The case comes before the Court as it fitly and properly should, without any prejudice at all from what has passed in the Court of Equity. For the application to the Court of Equity was founded on circumstances very different from what might appear to this court sufficient, on this species of application, for interposing by the authority, which it is necessary every court should have, whose records are made matters of security, and inquiring into those securities which proceed on the assumption of a suit, which in fact was never brought (a)². But when the Court is exercising its authority with respect to judgments entered, this principle is clear, that in judging of the transaction which is the foundation of the judgment, they will find themselves governed by the same rules which the law has prescribed, if the transaction itself, independent of the judgment, were before the Court in the form of an action. We have not a greater latitude by having an authority over the judgment entered up, than in the decision of the question between the parties themselves. To be sure, there is a strong inclination arising in favour of the redemption in such cases, from

(a)¹ [Vide *Barber v. Gamson*, 4 B. & A. 286. *Storton v. Tomlins*, 2 Bingh. 475.]

(a)² [Vide *Ex parte Chester*, 4 T. R. 695 (n).]

circumstances which are pretty generally understood. The small value of the price paid for such annuities, is, in general, governed by the probability, that when the party is in a situation to pay the money which has been fairly advanced, no obstruction or difficulty will occur in being permitted to redeem on such terms as are here suggested. Another circumstance is, that the redemption is, in general, extremely advantageous to the party from whom the annuity is redeemed; because, if the price bears any proportion to the subject matter, after the annuity has been paid a considerable time, it is less valuable than at the time of the original transaction, the life being so far spent. An idea has also prevailed, that the insertion of an express agreement to redeem might be dangerous to the security, and expose it to impeachment on the score of usury, by converting it in its appearance into a loan, and under those apprehensions (whether well or ill founded, it [663] is not necessary now to consider) covenants for that purpose have not been inserted in the deeds (a)¹.

Notwithstanding all these circumstances, the Court feels itself in a situation, in the present case, in which it is impossible, consistently with the rules which have been wisely laid down, to permit the redemption and open the transaction. The person on whose part the judgment was entered up, is dead. The only evidence is the declaration of Harborne the attorney, that in all the general circumstances of the transaction, down to the final execution of the deeds between the parties, this condition for the redemption of the annuity was understood between them as perfectly agreed to. If Haynes were living, the Court, considering the affidavit of Harborne his attorney who had entered up the judgment for him, would be under no difficulty to call upon Haynes. If he made an affidavit and admitted the fact, there would be no difficulty to oblige him, as the plaintiff in the judgment, to comply with the terms of the agreement, or in other words to set aside the judgment, and compel him to accept the redemption. If Haynes denied it, and his affidavit denying the agreement asserted by the attorney were before the Court, I rather apprehend that the Court would find itself in a situation, in which it could not move at all; there would be affidavit against affidavit. In a situation of this kind, I think it would be difficult for the court to put the matter in any course of trial, in which Harborne's evidence would be suffered to overbalance Haynes's denial. If Haynes declined to make an affidavit, the Court would give credit to Harborne. But Haynes is dead, and then the question is, whether the court can permit terms not inserted in the deed which the parties have executed, to be added to the contract, of which this instrument is the full and explicit evidence. This brings me to the question which has been argued, whether on the testimony of a witness to a parol communication between the parties, a term can be added to the contract, which does not appear in the instrument by which that contract is established. Several cases have been cited on this subject. The case of *Lord Portmore v. Morris* does not apply to this. For the evidence (a)² in that case, though extremely strong, was the evidence of persons not concerned for Rosoman: there Stubbs and Withy were both treating on behalf of Lord Port[664]-more, and Jenkins likewise attended on his behalf: the attorney on the other side was Exley, and he positively denied what was as positively asserted in the depositions of the others. He gave an explicit contradiction to the paper in which Stubbs had entered a memorandum of the agreement (b). Exley was not examined as a witness, but being a trustee of the annuity he was made a defendant in the cause, and against the denial in his answer it seemed difficult for the Court to have made any decree for the redemption, Rosoman being dead. But in the circumstances of these two cases there is an essential difference: here there is the testimony of Harborne the attorney for Haynes, as to the terms of redemption agreed upon between the parties. It is not necessary to cite any case to prove the proposition, that parol evidence of a parol communication between the parties ought not to be received to add a term, not inserted in the specific agreement which they have executed;

(a)¹ See *Murray v. Harding*, 3 Wils. 390.

(a)² The Court after the argument desired to have copies of the depositions in *Lord Portmore v. Morris* laid before them.

(b) This memorandum was dated on the day of the execution of the deeds, and signed by Stubbs, stating, that it was agreed by Lord Portmore and Rosoman, previous to and at the execution of the deeds, that his Lordship should, on payment of the 2000l. and half a year's annuity over and above that sum, have all the securities delivered up, and that the annuity should cease.

and for this plain reason, that what passed between them in that communication may have been altered and shifted in a variety of ways, but what they have signed and sealed was finally settled. It would destroy all trust, it would destroy all security and lay it open, unless the parties are completely bound by what they have signed and sealed. But it is said that, admitting the general rule, the particular circumstance of the testimony given by the attorney for the party forms an exception. The Court would certainly feel itself under no difficulty which way to act, if the party for whom Harborne was the attorney, were before the Court; but he being dead, and no discovery appearing to have been made by him, the circumstance of the attorney for the party being a witness, to invalidate the security against the representative of his employer, seems to be a strong confirmation of the general rule. There is nothing so dangerous as to permit deeds and conveyances after the death of the parties to them, to be liable to have new terms added to them, on the disclosure of the attorney in a matter in which he could meet with no contradiction. But this opinion is perfectly without prejudice to any application which may be made in the lifetime of the party. I give no opinion how far the Court might sanction such a requisition, on circumstances of this kind being disclosed. I wish to be understood as confining myself particularly to the mode of application, and to the evidence by which it is supported in the present case. The Court therefore must discharge the rule, but certainly without costs.

Rule discharged without costs.

SILL AND OTHERS, Assignees of Skirrow a Bankrupt, *against* WORSWICK.
Wednesday, July 13th, 1791.

[Referred to, *Phillips v. Hunter*, 1795, 2 H. Bl. 408; *Scott v. Bentley*, 1885, 1 Kay & J. 283; *In re Elliott*, 1891, 39 W. R. 297; *In re Queensland Mercantile and Agency Company*, [1891] 1 Ch. 514; [1892] 1 Ch. 219; *In re Belfast Ship Owners' Company*, [1894] 1 Ir. R. 332; *Minna Craig Steamship Company v. Chart-red Mercantile Bank of India*, [1897] 1 Q. B. 63, 460; *Diltsheim v. Lowlon and Westminster Bank*, [1900] 2 Ch. 47; *Dulaney v. Merry*, [1901] 1 K. B. 540.]

If after an act of bankruptcy committed, but before an assignment, a creditor of the bankrupt makes an affidavit of debt in England, by virtue of which he attaches, and receives, after the assignment, money due to the bankrupt in the West Indies, the assignees may recover the money in an action for money had and received (a).

Assumpsit for money had and received to the use of the Plaintiffs, with the usual counts. Plea, the general issue; which was tried before Mr. Justice Wilson at Lancaster, on the 27th of August 1787, when a special verdict was found in substance as follows.

That William Skirrow on the 2d of January 1782, exercised the trade of a woollen draper at Lancaster; that he was then indebted to one James Pilkington, in 100l. and upwards, and on that day became a bankrupt; that on the 16th of January a commission issued on the petition of Pilkington, that on the 28th of January he was declared a bankrupt; that on the 5th of March an assignment was made of all his estates and effects, &c. to the Plaintiffs: that before and when he became a bankrupt, he was indebted to the Defendant Worswick in 230l. 17s. 7d. and that the said debt was contracted at Lancaster aforesaid, and at the time when it was so contracted and always afterwards both Skirrow and Worswick resided at Lancaster, which was their place of abode; that on the 4th of January the Defendant Worswick, knowing that Skirrow had become a bankrupt, did verify and prove by affidavit in writing, before the Mayor of Lancaster that Skirrow was indebted to him the Defendant in 230l. 16s. and upwards, for money lent, &c. That on the same day and year last aforesaid the said affidavit was certified and transmitted under the common seal of the said Borough of Lancaster, to one Thomas Moore and one Luke Tyson then being persons resident in the Island of St. Christopher, which said Island then and there, and before, and at the passing of a certain act of parliament made in the fifth year of the reign of our

(a) [The principle of this case was recognized in that of *Phillips v. Hunter*, post, vol. ii. p. 402, decided in the Exchequer Chamber, Eyre, C.J., diss.]

Sovereign Lord George the Second, intituled, "An act for the more easy Recovering of Debts in his Majesty's Plantations in America," [666] and on the 29th day of September which was in the year of our Lord 1732, was, and thenceforth hath been, and still is, one of the British plantations in America; that the defendant Worswick appointed the said Thomas Moore and Luke Tyson, so being resident in the said Island of St. Christopher, his attorneys to sue for, recover, and receive, of and from the said William Skirrow, or of, and from, all, or any of his factors, agents or consignees, in the British West Indies, all such sum and sums of money, debts, goods, chattels, and effects whatsoever, as were in any wise due, owing and belonging to him from the said William Skirrow.

It was then stated, that Moore and Tyson having received the affidavit so certified and transmitted, and being so authorized by Worswick the Defendant, did on the 6th of March 1782 implead Skirrow in the king's court of the island of St. Christopher in a plea of trespass on the case, &c. for the recovery of the said sum of 230l. 17s. 7d. in which Skirrow was indebted to Worswick the Defendant: that on the same day a writ of attachment grounded on the said plea according to the form of a certain law of the said island in that case made and provided, did, at the request of Worswick the Defendant, duly issue out of the said court of our said lord the king, by which said writ of attachment the provost marshal of our said lord the king, of the said island, or his lawful deputy, was commanded by our said lord the king to attach all and singular the goods and effects of the said Skirrow, in the said island, to answer to the said Worswick in his plea aforesaid: that on the 7th of March 1782, the provost marshal did, according to the laws and customs of the said island attach divers sums of money as the proper monies and effects of the said William Skirrow (the bankrupt) in the hands of one Thomas Worswick the younger, who then and there was a merchant and resident in the said island of St. Christopher, within the jurisdiction of the said court; which said sums of money were the proper monies and effects of the said William Skirrow (the bankrupt) before and at the time when he became bankrupt as aforesaid, and were received before the time when he became bankrupt as aforesaid, in the said island by the said Thomas Worswick the younger, by the order, and to the use of the said William Skirrow (the bankrupt), and then and there, to wit, &c. did remain and were in the hands of the said Thomas Worswick the younger unaccounted for. It was afterwards stated that judgment was recovered in the court of St. Christopher's and execution awarded, and that Moore and [667] Tyson as attorneys for the Defendant received on the 14th of May 1783, the sum of 230l. 17s. 7d. from Thomas Worswick the younger, the garnishee; that this money was remitted to and received by the Defendant in England before the commencement of the present action; that he was requested by the Plaintiffs to pay it over to them, which he refused, insisting upon his right to retain the same, &c. and that he had not proved his debt under the commission, nor in any other manner received satisfaction for the same, except as aforesaid, &c. &c.

This was first argued in Easter Term 1789, by Lawrence, Serjt., for the Plaintiffs, and Le Blanc, Serjt., for the Defendant. The argument on behalf of the Plaintiff was as follows.

In this case there are two questions: 1. Whether the assignment of the bankrupt's effects to the Plaintiffs did not pass all the right which he had to the money in the hands of the garnishee? 2. Whether, supposing the assignment to have had that effect, the Plaintiffs are not intitled to recover, notwithstanding the proceedings in the West Indies? As to the first question, there can be no doubt, but that if this transaction had taken place in England the assignees would be intitled to the money attached by virtue of the stat. 13 Eliz. c. 7, s. 2; the only doubt is, whether they are so intitled, the attachment having been executed in the Plantations. Now as the bankrupt himself might, before his bankruptcy, have assigned this money by deed or otherwise, in satisfaction of a debt, or to trustees for the benefit of creditors; the question is, whether an assignment under the bankrupt laws, does not operate as fully as such an assignment by the bankrupt himself? The Court will, if possible, put this construction on the assignment by the commissioners, because the persons who are most likely to become the subjects of those laws, namely, traders of the most extensive dealings and connections, have, in general, great part of their property abroad, which justice requires should be divided among their creditors. The law expresses no distinction as to the property of a bankrupt being in one country rather than another.

The words of the statute of Eliz. are "money, goods, chattels, wares, merchandizes, and debts wheresoever they may be found or known;" these are general words, and must be construed to extend to all places. They are not, in practice, confined in their operations. A ship at sea is often assigned under a commission of bankrupt, by virtue of those words. If any distinction can be attempted to be made, between the case of a ship at sea, and the present, it [668] must be on the ground that the country in which the debt is attached is governed by different laws. But it is not contended that the Great Seal has authority to extend its proceedings beyond the limits of this country, as to all the purposes for which it acts; it can neither compel an appearance before commissioners, nor has it any power to affect the person in another country; but the assignment of a bankrupt's property being a statutable conveyance for the benefit of creditors, must in reason be taken to convey all that property, without regard to local situation. The assent of every subject of the realm, is implied to proceedings which take place by virtue of an act of parliament. This doctrine is laid down 8 Rep. 137 a. and has been since recognized in the case of *Wadham v. Marlowe* (a). So in the present case there was an implied assent to the assignment, both by the Defendant and the bankrupt, neither of whom shall now be permitted to deny the effect of that assent.

It is said by Chief Baron Comyns, 1 Com. Dig. 519, that the commissioners of a bankrupt may sell his goods in Ireland; if the commissioners may do this, so may the assignees; the property therefore vests in them. It was the opinion of Lord Talbot (Cooke's Bank. Laws, last edit. 522) that the effects of a bankrupt in the Plantations were liable to a commission here, and that the right was vested in the assignees. Whether the attachment in the West Indies will prevent the Plaintiff from recovering must depend on this, namely, Whether the effects at the time of the attachment were the property of the bankrupt or not? If the property were his, it passed to the assignees, and there could be no right to attach it: but a debt owing to him was clearly his property. In the case of *Lewis v. Wallace*, Sir Thomas Jones, 223, it was holden that where a debtor had assigned to his creditor a debt due to him from a third person, the assignor had nothing in it but as trustee for the assignee, and that it was not liable to an attachment by another creditor. So here the debt of the garnishee, after the assignment by the commissioners, was only in trust for the assignees. In *Le Chevalier v. Lynch* (Dougl. 169, last edit.) Lord Mansfield said, that it had been determined at the Cockpit, upon solemn consideration, that bills by English assignees might be maintained in the Plantations upon demands due to the bankrupt's estate, which shews that he considered that the right to such debts was vested in them: and though he also said, that where, [669] after the bankruptcy, and before payment to the assignees money owing to the bankrupt out of England was attached *bonâ fide* by regular process, according to the law of the place, the assignees cannot recover the debt, this doctrine only goes the length of shewing, that a debtor having been obliged by process, which he could not resist, to pay to the creditor attaching, should not be again compelled to pay to the assignees: but this only applies to the debtor who has paid the money, and not to the creditor who has received it. It is like the case of a recovery by an administrator, whose letters of administration are afterwards revoked, and another administrator appointed: in which case the debtor cannot be compelled to pay a second time, having paid to the former administrator, under legal authority which he could not resist. *Allen v. Dundas*, 3 Term Rep. B. R. 125. The second administrator must resort to his remedy against the former. 2 Bac. Abr. 11. In the case of *Bradshaw and Another, Assignees of Wilson, v. Fairholme* (Decisions of the court of session from 1752 to 1756, p. 198), the court of session in Scotland decided that the attachment of Captain Wilson's debts in Scotland by creditors in England, could not be supported against the assignees. In *Mackintosh v. Ogilvie* (Hil. 21 Geo. 2, in Cane. See 4 Term Rep. B. R. 193, *Hunter v. Potts*), Lord Hardwicke granted a writ of *ne exeat regno* against one who had obtained arrestments of a bankrupt's property in Scotland, and said, that the Court would prevent the creditor from having the effect of the arrestment, if the judgment was not before the bankruptcy; and the solicitor-general said that after such arrestments and foreign attachments the money had been recovered back in an action for money had and received.

(a) Cooke's Bank. Laws, 518, last edit.; and see a full note of this case, ante, 437.

In *Solomon v. Ross*, and *Jollett v. Deponthieu* (ante, 133), the assignment of a bankrupt's effects to curators in Holland was admitted to have such an effect in this country, as to make void all proceedings in foreign attachment. So also in *Neale v. Cottingham* (ante, 133), the assignment by commissioners in England was allowed to have a similar effect in Ireland. *Pari ratione* therefore, the assignment in the present case, by the commissioners in England, ought to extend to the property of the bankrupt in the West Indies.

Le Blanc, Serjt., *contra*. The assignees in this case did not interfere to prevent the attachment. The Defendant having obtained an advantage by using legal diligence, is intitled to re-[670]-tain it. Though two questions were made on the part of the Plaintiffs, the only one to be considered is, what effect the different statutes of bankrupts have with respect to foreign countries. Now these statutes are merely local, being confined in their operation to this country. The colonies are, in this respect, to be considered as foreign countries. It was contended that the assignment must have the effect of a conveyance by the bankrupt himself: admitting this, the voluntary conveyance of the bankrupt himself could not defeat the claims of a creditor, or take away what was obtained by legal process. It might operate as the assignment of a chose in action, which, till reduced into possession, is liable to the just demands of a creditor. The several statutes relating to bankrupts are confined to the country in which they were passed, because they were originally considered to be of a penal nature, confiscating the property of the bankrupt: and penal laws are strictly local. The first case in which they were in any degree extended, was that of Captain Wilson (*a*). As to the argument drawn from the words of the statute 13 Eliz. c. 7, "wheresoever found" it might with as much propriety be said that lands in a foreign country would pass by the assignment of the commissioners, lands being mentioned in the statute as well as goods. The case of *Wadham v. Marlowe* turned upon the form of the action, and the question whether an express consent to the assignment was not necessary to be stated, in order to maintain an action of debt on the reddendum of a lease? As to the authority of Com. Dig. 519, it is merely a dictum, no cases being cited in support of it; and if it be allowed, it can only be reasonably understood to mean that the commissioners may sell the effects in Ireland, subject to the claims of creditors. As to the opinion of Lord Talbot cited in Cooke's Bankrupt's Laws, the question is, what right vested in the assignees, whether such as will clothe them with all the privileges of the statutes of bankrupts. In England they have a power over the whole property of the bankrupt, but in other countries the general import of the words of the statute must be restrained by the laws and customs of those countries: still the question remains the same, namely, what right vests in the assignees? That right is admitted to be, such as the bankrupt himself had; but any assignment of his would have been subject to his creditors' demands. As to the case of *Lewis v. Wallace* cited from Sir Thomas Jones, if the debtor in St. Christopher's were a trustee [671] for the assignees here, they ought to have made that defence to the attachment; or they might have appealed to the privy council. The case of *Le Chevalier v. Lynch* proves only that the assignees should not be turned round by the debtor's saying that he was only liable to the bankrupt himself; and that creditors in another country should not come in under the commission, unless they would renounce the priority they had gained; but this shews that they could not be compelled to give up that priority.

In that case Lord Mansfield approves of the extent of the doctrine laid down by Lord Hardwicke, and concludes with saying, that where money owing to the bankrupt out of England is attached *bonâ fide* by the law of the place, the assignees cannot recover the debt; that is, they cannot recover it all. As to the argument drawn from the case of an administration being revoked, admitting the principle, that a debtor having once paid his debt to a person having legal authority to receive it, shall not be liable again to pay it, yet this principle is not applicable to the present case, unless it can be shewn that the assignment of a bankrupt's effects has, with respect to foreign countries, such a relation back as to give the assignees a preference to creditors in those countries. As to those creditors, the assignment is considered as voluntary, and like other voluntary assignments, subject to their claims. The assignees in such

(a) An account of this case is given in the judgment of the court, by Lord Loughborough.

case stand in the place of the bankrupt himself, but cannot recover a chose in action till it is reduced into possession. As to *Wilson's case* (1 Atk. 128), the principal question there was, whether drawing and re-drawing bills was a trading within the bankrupt laws; the point now in dispute was not agitated. In the case of *Mackintosh v. Ogilvie*, there was no ground to restrain the Defendant from going out of the kingdom, neither does it appear from the statement of it, either that he had gained an undue priority or that he had no right to retain an advantage which he had legally acquired. In *Solomons v. Ross* the money was actually in the hands of the debtor, and when all parties were before the chancellor he might use his discretion in compelling it to be paid for the general benefit of all the creditors. In *Jollett v. Deponthieu* the curators filed their bill pending the attachment, having used diligence to prevent it. But in the present case the assignees took no steps to prevent the attachment, to do which they had sufficient time. In *Neale v. Cottingham* also [672] the proceedings were depending before a court of equity, and all parties present. Here the proceedings were at an end, the judgment executed, and the money paid over. Those were likewise cases in equity, but the present action is in a court of law.

That assignments by commissioners of bankrupts are considered as voluntary with respect to the colonies or foreign countries, and as such take place only between the assignees and the bankrupt, but do not affect the rights of other creditors, (who having gained a lawful priority are entitled to keep it,) appears from the case of *Cleve v. Mills* (Cooke's Bankrupt Laws, 370, last edit.) *Richards and Others v. Hudson and Others* (c), and *Waring v. Knight* (Cooke's Bankrupt Laws, 372, last edit.), in all which cases Lord Mansfield's doctrine is uniform as to this point, and perfectly agrees with *Le Chevalier v. Lynch*, and with the opinion of Lord Hardwicke recognized in that case. Conformable to this, is the right which a consignor of goods has to stop them in transitu on the event of the insolvency of the consignee, and to retain them against the other creditors. So here, the Defendant has by due diligence stopped the debt in question in St. Christopher's, and shall not be compelled to refund to the assignees, who took no previous steps to prevent the attachment.

Lawrence replied, that though the plantations were to be considered in this respect as foreign countries, yet this was not the assignment of a chose in action. It was an assignment of goods and effects in the hands of the garnishee; by that name they were attached, as appears on the face of the special verdict. Now it is not necessary to have possession in order to transfer the property of a personal chattel, though the want of possession is sometimes evidence of fraud. Neither is money in all cases a chose in action; here it was considered as specific effects, and so denominated in the attachment. To the argument, that, if the words of the statute 13 Eliz. had a general effect, lands in foreign countries would pass by the assignment, as well as goods, it may be answered, that in all countries certain forms are to be observed in passing lands, without which a conveyance of them is not valid: but no such forms being necessary in transferring personal property, that may be conveyed by a mere contract; and an assignment by commissioners of bankrupt, is as good a contract as any other. The authority before cited from 1 Com. Dig. 519, is not restrained by any words, to shew that the property of a bankrupt in Ireland [673] which is vested in the assignees is subject to the claims of creditors in that country. The material point of Lord Hardwicke's decision mentioned by Lord Mansfield in *Le Chevalier v. Lynch*, was, that "he would make no order till the Scotch creditors had abandoned their priority." The principle upon which Lord Mansfield there holds that the debtor shall be answerable to the assignees must be, that the property vests in them. The observations made on the part of the Defendant on that case, are only applicable to the point there before the Court, that of a debtor of the bankrupt being sued; but in the present case, the action is brought against a creditor. In *Solomons v. Ross* the attachment was completed, and execution would have followed if security had not been given, which was equal to actual payment; but there Mr. Justice Bathurst compelled the party to give up his security: the only ground of which compulsion must have been, that the property was vested in the curators; otherwise, the decree would have been contrary to justice. Though in the next case of *Jollett and Another v. Deponthieu and Another*, the bill was filed pending the attachment, yet

(c) At the Cockpit, 1762, cited in argument, 4 Term Rep. B. R. 187, *Hunter v. Potts*.

the question was, in whom the property was vested at the commencement of the attachment, and it was decided in favour of the curators or assignees. The same principle is also admitted in the case of *Neale v. Cottingham*, by the Chancellor of Ireland. As to the case of *Waring v. Knight*, Lord Mansfield decided there on a ground not now tenable, that the form of the action was improper: but in *Kitchen v. Campbell*, 3 Wils. 304, it is decided, that either an action of trover, or for money had and received would lie by the assignees, under the circumstances of those cases. Although the attachment in the present case was obtained by the sentence of a court of justice, yet where the truth of the case on which that sentence was founded was not known, the money ought in justice to be recovered back, notwithstanding such sentence.

The authority cited from *Richards v. Hudsons* at the Cockpit, was only an obiter opinion of Lord Mansfield, and not necessary to decide the point there in question. In the case of *Cleve v. Mills*, the doctrine of Lord Mansfield on this head likewise was obiter, and goes no farther than that of *Le Chevalier v. Lynch*, namely, to shew that the debtor of a bankrupt having paid his debt by virtue of process which he could not resist, should not be himself obliged to pay it a second time. But, independent of authorities, the Court will not hold out so great [674] a temptation to fraud, as to prevent the effect of the assignment extending to the colonies; since, if the law were so understood, some creditors would be continually gaining an undue preference to others, by the goods of a trader being sent out of the kingdom on the eve of his bankruptcy, and the equal spirit of the bankrupt laws would consequently be defeated.

After these arguments, it was agreed, that the case should wait the determination of a similar one (*Hunter and Others v. Potts*, 4 Term Rep. B. R. 182), then depending in the Court of King's Bench, which, it was understood, was to be argued before the twelve judges in the Exchequer Chamber.

But no such argument having taken place, the case was argued a second time in this court, in the present term, by Adair, Serjt., for the Plaintiffs, and Hill, Serjt., for the Defendant.

On the part of the Plaintiffs, Adair rested on the authority of *Hunter v. Potts*, which, he said, was decisive of the present case, unless some material ground of distinction between the two cases could be shewn.

On behalf of the Defendant, Hill Serjt., argued in the following manner;—He submitted to the Court two propositions.

I. That the debt received by the Defendant for the recovery of which this action was brought, did not vest in the Plaintiffs by the assignment of the commissioners; and therefore, as they had no claim but under that assignment, they never had a right to the debt, nor consequently to the money received for it.

II. Supposing they ever had a right, they had lost it by their own fraud or laches.

I. That debts due to bankrupts in the island of St. Christopher do not vest in assignees under a commission of bankrupt, will be proved, 1st. From the rules established for determining the extent and operation of statutes in general in the plantations. 2d. From the wording of the statutes of bankrupts. 3d. From determinations both in law and in equity. After which, answers will be offered to the arguments used and the authorities cited on the side of the Plaintiffs.

1. As to the rules for determining the extent and operation of statutes in general over the plantations, there appears in 2 P. Wms. 75, and Salk. 411, to be an established distinction between plantations in new uninhabited countries, and plantations in conquered countries; that with respect to the former, it is necessary that in them the laws of England should prevail, [675] otherwise they would be without laws; but with respect to the latter there is no such necessity, and therefore in them the old laws of the conquered countries are in force till new laws are given by the conquerors (7 Co. 17 b. 4 Burr. 2500. Cowp. 209). Now the Island of St. Christopher was jointly conquered, and possessed by the English and French, till ceded by the treaty of Utrecht entirely to the English: but there is no difference between a country conquered and a country ceded by treaty; the distinction therefore above noticed is applicable to that island; and the consequence is, that in general statutes passed in this country have there no validity or force. This rule with respect to plantations in conquered countries has never been controverted, since the time when the determinations above alluded to took place: and even with respect to plantations in uninhabited countries, it has been construed not to extend to statutes

of particular police; of which kind are the bankrupt laws (4 Burr. 2500). This receives farther confirmation from,

2. The wording of the statutes of bankrupts. The first now in use is 13 Eliz. c. 7, by which a power is given to the commissioners to assign debts "whosoever they may be found or known." But when that act was passed, the English had no plantations, and in the subsequent statutes of James I, (1 Jac. 1, c. 15, 21 Jac. 1, c. 19), at a time when they had several, those words are omitted. Yet it must then have been obvious to the Legislature, that those plantations had powers of making laws for themselves, and that statutes passed in this country would not be in force in those plantations, unless they were particularly mentioned, or comprised under general words necessarily including them. When indeed the Legislature has designed to include the plantations, it has expressly mentioned them, as in stat. 25 Geo. 2, c. 6, s. 10. But though the bankrupt statutes are numerous, no mention is made of the plantations in any of them. On the contrary, some are so pointed, as to shew that the Legislature had no notion of their extending out of the kingdom. This appears by the provisions relating to foreign attachments, all of which are confined to attachments in England. Thus the stat. 1 Jac. 1, c. 15, s. 13, provides, that debts due to bankrupts shall not, after the same are assigned by the commissioners, be attached as the debts of the bankrupt by any other person, according to the custom [676] of the City of London or otherwise: which words or otherwise, must mean (as was admitted by the counsel for the assignees in *Hunter v. Potts* (4 Term Rep. B. R. 184)), according to any other custom of attachment. The stat. 21 Jac. 1, c. 19, is still more explicit; for the provision in sect. 9, respecting attachments is confined to "London, or any other place, by virtue of the custom there used." There are many cities in England, in which, as well as in London, there are customs of foreign attachment; these the Legislature had in view, but not the laws of foreign countries. Therefore neither the intention nor the words of those provisions extend to the attachment in this case, found by the special verdict to have "duly issued according to the form of a certain law of the island in that case made and provided." The stat. 7 & 8 W. 3, c. 22, s. 9, has expressly declared what laws in the plantations are void, and by so doing has impliedly confirmed the law on which the attachment in the present case issued, which does not fall within the description of any of those which are by that statute declared to be void. As therefore it is a valid law, and not within the provision of any of the bankrupt laws against foreign attachments, the Defendant had a right to proceed upon it. This is likewise proved by stat. 13 Eliz. c. 7, because, as is observed by the Court, Cro. Car. 150, that statute has made no provision against foreign attachments. But that statute, and those of James I. are the only laws on which the claim of the Plaintiffs was, or could be argued to be maintainable.

3. As the statutes of bankrupts were never established in any of the king's foreign dominions by any legislative act, and as they could not, by the settled rules of construction, be extended to foreign countries, it was long doubted whether any or what notice could be taken of them in such countries. But it was at length settled, that the assignment of the commissioners operated as a voluntary assignment, binding as between the assignees and the bankrupt, but not affecting the rights of other creditors, and therefore not preventing their proceeding to attach debts due in those countries to the bankrupt. This Lord Mansfield held at the Cockpit (*Cleeve v. Mills*, Cooke's Bankrupt Laws, 370, last edit.), at the sittings at Guildhall (*Waring v. Knight*, *ibid.* 372), and in the Court of King's Bench, with the concurrence of the other judges of that court (*Le Chevalier v. Lynch*, Dougl. 169, last edit.). This was also the opinion of Lord Chancellor Hardwicke, and of Lords Commissioners [677] Smythe and Bathurst (*infra*, *Mawdesley v. Parke*): but the precise time when this was first settled, does not distinctly appear. It is however to be found in a case (Dom. Proc. Feb. 1749) arising on the lunacy of Mr. Morrison, cited incorrectly by the counsel for the Plaintiffs, in *Hunter v. Potts*, as the case of Mr. Morris (4 Term Rep. B. R. 185), and not there stated as to the principal point, which is most material in the present case. Mr. Morrison being a bond creditor of the respondent, was under a commission of lunacy here; and the respondent removing into Scotland, his committees instituted a suit there; but the Court in Scotland held, that the committees could not maintain their suit in that country. The reason against that decision, given in the appellant's printed case (page 1), was, that "mobilia sequuntur personam, and as Mr. Morrison was in England, the administration of his personal estate, granted by the usual authority where he resided, must be taken every where to be of equal force with a voluntary

assignment by himself, and that assignments made under commissions of bankrupt in England, had been holden in Scotland of sufficient authority to commence a suit, and receive money there due to the bankrupt." The utmost insisted upon as the right of assignees of bankrupts, was, agreeable to Lord Mansfield's opinion, a right to sue for and recover in Scotland debts there due. But as that was the whole, the case by no means proves that the debt could not have been attached, if the creditor of a lunatic, or of a bankrupt (to a proceeding by whom the case was compared) had proceeded by foreign attachment. In the section of Lord Kaim's Principles of Equity (b. 3, c. 8, sect. 4, p. 360, second edit.), referred to in the argument for the Plaintiffs in *Hunter v. Potts*, it is laid down as settled, "that an assignment in the English form of a debt in Scotland, does not transfer the *jus crediti*, and though first in time, will not avail against a more formal assignment *bonâ fide*," and afterwards the same author says: "We may safely conclude, the statutory transference of property from the bankrupt to the commissioners cannot carry any effects in Scotland;" but adds, "the English bankrupt statutes, however, must not be totally disregarded (sect. 8, p. 368) by us." He afterwards allows the same operation to the assignment of the commissioners, as is mentioned by Lord Mansfield, "that in the forms of the law of Scotland, there appears nothing to bar the assignees from bringing a [678] direct action against debtors of the bankrupt; as the bankrupt himself might have done before his bankruptcy." On the same principle Lord Hardwicke decided in *Wilson's case*, which, as cited by Lord Mansfield (Cooke's Bankrupt Laws, 373, last edit.), was thus: "Wilson a bankrupt had had effects in Scotland, and some of his creditors had proceeded against the effects there (there being a custom in Scotland analogous to the foreign attachment in London), upon which an application was made to the Lord Chancellor to stay their proceedings (the parties who set such proceedings on foot living in England). But Lord Hardwicke said, it could not be done, for our bankrupt laws were not in force there, and therefore the parties had a right to proceed. But he said that if the effects there were not sufficient to satisfy the party's debt, and he applied for a dividend under the commission here, in that case he would postpone him till the other creditors were paid in the same proportions he had received." This is the same rule that is always observed with respect to legal and equitable assets: the Court cannot take away the legal right of creditors by specialty to be paid, in preference to simple contract creditors, out of legal assets; but with respect to equitable assets, every specialty creditor, who receives part of his debt out of legal assets, is postponed till all the simple contract creditors are paid out of the equitable assets, as much as the specialty creditor has received out of the legal assets. In *Wilson's case* Lord Hardwicke did the like, with respect to the bankrupt's creditors who lived in England, and attached the bankrupt's effects in Scotland. That case therefore is a determination in favor of the right insisted on by the Defendant in the present action; for if the creditors in that case had not a right to secure their debts, by the means they used for that purpose (which were similar to those used by the present Defendants), as they lived in this country, Lord Hardwicke might, and ought to have prevented their gaining any advantage by the foreign attachment. This opinion of Lord Hardwicke and Lord Mansfield is founded on a principle long ago established, that the assignees of a bankrupt are in the same, and no better situation than the bankrupt himself, and therefore take, subject to every equity to which he was subject. This appears (1 Atk. 188, *Broune v. Jones and Others*) from the case of *Taylor v. Wheeler*, 2 Vern. 564, [679] where the mortgagee of a copyhold neglected to have the mortgage surrender presented at the next court, by which, by the custom of the manor, it became void at law; but the Lord Keeper decreed the assignees under a commission of bankrupt against the mortgagor to pay principal, interest and costs, or be foreclosed. That case shews that the assignment of commissioners of bankrupt, even in England, has only the operation of a voluntary assignment; for in that case, if a purchaser for valuable consideration, without notice, had acquired the estate, he would have excluded the mortgagee. The right of the creditor to take advantage of the law of foreign attachment against the assignees, is a consequence of the assignment to them not operating as a transfer for a valuable consideration, but as a voluntary assignment. A voluntary assignment of a debt in England would not prevent its being attached by the custom of London, and therefore, as the assignment of commissioners of bankrupt operates in foreign countries as a voluntary assignment, it cannot prevent debts in those countries being attached by the creditors of the bankrupt;

particularly, as the assignment of the commissioners even here operates as a voluntary assignment, except in cases where an express provision is made to give it a more forcible operation, such as there is with respect to foreign attachment here, by custom, and as there is also by stat. 1 Jac. 1, c. 15, s. 5, with respect to the disposition by the commissioners of the bankrupt's real and personal estates, notwithstanding any prior voluntary settlement; which provisions would have been unnecessary, if the assignment were of itself more forcible than a voluntary assignment. That part of the argument for the assignees in *Hunter v. Potts* (4 Term Rep. B. R. 184), which tends to prove that they take as representatives, is a confirmation of their taking as volunteers, except in cases where they are enabled by statute to take in a stronger manner. When indeed the statutes of Elizabeth and James were passed, on which alone the present case depends (as was admitted by the counsel for the assignees in *Hunter v. Potts* (ibid. 183, 184)), the law was taken to be, that debts due to the representatives of debtors were liable to be attached for the debts of the original debtors. In the case of intestacy, the only doubt as to administrators taking subject to foreign attachment, was owing to there being no such office as that of an administrator at common law; for which reason it was doubted (1 Roll. Rep. 105, 106, *Spink v. Tenant*. 5 Co. 82 b. *Snelling's case*), whether a custom could be applicable [680] to them. But notwithstanding that doubt, it was holden that debts due to administrators were liable to be attached by the creditors of the intestate, in those places where there was a custom of foreign attachment (ibid. and 1 Roll. Abr. 554 (K.), pl. 2).

In the case of *Cleeve v. Mills*, Lord Mansfield held, "that the statutes of bankrupts do not extend to the colonies, or any of the king's dominions out of England, but the assignments under such commissions are considered as voluntary, and as such take place between the assignees and the bankrupt, but do not affect the rights of any other creditors." In *Waring v. Knight*, "Sims the bankrupt went to Gibraltar, and the Defendant sent a power of attorney there to commence a suit against the bankrupt, which was done, and a decree obtained, and his goods taken in execution and sold, and the debt paid to the Defendant, to recover which, the action was brought." Lord Mansfield held, "that this money, being recovered by sentence in a foreign court, could never be recovered back by the assignees, our bankrupt laws not extending to any of our foreign settlements. He also said, it had been for a long while doubted, whether the assignees could recover a debt due in a foreign country to the bankrupt; but of late it had been determined they might (in a case at the Cockpit); so a debt may be recovered here due to a bankrupt in a foreign country, where the law obtains analogous to our bankrupt laws, which other countries will take notice of, and consider it in the same light as if the bankrupt had made an actual assignment:" by an actual assignment, his Lordship must have meant a voluntary assignment, agreeable to his opinion expressed in other cases. The case of *Le Chevalier v. Lynch* was a determination against the assignees, and in point with the present, and that, after the same right had been insisted on for the Plaintiff as is now contended for, except that the action was against the garnishee. But that circumstance was not (nor could be, as shall hereafter be shewn) the ground of the determination, notwithstanding what was said in the argument for the Plaintiffs in *Hunter v. Potts* (4 Term Rep. B. R. 187).

The case of *Mawdesley v. Parke and Beckwith* (Lincoln's Inn Hall, Dec. 13th, 1770, before the Lords Commissioners Smythe and Bathurst), was this:—"The Defendants were assignees under a commission of bankrupt against Campbell and Hayes, and after the assignment to them from the commissioners, several of the bankrupt's creditors [681] in Rhode Island attach a debt due from the Plaintiff to the bankrupt, in pursuance of an act of Assembly there, authorizing such process. The Plaintiff coming to England, the assignees brought an action at law against him, and the bill was filed for an injunction, the Plaintiff offering to pay what, if any thing, should appear to be due to the assignees, after deducting what should be recovered against him by the Plaintiffs in the foreign attachment. The assignees by their answer insisted, that the property of the bankrupts was vested in them before the writs were served on the Plaintiff, and therefore that he had no money or effects belonging to the bankrupts in his hands, and consequently that the Plaintiffs in those writs were not intitled to recover any thing. An injunction had been granted, and on shewing cause why it should not be dissolved, the Lords Commissioners Smythe and Bathurst continued the injunction to the hearing, and refused to order the Plaintiff to bring the

money into court, but directed that he should give security to be approved of by the Master, to pay the Defendants what (if any thing) should be decreed to be due: and they were of opinion that the assignment did not divest the property out of the bankrupts, as the debt was due in the plantations, but only gave the assignees a right to sue for it: that the creditors there had also a right to sue for it, who, having commenced a suit first, and recovered judgment there (on which there were appeals here depending, as was said at the bar, and was the fact, though it did not, nor could appear on the pleadings, being subsequent to them), had gained a priority over the Defendants; though it was admitted that there had been two cases (*Solomon v. Ross*, ante, 131, 132), one determined by Mr. Justice Bathurst sitting for Lord Northington, the other (*Jollett and Another v. Deponthieu and Another*, 132, n.) by Lord Camden, where commissions of bankrupts were issued in Holland, and some of the bankrupt's effects were attached in London, and the attachments were ordered to be discharged, and the money or effects paid to the assignees: and though it was argued by the counsel for the Defendants, that the rule in that respect ought to be reciprocal, yet it was answered that the bankrupt laws were not received in the plantations, and therefore this case was not like those two which were mentioned, there being bankrupt laws in Holland."

The distinction in that case was well founded. For as Scotland, with respect to its laws, continues, notwithstanding the [682] union, in the same situation as a foreign country, so do the plantations, when not included in acts of parliament.

But all questions arising on the laws of any particular country, in respect to their operation in foreign countries, especially such as relate to war or commerce, are to be determined by the law of nations, one maxim of which is equality (*a*)¹. The bankrupt laws therefore of all foreign countries ought to be allowed their operation here, on a presumption, that our bankrupt laws would be allowed to have effect in those countries. But in the plantations there are no bankrupt laws which could operate here; our bankrupt laws therefore ought not to be extended to them. It was on this ground they were at first disregarded in the plantations; but, as appears from *Mr. Morrison's case*, commissions of lunacy and bankruptcy were afterwards considered as investing the commissioners or their assignees with a power of seizing and recovering the effects of the lunatic or bankrupt, though not as giving them any right before seizure or recovery. This having become the usage in the plantations (which is one mode by which statutes may be in force there, as appears by 25 Geo. 2, c. 6, s. 10), so far they are in force there, and so far they have been allowed to be by Lord Hardwicke and Lord Mansfield, and no farther.

Thus much being advanced in support of the first proposition stated in the outset of the argument, answers shall next be attempted to the reasoning used, and authorities cited on the other side of the question, particularly in the case of *Hunter v. Potts*.

It was said in arguing that case (4 Term Rep. B. R. 187), that the case of *Le Chevalier v. Lynch* was not applicable, because the action was against the garnishee, and that nothing could be more clear, than that a person who had been compelled by a competent jurisdiction to pay the debt once, should not be compelled to pay it over again, and it was farther said, "that *Clore v. Mills* and *Allen v. Dundas*, went upon the same principle." But to this it may be answered: 1st, that not one of the cases above cited for the Defendant were determined on that principle; that in *Waring v. Knight* the action was against the Plaintiff, who recovered the money from the bankrupt, and in *Mawdsley v. Parke* the garnishee was the sole Plaintiff, and the Plaintiffs in the foreign attachment were not before the Court; yet both those cases were determined in the same manner as when the actions were [683] against the garnishees. 2dly, the garnishee is the proper person against whom the action should be brought; for he must be the correspondent of the bankrupt, and ought to give him and his assignees due notice. If he does give them notice, they ought to defend the suit, or else be bound by it. On the other hand, if he does not give due notice, he ought to pay the money over again (*a*)², for the fault was in him in not giving it.

(a)¹ On this, cap. 30 of Magna Charta is founded.

(a)² If money be attached and paid thereon, and afterwards the original creditor sues for the same, and the attachment happens to be ill pleaded, or otherwise avoided, the party must pay the money over again, and hath no remedy either in law or equity. 2 Show. 374, *Anon.*

He ought to suffer by his own laches, rather than the Plaintiff in the foreign attachment, who has been thereby prevented from coming in under the commission. The other case of *Allen v. Dundas* was on quite a different subject. The point there decided was, that payment to one who had a probate as executor of a forged will, notwithstanding the probate was afterwards revoked, was a good discharge against a subsequent rightful administrator. The reason of which is, that the party was not in fault, and the law will protect parties who are not in fault; but it will not protect those who are in fault, as every garnishee must be, who does not give due notice to the principal, when time is allowed for that purpose. Here more than thirteen calendar months appear, by the special verdict, to have been allowed for that purpose.

As to the supposed change of opinion of Lord Hardwicke and Lord Mansfield (4 Term Rep. B. R. 188), it was said, that Lord Hardwicke in the case of *Mackintosh v. Ogilvie* granted a writ of *ne exeat regno* against one who had obtained arrestments of a bankrupt's property in Scotland, and this was placed among the decisions said to be expressly in point. But in fact it was no decision at all concerning a foreign attachment, but a Scotch arrestment, which was indeed compared with a foreign attachment. What the circumstances of that case were does not fully appear, but according to the note of it, the person who made the arrestments had got the money into his hands, which, it is presumed, is by the Scotch law inconsistent with every species of arrestment. There must therefore have been something unjust done by the Defendant, which might be the reason for granting the *ne exeat regno*. However, as far as it concerns the present case, it was but an obiter and extra-judicial opinion. Lord Mansfield, when at the bar, is made to say (4 Term Rep. B. R. 188), "there had been many instances [684] where, after such arrestments and foreign attachments by creditors, the money had been recovered back again by the assignees under the commission, in actions for money had and received." But as not one of those many instances appear, and as in three several instances his Lordship determined the contrary, it is more than probable that the note was mistaken. The case of *Ballantine v. Golding* (Cooke's Bank. Laws, last edit. 522) cited in the argument of *Hunter v. Potts*, to prove Lord Mansfield's change of opinion, related not to the assignment, but to the certificate, and the former is only in question in this case; a change of opinion therefore, with respect to the last, if there had been any, would be no proof of a change with respect to the first. But there was no change of opinion at all, for in that case the debt was contracted, and the certificate obtained in Ireland; and therefore the debt was legally discharged, and could not be revived by the bankrupt's coming afterwards into England. What was said by Lord Mansfield that "a discharge by the law of one country will be a discharge in another," is to be understood with reference to the case then before him; but, whatever it was he said, the case was not determined upon it, but put off to another day, when the point was given up on the authority of *Burrows v. Jemino* (2 Stra. 733). Now the point determined in *Burrows v. Jemino*, was, that the sentence of a foreign court of competent jurisdiction is decisive; so that the principle, if applicable at all to the present case, is rather against than for the Plaintiffs, as there was a sentence in St. Christopher's in favour of the Defendant.

Another argument for the assignees was, "that with respect to personal property, the *Lex Domicilii*, and not the *Lex rei sitæ* is permitted to prevail;" to prove which, many cases were mentioned, and others referred to, as collected in *Bruce v. Bruce* (Dom. Proc. Ap. 1790). But in that case, the principle contended for was controverted, and the appellant, who rested his case upon it, failed. If he failed on the fact, there could be no determination on the principle; if on the law, the determination was contrary to the principle. The case therefore either proves nothing on either side, or else it makes against the Plaintiffs in the present action. And though many of the cases there cited, prove that the succession to an intestate's personal estate is to be determined by the law of the place where he had his [685] domicile, yet in none of them is there so much as a dictum, that debts due to him may not be attached by the law of the country where due. But admitting the rule, that the *Lex Domicilii* is to prevail, yet it is begging the question to draw any inference from that rule to the present case. For that would be going on a supposition, that by the law of this country, the property of debts due to bankrupts in St. Christopher's vests in the assignees under a commission of bankrupt here, which is the very point in question.

If it does not vest, then the law of the country, which is the domicile of the bankrupt, and the law of the country where the debt is due, are the same, and by the law of both countries the Plaintiffs have no property in the money for which they have brought this action, but had only a right to sue for it in St. Christopher's, which as they have not done, but acquiesced till it was recovered by the Defendant, he is intitled to it. Two authorities, Cro. Eliz. 683, and Skinn. 370, were cited, that an alien enemy may maintain an action here as administrator. But that affords no argument against the Defendant; rather the contrary, for an administrator sues en autre droit, and if the intestate were an alien enemy, the administrator could not maintain any action; which is implied Skinn. 370. The cases of *Pipon v. Pipon* and *Bruce v. Bruce*, relate only to questions of the succession to the effects of intestates; and as that of *Kilpatrick v. Kilpatrick* (4 Term Rep. B. R. 185) is among them, and not particularly stated, it is to be presumed to be of the same kind. In Precedents in Chan. 207, and 1 Bro. Parl. Cas. 38, the question was on the construction of marriage articles made in France, which was decided in this country, to which the parties had fled. The decision seems to have been, that the construction must be made according to the law of France. But whether it was or not, that is now settled to be the rule of construction in like cases, and if applicable at all to the present case, is against the Plaintiffs, as the debt was contracted at St. Christopher's. With respect to *Richards v. Hudson* (ibid. 187) and *Beckford v. Turner* (4 Term Rep. B. R. 188), the first relates only to rights not clearly stated, nor, as far as appears, applicable to this case; the other is against assignees, and mentioned only to be answered. Three cases (in the notes ante, 131, 132, 133,) were holden to have removed all doubts. But the two first, as far as appears, passed without argument, and in *Mawdesley v. Parke* were distinguished from [686] that case (as has been already observed), inasmuch as there are no bankrupt laws in the plantations, whereas in Holland there are; for which reason they are also equally distinguishable from the present case. With respect to the first of them, *Solomons v. Ross*, as Lord Commissioner Bathurst could not but know of his then late determination, he must have been the best judge of it, and if it was not applicable to the case then before him (i.e. *Mawdesley v. Parke*), it certainly cannot be to the present, as both cases arose in the plantations, that of *Mawdesley v. Parke* at Rhode Island, in which there was a law for foreign attachments stated and admitted in the pleadings; but no such law was stated in *Hunter v. Potts*, and therefore the Court could not suppose that there was any. That is likewise a material distinction between the present case and *Hunter v. Potts*, especially as it seems admitted by the Court (4 Term Rep. B. R. 192), that if there had been such a law in that country the determination would have been different. As to the case before Lord Camden of *Jollett v. Deponthieu* (ibid.), he took no note of it, and as he did not, and no argument appears in the printed note, it is reasonable to suppose there was none, and consequently that the point passed unnoticed in that case as well as the other. With regard also to the case of *Neale v. Cottingham*, before the Chancellor of Ireland, no arguments are there stated; and besides, as the bankrupt laws were then introduced in Ireland, that case is likewise within the distinction taken in *Mawdesley v. Parke*. Notes of cases without the grounds on which they were determined, ought to have but little weight, in opposition to cases decided on argument, and supported by general rules and principles, which are more to be relied on than particular opinions; especially when those opinions are not reconcilable (ibid. 186), as they were admitted not to have been, by the Counsel for the Plaintiffs in *Hunter v. Potts*, previous to that case. But there was no inconsistency in the decisions on this point. For though it was said in that case (ibid), that "there were several decisions expressly in point," yet it is submitted, that there is not one to be found, till that case was decided, in which the point determined was "that a creditor of a bankrupt cannot, after an assignment by the Commissioners, recover by foreign attachment in the plantations his debt, from a debtor of the bankrupt there," which is the point in the present case.

Another argument for the Plaintiffs was, that as all the parties were inhabitants of England, they were bound by the bankrupt laws, the evasion of which it was a fraud to attempt. [687] But this argument takes that for granted which is to be proved, namely, that the bankrupt laws vest the property of debts in St. Christopher's in assignees of bankrupts; which is the point on which the case depends; for if the property of the debt in question did not vest in the Plaintiffs by the assignment, the Defendant had a right to attach it. Though he is bound by the laws of this country,

yet unless those laws do in this respect extend to St. Christopher's (which is the point in dispute), he had not acted contrary to them in taking a legal course to secure his debt, which the jury have found to be a just debt. Every fair creditor has a right to make use of any legal means to secure his debt, and the using those means cannot be a fraud. Besides, there were similar circumstances in the case of *Waring v. Knight*. If indeed this argument were allowed, it would put the English in a worse situation than other nations, which would be both unjust and impolitic. The fraud is not in the Defendant, but in the Plaintiffs, which brings the argument to the second proposition submitted to the Court, viz.

II. That supposing the Plaintiffs ever had a right to recover the money which they demand, they have lost it by their own fraud or laches.

Their claim is founded on the assignment of the Commissioners, which was on the 5th of March 1782. The present action was not brought till Trinity Term 1787. It is impossible that they should not from the bankrupt's examination, and the inspection of his books, have known of this debt due to him in St. Christopher's; and if they also knew of the proceedings there, then their acquiescence from the 5th of March 1782, to the time when judgment was obtained in St. Christopher's, was a fraud. But if they did not know of the proceedings, (which is incredible,) it was gross negligence (2 Wils. 354) not to make an inquiry, of which they ought not to be permitted to take advantage. They acquiesced above five years before they brought the present action, and nine have elapsed before it is determined. And as far as appears, no application was made to the Defendant till just before the action was brought. Many of the creditors under the commission must be dead, or not to be found; and those who are living have probably given up all thoughts of any future dividend, by which means the Plaintiffs will, of course, keep to their own use, all, or the greatest part of what, if any thing, shall be recovered of the Defendant, who has lost [688] the opportunity of obtaining any satisfaction for his debt, and has been put to great expence; all which would have been prevented, if the Plaintiffs had defended the action in St. Christopher's. For then, either judgment would have been given for them at a far less expence than what has been incurred, and the Defendant would have had an opportunity of proving his debt under the commission and receiving his dividend; or, if the judgment has been given against them, they might have appealed to the King in Council, which would have been the proper way of proceeding (2 Lord Raym. 1447), and would have been speedily determined. But they suffered judgment to go against the bankrupt and the garnishee by a competent jurisdiction, which not being appealed from ought to be decisive. It is not to be considered as *res inter alios acta*, since there is that privity between the Plaintiffs and the garnishee that the judgment against the garnishee was, in effect, a judgment against the assignees, especially as it was not possible to make them parties. Though they are assignees under a commission of bankrupt, yet their acts and defaults are binding on the other creditors under the commission by whom they are chosen, to whom they are accountable, and who have a right to inspect their books and proceedings. This appears from the case of *Troughton v. Gitley*, Ambl. 630, where one of the assignees encouraged an uncertificated bankrupt to set up again in his trade, which he did, and carried it on for four years successively, and then died; upon this the assignees filed a bill against his administrator for his personal estate, and though it is clear that all effects acquired before a bankrupt obtains his certificate belong to his creditors under the commission in preference to any others, yet Lord Camden decreed in favour of the new creditors, and held that the case fell within the principle, that if a man having a lien stands by and permits another to make a new security, he shall be postponed like the common case of a first mortgagee suffering a second mortgage without giving notice of his security: his lordship therefore thought that the creditors under the commission ought to lose their priority. The same principle is applicable to this case. If indeed the Plaintiffs were to recover, it would encourage future assignees to delay the getting in debts till it was impossible to distribute them among all the creditors, and what was not distributable would be retained by themselves. [689] On this last proposition therefore, as well as on the general question, it is submitted that the judgment of the Court ought to be for the Defendant.

Cur. advis. vult.

On this day LORD LOUGHBOROUGH, after stating the special verdict, proceeded in the following manner,

The question is, whether the assignees of the bankrupt have a right to recover this money, as money had and received to their use? The objection made to it is, that the money was recovered by process in the Island of St. Christopher, in which the bankrupt laws of England have no direct binding force. A variety of cases have occurred on this question; and there is some confusion in the reports of them, which made a very deliberate consideration of it necessary. Not that I think it appears from the mere terms of the case itself, that the decision of this particular case could be attended with any great difficulty, or that any great question could arise out of it. The whole which has been argued has been as to the operation of the bankrupt laws in countries not subject to the jurisdiction of the courts of this country. In the present case, it is difficult for me to conceive that this question can arise out of the facts stated. For the simple state of the case is no more than this. The Defendant resident in England, and a creditor of Skirrow in England, has received money which was due to Skirrow in the Island of St. Christopher at the time of his bankruptcy, and which at that time was subject to no lien whatsoever. The money being remitted to Worswick in England, and being clearly money which at the time of the act of bankruptcy was the property of the bankrupt, and subject to no lien whatever, he is, *prima facie*, accountable for it to the assignees. The defence he makes is, that he recovered this money by legal process in the island; but he states also that the process was founded on an act done by him in England, and under the aid of the law of England. For the foundation of the recovery was an affidavit of debt made before the Mayor of Lancaster. Without that affidavit he could have instituted no proceeding in St. Christopher's; the money would have remained subject to the demand of the assignees whenever they had been appraised that such a debt was due, and had sent out proper powers. These propositions cannot be doubted. Then it is not a question whether the bankrupt laws have an operation at St. Christopher's, but whether they operated at Lancaster. It is a question, whether [690] a creditor resident in England, subject to the laws of England, shall avail himself of a proceeding of that law to enable him to get possession of a debt from those who are intitled to that debt, and who have the distribution of it for the benefit of all the creditors, and to hold that possession against those creditors.

But the argument has gone into a more general consideration of the cases which have arisen under different circumstances, in which the bankrupt's property being dispersed abroad, or he himself having changed his residence, advantage has been taken of his local situation, or of the local situation of the property which has been attached. This leads me to a short consideration of the cases on this subject, in which I see no difference, if their circumstances are rightly understood and rightly applied. First, it is a clear proposition, not only of the law of England, but of every country in the world, where law has the semblance of science, that personal property has no locality. The meaning of that is, not that personal property has no visible locality, but that it is subject to that law which governs the person of the owner. With respect to the disposition of it, with respect to the transmission of it, either by succession, or the act of the party, it follows the law of the person (*a*). The owner in any country may dispose of his personal property. If he dies, it is not the law of the country in which the property is, but the law of the country of which he was a subject, that will regulate the succession. For instance, if a foreigner having property in the funds here, dies, that property is claimed according to the right of representation given by the law of his own country. In the case of *Pipon v. Pipon* (Ambl. 29), a party had possessed himself of a debt which was due to the intestate a subject of Jersey, and whose personal property was therefore governed by the law of Jersey. Lord Hardwicke was applied to by his other relations resident in England, stating that they should be excluded from a share according to the distribution of Jersey, but that they should be entitled to a share according to the distribution of England; and they therefore prayed by their bill, that the administratrix might be restrained from taking the property to Jersey. Lord Hardwicke very wisely and justly determined that he would not restrain the administratrix, he would not direct in what manner she was to dispose of the property or to distribute it. Having acquired the right to

(a) [As to what constitutes a man's domicile so as to govern the distribution of his personal property, see *Bruce v. Bruce*, 2 Bos. & Pul. 229 (n), *Marsh v. Hutchinson*, *ibid*. See also *Scrimsire v. Scrimsire*, 2 Haggard, 405. *Hunter v. Potts*, 4 T. R. 185.]

it, she was to distribute it according to the law which guided the succession to the personal estate of the intestate.

[691] Personal property, then, being governed by the law which governs the person of the owner, the condition of a bankrupt by the law of this country is, that the law, upon the act of bankruptcy being committed, vests his property upon a just consideration, not as a forfeiture, not on a supposition of a crime committed, not as a penalty, and takes the administration of it by vesting it in assignees, who apply that property to the just purpose of the equal payment of his debts. If the bankrupt happens to have property which lies out of the jurisdiction of the law of England, if the country in which it lies proceeds according to the principles of well regulated justice, there is no doubt but it will give effect to the title of the assignees. The determinations of the courts of this country have been uniform to admit the title of foreign assignees. In the two cases of *Solomons v. Ross* (ante, 131) and *Jollett v. Deponthieu* (ante, 132), where the laws of Holland, having, in like manner as a commission of bankrupt here, taken the administration of the property, and vested it in persons who are called curators of desolate estates, the Court of Chancery held that they had, immediately on their appointment, a title to recover the debts due to the insolvent in this country, in preference to the diligence of the particular creditor seeking to attach those debts. In those cases the Court of Chancery felt very strongly the principle which I have stated, and it has had a very universal observance among all nations. But it may happen, that in the distribution of the law in some countries, personal property may be made the subject of securities to a greater or less extent, and in various degrees of form. It is in those cases only that any difficulty has occurred. A question of this nature came before Lord Hardwicke very largely in the bankruptcy of Captain Wilson. With the little explanation I am enabled to give of that case, in which the court of session entirely concurred with Lord Hardwicke, the distinctions will be apparent. There were three different sets of creditors who claimed, subject to the determination of the court, on the ground that Wilson had considerable debts due to him in Scotland. By the law of Scotland debts are assignable, and an assignment of a debt notified to the debtor, which is technically called an intimation, makes a specific lien quoad that debt. An assignment of a debt not intimated to the debtor gives a right to the assignee to demand that debt, but it is a right inferior to that of the [692] creditor who has obtained his assignment and intimated it. By the law of Scotland also, there is a process for the recovery of debts, which is called an arrestment. Some of Wilson's creditors had assignments of specific debts intimated to the debtors, and completed by that intimation prior to the act of bankruptcy. Others had assignments of debts not intimated before the bankruptcy. Others had arrested the debts due to him subsequent to the bankruptcy, and were proceeding under those arrestments to recover payment of those debts. The determination of Lord Hardwicke and that of the Court of Session entirely concurred. The first class I have mentioned, namely, the creditors who had specific assignments of specific debts, intimated to the debtors prior to the bankruptcy, were holden by Lord Hardwicke to stand in the same situation as creditors claiming by mortgage, antecedent to the bankruptcy. All therefore he would do with respect to them was, that if they recovered under that decree, they could not come in under the commission without accounting to the other creditors for what they had taken under their specific security. With respect to the next class of creditors Lord Hardwicke was of opinion, and the Court of Session were of the same opinion, that their title, being a title by assignment, was preferable to the title by arrestment: and they likewise held, that the arrestments, being subsequent to the bankruptcy, were of no avail, the property being by assignment vested in the assignees under the commission. It is in this sense that an expression has been used by Lord Mansfield, in one or two cases, in which his language rather than his decision has been quoted with respect to the law of Scotland, namely, that the effect of the assignment under a commission of bankrupt was the same as a voluntary assignment. For so the law of Scotland treats it in contradistinction to the assignment perfected by intimation, and to an assignment which the party might be compelled to make. But it does not follow that it is an assignment without consideration. On the contrary, it is for a just consideration; not indeed for money actually paid, nor for a consideration immediately preceding the assignment. In that respect, therefore, it is a voluntary assignment. But taking it to be so, it excludes and is preferable to all others attaching, it is preferable to all the arresters,

it is preferable to all creditors who stand under the same class, and to all who have not taken the steps to acquire a specific lien till after the act of bankruptcy [693] committed. In a variety of cases enumerated in Lord Kenyon's opinion (4 Term Rep. B. R. 192), the same idea has prevailed, which I think is founded on the clearest and most evident principles of justice. If the assignees in this case had sent a person over to St. Christopher's to act for them, if they had given notice of the assignment, the Court of St. Christopher's ought unquestionably to have preferred the title of the assignees to the title of the creditor using the process of attachment, because the law of the country, to which the creditor making the demand was subject, had, on a just consideration, vested that property in the present Plaintiffs. As I take the determination in the Court of Chancery in the case of *Solomons v. Ross*, and the other case, to be founded, not on any policy or technical notions of the law of England, but on general law, preferring the title of the assignees to the title of the arresting creditor, the Court in St. Christopher's ought also to have preferred the title of the assignees. When I have laid this down, it by no means follows that a commission of bankrupt has an operation in another country against the law of that country. I do not wish to have it understood, that it follows as a consequence from the opinion I am now giving (I rather think that the contrary would be the consequence of the reasoning I am now using), that a creditor in that country, not subject to the bankrupt laws nor affected by them, obtaining payment of his debt, and afterwards coming over to this country, would be liable to refund that debt. If he had recovered it in an adverse suit with the assignees, he would clearly not be liable. But if the law of that country preferred him to the assignee, though I must suppose that determination wrong, yet I do not think that my holding a contrary opinion would revoke the determination of that country, however I might disapprove of the principle on which that law so decided. But another case may possibly occur, of a suit brought against the bankrupt personally, and a case of this sort was stated in the argument, *Waring and Others v. Knight (a)*. I have not been able to get a particular account of that case. It is shortly stated in *Cooke's Bank. Law*, 372, that a person having committed an act of bankruptcy had gone over to Gibraltar, that a commission of bankrupt was taken out against him, and that the Defendant brought an action against him in Gibraltar, and obtained judgment, and under the judgment payment of his debt. Whether the person was resident at Gibraltar prior to the bankruptcy, whether the debt was contracted at Gibraltar, whether he appeared to the commission in England, none of [694] these circumstances are stated. But the decision would undoubtedly be very materially varied by those circumstances. Lord Mansfield held, that the Defendant, having recovered the debt against the bankrupt who was personally present at Gibraltar, was not answerable to the assignees for the money. I am told in one account of that case, that it turned on the form of the action. But this is clear, that there being no certificate, the Defendant in that case had a right to sue the bankrupt. A bankrupt in this country without a certificate, may be sued; and though his goods could not be taken in execution, being vested in the assignees, yet his person might. There was therefore a good commencement of the suit against the person of the bankrupt at Gibraltar. How the debt was contracted, and how the suit was carried on, the report gives no account. However, it is at most but a decision at *Nisi Prius*, and is the only case which seems at all to stand against the current of authorities, which hold that the operation of the bankrupt laws, with respect to the personal property of the bankrupt, when that property is brought into this country by any one who has obtained it, is to carry a right to recover it to the assignees for the benefit of all the creditors. But, as I said before, it is not necessary to go the whole length of that discussion, because, on the circumstances of this particular case, the question is merely whether a creditor of the bankrupt resident in England, and knowing of the bankruptcy, shall avail himself of a process which he has commenced in England, so as to retain his debt from the assignees, and gain a preference over the other creditors. This is a proposition too clear to require any discussion. The consequence therefore is, that there must be

Judgment for the Plaintiffs.

End of Trinity Term.

(a) [Vide post, vol. ii. p. 413.]

REPORTS of CASES ARGUED and DETERMINED
in the COURTS of COMMON PLEAS and EX-
CHEQUER CHAMBER. By HENRY BLACK-
STONE, of the Middle Temple. Vol. II. From
Michaelmas Term, 32d GEORGE III. 1791, to
Hilary Term, 36th GEORGE III. 1796, both
inclusive. The Fourth Edition. With Additional
NOTES and REFERENCES to the subsequent
DECISIONS. London, 1827.

[1] CASES ARGUED AND DETERMINED IN THE COURT OF COMMON PLEAS,
IN MICHAELMAS TERM, IN THE THIRTY-SECOND YEAR OF THE REIGN OF
GEORGE III.

VINCENT *against* BRADY. Friday, Nov. 18th, 1791.

Where a certificated bankrupt is arrested for a debt due before his bankruptcy, the Court will not discharge him on entering a common appearance, on stat. 5 Geo. 2, c. 30, s. 7 (a), if it appear that his certificate was obtained by fraud.

The Defendant in this case having become a bankrupt, and obtained his certificate, was arrested on a promissory note, given by him before his bankruptcy. In consequence of this, a rule was granted to shew cause why he should not be discharged out of custody on entering a common appearance, in pursuance of stat. 5 Geo. 2, c. 30, s. 7, which directs, that "In case any such bankrupt shall afterwards be arrested, prosecuted, or impleaded, for any debt due before such time as he, she, or they became bankrupt, such bankrupt shall be discharged upon common bail," &c.

Affidavits were read on shewing cause, stating that the Defendant's certificate was obtained by palpable fraud, many fictitious creditors having proved debts under the commission, and others having received money for signing the certificate. One of the affidavits was of the Defendant himself, made by him, last term, in the case of *Summer v. Brady* (ante, vol. i. 647), and setting forth the fraudulent means by which the certificate was obtained.

Marshall, Serjt., contended that the benefit of 5 Geo. 2, c. 30, s. 7, was taken away, if the certificate were obtained unfairly, [2] or by fraud, and by 24 Geo. 2, c. 57, s. 9, such certificate was declared to be void. And he cited *Martin v. O'Hara*, Cowp. 823, and *Sowley v. Jones*, 2 Black. 725.

Adair, Serjt., argued in support of the rule, that the Defendant was intitled to be discharged on a common appearance, by the terms of the stat. 3 Geo. 2, c. 30, s. 7, that he was not obliged to remain in prison till the time of the trial, when, and not before, it was to be proved whether or not the certificate were fraudulently obtained.

But the Court were clearly of opinion that the Defendant was not intitled to his

(a) [Similar provision in the new Act, 6 Geo. 4, c. 16, s. 126.]

discharge, as it plainly appeared from his own affidavit, that the certificate was obtained by fraud.

Rule discharged with costs.

REDRIDGE *against* PALMER. Monday, Nov. 21st, 1791.

Where, to an action of trespass, the Defendant pleads a special plea of justification to the whole declaration, and the verdict is against him, the plaintiff is intitled to full costs, although the damages are less than 40s. and the judge, at the trial, does not certify (a)¹.

In this action of trespass, the declaration, which contained only one count, stated that the Defendant with force and arms broke and entered a certain close of the Plaintiff, called the Yard, situate, &c. and then and there broke down, prostrated, &c. two wooden fences, &c. and the materials thereof, to wit, 500 pales, &c. took and carried away, &c. and also then and there pulled down, spoiled and destroyed a certain hog-stye, &c. and the materials thereof, to wit, 50 cart-loads of wood, &c. took and carried away, &c. and then and there ejected, expelled, and put out the Plaintiff from the possession, &c. of his said close, &c.

The Defendant pleaded, First, not guilty; Secondly, a plea of licence to all the trespasses mentioned in the declaration; on both of which pleas issues were joined.

These issues came on to be tried before Mr. Baron Hotham, at the last Lent assizes at Kingston, for the county of Surrey, when, on each of them, a verdict was found for the Plaintiff, with one shilling damages, and 40s. costs; but the judge did not certify. The prothonotary having allowed full costs to the Plaintiff, a rule was granted to shew cause why the taxation should not be reviewed, on the ground that as the damages were under 40s. and there was no certificate, the Plaintiff was intitled to no more costs than damages.

Against this rule, Kerby, Serjt., shewed cause; arguing, 1st, that where there was an asportavit of personal chattels, though [3] in the smallest degree, joined with the trespass, and a verdict found for the Plaintiff, he was intitled to full costs, (the case being out of the statute 22 & 23 Car. 2, c. 9), by the following authorities; in some of them in express terms, in others, by necessary inference. 2 Show. 258. Sir Thomas Raym. 487. Sir Thomas Jones, 232. S. C. 1 Salk. 208. Carth. 225. 2 Ventr. 48. 2 Bac. Abr. 513. 2 Com. Dig. tit. Costs, 446. 2dly, It was the constant practice, never departed from by the officers of the court (a)², to tax full costs to the Plaintiff, wherever a special plea of justification was pleaded, and found against the Defendant. And this was supported by 2 Ventr. 295. 2 Ld. Raym. 1444. 2 Com. Dig. 547. Barnes, 129 (last Edit. 8vo), and also by *Page v. Creed*, 3 Term Rep. B. R. 391, which was trespass for assault and battery; the Defendant justified the assault only, and the Plaintiff obtained damages under 40s. but the judge did not certify, and the Plaintiff had no more costs than damages: but the Court held, that if the plea of justification had extended to the battery as well as the assault, no certificate would have been necessary, the justification being tantamount to it. 3dly, A certificate was not necessary in this case, since it appeared on the record by the plea of licence, that the trespass was wilful (c).

Bond, Serjt. contra. The statute of Gloucester having given costs where damages were recoverable at common law, wherever the smallest damages were recovered the Plaintiff obtained his full costs. This was productive of so much inconvenience by encouraging vexatious suits, that it was the object of the Legislature, in subsequent statutes, to confine the operation of the statute of Gloucester. The Court therefore will not be anxious to extend the construction of the stat. 22 & 23 Car. 2, to the

(a)¹ [Accord. *Peidle v. Kiddle*, 7 T. R. 659. *Comer v. Baker*, post, 341. See also *Stead v. Gamble*, 7 East, 326.]

(a)² This was stated in Court by the prothonotaries, to be the uniform course in their office.

(c) But whatever might have been collected from the whole record, prior to the stat. 8 & 9 W. 3, c. 11, qu. Whether the only proper mode by which it can appear, since the passing that statute, that the trespass was wilful and malicious, be not the certificate of the judge, according to sect. 4 of that statute?

present case. As to the cases cited on the other side, to shew that an asportavit of personal chattels carries costs, the modern authorities of *Clegg v. Molyneux* (Dougl. 779, 8vo Edit.) and *Mears v. Greenaway* (ante, Vol. I. 291) sufficiently prove, that where the asportavit is coupled with the rest of the count, in the same manner as in the present declaration, it is not considered as a distinct injury, but part of one trespass, and therefore does not intitle the Plaintiff to full costs. [4] With respect to the argument, that wherever a special plea is found against the Defendant, the Plaintiff has full costs, it is a proposition which is by no means warranted by the statute; besides, if in the pleading that is involved which might have brought the title to the freehold in question, there must be a certificate from the judge, to give the Plaintiff a right to costs. Here the title to the freehold might have come in question, but there is no certificate.

LORD LOUGHBOROUGH on this day declared, that, after due consideration, the Court were of opinion that whatever question might be made on the true construction of the statute, as to the asportavit of personal chattels, yet as the practice had been uniform for a great length of time, above 100 years, it would be highly inconvenient to disturb it. The rule therefore, which had so long prevailed in both this court and the King's Bench, namely, that where there was a special plea of justification found against the Defendant, the Plaintiff was intitled to his full costs, ought not to be overturned.

Rule discharged.

WHITEMAN *against* KING. Wednesday, Nov. 23d, 1791.

A. being possessed of a quantity of land in a common field and having a right of common over the whole field, and B. having also a right of common over the whole field, they enter into an agreement, for their mutual advantage and convenience, not to exercise their respective rights for a certain term of years, and each party covenants to that effect. If during the term the cattle of B. come upon the land of A. he may distrain them damage feasant; And may in his replication (in answer to a plea pleaded by B. of his right of common, in bar of the cognizance of A.), set forth the special circumstances of the agreement and covenants [and leave the construction of them to the Court].

Replevin for taking, on the 20th of November 1790, at Holt, in the county of Norfolk, in a certain place called Holt-Field, one gelding, and three mares of the Plaintiff, &c. &c.

Cognizance, that the locus in quo was an open and common field, that one Anne Peters was seised in fee of 10 acres of land, being in and parcel of the said field; that on the 25th of March 1790, she demised the same to the Defendant King, for one year, and so from year to year, &c. &c., and acknowledged the taking the cattle, damage feasant, &c.

Plea in bar, admitting that the said place called Holt-Field, in which, &c. was an open and common field, and that the cattle were taken in the said parcel of the said field demised to the Defendant; that the said parcel of the said field, in which, &c. at the said time when, &c. lay, and from time whereof, &c. hath lain open to other parts of the said field, &c. and not inclosed or divided therefrom by any hedge or fence whatsoever; [5] that one Robert Jennis was seised in fee of a messuage and 60 acres of land in the parish of Holt, &c. that he and all those whose estate he hath (prescribing in a que estate) have had and used, &c. common of pasture for all his and their commonable mares and geldings, levant and couchant, &c. in and over the locus in quo (specifying the times of the year, and the mode of enjoying the common, with reference to the sowing the field with corn) as belonging and appertaining to the said messuage and land with the appurtenances: That the said Robert Jennis on the 15th of November 1782, demised the said messuage, &c. to the Plaintiff for 14 years; that the Plaintiff entered, &c. and (according to the specified terms of the prescription) put the cattle in the declaration mentioned, being his commonable gelding and mares levant and couchant, &c. into and upon the locus in quo, &c. and that the said cattle were and continued, &c. until the Defendant of his own wrong, &c.

The second and third pleas varied in a few circumstances of the prescription, and stated that Robert Jennis was seised of 50 acres of land, &c.

The fourth stated, "That in Holt-Field the lands of divers persons from time immemorial had lain, and still lay dispersed and intermixed in small parcels, and not inclosed or divided, the one from the other, by any fences or inclosures whatsoever; that Robert Jennis was seised in fee of 50 other acres of land; that as well as the last mentioned 50 acres of land, as also divers and many other parcels of land, of divers and many other persons, at the said time when, &c. did lie, and from time immemorial had lain dispersed in the said field, and were not inclosed or divided, the one from the other, by any fences or inclosures whatsoever; and that from time immemorial the mares and geldings of the respective owners of the said last mentioned 50 acres of land with the appurtenances, parcel, &c. and of their farmers and tenants thereof for the time being, levant and couchant upon the said last mentioned 50 acres of land, and depasturing and feeding there yearly and every year, from Michaelmas day, according to the said old style, in case all the corn growing before corn-harvest in such year, in the said field whereof, &c. hath been before that time cut down, taken and carried away from thence, and if not, then from the time that all the corn growing before corn-harvest in such year, in the said field whereof, &c. hath been cut down, taken and carried away from thence, until Lady-Day then next following, [6] according to the same old style, have used and been accustomed to stray and escape out of the said last mentioned 50 acres of land, into all the other parts of the said field whereof, &c.; which have so laid open and uninclosed, and were not divided, as aforesaid, by any fences or inclosures whatsoever, and which have not within that time been sown with any kind of corn, and to intercommon there; and that for and during all the time aforesaid, the mares and geldings of the respective owners of all other parts of the said field whereof &c. (the last mentioned 50 acres excepted) which have so during all the time aforesaid lain open and were not inclosed and divided, as aforesaid, by any fences or inclosures whatsoever, and of their farmers and tenants of such respective parts of the said field, so lying open and not inclosed or divided as aforesaid, respectively, for the time being levant and couchant upon such their said respective lands, and feeding and depasturing there yearly and every year from Michaelmas-day according to the said old style, in case all the corn growing, before corn-harvest, in such year in the said field whereof, &c. hath been before that time cut down, taken and carried away from thence, and if not, then from the time that all the corn growing before corn-harvest in such year in the said field whereof, &c. hath been cut down, taken and carried away from thence, until Lady-day then next following; according to the same old style, have used and been accustomed to stray and escape out of the said respective lands of the respective owners of such mares and geldings, into all parts and parcels of the said last mentioned 50 acres of land, parcel, &c. so lying and having lain open, and not inclosed or divided, as aforesaid, by any fences or inclosures whatsoever, which have not during that time been sown with any kind of corn, and to intercommon there, which said several strays, escapings, and intercommonings have been during all the time aforesaid called and known by the name of Shack."

The demise of the said 50 acres of land from Robert Jennis to the Plaintiff Whiteman was then set forth, &c. and "That as well the said parcel of the said field in which, &c. as the said last mentioned 50 acres of land, parcel, &c. so lying and being open, &c. and all the corn, &c., being cut down and carried away, the said cattle in the said declaration mentioned being the commonable geldings and mares of the said Plaintiff Whiteman, levant and couchant upon his said last mentioned 50 acres, and feeding and depasturing there, &c. &c. strayed and escaped from the said last mentioned 50 acres of land, into the said [7] parcel of the said field in which, &c. the same then, and from thence until, &c. lying open, and not being inclosed or divided as aforesaid, and not being then, nor from thence until, nor at the said time when, &c. sown with any kind of corn whatsoever, and for the cause aforesaid there continued and remained, from thence until the said Defendant King of his own wrong, &c. &c. &c."

The replication, as to the said several pleas, &c. protesting against the right of common of Robert Jennis, as in the said three first pleas is severally mentioned, protesting also that the mares and geldings of the said respective owners and farmers of the said 50 acres of land in the said plea last mentioned, &c. have not from time immemorial intercommoned, &c. stated "That before and at the time of making the articles of agreement hereafter mentioned, and also at the said time when, &c. the said Plaintiff Whiteman was an occupier of half year land in the said parish of Holt

in the said county ; and that after the making of the said several demises by the said Robert Jennis, &c. and before the said time when, &c. to wit, on the 1st of September 1783, by certain articles of agreement indented, made between the Defendant King of the one part, and the Plaintiff Whiteman and divers other persons being owners and occupiers of half year lands lying in the parish of Holt aforesaid, of the other part, (with a profert of the counterpart,) reciting, that by virtue of a lease granted to King by Joshua Smith, clerk of the farm called the Fold-Course, in the parish of Holt, for the term of 21 years, of which 12 years would remain and be unexpired on the 10th of October then next, he (King) was intitled to and had a right to feed and depasture his flock of sheep in, over, and upon the common heaths and waste grounds within the said parish, at all times of the year, and also in, over, and upon the common fields and other half year lands within the said parish of Holt, from twelve o'clock at noon on the 10th of October, to twelve o'clock at noon on the 5th of April in every year during the continuance of the said lease (except from time, and at all times when the same should be sown with wheat or rye) ; and also reciting, that the occupiers of half year lands in the said parish had a right to feed and depasture their great cattle at large, in, over, and upon, all the said common heaths and waste grounds, and also in, over, and upon the said common fields and other half year lands, (except, &c. as aforesaid) during the said time in every year that the same were subject to be fed by the said flock of sheep ; and re-[8]-citing, that for the improvement of the land in the said open fields, it had been the practice for some years then past, by general consent, to sow several pieces or parcels of land lying together in the same field (called a shift), and belonging to different occupiers with turneps, whenever the said lands came in course for that purpose, and to inclose and separate the whole of the said shift from the next adjoining lands with hurdles, lifts, or faggots, &c. that the turneps there growing might not be trespassed upon, or promiscuously fed, by the said flock of sheep or great cattle going at large, but preserved for a crop, for the use or disposal of each respective owner thereof, satisfaction being made to the occupier for the time being of the said Fold-Course, for the shackage of the said turneps. But some disputes having then lately happened, on account of the proportion of fencing materials which ought to be provided by each respective owner of turneps growing in the said fields, for inclosing and preserving them in manner above mentioned, tending to defeat the said practice ; in order therefore to remove and prevent all causes of complaint and dissensions relative to the premises, by some means that might render the inclosing turneps in the said field totally unnecessary, and make them and the said half year closes and inclosures more useful and convenient to the occupiers thereof, by exempting the whole from the said flock of sheep and great cattle going at large, and being promiscuously depastured thereon, during the remainder of the said lease ; it was agreed by and between the said Plaintiff and Defendant, and the said other persons whose hands and seals were subscribed and set to the said indenture, that for the consideration in the said articles of agreement mentioned, all the said half year land so occupied by them, should yearly and at all times of the year during the said term, be exempted, freed and discharged from being fed and depastured, not only by or with the said flock of sheep, or any other sheep belonging to the said Robert King (the Defendant), his executors, administrators, or assigns, but also by or with the great cattle going promiscuously or at large : And that the said half year land should, during the said term, in all respects be considered and used as whole year land, and be separately fed and depastured by the sheep and great cattle of the respective occupiers thereof, or such as they should take to pasture only.

A covenant was next recited, that neither of the parties should nor would, during the said term of 12 years, turn any sheep or other cattle loose into or permit them to go at large in the common fields, or on other half year lands lying in the parish of [9] Holt aforesaid, but feed and depasture them upon the lands in his or her respective occupations only, &c. There was then an averment, that the Defendant had not fed or depastured with sheep or great cattle, any of the common fields or half year lands in the said parish, and that his sheep and great cattle had not gone promiscuously over the said common fields or half year lands, (except the half year land of him the said Robert King,) but that the said Robert King had wholly abstained from feeding or depasturing with sheep or great cattle, any of the common fields or half year lands in the said parish, except his own half year lands ; that the lease granted

to Robert King (the Defendant) in the said articles of agreement mentioned, and the term of 12 years therein also mentioned, were in force and unexpired: that the said place called Holt-field, in which, &c. whereof the said land of the said Robert King was parcel, before and at the time of the making of the said articles of agreement, and also at the said time when, &c. was and still is an open common field in the parish of Holt aforesaid, and the said land of the said Robert King parcel, &c. before and at the time of making of the said articles of agreement, and at the said time when, &c. was half year land in the parish of Holt aforesaid, and that at the said time when, &c. the said cattle in the said declaration mentioned were turned loose and going at large on the said land of the said Robert King parcel of the said common field, &c. contrary to the said articles of agreement, and the covenant of the said John Whiteman (the Plaintiff), &c. &c.

To this replication there was a general demurrer, which was argued by Runnington, Serjt., on the part of the Plaintiff, as follows:

The question in this case is, whether under all the circumstances, the Plaintiff can be legally considered as a trespasser, so that the Defendant can justify the taking his cattle as a distress, damage feasant? But this cannot be, since it is admitted by the pleadings, that both parties had an equal right of common; and it is a clear rule of law, that though a commoner may distrain the cattle of a stranger damage feasant, yet he cannot those of his fellow commoner; for where there is only a colour of right in the one to put in the cattle, there cannot be a distress taken by the other. *Hall v. Harding*, 4 Burr. 2426. *Atkinson v. Teasdale*, 3 Wils. 278. 2 Black. 817, but the remedy is by an action on the case. *Ibid.*

[10] And secondly, The right of the Plaintiff was not released by the covenant. No interest passes by a bare covenant, Poph. 140. *Fulcher v. Griffin*, where "the parson of a parish covenanted with one of his parishioners that he should pay no tithes, for which the parishioner covenanted to pay to the parson an annual sum of money, and afterwards the tithes not being paid, the parson sued him in the Court Christian, and the other prayed a prohibition: and it was agreed that if no interest of tithes pass, but a bare covenant, then the party who is sued for the tithes hath no remedy but a writ of covenant: And the better opinion of the Court in this case was, that this was a bare covenant, and that no interest in the tithes passed." So also in *Deux v. Jefferies*, Cro. Eliz. 352. "Where to debt on an obligation the Defendant pleaded, that the Plaintiff had covenanted that he would not sue on the bond before Michaelmas, the Court held that the covenant did not enure as a release, and could not be pleaded in bar, but that the party was put to his writ of covenant, if the other sued before the time." To the same effect likewise is *Ayliff v. Scrimshire*, 1 Show. 46 (a).

The most that can be contended in the present case is that the right was suspended. But if it were suspended for a moment, it was so for the whole term. Now as it is a right appurtenant to the possession, if the Plaintiff had surrendered the lease to his lessor, and he had made a fresh demise to another tenant, that subsequent tenant could not be bound to the agreement. It would not even bind the assignee of the Plaintiff, notwithstanding the word "assigns" is used; for the contract was personal. *Shep. Touch.* 179.

But supposing the Defendant to have been right in considering the Plaintiff as a mere stranger and a wrong-doer, yet the distress could not be supported, unless expressly reserved and consented to by all the parties to the deed. *Co. Litt.* 143. *Doct. & Stud. dial.* 2, c. 9. So a penalty inflicted by a bye-law may be levied by distress, but only in case where such remedy is appointed for the recovery thereof, by the power that made the bye-law, and at the time when it was made; because the bye-law binds only the members of that community who make it, and consequently the penalty may be recovered by distress, [11] where the parties themselves have agreed to that remedy. But unless the distress be expressly provided for by the corporation, the penalty can be only recovered by action of debt. 5 Co. 64 a. *Dyer*, 321, pl. 23.

(a) But the principle, on which those cases of personal contracts were decided, seems to have been, that if the covenant not to sue had been construed to be a temporary release it was a perpetual one, because a personal action if once released is entirely gone.

Le Blanc, Serjt., contra. Although it be true, that one commoner cannot distrain the cattle of another, yet that rule is to be understood as applicable, only where the right of each is equal, and that no more than a right of common. But in the present case King, the Defendant, is owner of the soil, subject to a right of common in Whiteman the Plaintiff, and other persons at certain times. Now, by the deed the land was discharged from that right during the term; and then the common law right of distress was restored to the owner of the soil. The cases therefore between mere commoners cannot be applied to the situation of the owner of the soil and a stranger, which Whiteman was during the term. With respect to the argument, that no power of distress is given by the deed, King took the distress, not by virtue of the deed, but in his character of owner of the soil, upon whom all his common law rights attached.

LORD LOUGHBOROUGH. There is no difficulty in this case. The avowant had originally a clear right in respect of his property to distrain cattle damage feasant. The right of the Plaintiff is also stated which he might have had, but which he agreed by the deed under his hand and seal not to exercise: with regard to the avowant therefore he was a stranger. The consequence is that the avowant had a right to distrain. And I think there would have been no difficulty in pleading this agreement as a release.

GOULD, J., of the same opinion.

HEATH, J., of the same opinion.

WILSON, J. I think there was in this case, a release or extinguishment pro tempore, of the Plaintiff's right, and that it might have been pleaded as such. I take it to be a clear rule in pleading, that a party may state a deed and leave it to the Court to determine what is the operation of it (a)¹. If the legal operation of the deed is misstated, the plea is bad; but if the deed is only stated without its legal operation, it is good. My Brother Runnington's argument would be good, if the right were a mere personal interest. Here there is an agreement in the deed that the land shall be exempted. It is therefore not like the case in Popham, supposing that case to be law; for there the parson only agreed that he would not demand the tithes.

Judgment for the Defendant.

[12] DAVIDSON *against* LORD FOLEY AND OTHERS. Saturday, Nov. 26th, 1791.

Where a warrant of attorney has been given to confess a judgment to secure an annuity (together with other securities) the memorial must state the warrant of attorney, as well as the other securities. Nor is there any difference, in this respect, whether the annuity were granted and the warrant given before or after the 17 Geo. 3, when the annuity act passed (a)².

On the 4th of February, 1774, the Defendants in consideration of 700l. paid to them by the Plaintiff, executed a bond to the Plaintiff, in the penalty of 1400l. conditioned for the payment of an annuity of 100l. a year to the Plaintiff; and at the same time a warrant of attorney was given to confess judgment, which was entered up as of Easter Term, 14 Geo. 3. On the 31st of May 1785, a memorial was inrolled in the Court of Chancery, stating the bond and the judgment, but taking no notice whatever of the warrant of attorney. In the year 1786 an elegit issued on the judgment, and a moiety of the Defendant's lands were delivered to the Plaintiff.

A rule having been granted, in last Trinity Term, to shew cause why the judgment and all subsequent proceedings, together with the writ of elegit, should not be set

(a)¹ [That a deed ought to be pleaded according to its legal operation, see *Baker v. Lade*, 3 Lev. 291. 2 Saund. 97 b. (n.), 5th Edit. *Moore v. Earl of Plymouth*, 3 B. & A. 70.]

(a)² [Under the stat. 17 Geo. 3, c. 26, the date of the annuity deed must be set forth, *Ex parte Chester*, 4 T. R. 694. So the whole proviso for redemption, *Ex parte Ansell*, 1 Bos. & Pul. 62. *Steadman v. Purchase*, 6 T. R. 737. *Appleby v. Smith*, 3 Austr. 865. See *Dalmer v. Burnard*, 7 T. R. 250. But the memorial of an annuity granted since 53 Geo. 3, c. 141, need not state that the annuity is redeemable, *Fems v. Smith*, 3 B. & A. 206. If any one of the deeds constituting the assurance is not properly enrolled (under 17 Geo. 3), all the instruments are void. *Duke of Bolton v. Williams*, 4 Bro. Ch. C. 310. 2 Ves. J. 154. *Hart v. Lovelace*, 6 T. R. 476.]

aside, on the ground that the warrant of attorney was not stated in the memorial, *Adair and Rooke, Serjts.*, shewed cause (*a*). By the statute 17 Geo. 3, c. 26, s. 1, it is enacted that "a memorial of every deed, bond, instrument or other assurance, whereby any annuity should be granted after the passing the act, should be inrolled in the Court of Chancery," &c. By the second section, the case of annuities granted before the passing the act is provided for, and that section enacts, "That before any judgment should be entered of record upon any warrant of attorney for recovering or securing the payment of any annuity or rent charge, that had been then already granted, and before any execution should be sued out or action brought on any such judgment then already entered, or any deed, bond, instrument, or other assurance then already executed for the purposes aforesaid, a like memorial of the deed, bond, instrument, or other assurance, should be inrolled in the Court of Chancery," &c. Now it is evident from this clause of the statute, (by which the present case must be decided), coupled with and referred to the preceding one, that the only deed, bond, instrument, or assurance, which is required to be set forth in the memorial, is that by which the annuity was granted. But a warrant of attorney is not of that description; nothing is granted by it, it is merely an authority [13] to enter up judgment, and is completely functus officio when judgment is entered in pursuance of the authority. This transaction happened before the passing of the act 17 Geo. 3, c. 26; the parties did all that the law as it then stood, required of them; they could not possibly foresee what regulations parliament might think proper to make on such subjects; it could not occur to them that it was necessary to preserve the warrant of attorney, when the purpose for which it was given was answered: it might therefore be accidentally lost or mislaid, without the smallest imputation on the parties; and surely the legislature did not mean, by retrospect, to invalidate a security, merely because a useless instrument was not forth-coming. The Court therefore will not, it is presumed, put such a construction on the act as will be productive of so great a hardship.

Le Blanc, Serjt., for the rule. The object of the statute was, as appears from the preamble, to bring to light transactions of this kind which had become a general inconvenience from the secrecy with which they were conducted. It therefore directs that all the circumstances relating to such transactions should be disclosed: the dates of the several instruments, the names of all the parties, the sums to be paid, the consideration, &c. must all be set forth and specified. It is, therefore, contrary to the intent of the legislature that any instrument whatever respecting the annuity, should be kept back. Besides, a warrant of attorney is a deed; it is an instrument under seal, and therefore within the terms of the act. As to the argument that when judgment is entered it is functus officio, it is no more so than the bond when judgment is entered, and yet the bond must be inrolled: but if one may not be omitted, neither may the other. In *Downes v. Parkhurst* (Hil. 30 Geo. 3), this Court set aside a judgment to secure an annuity, because the date of the warrant of attorney was not stated in the memorial.

The Court took time to consider, till this day, when Lord Loughborough declared, that the reason for their hitherto delaying to pronounce their judgment was, that a similar case (*b*) was depending in the King's Bench, which was now decided, and with which decision this Court fully concurred; and that they were of opinion that the objection made to the memorial in the present case was well founded, and not to be obviated.

Rule absolute.

[14] *GODING against FERRIS.* Monday, Nov. 28th, 1791.

An action cannot be maintained against officers of the customs, for seizing goods as forfeited by the revenue laws, unless it be brought within three months after the actual seizure; notwithstanding a suit is instituted in the Court of Exchequer for

(*a*) It was at first objected that in consequence of a bill depending in chancery, filed by the Plaintiff against the Defendants, and the trustees and executors of the late Lord Foley's will, an ejectment was brought in the Exchequer by order of the Lord Chancellor on the elegit, and therefore that this Court ought not to proceed in the cause till the ejectment had been tried. But this objection the Court over-ruled.

(*b*) *Hopkins v. Waller*, 4 Term Rep. B. R. 463.

the condemnation of the goods, which is depending at the expiration of the three months (a).

This was an action of trespass, for seizing, taking and carrying away, at Cowes in the Isle of Wight, a lug sail boat of the Plaintiff, together with her furniture, tackle, &c. and divers other goods and chattels of the Plaintiff, to wit, 500 wooden casks, 200 gallons of brandy, &c. &c. under pretence that the same were forfeited, and were seized as forfeited by the Defendant under and by virtue of some or one of the laws relating to his Majesty's customs: Whereby, &c. &c. The second count was for seizing the boat and goods, &c. generally.

The Defendant pleaded not guilty, on which issue was joined. This issue came on to be tried before Lord Loughborough, at the last assizes at Winchester, when it appeared in evidence that the seizure was made by the Defendant, who was mate of the "Speedwell" Cutter, belonging to the Custom-house, on the 11th of May 1787, on the high seas in Shoreham Bay; that it was returned into the Court of Exchequer in the name of the Defendant, where proceedings were had to condemn the seizure, but that on the 26th of February 1789, the Plaintiff obtained a writ of delivery out of the Court of Exchequer which was not executed, he not having given the usual security in double the appraised value according to an order of that court (b): that on the 9th of August 1790, a notice was delivered to the Defendant dated the 6th of May 1790, of the Plaintiff's intention to commence this action, in pursuance of stat. 23 Geo. 3, c. 70, s. 30, and 24 Geo. 3, Sess. 2, c. 47, s. 35. On the 30th of September the action was commenced by suing out a *capias ad resp.*

It was objected by the counsel for the Defendant, that the action was not commenced within three months next after the matter or thing done, nor within three months next after the cause of action arose, as required by the statutes above mentioned. Lord Loughborough was of this opinion, and it was agreed that a verdict should be found for the Defendant, subject to the opinion of the Court on those points; for which purpose an [15] order of *Nisi Prius* was made. And a rule having been granted for the Defendant to shew cause why the verdict found for him should not be set aside, and instead thereof a verdict returned on the back of the record for the Plaintiff;

Adair and Rooke, Serjts., shewed cause. On the true construction of the statutes on this subject, the limitation must begin to run from the time of the actual seizure, which is the time when the cause of action arose; otherwise the statutes which were meant for the protection of revenue officers would be rendered nugatory. Where indeed by proceedings in a court of competent jurisdiction the Plaintiff's right of action is suspended, it is a different case; but here, unless it can be shewn that the proceedings in the Exchequer were a bar to commencing the action, the Plaintiff ought to have commenced it within three months from the actual seizure, and if those proceedings were a bar, as they are still depending, there is an end of the question. He had it in his power to gain possession of the goods by means of the writ of delivery, which vested the right of possession in him on giving the security required; but the Plaintiff's neglect to do so cannot in justice be imputable to the Defendant, so as to make him a trespasser by the detention subsequent to that writ, as a substantive cause of action. Neither could any evidence be given of what was not

(a) [So it has been held that trover will not lie for goods seized, if the action is brought after three months from the original seizure, though within three months from the grant of a writ of delivery under which part only of the goods had been delivered. *Saunders v. Saunders*, 2 East, 254. See also *Smith v. Wiltshire*, 2 B. & B. 622. *Crook v. M'Tavish*, 1 Bingh. 170. But where a consequential damage is the cause of action, the action may be brought within the limited period computed from the happening of such damage. *Roberts v. Read*, 16 East, 215, on the Highway Act, 13 Geo. 3, c. 78, s. 81.]

(b) On the 26th of February 1789, the Plaintiff obtained an order from the Court of Exchequer for the writ of delivery to issue without giving security. On the 2d of March 1789, the order was amended by adding, that the writ of delivery should issue on giving the usual security in double the appraised value. But no proceedings were had on the last order, nor was it served on the claimant's attorney.

contained in the notice (a)¹, clearly therefore no evidence of a detention subsequent to the date of the notice, could be received.

Lawrence, and Cockell, Serjts., argued in support of the rule, that though the legislature had limited the time of bringing the action to three months "next after the matter or thing done," yet the subsequent detention was to be considered as part of the same act as the seizure. So an imprisonment and detaining in prison are considered as constituting the same act. 1 Salk. 420. *Coventry v. Apsley*, Comb. 26. *Aldridge v. Duke*. By stat. 24 Geo. 2, c. 44, s. 8, it is provided, that no action shall be brought against any justice of the peace for any thing done in the execution of his office, unless commenced within six calendar months after the act committed; and on this statute it is holden, that if a man be imprisoned by a justice's warrant on the first day of January, and kept in prison till the first day of February, he will be in time if he brings his action within six months after the first of February, for the whole imprisonment is one entire trespass. Bull. N. P. 24. *Pickersgill v. Palmer*. Though [16] the goods were in the king's warehouse, yet they were put there by the officer who seized them, and the possession must be construed to be his. If the Plaintiff were obliged to sue within three months of the act done, he could not recover the special damage arising from the vexation of the suit in the Exchequer, and the long detention of the goods.

On this day, GOULD, J., declared, that after due consideration, the Court had no doubt but that the opinion which Lord Loughborough held at the trial was right, viz. that the time when the limitation of the three months was to commence, was to be reckoned from the actual seizure, that being the wrongful act or thing done, according to the meaning of the legislature.

Rule discharged.

End of Michaelmas Term.

[17] CASES ARGUED AND DETERMINED IN THE COURT OF COMMON PLEAS, IN HILARY TERM, IN THE THIRTY-SECOND YEAR OF THE REIGN OF GEORGE III.

PRITCHETT QUI TAM *against* RACHAEL CROSS. Saturday, Jan. 28th, 1792.

If a married woman be holden to bail (for the penalties incurred by insuring in the lottery) the Court will discharge her on entering a common appearance, if she make an affidavit of her coverture (a)². An affidavit to hold to bail on the lottery acts is sufficient, if it state that the Defendant "insured or caused to be insured, &c."

The Defendant having been arrested and holden to bail for penalties to the amount of 200l. incurred by insuring tickets in the last Irish lottery, a rule was granted to shew cause why she should not be discharged on entering a common appearance, and the bail-bond given up to be cancelled. The grounds on which the rule was moved for, were two, 1. That the affidavit to hold to bail was insufficient, because it stated in the disjunctive that she "insured or caused to be insured" (b), &c. 2. That she was a married woman (c).

The first objection the Court held to be of no weight, as they thought the allegation was sufficiently positive: but on the second, they made the rule absolute, being of opinion that the coverture of the Defendant was a good reason to discharge her, notwithstanding Runnington, Serjt., who shewed cause, urged [18] that she resided apart

(a)¹ 23 Geo. 3, c. 70, s. 30.

(a)² [Accord. *Edwards v. Bourke*, 1 T. R. 486. If the Plaintiff knowingly arrest a married woman, the Court will make him pay the costs of the motion for her discharge. *Wilson v. Serres*, 3 Taunt. 307. The affidavit must state in positive terms that the party is a married woman, *Harvey v. Cooke*, 5 B. & A. 747. See Tidd's Pr. 196, 8th Ed. Under what circumstances the Court will set aside a bail-bond given by a married woman, see *De Gaillon v. Victoire Harel L'Aigle*, 1 B. & P. 8. See also *Burfield v. De Pienne*, 2 Bos. & Pul. N. R. 380. *Luden v. Justice*, 1 Bingham. 344.]

(b) Stat. 22 Geo. 3, c. 47. 27 Geo. 3, c. 1.

(c) This appeared from her own affidavit; but it also appeared that her husband resided at Birmingham and she in London.

from her husband, and the bad consequences which might ensue during the drawing of a lottery, from lessening the effect of the statutes against the pernicious practice of insuring.

Rule absolute; but

GOULD, J., seemed to disapprove of the summary proceeding by motion, and of taking the fact of coverture from the Defendant's affidavit. He mentioned the case of *Mrs. Baddeley*, (2 Black. 1079) where the Court were not satisfied with an affidavit, but put her to plead her coverture, and he said he had always understood that such was the course both in the King's Bench and in this Court.

VERNON, Executor of Palmer, *against* CURTIS AND ANOTHER.
Friday, Feb. 10th, 1792.

In the Exchequer Chamber in Error.

[See *Hill v. Curtis*, 1865, L. R. 1 Eq. 97.]

To an action brought by a simple contract creditor, against an executor de son tort of an intestate, the executor de son tort cannot plead, that after action brought but before plea pleaded, he delivered over the effects to the rightful administrator, though in fact no administration was granted till after the action was brought; nor can he plead a retainer for his own debt of a superior degree, with the assent of the rightful administrator.

This was a writ of error on a judgment of the Court of King's Bench (a) in an action of assumpsit for work and labour done, for goods sold and delivered to, money paid to the use of, and money had and received by the testator. Pleas. Ne unques executor. 2. Plene administravit. 3. "That the said John Palmer died intestate, to wit, at London aforesaid, in the parish and ward aforesaid, and that he the said William Vernon never was executor of the last will and testament of the said John, nor ever had or possessed any goods or chattels which were of the said John, save as executor of his own wrong, and that after the death of the said John, and before this same Saturday (b) next after one month from the day of Easter, to wit, on the 14th day of May, in the year of our Lord 1789, administration of all and singular the goods and chattels which were of the said John Palmer deceased, who died intestate, by the Right Reverend Father in God John, by divine Providence, Archbishop of Canterbury, Primate of all England, and Metropolitan, to whom the granting of that administration of right belonged, was in due form of law committed to Susannah Palmer, widow, and relief of the said John Palmer, to wit, at London aforesaid, in the parish and ward aforesaid, and the said Susannah being so constituted administratrix, as aforesaid, he the said William Vernon afterwards, [19] and before this same Saturday next after one month from the day of Easter, to wit, on the 15th day of May in the year last aforesaid, at London aforesaid, in the parish and ward aforesaid, delivered and paid over, and caused to be delivered and paid over, to her the said Susannah as administratrix aforesaid, all and singular the goods and chattels, which were of the said John, which had ever come to the hands of him the said William Vernon, and the said William Vernon says, that he hath not, nor on the day of exhibiting the bill of them the said Timothy and William Curtis, had, nor at any other time since, hath had any goods or chattels of the said John at the time of his death, except the said goods and chattels so delivered and paid over to the said Susannah as administratrix as aforesaid, and this he is ready to verify, wherefore he prays judgment if the said Timothy and William Curtis ought further to maintain their aforesaid action thereof against him, &c. And the said William produces here in court the letters of administration of the said archbishop, so by him granted as aforesaid, which testify the granting thereof in form aforesaid, the date whereof is the same day and year in that behalf aforesaid. And for further plea in this behalf, by like leave of the Court here for that purpose first had and obtained, according to the form of the statute in such case made and provided, the said William Vernon says, that the said Timothy and

(a) See 3 Term Rep. B. R. 587.

(b) The day on which the plea was filed, and to which day there was imparlance.

William Curtis ought not further to maintain their aforesaid action thereof against him, &c. because he says, that the said John Palmer died intestate, to wit, at London aforesaid, in the parish and ward aforesaid, and that he the said William Vernon never was executor of the last will and testament of the said John, nor ever had or possessed any goods or chattels which were of the said John, save as executor of his own wrong, and that after the death of the said John, and before this same Saturday next after one month from the day of Easter, to wit, on the 14th day of May, in the year of our Lord 1789, administration of all and singular the goods, chattels and credits, which were of the said John Palmer deceased, who died intestate, was by the right reverend father in God John by divine Providence Archbishop of Canterbury, Primate of all England, and Metropolitan, to whom the granting of that administration of right belonged, in due form of law committed to Susannah Palmer widow and relict of the said John Palmer, to wit, at London aforesaid, in the parish and ward [20] aforesaid; and the said William Vernon further says, that he the said William Vernon in the life-time of the said John Palmer, to wit, in the Term of Saint Hilary, in the twenty-seventh year of the reign of our lord the now king, before the king himself, at Westminster, impleaded the said John Palmer in a plea of debt for 3000l. upon a certain writing obligatory of the said John Palmer, sealed with his seal, whereby he acknowledged himself to be held and firmly bound to the said William Vernon in the said sum of 3000l. to be paid to the said William Vernon, when he the said John should be thereunto requested, in which said plea it was in such manner proceeded that afterwards, to wit, in that very same Hilary Term, in the twenty-seventh year aforesaid, the said William by the consideration and judgment of the said court, recovered against the said John Palmer in that plea, the said 3000l. and also sixty-three shillings for his damages, which he had sustained, as well by the occasion of the detaining of the said debt, as for his costs and charges by him about his suit in that behalf expended, as by the record and proceedings thereof, remaining in the court of our said lord the now king, before the king himself, at Westminster, more fully and at large appears; which said judgment still remains in full force, strength and effect, no ways vacated, set aside, paid off, annulled, satisfied or discharged; and the said William Vernon further says, that no goods or chattels which were of the said John Palmer, at the time of his death, have ever come to his hands except goods and chattels to the value of 794l. 13s. 9d.; which are not sufficient to satisfy and pay the said debt and damages, and which are charged, bound and liable, to the payment and satisfaction thereof, and which he retains towards the payment and satisfaction thereof, and to which the said Susannah after the granting of the said administration, and before the same Saturday next after one month from the day of Easter, to wit, on the 15th day of May 1789, at London aforesaid, in the parish and ward aforesaid, duly assented," &c.

On the two first pleas issues were joined, and to each of the two last there was a general demurrer.

The Court of King's Bench having given judgment for the Plaintiffs (3 Term Rep. B. R. 587), a writ of error was brought and the assignment of errors was

"That in the record and proceedings aforesaid, as also in the rendering of the judgment aforesaid, there is manifest error in this, because by the record aforesaid it appears that [21] the judgment aforesaid was given for the said Timothy and William Curtis against him the said William Vernon, when by the law of the land that judgment ought to have been given for the said William Vernon against the said Timothy and William Curtis. There is also error in this, that it appears by the record aforesaid that judgment was given for the said Timothy and William Curtis against the said William Vernon, upon demurrer to the third plea of the said William Vernon to the declaration of the said Timothy and William Curtis, whereas that judgment ought to have been given for the said William Vernon against the said Timothy and William Curtis, because the said plea and the matters therein contained are sufficient in law to bar and preclude the said Timothy and William Curtis from further maintaining their aforesaid action against the said William Vernon, the said several matters therein alleged having occurred previous to the time of such plea being pleaded, as appears by the record of such plea; and such plea being pleaded in bar of further maintaining such action, therefore in that there is manifest error. There is also error in this, that it appears by the record aforesaid, that judgment was given for the said Timothy and William Curtis against him the said William Vernon upon demurrer to the fourth

plea of the said William Vernon to the declaration of the said Timothy and William Curtis, whereas that judgment, by the law of the land, ought to have been given for the said William Vernon against the said Timothy and William, because the said plea and the matters therein contained are sufficient in law to bar and preclude the said Timothy and William Curtis from further maintaining their said action against the said William Vernon, the several matters therein alleged having occurred previous to the time of such plea being pleaded, as appears by the record of such plea, and such plea being pleaded in bar of further maintaining such action; therefore in that there is manifest error. There is error also in this, that judgment was given upon the said third plea for the said Timothy and William Curtis against the said William Vernon as executor of his own wrong, although it appears that before such plea pleaded he delivered over all the assets of John Palmer which had ever come to his hands, to the rightful administratrix of the said John Palmer, and that as soon as administration was granted to her; therefore in that there is manifest error. There is also error in this, that judgment was given upon the said fourth plea for the said Timothy and [22] William Curtis against the said William Vernon, as executor of his own wrong, to recover a simple contract debt of the said John Palmer, although it appears that the rightful administratrix of John Palmer had before plea pleaded, and as soon as administration was granted to her, assented to the said William Vernon's retaining assets in respect whereof the action was brought, towards satisfaction of a debt of a superior nature, to wit, a debt on a judgment recovered in His Majesty's Court of King's Bench, by the said William Vernon against the said John Palmer, and although by the law of the land a rightful administratrix is bound to apply the assets of an intestate in discharge of debts of a superior nature before debts of an inferior nature; therefore in that there is manifest error," &c.

This was twice argued in the Exchequer Chamber, the first time in Easter Term last by Wood for the Plaintiff in error, and Bower for the Defendants; the second in Trinity Term, by Gibbs for the Plaintiff, and Bower for the Defendants. The substance of the arguments on behalf of the Plaintiff in error was as follows:—

At the death of the testator, the Plaintiff in error being a judgment creditor, but not intitled to administration, possesses himself of part of the effects, and the defendants being simple contract creditors, bring their action against him as executor de son tort, before any administration is taken out. On this state of the case it is obvious that if the Defendants prevail they will gain an unlawful advantage, but if they do not, the Plaintiff will have no advantage to which the law does not entitle him; it being perfectly clear that a creditor by judgment has a legal right to the payment of his debt, in preference to a creditor by simple contract. Although it seems to be taken for granted, that an executor de son tort cannot retain for his own debt, yet there is no express authority for this, except a position in 2 Bac. Abr. 390, which is not supported by the cases to which it refers. The principal authority on which that position seems to be founded, is *Coulter's case*, 5 Co. 30 a. but that case is not applicable to the present. There the Court held, "that an executor of his own wrong should not retain, for from thence would ensue great inconvenience and confusion, for every creditor (and chiefly when the goods of the deceased are not sufficient to satisfy all the creditors) would contend to make himself executor of his own wrong, to the intent to satisfy himself by retainer, by which others would be barred. And it is not reasonable that one should take advantage of his [23] own wrong; and if the law should give him such power, the law would be the cause and occasion of wrong, and of the wrongful taking of the goods of the deceased," &c. But in that case there was no question made as to the priority of debts: and though it may be proper that an executor of his own wrong shall not take advantage of that wrong, and give himself a preference which the law would not give him, yet it does not follow, that the Court ought to take away from him the preference which the law gives to creditors of a superior over those of an inferior degree. As an executor is bound to satisfy judgment before simple contract debts, why should he not retain his own judgment debt, in preference to a debt by simple contract? But in fact it appears from examining the Roll, that no judgment was given in *Coulter's case* (which is misreported Cro. Eliz. 630), but that a discontinuance was entered. There is therefore no decided authority to shew that an executor de son tort cannot retain for his own debt of a superior nature, against a creditor by simple contract. In 12 Mod. 471, Lord Holt says, "an executor de son tort, who is but an executor de facto, if he does lawful acts with the goods, as

paying of debts in their degrees, it shall alter the property against the lawful executor; as if he pay just and honest debts, the rightful executor shall not avoid that payment; and yet it is an act done by one that has no right. It is true he is not quit against the rightful executor, but he shall maintain trover against him; but what shall he recover in damages? Only for so much as he has misapplied; and all that he has well applied shall be abated in damages." And afterwards, if an executor de son tort gets 300l. of the testator's goods, and pays it duly to a just creditor, there the lawful executor, in my opinion, shall not even maintain trover against the wrongful executor, because it is a good payment, and no prejudice to the executor." Here the Plaintiff in error has done no more than paying a debt, in its due course, and according to its degree, and therefore ought not to suffer because he has paid it to himself. This alone affords sufficient ground for a determination in his favour. But the third plea states that before plea pleaded he delivered over the effects to the lawful executor. If this had been done before action brought, it would clearly have been a good defence. 1 Mod. 213. But the Plaintiff has not been guilty of any laches: no administration was granted till after action brought, and immediately upon its being granted he delivered over the effects to the rightful ad-[24]-ministratrix. It would be therefore highly unreasonable that he should be deprived of the benefit of this defence, when before action brought there was no person legally entitled to receive the effects, to whom he could have delivered them. The delay in granting administration, which he could not expedite, ought not to work so great injustice. The opinion of Lord Holt, Salk. 313 (a), "that if H. get the goods of an intestate into his hands, and administration be granted afterwards, yet he remains chargeable as a wrongful executor, unless he deliver the goods over to the administrator before the action is brought," can only be fairly understood as decisive, where such delivery over is possible, that is, where administration is granted before the action is brought.

An executor de son tort cannot be liable both to the rightful administrator and a creditor. Now supposing the rightful administratrix in this case had brought an action of trover, the Plaintiff in error could not have pleaded to that action, that a creditor had brought another action against him, and that he was liable to that creditor; but as he is not liable to both, if such a plea would not be an answer to the action of the administratrix, the consequence is, that the plea in the present instance is an answer to the action of the creditor. It is plain from 1 Sid. 76, 2 Show. 373, Freem. 265, 2 Vent. 180, 2 Stra. 1106, Andr. 333, that if after action brought, and before plea pleaded, an executor de son tort take out administration, the tort is purged, and he may plead a retainer for his own debt, though the writ is not abated by taking out administration. If it be objected that the Defendant's own act cannot give him a defence after the action brought, it may be answered, that the grant of letters of administration is not the act of the Defendant, and the delivery over by him is merely the discharge of a duty. But it is not true, in point of fact, that a party cannot have, by his own act, a defence after action brought. The contrary seems to appear from *Sullivan v. Montague*, Dougl. 106 (last 8vo edit.). If the defence in the third plea be over-ruled, the consequence might be, the setting aside the whole course of distribution and an injury to all the specialty creditors; for it would go to apply all the assets in the hands of the wrongful executor to the payment of a debt of an inferior degree, as he could not be liable to pay to the rightful administrator, and also to a specialty cre-[25]-ditor. With respect to the fourth plea, it is sufficiently clear from the authorities already cited, that if administration had been granted to the executor de son tort, he might have retained for his own debt, especially as it was a debt by judgment; he might also have defended himself from the action of the simple contract creditor, by other specialty debts due to third persons; then there is no good reason why he should not have the same right to retain, since the legal administratrix has assented to the retainer, which, in substance and effect, is no more than if he had paid over the money to the administratrix, and she had immediately repaid him the amount of his debt.

On the part of the Defendants in error, it was insisted upon, that an executor de son tort could derive no advantage from the wrongful character which he had thought proper to assume; that *Coulter's case* was a sufficient authority as to that point, and

(a) Which was relied upon by the Court of B. R. as decisive, 3 Term Rep. B. R. 590.

fully supported the position laid down in Bacon's Abridgement; that in *Coulter's case* also the Defendant was a creditor by bond in the nature of a statute staple, and therefore his debt was of a higher degree (stat. 23 Hen. 8, c. 6), than that of the Plaintiff, who sued only on a common bond, and yet the Defendant was not permitted to retain. The only ground open to argument is that which arises from the delivery over of the effects to the rightful administratrix, and her assent to the retainer. It is true that an administration granted to an executor de son tort legalizes his previous acts, and gives him a right to retain; but that arises merely ex necessitate, from the same necessity which gives the general right to executors to retain for their own debts, namely, to avoid the absurdity and inconvenience of a man's bringing an action against himself. And delivery over of the effects, after action brought, cannot defeat the action which was well brought, nor abate the writ. If the effects had been delivered over before action brought, it would have been good, because it would support the plea of plenè administravit. Salk. 313. But the plea of plenè administravit must be of an administration before action brought (a)¹: no subsequent payment can entitle an executor to the benefit of that plea. No person can have a plea puis darrein continuance by his own act; it must [26] be either the act of law or of the Plaintiff that can intitle him to it. Nor can he by his own mere act, done after action brought, give himself a plea in bar of the action. Thus in *Bradbury v. Reynel*, Cro. Eliz. 565 (b), the Court held that the Defendant, having once made himself chargeable to the Plaintiff's action, as executor de son tort, could not afterwards discharge himself by matter ex post facto. The same principle is recognized in *Padget v. Priest*, 2 Term Rep. B. R. 97. With respect to bankruptcy, release, &c. subsequent to action brought, from which the party may derive a plea, in those instances it is the operation of law, and not the mere act of the Defendant, which makes the benefit personal to himself. As to the argument drawn from the assent of the rightful administratrix, it cannot be law that such assent should give validity to the right of retainer claimed by the Defendant, so as to bar the Plaintiff's action, which was well founded when brought: and besides, such a defence, if admitted, would be often used as a colour for the purposes of fraud and collusion.

On this day, after consideration, Lord Loughborough declared the unanimous opinion of the Court, that whatever hardship or inconvenience there might be in the decision, yet as the law was settled, the Court ought not to overturn it. That on both the points rested upon in the argument, the law was established by a series of authorities from *Coulter's case* to that in Salk. 313, that an executor de son tort could not retain for his own debt, though of a superior nature, nor could he avail himself of a delivery over of the effects to the rightful administrator, after action brought, nor of the assent of the administrator to his retainer, so as to defeat the action of the creditor.

Judgment affirmed (a)².

End of Hilary Term.

(a)¹ In *Evans v. Prosser*, 3 Term Rep. B. R. 186, it was holden "that a plea of set-off, that the Plaintiff was indebted to the Defendant at the time of the plea pleaded, was bad; but that it ought to have stated, that he was indebted at the commencement of the action;" in contradiction to *Reynolds v. Beerling*, Mic. 25 Geo. 3, B. R., which case Buller, J., said, he found could not be supported as to that point. [Vide *Le Brett v. Papillon*, 4 East, 502. *Lee v. Levy*, 4 B. & C. 393.]

(b) But quære whether what is stated in *Bradbury v. Reynel* were true, viz. that the Court held, that if administration had been committed to the Defendant, it would not have purged the first tort? [See the cases collected in 3 T. R. 589. See also *Picard v. Brown*, 6 T. R. 551.]

(a)² At the close of the first argument, a doubt was suggested by Mr. Justice Gould, whether the Stat. 43 Eliz. c. 8, s. 2, had not given an executor de son tort a general right to retain for his own debt, and the counsel for the Defendants in error were desired to advert to that statute, previous to the second argument.

Afterwards Bower said, that, according to the desire of the Court, he had looked into the statute, but that it appeared to him clearly to relate only to the case of fraudulent administrations, which it was designed to prevent. To which opinion the Court seemed to assent.

[27] CASES ARGUED AND DETERMINED IN THE COURT OF COMMON PLEAS, IN EASTER TERM, IN THE THIRTY-SECOND YEAR OF THE REIGN OF GEORGE III.

FIELD QUI TAM *against* CARRON. Wednesday, April 25th, 1792.

The Court will not require the Plaintiff in a *qui tam* action to give security for costs, though it appear by affidavit that he is insolvent (*a*)¹. In such a case, the proper mode for the Defendant to pursue, is to move the court that the issue-money should be paid into the hands of the prothonotary (*b*)¹.

Adair, Serjt., moved for a rule to shew cause, why the proceedings in this action (which was against the keeper of a lottery-office for the penalties incurred by insuring tickets (*c*), should not be staid, till the Plaintiff give security for costs, on an affidavit of his insolvency and extreme indigence. But the Court said, they had already gone as far as they could in actions of this kind, by preventing the issue money from being paid to the Plaintiff, and ordering it to be placed in the hands of the prothonotary (*d*): that to require a security for costs would be directly contradicting the acts of parliament, which gave the penalties to whoever would sue for them, without imposing any such condition.

Rule refused.

[28] SHRUBE *against* BARRETT AND ANOTHER. Friday, May 11th, 1792.

If there be two Defendants in an action of assumpsit, one of whom suffers judgment by default, and the other obtains a verdict, he who obtains the verdict is also intitled to costs.

In this action of assumpsit for goods sold and delivered, one of the Defendants suffered judgment to go by default, and the other gained a verdict; but the judge did not certify that there was reasonable cause for making him a Defendant, according to stat. 8 & 9 W. 3, c. 11, s. 1 (*a*)². The prothonotary having allowed costs to him who obtained the verdict, a rule was granted to shew cause why the taxation should not be reviewed. Watson, Serjt., who moved for the rule, contended that before the passing the statute 8 & 9 W. 3, c. 11, if there were two Defendants, and one suffered judgment by default, and the other had a verdict, he was not intitled to costs, the courts holding that the former statutes (*b*)² which gave costs to Defendants, related only to cases in which all the Defendants had a verdict. This being found inconvenient, the stat. 8 & 9 W. 3, c. 11, gave costs where one of the Defendants was acquitted, unless the judge should certify. But that statute mentions only trespass, assault, false imprisonment and ejectment, and has been construed so strictly as not to extend to trespass on the case, 2 Stra. 1005, to trover, Barnes, 139 (8vo, last edit.), to replevin, 3 Burr. 1284, nor to an information, Salk. 194. The same construction therefore ought to prevail in the present action, which being assumpsit, is clearly an action on the case.

Le Blanc, Serjt., in shewing cause, urged that all the cases cited on the other side, were of actions founded on torts, between which and those on contracts of this kind there was this material difference, viz. that torts were joint and several, so that one Defendant might be acquitted, and the other found guilty; but that contracts being joint, where there were two Defendants in an action on a contract, one could not have a verdict, without a demonstration that there was no cause of a joint action against both. It was immaterial, therefore, that in the present case judgment went by default against one Defendant, since the other obtained a verdict. 1 Lev. 63,

(*a*)¹ [Accord. Bull. N. P. 196.]

(*b*)¹ [As to payment of the issue money, vide ante, vol. i. p. 254, note (*a*).]

(*c*) Stat. 22 Geo. 3, c. 47, and 27 Geo. 3, c. 1.

(*d*) This is the course in *qui tam* actions if the Defendant apply for it by motion. The same practice also prevails in B. R. 3 Term Rep. B. R. 137.

(*a*)² Which indeed would have been rather singular, if it had been required.

(*b*)² 23 Hen. 8, c. 15. 4 Jac. 1, c. 3.

1 Siderf. 76, 1 Keb. 284, are authorities to this point in an action of covenant, and Pract. Reg. C. P. 102, in an action of assumpsit.

The Court were very clearly of this opinion, and therefore Discharged the rule.

[29] LOVERIDGE, one, &c. *against* PLAISTOW. Friday, May 11th, 1792.

If a person be arrested after the writ is returnable, the officer cannot legally detain him (though for the shortest time) till the writ be contained (a)¹.

Runnington, Serjt., shewed cause against a rule, to discharge the Defendant out of the custody of the sheriff of Middlesex, on the following circumstances. The *capias* was returnable in three weeks of Easter, viz. on Sunday April the 29th; on Monday, April the 30th, at eight o'clock in the morning, the Defendant was arrested, and detained by the officer till ten o'clock on that morning, at which time the Plaintiff renewed the writ. This Runnington contended was a legal detainer, though the arrest was void, being made after the former writ had expired (*b*). But the Court were of a different opinion, and therefore made the

Rule absolute for the Defendant's discharge.

WELSH *against* TROYTE. Friday, May, 11th, 1792.

An action cannot be brought in a county court, unless both the Defendant reside and the cause of action arise within the county, i.e. within the jurisdiction of the court. Therefore, though the demand be for less than 40s. if the cause of action arise in one county, and the Defendant live in another, the action must be brought in a superior court (a)².

A rule was granted to shew cause why all the proceedings in this action, which was for coals, sold and delivered to the amount of 1l. 2s. 6d. only, should not be set aside, on the ground that as the demand was for a sum under 40s. the action ought to have been brought in the county, and not in this court.

Rooke, Serjt., shewed for cause, that the Defendant lived in Devonshire, and that the sale and delivery of the coals was in Somersetshire; that the action therefore could not be brought in the court of either of those counties; not in the former, because the cause of action arose in the latter, nor in the latter, because the Defendant lived in the former: for it was a rule of law that no suit could be brought in a county court unless both the Defendant resided, and the subject-matter arose within its jurisdiction, stat. West. 1, cap. 35. 2 Inst. 229, 230, 231.

The cause having stood over, on this day Lawrence, Serjt., who moved for the rule, admitted that it could not be supported, the following authorities being against it; viz. Dalton Sher. 412, cap. 110, where it was said that "sheriffs in their county courts may examine, hear, and determine certain smaller personal actions, as of debts due upon contracts, &c. [30] assumpsit, &c. happening, made, or done, within their county;" and Hern's Pleader, 493, 498, where in proceedings in county courts, the cause of action was alleged to be "within the jurisdiction of the Court," &c.

Rule discharged.

(a)¹ [Accord. *Barlow v. Hall*, 2 Anstr. 461. *Birch v. Proddger*, 1 Bos. & Pul. N. R. 135. But third persons who find him in such custody have a right to consider him as being lawfully in custody, and to proceed against him accordingly. *Barclay v. Faber*, 2 B. & A. 743. 1 Chitty's Rep. 579, S. C. and see the notes there, and Tidd's Pr. 217, 8th Edit.]

(b) Writs, therefore, which are returnable on a Sunday, must be executed, at latest, on the Saturday before.

(a)² [Accord. *Tubb v. Woodward*, 6 T. R. 175. *Busby v. Fearon*, 8 T. R. 235. *Smith v. O'Kelly*, 1 Bos. & Pul. 75. *Harwood v. Lister*, 3 Bos. & Pul. 617.]

MITCHELL *against* WHEELER. Saturday, May 12th, 1792.

The Court will not set aside an execution issued on a judgment after notice of a writ of error, if it appear from the admission of the Defendant's attorney, that the writ of error was brought merely for delay (a)¹.

A rule was obtained by Bond, Serjt., to shew cause why an execution issued on the judgment in this case, after notice of the allowance of a writ of error, should not be set aside, Kerby, Serjt., shewed cause by producing an affidavit of the Plaintiff's attorney stating the proceedings, and an admission of the Defendant's attorney, that the writ of error was merely for delay, and to drive the Plaintiff into terms. This the Court held to be sufficient cause, as it appeared from the admission of the attorney himself, and therefore

Discharged the rule (b).

GREEN *against* CROFT AND OTHERS. Saturday, May 12th, 1792.

Where there is a devise to A. for life, of the rents and profits of a real estate, and the interest and dividends of personal property, and after his death, the whole estates, both real and personal, to be divided between B. and C., the executors and trustees are bound to pay to A. the annual produce of the personal as well as real property, (especially if the personal property be money in the funds,) without requiring a receipt stamped as for a legacy; such annual payment not being subject to the tax (a)² imposed on legacies. [By stat. 20 Geo. 3, c. 28, 23 Geo. 3, c. 58.] Quere, whether in any case an executor can refuse to pay a legacy until a receipt or discharge be given?

This was an action for money had and received to the use of the Plaintiff; the Defendant pleaded the general issue, and a verdict was found for the Plaintiff, for 1062l. 7s. 6½d., subject to the opinion of the Court, on a case, the material part of which stated, that on the 27th of December, 1782, George Huddleston, by his will devised all his real and personal estates to the Defendants ⁶James Croft, George Huddleston, Jervoise Purefoy, and John Walker, their heirs, executors, and administrators, in trust that they and the survivor of them, and the heirs, executors and administrators of such survivor, do and shall receive all and singular the rents and profits, interests

(a)¹ [Accord. *Pool v. Charnock*, 3 T. R. 79. *Law v. Smith*, 4 T. R. 436 (n). So if the attorney admit it in effect, though not in terms, *Miller v. Cousins*, 2 Bos. & Pul. 329. See also *Spooner v. Garland*, 2 M. & S. 474. *Hawkins v. Snuggs*, 2 M. & S. 476. *Eicke v. Soverby*, 1 B. & C. 287. But where it did not appear but that the declaration of the Defendant that he would delay the Plaintiff was made before any action pending the Court refused leave to take out execution after error brought. *Barkett v. Barnard*, 4 M. & S. 331. And in *Rawlins v. Perry*, 1 Bos. & Pul. N. R. 307, the Court would not allow the Plaintiff to take out execution pending a writ of error, merely because the Defendant's attorney had declared that the debt would be settled, and that time was all the Defendant wanted. So the Court set aside an execution issued, pending a writ of error sued out before final judgment signed, when the Defendant had six months previously declared that if the Plaintiff did not accept the terms then proposed, he should never have any thing, and that he (the Defendant) would ultimately bring a writ of error. *Redford v. Garrod*, 1 B. Moore, 253. 7 Taunt. 537, S. C. See Tidd's Prac. 1202, 8th edit. and ante, vol. i. p. 432.]

(b) *Goodin v. Hammond*, Trin. 31 Geo. 3, C. B. A rule was obtained to shew cause why all proceedings should not be staid in an action on a judgment, pending a writ of error. On shewing cause, it appeared that the Defendant in the original action had once taken out a summons to pay the debt and costs, which he afterwards deserted, and suffered judgment to go by default; and that the attorney admitted there was no error, but that the writ was brought merely for delay. This being disclosed on affidavit, the rule was discharged with costs.

(a)² [By stat. 20 Geo. 3, c. 28, 23 Geo. 3, c. 58, and 29 Geo. 3, c. 51, the duty was imposed upon legacies through the medium of the receipt, and not, as in the later statutes, immediately upon the legacy itself.]

[31] and dividends thereof, and pay and apply the nett annual produce, after deducting thereout all charges and expenses of setting, letting, and managing the same, to my nephew John Green (the Plaintiff) during his life; and after his death, to convey, assign, transfer, and pay the same to and amongst his children living at his death," &c. that the same persons, who were thus appointed trustees, were also executors of the will; that the testator died on the 12th February 1784; that the annual value of his real estates, after deducting charges and expenses, was 284l. 6s. 7½d., and of his personal, after making the same deduction, 778l.; that the Defendants received those two sums previous to the commencement of the action, and tendered and offered to pay the same to the Plaintiff on his giving them a receipt or discharge upon such a stamp or stamps as is or are imposed by stat. 20 Geo. 3, c. 28, 23 Geo. 3, c. 58, and 29 Geo. 3, c. 51. And the question for the opinion of the Court was, whether the Plaintiff was intitled to receive from the Defendants, both or either of the said sums of 284l. 6s. 7½d. and 778l. without giving a receipt or discharge for the same, or any part thereof, on a legacy stamp, as required by the above cited statutes, or either of them?

On the part of the Plaintiff, Le Blanc, Serjt., made four points,

1. Whether a legatee were bound to give a receipt for his legacy?

2. Whether the statutes in question extended to an interest in lands?

3. Whether they extended to a life interest in personal property?

4. Whether the stat. 29 Geo. 3, c. 51, which passed after the death of the testator, was applicable to this case?

With respect to the first point, none of the statutes make it necessary that a receipt should be given, but only have the effect of declaring that no receipt shall be evidence of payment, unless it be properly stamped: it is not enacted that the payment of a legacy shall not be proved by other modes of evidence, as by witnesses who were present. If an action be brought to recover a sum of money, it is no defence for the Defendant to say that he offered to pay the money on condition that the Plaintiff would give him a receipt (a)¹, which the Plaintiff refused; and such a tender would not be good. As to the second point, the word legacy in the statutes cannot be holden [32] to extend to a devise of lands; the ordinary signification of it being the bequest of a sum of money in gross, and it is plain, that personal property alone was in the contemplation of the legislature, since the word legacy is followed by the words "any share or part of a personal estate, divided by force of the statute of distributions." The sum, therefore, of 284l. 6s. 7½d. the produce of the real estates is quite out of the question, and to that the Plaintiff is clearly entitled. As to the third point, the word legacy, as used in the acts of parliament, cannot be fairly construed to include an annuity, in the nature of which, this bequest of the annual produce of the personal estate evidently was: for if the legislature had intended to charge that species of property with a stamp duty, they would probably have appointed some person in the stamp office to regulate it, as is done in the case of the duty on indentures of apprenticeship (a)². Suppose the testator had directed the dividends and interest of his personal estate to accumulate, the produce in that case could not be liable to the duty, for then interest upon interest would be charged. So if part of the interest were directed to be laid out in the maintenance of an infant during his minority, it could not be said in that case that a stamped receipt as for a legacy must be given for every payment. It was the intention of the legislature, that the gross amount of money which should be given by a testator away from his wife and children, should be liable to pay a duty, which duty, to prevent evasion, is to be charged on the receipt. But it was not intended to charge the produce which arises after the testator's death, or the dividends on the public funds, the receipts for which are not liable to any duty at all. And the Defendants in this case might have enabled the Plaintiff to receive the dividends at the Bank, by means of a power of attorney. Indeed it is plain, that every legacy is not within the meaning of the statutes, as, for instance, a specific chattel. Suppose, too, that goods were bequeathed to A. for life,

(a)¹ But the obligor of a single bond is not bound to pay without an acquittance under seal: otherwise of a bond with condition, Bro. tit. Faits, pl. 8. 1 Vin. Abr. 192. Fortesc. Rep. 145. [The reason is, because payment was no plea at common law to debt on single bond.]

(a)² Stat. 8 Anne, c. 9, s. 37.

remainder to B, A. could not be required to give a receipt for the value at which the use of them might be estimated (*b*).

Lawrence, Serjt., for the Defendants. Wherever a legacy is liable to the duty, the legatee ought, in reason, to be compellable to give a receipt; for it would defeat the end of the acts of par-[33]liament, to hold them not to be compulsory. The definition of a legacy given by Swinborne (Part I. s. 6, p. 17), is "a gift left by the deceased, to be paid or performed by the executor or administrator;" and that the term legacy includes a devise of lands as well as a bequest of chattels, appears from Shep. Touch. 400, Salk. 415, Bendl. 60. This is in the nature of a legacy to be paid at different times, or by instalments, the same as if the testator had directed so much to be paid to the Plaintiff every half year: for if the increase is not a legacy, what is it? Nor is there any hardship in this construction; for the same property is not paid for more than once, if the duty is levied only on what is received. Suppose the whole had been directed to accumulate during the life of the father, and after his death to be paid to the children, must not they have paid the legacy duty for such accumulation? In this case, all the payments make one gross sum, for which the duty ought to be paid. If a testator gives a legacy of a certain sum to be raised out of the rents and profits of his land, it would be clearly liable to the duty. It was the intention of parliament that all persons should pay the tax who were the objects of the testator's bounty; and it is incumbent on the Court to carry that intention into effect.

LORD LOUGHBOROUGH. The only question for us to consider is, whether a receipt under the legacy acts was necessary in this case. The Defendants might have empowered the Plaintiff to receive the money himself, which brings it exactly to the case of money had and received by them to the Plaintiff's use. Legacies charged on land are undoubtedly liable, but not a devise of land, or of an interest in the land. No receipt is given for land, and the Plaintiff in this case is tenant for life in equity, and might have received the rents from the tenants, for it would have been no imputation on the Defendants to have permitted him so to do. The intention of the legislature was to charge all pecuniary legacies, it being supposed that for them the executors would find it necessary to take receipts; and therefore where the executor can demand a receipt as executor, he may deduct it out of the legacy. But this is not a case where the executors can demand a receipt, for undoubtedly they might authorize the legatee to receive the dividends at the Bank, and if an action were to be brought afterwards by him for the dividends, it would be a sufficient defence for the executors that he had received them himself, of which the books of the Bank would be evidence. It is impossible to construe the words "any [34] legacy" to mean all legacies, for it is plain they do not extend to specific chattels, as a horse or a piece of furniture. So a residue is out of the act of parliament, and accumulations de anno in annum are not subject to the tax, for if they were, it would be taxing interest upon interest. Suppose a legacy of 1000*l.* were given to A. in trust for an infant to go over in case he should die during his minority, and the infant dies; the interest during his life would belong to his representatives, and the remainder-man would be intitled to the principal. Now in that case, would the interest be liable to the legacy duty? Or suppose the money was paid to a trustee by the executor and a receipt taken for the whole, would the remainder-man afterwards be liable? The act does not appear to me to charge the profits arising after the death of the testator, but only the gross amount at the time of his death. If this interest were liable, it would follow, that all dividends of the public funds transmitted by will to persons for life, would pay an annual tax; which would very much sink the credit of the funds. It is difficult to calculate the value of an annuity; and the calculation can only be made at the time when the annuity commences: besides, the annuitant may sell it. But the growing profits after a testator's death, are not subject to the tax. As this demand therefore is for nothing

(*b*) The fourth point, viz. whether the stat. 29 Geo. 3, c. 57, which passed after the death of the testator, was applicable to this case, was not argued. Nor indeed was it very material, as that statute could only affect the quantum of the tax. But it seemed to be admitted in the course of the argument, that if the legacy tax were to be paid at all, it must be such as was prescribed by that statute, though passed subsequent to the death of the testator.

but growing profits, the Plaintiff must have judgment for the whole sum found by the verdict.

GOULD, J., of the same opinion. This bequest may perhaps be considered as a legacy to the children, with an exception in favour of the Plaintiff during his life.

HEATH, J. If the legacy tax were to be charged on the dividends of the public funds, it would be a breach of the national credit, and contrary to the acts of parliament, which expressly provide, that they shall not be liable to any taxes or impositions whatsoever (*a*)¹. It is a great error in the legacy acts that legacies themselves are not chargeable, but only the receipts for them.

WILSON, J. The legacy acts do not seem to me to extend to this case, nor to those cases where a receipt cannot be given, as where a legacy is bequeathed to an executor ; in which case he could not give a receipt to himself.

Judgment for the Plaintiff for the whole sum found by the verdict.

[35] KAY, one, &c. against WHITEHEAD. Saturday, May 12th, 1792.

Time to plead under a judge's order, is reckoned inclusive of the day of the date of the order, but exclusive of the day on which it expires (*a*)².

Adair, Serjt., shewed cause against setting aside an interlocutory judgment signed in this case for want of a plea, on the following circumstances.

A rule to plead having been given, a summons for time was taken out ; on Saturday the 28th of April a judge's order (*b*) was made for a week's time to plead ; and on Saturday the 5th of May in the afternoon, judgment was signed. The question therefore whether the judgment was regular, depended on this, namely, whether the week's time to plead was to be reckoned inclusive or exclusive of the day when the order was made ? The officers of the court being referred to stated the practice to be, that the time was reckoned inclusive of the day of the date of the order, but exclusive of the day when it expired ; that the judgment therefore was regular (*c*). And

GOULD, J., cited from a MS. note, the case of "*Read v. Montgomery*, in this Court, Easter, 26 Geo. 3, where an order for time to plead was made on the 16th of May, and judgment signed on the 23d of that month for want of a plea, which the Court held to be regular on consulting the officers."

Rule discharged.

NORTH against EVANS. Monday, May 21st, 1792.

Of the four days allowed to perfect bail after exception, the first is reckoned exclusively, and the last inclusively ; so that where the exception was on Wednesday, an attachment could not regularly issue against the sheriff till the Tuesday following (Sunday being no day). But though the attachment did issue on the Monday, the Court would not set it aside, because the bail were not perfected (*a*)³.

Lawrence, Serjt., shewed cause against setting aside an attachment against the sheriff for not bringing in the body on the following circumstances. Bail were put in on Monday the 30th of April, on Wednesday the 2d of May an exception was entered, and on Monday the 7th of May no bail being justified, the attachment issued.

(*a*)¹ Vide stat. 3 Geo. 1, c. 7, s. 27. Runninton's Edit. and the other statutes there referred to. [But now see statutes 36 Geo. 3, c. 52. 55 Geo. 3, c. 184.]

(*a*)² [But see *Freeman v. Jackson*, 1 Bos. & Pul. 479. See also *Aspinall v. Smyth*, 2 B. Moore, 655, that where time to plead is given under a judge's order, such time is to be reckoned from the expiration of the time to plead and not from the date of the order. But see *Tidd's Pr.* 476, 8th Ed.]

(*b*) The order was drawn up in the usual way, and nothing appeared on the terms of it decisive of the question.

(*c*) The practice in this court is, that the Plaintiff may sign judgment at the opening of the office in the afternoon of the day after the time to plead has expired. In B. R. he cannot do so till after 24 hours have passed from that time.

(*a*)³ [See *Maycock v. Solymán*, 1 Bos. & Pul. N. R. 139. *Tidd's Pr.* 257, 8th Ed.]

This, Lawrence contended, was regular, because he said the bail ought to have been perfected on the Saturday preceeding, viz. May the 5th, the four days allowed for perfecting bail after an exception being inclusive. On the other hand, Cockell, Serjt., insisted that the attachment was [36] too early; that the first of the four days was reckoned exclusively, and the last inclusively; and therefore that the attachment could not issue till Tuesday, May 8th, the preceeding Monday being one of the four days. The Court declared themselves of this opinion, but as the bail were not in fact perfected, they said they could not allow the present motion, and therefore

Discharged the rule with costs.

CONCANEN *against* LETHBRIDGE. Monday, May 21st, 1792.

In an action on the case against a sheriff for taking insufficient sureties in a replevin bond, the Plaintiff may recover damages beyond the penalty of the bond, i.e. for more than double the value of the goods distrained (*a*)¹.

This was an action on the case against the sheriff of the county of Somerset for taking insufficient sureties in a replevin bond.

The declaration consisted of two counts; the first stated that the Plaintiff on the 13th of October 1788 distrained goods and chattels of a large value, to wit, of the value of 21l. 4s. in the dwelling house of one Thomas Jones, for arrears of rent, to wit, for 10l. 10s. then due from the said Thomas to the Plaintiff, &c.; that the goods were replevied, a plaint levied in the county court, and pledges found to prosecute the said Thomas Jones, William Lewis and Charles Lewis, which plaint was removed by re. fa. lo. into the King's Bench; that in Trinity term 29 Geo. 3, the said Thomas impleaded the now Plaintiff on the said plaint in the King's Bench, that the now Plaintiff avowed the taking, &c. for the 10l. 10s. rent arrear, and that such proceedings were therefore had; that in Michaelmas term in the 31st year of Geo. 3, it was considered by the said Court that the said Thomas should take nothing by his said writ, &c. &c. and that the now Plaintiff should have a return of the goods, &c. And it was also considered, &c. that the now Plaintiff should recover against the said Thomas 84l. which in and by the said court were adjudged to him according to the form of the statute in such case made and provided for his costs and charges, &c. That afterwards the now Plaintiff sued out a certain writ directed to the sheriff of the county of Somerset, whereby it was commanded to the said sheriff that he should cause a return to be made to the said Plaintiff of the said goods and chattels, &c. &c.; that the then sheriff returned that the goods and chattels were cloined, &c. &c. It was then stated, that the Defendant, so being such sheriff as aforesaid, and not regarding the duty of his office, &c. but fraudulently intending to defraud the Plaintiff, &c. and to deprive him of his said distress and of all benefit thereof, did not at or before the replevying of the said goods and chattels, &c. take from the said Thomas and two responsible persons as sureties, a bond in double the value of the goods distrained, &c. &c. And the Plaintiff further said that the said goods and chattels have not been returned to him, &c. nor the rent, for which the distress was made, paid, nor the judgment discharged or satisfied, nor had the said Thomas Jones, William Lewis, or Charles Lewis, or any other person whatsoever, answered for or paid to the Plaintiff the value of the goods and chattels distrained as aforesaid, or any part thereof; by reason of which said premises the Plaintiff is still deprived of the benefit of the said distress (*a*)², &c.

The second count was nearly the same as the first, but concluded with stating, that the Defendant did not before, or at the time of replevying the said goods and chattels, to the said Thomas, take from him pledges sufficient as well for the said goods and chattels so distrained, being returned, if a return should be adjudged, as

(*a*)¹ [But it is now clearly decided that in an action against the sheriff for taking insufficient sureties, no more can be recovered against him than the party could have recovered against sufficient sureties, i.e. double the value of the goods distrained. See *Evans v. Brander*, post, 547. *Baker v. Garratt*, 3 Bingh. 59. Willes, 375 (*n*). See *Scott v. Waithman*, 3 Stark. N. P. C. 171.]

(*a*)² It was not stated under the per quod either in this or the other count, that the Plaintiff had sustained damage by the costs of the replevin suit.

for the said Thomas prosecuting his said complaint, which he ought to have done according to the form of the statute in such case made and provided, but neglected so to do, for that the said Thomas Jones, William Lewis, and Francis Lewis above mentioned to have been returned by the Defendant as such sheriff as aforesaid, at the time of their becoming pledges, were not sufficient to answer for prosecuting the said plaint, and for duly returning the said goods and chattels so distrained, in case a return should be adjudged; but the said Thomas Jones, William Lewis and Charles Lewis at the time of their being found by the said Thomas, and accepted by the said Defendant as such sureties, were and now are insufficient and totally irresponsible for that purpose, nor have the said goods and chattels been returned or delivered to the Plaintiff, nor hath the said judgment been yet discharged or satisfied, nor have the said Thomas and the said William Lewis and Charles Lewis, any, or either of them, or any other person answered to the Plaintiff for the value of the said goods and chattels so distrained, or of any part thereof, by reason of which said premises the Plaintiff is deprived of the said goods and chattels, and of the whole benefit of the said distress, &c.

At the trial it appeared that the rent in arrear was 10l. 10s. the costs of the replevin suit 84l. the value of the goods 22l. 4s. [38] and the penalty of the bond 50l. An expense of 5l. also had been incurred, in the proceeding de retorno habendo.

The Plaintiff had a verdict, with 100l. damages, subject to the opinion of the Court, as to what ought to be the extent of them.

A rule was granted to shew cause why the damages should not be reduced to the value of the rent distrained for, or to such other sum as the Court should think proper

Against this rule, in a former term, *Adair and Watson, Serjts*, shewed cause.

The damage sustained and stated by the Plaintiff is, that he has lost the benefit of his distress. The sureties in the replevin bond engage, not only that the goods shall be returned, but that the Plaintiff shall prosecute his suit with effect. They are therefore liable to the extent of the penalty of the bond, not only for the value of the goods, but also for the costs of the avowant in proceeding for the rent in arrear. The sheriff therefore ought to be liable to the same extent, as the sureties would have been if they had been solvent. The declaration states amongst the gravamina the costs paid by the Plaintiff in the replevin suit, and concludes generally per quod he has lost the benefit of the distress, and sustained damage to the value of 100l. The costs of the replevin are incident to the distress, and when the Plaintiff loses the benefit of the distress, he loses the benefit of those costs. The benefit of the distress is, that he shall have his rent with the costs of acquiring it. The costs necessarily follow the rent, and need not be separately claimed. The per quod referring to all the premises, it is unnecessary to repeat them at the close of the declaration. *Carth. 451. Salk. 15. The cases of Pattison v. Prowse (Bull. N. P. 602. Crompt. Prac. 238. [16 Vin. Ab. 400]), and Gibson v. Burnell (Triu. 20 Geo. 3, C. B.)* were similar to the present.

Rooke and Lawrence, Serjts., argued in support of the rule. The Plaintiff can recover no more than he would have had if the sheriff had acted right. Now the sheriff is to take a bond in double the value of the goods (*c*). If he had taken such a bond in this case, it would have been for no more than 44l. 8s. This is the farthest extent therefore to which the sheriff ought to be liable. But in the declaration the Plaintiff claims no more than the benefit of the distress, which, he alleges, he has lost by the Defendant's misconduct. Now the benefit of [39] the distress can be no more than the value of the goods taken. The sureties are not liable for the costs of the replevin suit, but only to return the goods. If the goods are returned, the bond is not forfeited; as against the sureties, then, nothing could be demanded but the value of the goods. The costs of the replevin suit cannot be a special damage, arising from the act of the sheriff. He is not to take sureties for those costs, which were not given to the avowant till the stat. 21 Hen. 8, c. 19, gave them. But sureties de retorno habendo were directed by stat. West. 2. The 11 Geo. 2, c. 19, does not alter the nature of the obligation of the sureties, but only the form, and some part of its effect. But if the Plaintiff were intitled to recover these costs, as special damages, he ought

to have stated them as such in his declaration. He states indeed in the count the judgment in replevin for the costs, not as a ground of claim against the Defendant, but to shew that the suit was determined, which was necessary to support the action. Before the Legislature (*d*) gave a power to sell the distress, the party distraining could only have kept it to compel payment of the rent.

Cur. advis. vult.

On the last day of the term LORD LOUGHBOROUGH said, that the Court had examined the roll in *Pattison v. Prouse*, where it appeared that the damages given by the jury for which judgment was entered, were made up of the costs of the replevin suit and the rent in arrear; the sum was precisely the same as was given for the damages and costs of the Plaintiff in the replevin suit. But there was a circumstance in that case, which was different from the present, viz. that the value of the goods was more than the sum for which the judgment was given; the value of them being 100*l.* but the whole amount of the damages and costs less than 100*l.* Here the value of the goods was 22*l.* 4*s.* which when doubled was considerably less than the damages found, which were compounded of the rent in arrear, the costs in the replevin suit, and the costs of the retorno habendo. But the Court would give the Plaintiff leave to enter up his judgment for the whole sum, subject to a condition that he should remit such part of it, as, upon a conference with all the judges, it should appear he had taken beyond what he was intitled to. That the Court were agreed that the Plaintiff would have a right to recover to the extent of double the value of the [40] goods; but whether he could go beyond that, was a point upon which they were not agreed, and upon which they proposed to take the opinion of the other judges, it being a question of great importance.

Cur. advis. vult.

The cause having stood over for some time,

On this day, LORD LOUGHBOROUGH, gave the judgment of the Court. After stating the facts, and observing, that it clearly appeared at the trial, that the Defendant knew the sureties to be insufficient at the time when he took them, his Lordship proceeded thus.

This case has been fully argued, and the Court has given it long and great consideration, a similar case having been lately decided in the Court of King's Bench (*a*), with which we cannot bring ourselves to concur. It was contended, in the argument, that the damages ought not to exceed the amount of the penalty of the replevin bond, and also that the value of the goods limited the responsibility of the sheriff, because if he had done his duty, and taken sufficient sureties, the Plaintiff could not have recovered more than double that value. It will therefore be proper to take a view of the law on this subject, as it originally stood, and the subsequent alteration which it has undergone. At common law, the sheriff, on delivering the goods, took pledges to prosecute, who were to answer the amercement. By the statute West. 2 (cap. 2) "he who delivered the goods was also to take pledges for the return of the beasts or the price of them; and it appears from 2 Inst. 340, that if he took insufficient pledges, they were no pledges within that statute, and the sheriff was charged by it, as if he had taken no pledges at all." At that time, then, the sheriff was liable to answer the value of the goods. From thence down to the 21 Hen. 8, there could be no question as to costs, as there were no costs given to the avowant before the passing of the stat. 21 Hen. 8, c. 19. But it appears from 2 Inst. 107, and 341, that after judgment of return irreplevisable, the lord or avowant was not bound to return the cattle, unless not only the arrarages of rent were tendered, but also "all that was due upon the judgment in the avowry."

Thus the law stood, till the act 11 Geo. 2, c. 19, was made, the last section of which was to remedy the mischiefs of vexatious proceedings in replevin. In this section also the case is [41] supposed, that the bond, which is the additional security, might be forfeited. If so, the penalty is a debt, and judgment must be entered up to the extent of it; but in the same section there is an equitable jurisdiction given to the Court, to qualify the penalty by giving such relief to the parties upon the bond, as may be agreeable to justice and reason, by rule of Court, which shall have the nature and effect of a defeasance to the bond. This made a material alteration in the

(*d*) 2 W. & M. c. 5. 8 Anne, c. 15. 4 Geo. 2, c. 28. 11 Geo. 2, c. 19.

(*a*) *Yea v. Lethbridge*, 4 Term Rep. B. R. 433.

law with respect to the relief which the landlord has, where the replevying is vexatious; as the judgment is for the whole penalty, it must cover, according to the equitable jurisdiction of the Court, all that has been lost by the proceeding; there would be no equity, it would not be "agreeable to justice and reason," unless the whole were covered. If therefore an action were brought on the security given by the statute, the party would be entitled to the whole. The only question then is, how far he shall be entitled where he does not proceed upon the statute. In *Prinse v. Pattison* (Bull. N. P. 60), it was decided, after great doubt, that an action on the case would lie. What then is the measure of damages, in an action on the case against an officer for neglecting the duties of his office? What has the Plaintiff lost by the neglect? This is a culpable neglect, not merely a simple non-feasance, and must have been accompanied with a bad intention. The rule then must depend upon what damages the party has sustained. The great doubt we have had, has been, whether we could go beyond the penalty of the bond. But this is the same sort of question as whether an action on the case would lie: and there is no rule which says, that in action on the case for an injury accompanied with a bad intent, less shall be recovered than the whole damage sustained. The verdict therefore must be entered for the whole sum found by the jury.

End of Easter Term.

[43] CASES ARGUED AND DETERMINED IN THE COURT OF COMMON PLEAS, IN TRINITY TERM, IN THE THIRTY-SECOND YEAR OF THE REIGN OF GEORGE III.

BROWN *against* LEESON. Tuesday, June 19th, 1792. No action will lie on a wager respecting the mode of playing an illegal game; and if such a cause be set down for trial, the judge at Nisi Prius will order it to be struck out of the paper (a).

This was an action of assumpsit on a wager. The declaration stated, "That a certain discourse was had and moved between the Defendant and the Plaintiff, on the number of ways of nicking seven on the dice, allowing seven to be the main, and eleven to be a nick to seven. That the Defendant asserted that there were no more ways than six of nicking seven on the dice, allowing seven to be the main, and eleven to be a nick, which assertion of the Defendant's the Plaintiff denied, and thereupon both the Plaintiff and the Defendant agreed to refer and submit the determination of the said question in dispute to one Walter Payne. That thereupon, in considera-

(a) [A wager upon the contingency of a peace between this country and a state with which we are at war, is illegal.—*Locausdale v. White*, 2 Esp. N. P. C. 629. So a wager upon a cock-fight, and the judge will not try such a cause. *Squires v. Whisken*, 3 Campb. N. P. C. 140. Or upon a dog-fight. *Egerton v. Furzeman*, 1 R. & M. N. P. C. 213. So also a wager, whether an unmarried woman has had a child? and the Judge will stop the trial. *Ditchburn v. Goldsmith*, 4 Campb. N. P. C. 152, and see Cowp. 729. Nor will the Court try an action upon a wager on an abstract question of law, or judicial practice, not arising out of circumstances really existing, in which the parties have a legal interest. *Henkin v. Guerss*, 2 Campb. N. P. C. 409. 12 East, 247, S. C. It seems also that a wager between the proprietors of two carriages for the conveyance of passengers for hire, that a given person should go by one of those carriages and no other, is illegal. *Eltham v. Kingsman*, 1 B. & A. 683, and see the observations of Abbott, J., *Ibid.* 688, as to the Judge refusing to try such questions, with regard to which, see also *R. v. Deacon*, 1 Ry. & M. N. P. C. 27, and *Burn v. Taylor*, *ibid.* (n).

But an action may be maintained upon a wager of a rump and dozen, whether the Defendant be older than the Plaintiff. *Hussy v. Crickett*, 3 Campb. N. P. C. 168. So a wager of less than 10l. upon a legal horse race. *M. Alister v. Haden*, 2 Campb. N. P. C. 438. So also a declaration on a wager, whether a certain agreement purporting to be subscribed by A., really was subscribed by him, is good after verdict. *Micklefield v. Heggins*, 1 Anstr. 133.

As to the action against the stakeholder in case of an illegal wager. Vide ante, vol. i. p. 65, note (a).]

tion that the Plaintiff at the special instance of the Defendant had undertaken to pay him the sum of 105l. in case the said Walter Payne should determine that there were no more ways than six of nicking seven on the dice, allowing seven to be the main, and eleven a nick to seven, he the said Defendant undertook to pay the Plaintiff the sum of 105l. in case the [44] said Walter Payne should determine that there were more ways than six of nicking seven as aforesaid.

"That the said Walter Payne did determine that there were more ways than six of nicking seven, &c. by means whereof the Defendant became liable to pay the Plaintiff the said sum of 105l. of all which premises Defendant had notice," &c.

The second count was similar to the first, omitting the reference to Payne. The third was for money had and received. Plea, the general issue. When the cause came on for trial, Lord Loughborough directed it to be struck out of the paper, as being of a nature highly improper to be made the foundation of an action; with a proviso, that it should be restored, in case the Court should, upon argument, be of a different opinion. Accordingly, a rule was obtained to shew cause why it should not be restored to the paper.

Against which *Le Blanc*, Serjt., shewed cause. He argued, that independent of the general question, which might be made as to the legality of a wager, in the subject of which neither party had an interest (*a*), the circumstances of this particular transaction were such as made it a very unfit matter for discussion in a court of justice. The game of hazard being played with dice, is prohibited by a number of statutes, and any wager which leads to an open enquiry into the mode of playing that illegal game, by which the by-standers may acquire a knowledge of it, is contrary to good morals and the policy of the law, and therefore not a ground on which an action ought to be maintained. Those statutes are, 33 Hen. 8, c. 9, s. 11. 12 Geo. 2, c. 28, s. 2. 13 Geo. 2, c. 19, s. 9. 18 Geo. 2, c. 34, s. 1 & 2. In *Atherfold v. Beard* (2 Term Rep. B. R. 610), which was on a wager, whether the Canterbury collection of the duties on hops in one year, would amount to more than the collection in the preceding year, though the Defendant admitted that he had lost, yet the Court set aside the verdict, because the wager was contrary to sound policy, inasmuch as it led to a discussion which tended to expose to the world the amount of the revenue. The present case is much stronger as it leads to an enquiry *contra bonos mores*.

The mode also of proceeding adopted at the trial, that of striking the cause out of the paper, was the proper one, because [45] if it had been tried, such an inquiry must necessarily have taken place.

Thus in *Jones*, assignee of *Knight, v. Parry* (cited in *Allen v. Hearn*, 1 Term Rep. B. R. 58), Lord Mansfield nonsuited the Plaintiff the moment the case was opened. And a good distinction is made in *Brewster v. Kidgil*, 5 Mod. 368, and Comb. 424, 466, between feigned issues to try a real right, and those which are merely a cover for another transaction, which Lord Holt declared he would not try. Besides, this wager was void on another ground: it was laid on a thing which admitted of no doubt, being capable of demonstration; for it is a matter of certainty, how many times any two numbers can be thrown with a pair of dice.

Lawrence, Serjt., contra. This wager cannot be brought within the description of those which are *contra bonos mores*, there being no immorality in simply discussing the manner in which a game could be played. It was a mere matter of curiosity. So in *Pope v. St. Leger*, Salk. 344, a wager on the rules of the game of backgammon was holden not to be illegal. As to the cases of *Brewster v. Kidgil*, and *Atherfold v. Beard*, they chiefly proceeded on the ground that it was a contempt of the Court to try one question, merely as a feint to introduce the decision of another. But there is surely nothing which militates against good morals or sound policy, in discussing how many times 7 and 11 can be thrown on two dice, which is the simple question, abstracted from the cant terms nick and main. With respect to the striking the cause out of the paper, that mode seems to have been improper, because it prevents the Plaintiff from carrying the question, which was on the record, to a court of appeal.

Le Blanc replied, to the objection that the Plaintiff was prevented from going on

(a) But the simple circumstance of neither party having an interest in the subject-matter of a wager, does not seem alone sufficient to make the wager illegal, according to the doctrine laid down in *Good v. Elliott*, 3 Term Rep. B. R. 693. [But see *Henkin v. Guerss*, 12 East, 247.]

to a superior court, that he had it in his power to bring a fresh action in that court; and to the argument drawn from *Pope v. St. Leger*, that in that case the bet was concerning a legal game, backgammon being excepted out of the statutes which prohibited other games at dice (a)¹.

GOULD, J. I think my Lord Chief Justice did perfectly right in refusing to try this cause. The game of hazard stands con-[46]-demned by the law of England; there are many statutes which make it illegal, and nothing can be more injurious to the morals of the nation, than a public discussion of this nature, before an audience whose curiosity is whetted to attend the trial of such questions. The refusing therefore to try it was both laudable and legal. In *Du Costa v. Jones* (Cowp. 729), which was on a wager concerning the sex of Madame D'Eon, I believe Lord Mansfield refused to try it a second time; and I very well remember that the only ground on which Mr. Justice Burnet was thought to have done wrong in the case before him (c), where he threw the record out of court, and refused to hear the trial on account of its indecency, was, that it involved a civil injury to the Plaintiff, it being stated in the declaration that she had lost her marriage by reason of the slander.

HEATH, J. All games at dice except backgammon (d) are prohibited by law, and I think it would be vilifying and degrading courts of justice, if they were to hear, by means of a wager, a discussion on prohibited games.

LORD LOUGHBOROUGH. This was a mere idle wager, and I [47] have no hesitation in saying, that I think a court or a jury ought not to be called upon to decide such wagers. But that point is not now insisted upon, nor is it necessary; for the other ground is extremely clear. I therefore adhere to the opinion which I held at the trial.

Rule discharged.

GOODRIGHT, ON THE SEVERAL DEMISES OF BURTON, *against* RIGBY AND OTHERS.
Wednesday, June 20th, 1792.

By a marriage settlement, lands were limited to A. for life, remainder to B. for life, with intermediate remainders, remainder to the heirs of the body of B. A. became a bankrupt, and by an act of parliament passed to vest his estates in trustees for the payment of his debts, &c. the lands in question were given, after payment, &c. to B. for life, with such remainders over (in general terms of reference) as were limited by the settlement: under these circumstances B. had a vested estate tail, of which she might suffer a recovery. A common recovery is good, though the sheriff return to the writ of seisin, that he delivered seisin on a day prior to the date of the conveyance to make the tenant to the præcipe, where the proceedings are all in the same term, by stat. 14 Geo. 2, c. 20 (a)².

In this ejectment which was on two demises, one of lands, &c. in the parishes of Lawford and Ardleigh; the other of lands, &c. in the parish of Lawford in the county of Essex, tried before Mr. Baron Hotham at Chelmsford, at the Spring Assizes, 1791, the following special verdict was found.

That John Launder and Francis Plumtree, being seised in their demesne as of fee of and in the lands, tenements and hereditaments, in the declaration mentioned, by a certain indenture, bearing date the 19th day of December 1738, made and executed between the said John Launder and Francis Plumtree of the first part, and the Right

(a)¹ See 13 Geo. 2, c. 19, s. 9. But that distinction was not, nor could have been, the ground of the decision in *Pope v. St. Leger*, no exception having been made, at the time when that case was decided, in favour of the game of backgammon. It appears indeed from the various reports of that case, viz. Salk. 344. 4 Mod. 409. 5 Mod. 4. 1 Lutw. 484, that the wager was holden not to be within the stat. 16 Car. 2, c. 7, against gaming, and therefore legal, because it was laid, not on the chance, but on the rules of the game, or as it is called, "the right of the play," which was a collateral matter.

(c) See an account of that case in *Du Costa v. Jones*.

(d) And games played with the back-gammon tables, 13 Geo. 2, c. 19, s. 9.

(a)² [Affirmed on error in K. B. when the objection as to the estate tail of B. was abandoned. 5 T. R. 177. Affirmed on error from K. B. in the House of Lords. 2 Dow, 250.]

Honourable Thomas Lord Onslow, George Bramston, William Guidott and John Barton, of the second part, the said John Launder and Francis Plumtree, for and in consideration of the sum of 5s. to them paid by the said Thomas Lord Onslow, George Bramston, William Guidott and John Barton, did bargain and sell to the said Thomas Lord Onslow, George Bramston, William Guidott and John Barton, their executors, administrators and assigns, the premises, with the appurtenances in the declaration specified, to have and to hold the same, with the appurtenances, to the said Thomas Lord Onslow, George Bramston, William Guidott and John Barton, their executors, administrators and assigns, for one year from thence next ensuing, by virtue whereof, and by force of the statute for transferring uses into possession, the said Thomas Lord Onslow, George Bramston, William Guidott and John Barton, were possessed of the said premises, as the law requires, and being so possessed thereof, by a certain other indenture quadripartite of release, dated the 19th day of December 1738, and made between Sir John Williams, Knight, Dame Mary his wife, and Richard Williams, Esquire, of the first part, the said John Launder and the said Francis Plumtree of the second part, and Henry Burton, Mary his wife, and Sarah Bishop, of the third part, the said Thomas Lord Onslow, George Bramston, William Guidott and John Barton, of the fourth part, after reciting amongst other things, that a marriage was intended to be had and solemnized between the said Richard Williams and Sarah Bishop, the said John Launder and Francis Plumtree, for the consideration in the said indenture mentioned, did grant, bargain, sell, remise, release and confirm, unto the said Thomas Lord Onslow, George Bramston, William Guidott and John Barton, in their actual possession then being by virtue of the said bargain and sale, amongst other things, all the several tenements, with the appurtenances in the declaration mentioned, to hold the same to the said Thomas Lord Onslow, George Bramston, William Guidott and John Barton, their heirs and assigns for ever, to and for the following uses, intents and purposes, that is to say, as to all the several tenements, with the appurtenances in the first demise of the said declaration mentioned; [48] to the use of the said Mary Burton during her natural life, and from and after her decease, or the sooner determination of that estate, to the use of the said Sarah Bishop and her heirs, till the said intended marriage should take effect, and from and after the solemnization of the said intended marriage, and the determination of the estate of the said Mary Burton, to the use of the said Richard Williams during his natural life, without impeachment of waste, with remainder to the use of the said Thomas Lord Onslow, George Bramston, William Guidott and John Barton, during the life of the said Richard Williams, to preserve the contingent remainders, therein after limited, from being defeated or destroyed, with remainder to the use of the said Sarah Bishop during her natural life, without impeachment of waste, in full satisfaction of her dower, with remainder to the use of the said Thomas Lord Onslow, George Bramston, William Guidott and John Barton, for a term of 500 years, without impeachment of waste, upon certain trusts therein specified, which said term has long since extinguished, with remainder to the use of the first and other sons of the said Richard Williams on the body of the said Sarah Bishop lawfully to be begotten, successively in tail male, with remainder to the use of all and every the daughters of the said Richard Williams on the body of the said Sarah Bishop lawfully to be begotten, and to the heirs of the body and bodies of such several and respective daughters lawfully to be begotten, to take as tenants in common, and for want of such issue, to the use of the heirs of the body of the said Sarah Bishop, and for want of such issue, to the use of the said Mary Burton, her heirs and assigns for ever. And as to the several tenements, with the appurtenances, in the second demise of the said declaration mentioned, to the use of the said Sarah Bishop and her heirs until the said intended marriage should take effect, and from and after the solemnization of the said marriage, to the use of the said Richard Williams during his natural life without impeachment of waste, and from and after the determination of that estate, to the use of the said Thomas Lord Onslow, George Bramston, William Guidott and John Barton, during the life of the said Richard Williams to support the contingent remainders thereafter limited, from being defeated or destroyed, and from and after the determination of that estate, to the use of the said Sarah Bishop during her natural life, without impeachment of waste, with remainder after the decease of the said Richard Williams and Sarah Bishop, to the use of the first and other sons of the said Richard Williams, on the body of the [49] said Sarah Bishop lawfully to be begotten, successively in tail male, with remainder to the use

of all and every the daughters of the said Richard Williams on the body of the said Sarah Bishop to be begotten, and the heirs of their several and respective bodies, as tenants in common, and for want of such issue, To the use of the heirs of the body of the said Sarah Bishop, and for want of such issue, to the use of the said Mary Burton, her heirs and assigns for ever. And the jurors aforesaid, upon their oath aforesaid, further say, that Henry Burton and Mary his wife, in right of the said Mary, by virtue of the said two last indentures, entered into the tenements, with the appurtenances in the first demise of the said declaration mentioned, and became and were seised thereof in their demesne as of freehold, to wit, for and during the term of the natural life of the said Mary, the remainders thereof in form aforesaid belonging; and that a marriage was afterwards had and solemnized by and between the said Richard Williams and Sarah Bishop, and thereupon the said Richard Williams entered into the tenements, with the appurtenances in the second demise of the said declaration mentioned, and became and was seised thereof as the law requires in his demesne as of freehold, to wit, for and during the term of his natural life, the remainders thereof in form aforesaid belonging. And the jurors aforesaid, upon their oath further say, that the said Henry Burton and Mary his wife, and Richard Williams being so respectively seised thereof, the said Henry Burton and Mary his wife, by a certain indenture, dated the 24th of May 1739, and made and executed between the said Henry Burton and Mary his wife, of the one part, and John Launder the younger, gentleman, of the other part, for divers good causes and valuable considerations, did covenant, promise and grant, to and with the said John Launder the younger, that they would before the end of the then Easter Term, or the then next Trinity Term, or some other subsequent term, acknowledge and levy to the said John Launder the younger, and his heirs, one or more fine or fines sur conusance de droit tantum, of all their reversions of the several tenements, with the appurtenances in the said indenture and declaration mentioned, which said fine or fines should be and enure to the use of the said Mary Burton during her natural life, with the remainder to the use of the heirs of the body of the said Mary Burton, by the said Henry Burton, or by any future husband lawfully begotten, and of the heirs of the body and bodies of such issue lawfully issuing, and for de-[50]-fault of such issue, then to the use and behoof of the said Henry Burton, his heirs and assigns for ever. And the jurors aforesaid, on their oath aforesaid, further say, that in pursuance of the said indenture last mentioned, in the said Easter Term, in the said last-mentioned indenture specified, a fine with proclamations according to the form of the statute in that case made and provided, was had and levied in the court of his late majesty, of the bench at Westminster, before John Willes, Alexander Denton, John Fortescue Aland, and William Fortescue, the justices of our lord the king, of his common bench at Westminster, between the said John Launder the younger, Plaintiff, and the said Henry Burton and Mary his wife Defendants, amongst other things, of the said reversion of and in the several tenements and premises, with the appurtenances, comprized in the last mentioned indenture, and specified in the within written declaration, whereupon the said Henry and Mary were summoned to answer the said John Launder the younger, in a plea of covenant in the said Court, that is to say, that the said Henry and Mary did acknowledge the same premises with the appurtenances, to be the right of him the said John, and they did grant for them and the heirs of the said Mary, that all the estate and interest which the said Mary then had in the aforesaid premises, with the appurtenances, should, after the decease of the said Richard Williams and Sarah his wife, and the longer liver of them and their sons without issue male of their bodies, and their daughters without issue of their bodies, wholly remain to the aforesaid John Launder and his heirs, to be held of the chief lords of the fee thereof, by the services which to the aforesaid premises with the appurtenances belong, for ever: And the aforesaid Henry and Mary, and the heirs of the said Mary would warrant to the aforesaid John Launder and his heirs, the said tenements and premises with the appurtenances therein mentioned, against them the said Henry and Mary, and the heirs of the said Mary for ever, and for that, &c. And the jurors aforesaid, on their oath aforesaid further say, that the said fine was afterwards duly proclaimed in the said term, and in the three terms then next following, according to the form of the statute in that behalf made: and that by virtue of the said indenture and fine, the said Mary Burton became and was seised of such estate, of an l in the said reversion, as could or might lawfully

pass to her, under and by virtue of the same indenture and fine, the further remainder thereof belonging to the said Henry Burton and his [51] heirs. And the jurors aforesaid, on their oath aforesaid, further say, that the said Richard Williams afterwards became a bankrupt, and a commission was in due form of law issued against him and John Wood, Edward Mountney and Francis Salmon were duly chosen assignees of his estate and effects, according to the form of the statute in such case made and provided and all the real and personal estate of the said Richard Williams, was in due form of law assigned to them; and the jurors aforesaid, on their oath aforesaid further say, that before and at the time of the said bankruptcy and assignment, and of passing the act of parliament hereafter mentioned, said Richard Williams was seised in his demesne as of fee, of and in the reversion and inheritance of certain lands, tenements and hereditaments in the counties of Essex and Suffolk, expectant on the determination of certain particular estates, which were by the said indenture quadripartite of the 20th day of December 1738, limited to the use of the said Richard Williams for his life, without impeachment of waste, with remainder to trustees therein named, and their heirs, during the life of the said Richard Williams in trust, to preserve certain contingent remainders by the said indenture limited from being defeated and destroyed, and after the decease of the said Richard Williams, to the use of the said Sarah Williams for her life, in part of her jointure, and after the decease of the said Sarah Williams, to the use of the said Thomas Lord Onslow, George Bramston, William Guidott and John Barton, their executors, administrators and assigns, for the term of six hundred years, and subject to the said term, to the use of the first and every other son of the said Richard Williams, on the body of the said Sarah Williams to be begotten, successively in tail male, and that the said lands and tenements last mentioned were the paternal estate of the said Richard Williams: And that afterwards, by a certain act of parliament made and passed in the twenty-first year of the reign of his late Majesty King George the Second, entitled, "An act for vesting the estates of Richard Williams a bankrupt, which were settled on his marriage with Sarah Williams his present wife, in the assignees under the commission of bankrupt awarded against him, to be sold for the payment of his debts, and for making a provision for the said Sarah Williams and her issue, in such manner as therein is mentioned," reciting, among other things, the said indenture quadripartite, "bearing date the 20th day of December 1738, and that the said Richard Williams had engaged in trade, and [52] had met with great losses, and contracted debts to the amount of 15,000l.; also reciting the said commission of bankrupt, and the said assignment of the real estate of the said Richard Williams, to the said John Wood, Edward Mountney and Francis Salmon, and that it had been proposed by and between the said Richard Williams and Sarah Williams on the one part, and the assignees under the said commission of bankrupt on the other part, that the fee-simple and inheritance in possession of the paternal estate of the said Richard Williams, should be absolutely vested in the said assignees, in order that the same, or a competent part thereof, might be sold, for raising money to discharge the said debts and incumbrances of the said Richard Williams, and that the surplus of the money arising by any such sale, after discharging of the said debts and incumbrances, should be laid out in the purchase of lands or hereditaments in fee-simple, and that such lands and hereditaments so to be purchased, together with such part of the said settled estates as should not be sold, should be settled and limited to the uses and for the purposes in the said act mentioned, and that a provision should be made out of the other estates comprized in the said indenture quadripartite, being the said premises in the said declaration mentioned, for the maintenance, benefit, and support of the said Sarah Williams, and of any child or children that she might happen to have by the said Richard Williams, in such manner as is therein mentioned, and that subject to such alterations, for the benefit of Sarah Williams, and the issue of the said marriage, in case there should be any, the same estate should remain and be confirmed to the uses, and for the purposes in the same settlement thereof limited and declared, it was enacted, that all and every the messuages, farms, lands, tenements, and hereditaments, being the paternal estate of the said Richard Williams, which were so settled as aforesaid, should from and after the first day of June 1748, be settled upon and vested in, and the same were thereby settled upon and vested in the said John Wood, Edward Mountney and Francis Salmon, their heirs and assigns, to the use of them their heirs and assigns for ever, freed and discharged, and absolutely acquitted, exempted, exonerated and indemnified, of from and against all and every

the uses, estates, trusts, powers, provisos and limitations, in and by the said therein recited settlements limited, created, provided and declared for the benefit of the creditors, and payment of the debts of the said Richard Williams, and other purposes [53] as therein mentioned; And it was further enacted, that the said manor, messuages, lands, tenements and hereditaments, which in and by the therein and herein mentioned indenture quadripartite, were granted, conveyed, settled, and assured, to the several uses, and for the several purposes therein mentioned, and not being the paternal estate of the said Richard Williams, with their and every of their appurtenances, should from and after the 1st day of June 1748, be settled upon and vested in William Chapman of Battersea, in the county of Surry, and Robert Woodford of Lincoln's Inn, in the county of Middlesex, esquires, their executors, administrators and assigns, for and during, and unto the full end and term of one hundred years, of the said Richard Williams and Sarah Williams, or the survivor of them should so long live, the said term to take effect in possession, as to such parts or parcels of the manor and premises, as in and by the said indenture quadripartite, were limited in possession to the said Richard Williams for life, and to take effect in possession after the death or other determination of the estate for life, of the said Mary Burton, in such parts or parcels of the said manor and premises, as by the said indenture quadripartite were limited to her for life, upon the trusts, and to and for the ends, intents and purposes therein declared, of and concerning the same, and which said term was determinable as in the said act is mentioned: and subject to the said term of one hundred years, it was thereby enacted and declared, that the said manor and other the premises last mentioned, which in and by the said therein and herein recited indenture quadripartite, were limited to the said Richard Williams for his life, and to take effect in possession, and in reversion after the death of the said Mary Burton respectively, and also all the estate and inheritance then vested in the said assignees, by virtue of and under the said commission of bankruptcy issued against the said Richard Williams as aforesaid, of and in the same premises, should subject to the said term of one hundred years, from and after the first day of June, 1748, be vested in William Round, of Cophall-Court, London, and Gilbert Todrell, of Lincoln's-Inn, in the county of Middlesex, gentleman, and their heirs, during the life of the said Richard Williams, upon trust to pay, apply and dispose of the rents, issues and profits of the same premises, upon the same trusts, and to and for the same uses, intents, and purposes, as were thereafter enacted and declared of and [54] concerning the rents and profits of the said manor and premises, during the said term of one hundred years thereinbefore mentioned: and that from and after the determination of the said estate, and subject to the said term, the freehold and inheritance of all the said manor and premises during the life of the said Richard Williams, should be and remain to and in the trustees to preserve contingent remainders named in the said indenture quadripartite and their heirs, during the life of the said Richard Williams, and after the decease of the said Richard Williams, the same should be and remain to and in the said Sarah Williams, for the term of her natural life, without impeachment of waste, with such several remainders over, as are limited to the said last mentioned premises, in the said indenture quadripartite, to take effect after her decease, in such order, course, and manner as the same were thereby limited and appointed of and concerning the same premises; provided nevertheless, that nothing in that act contained should prejudice, impeach or defeat, any estate, use, trust, or interest, limited, created or declared, in or by the said recited settlement on the 20th day of December 1738, unto or for the benefit of the said Mary Burton, her heirs and assigns, and saving to the king's most excellent majesty, his heirs and successors, and to all and every person and persons, bodies politic and corporate, his, her and their heirs, successors, executors, and administrators, (other than and except the said Richard Williams, and Sarah Williams his wife, and the first and other son and sons between them two begotten, or to be begotten, and the heirs male of the respective bodies of such sons, and the heirs male of the body of the said Richard Williams, and all and every the daughter and daughters of the said Richard Williams, on the body of the said Sarah begotten, or to be begotten, and the heirs of the body and bodies of such daughter and daughters, and the heirs of the body of the said Sarah Williams, and also the trustees named in the said recited settlements of the 20th day of December 1738, to preserve the contingent remainders, and to execute the trusts of the therein mentioned several terms of six hundred years

and five hundred years, their respective heirs, executors, administrators and assigns, and all and every other person and persons, claiming any use, trust, estate or interest, by virtue of and under the said recited settlement of the 20th day of December 1738, and not mentioned to be saved by that act,) all such estate, right, title, interest, claim and demands. [55] of, in, to, and out of the same premises vested by the said act, or any part thereof, as they, every, or any of them had before the passing of the said act, or would or might have had or enjoyed in case the said act had not been made." And the jurors aforesaid on their oath aforesaid, further say, that after the making of the said indenture of the 24th day of May 1739, and after the levying the fine therein mentioned, and after the making the said act of parliament, the said Henry Burton made his last will and testament in writing, dated the 17th day of August 1752, with a codicil thereunto annexed dated the 18th day of October 1754, and which will and codicil were duly executed and attested to pass lands, whereby the said Henry Burton among other things devised all his messuages, lands, tenements, hereditaments, and real estates whatsoever and wheresoever after the decease of Mary Burton his wife, unto his brother Doctor Michael Burton and his heirs: and the jurors aforesaid, on their oath aforesaid further say, that the said Henry Burton died in the year 1754 after making the said will and codicil without issue, and without altering or revoking his said will and codicil, and without having disposed of such estate and interest of and in the said tenements, with the appurtenances in the said declaration mentioned as had come to him under the said indenture of the 24th day of May 1739, and the said fine levied in pursuance of the said indenture; by virtue of which said devise Michael Burton, the devisee named in the said will of the said Henry Burton, became and was seised of such estate of and in the reversion of the said tenements, with the appurtenances in the said declaration mentioned as had belonged to the said Henry Burton, and being so seised afterwards, to wit, in the year of our Lord 1759, died; after whose death, all the estate and interest of the said Michael Burton of and in the said premises, descended and came to Michael Burton, Esq. the lessor of the said Cornelius (the Plaintiff) his son and heir; and the said Michael Burton the lessor, thereupon became seised of such estate of and in the said reversion as could or might lawfully pass to him by virtue of the several premises aforesaid. And the jurors aforesaid, on their oath aforesaid, further say, that the said Richard Williams died before the year of our Lord 1788, without having had issue by the said Sarah Williams; and that the said Mary Burton also died on the 10th day of July in the year of our Lord 1778, without having had issue by the said Henry Burton or any after-[56]-taken husband. And the jurors aforesaid, on their oath aforesaid, further say, that the aforesaid term of one hundred years ceased and determined immediately after the death of the said Richard Williams; and that the said Sarah Williams after the several deaths of the said Richard Williams and Mary Burton, entered upon the several tenements with the appurtenances in the said declaration mentioned, and became and was seised of such estate therein as could or might legally pass to her under and by virtue of the several premises aforesaid, and afterwards by a certain indenture bearing date and executed on the 19th day of November in the year of our Lord 1778, between the said Sarah Williams of the one part, and one Robert Woodford of the other part, she the said Sarah Williams, for and in consideration of the sum of five shillings to her in hand paid by the said Robert Woodford, did bargain and sell to the said Robert Woodford, his executors, administrators and assigns, the aforesaid several premises in the said indenture quadripartite contained, not being the paternal estate of the said Richard Williams being the premises in the said declaration mentioned, to have and to hold the same to the said Robert Woodford, his executors, administrators and assigns, for one whole year from thence next ensuing; by virtue whereof, and by force of the statute for transferring uses into possession, the said Robert Woodford became seised and was possessed of the said last mentioned premises as the law requires: and being so possessed thereof by an indenture tripartite of release, dated and executed on the 20th day of November 1778, and made between the said Sarah Williams of the first part, the said Robert Woodford of the second part, and William Mayhew of Colchester, in the county of Essex, Esq., of the third part; the said Sarah Williams, for barring and extinguishing all estates tail, and the remainders and reversions thereupon expectant and depending, and for settling, establishing, limiting, and disposing of the inheritance of the several premises in the said indenture mentioned to the several uses therein declared concerning the same, and for the considerations therein mentioned, did grant,

bargain, sell, release and confirm unto the said Robert Woodford and his heirs in his actual possession then being, by virtue of the aforesaid bargain and sale thereof to him made by the said Sarah Williams for one year, all the said last mentioned tenements with the appurtenances, being the premises in the said declaration mentioned amongst other things, to have and to hold the same unto and to the use and behoof of the said Robert Woodford [57] and his heirs, to the intent and purpose that the said Robert Woodford might become a good and perfect tenant to the freehold of the said premises, in order that one or more common recovery or recoveries might be thereof had and suffered in the then present Michaelmas or Hilary term then next, or in any subsequent term; and it was thereby declared that the said recovery or recoveries should be and enure to the use of such person or persons, and of and for such estate and estates, intents, and purposes, and in such sort, manner and form as the said Sarah Williams by any deed or deeds in writing, to be by her from time to time duly executed and attested in the presence of two witnesses; or by her last will and testament in writing, or any writing purporting to be her last will to be by her duly executed, should at any time or times after the making of the said indenture, appoint, direct, limit, or declare, and for want of such appointment, and as to such part or parts thereof whereof no such appointment should be made, to the use of the said Sarah Williams her heirs and assigns for ever. And the jurors aforesaid, on their oath aforesaid, further say, that the said last mentioned indenture was duly inrolled in the Court of Chancery on the 8th day of December 1778, being first duly stamped according to the statute in such case made and provided, and that the said Robert Woodford by virtue thereof became and was seised of and in the said several lands and premises in the said last mentioned indenture, specified, as the law requires: and the jurors aforesaid, on their oath aforesaid, further say, that for the purposes which are expressed in the said indenture, one William Mayhew sued and prosecuted a certain writ of entry sur disseisin en le post out of his majesty's Court of Chancery at Westminster, directed to the sheriff of the county of Essex bearing date the 15th day of October, in the 18th year of his said majesty's reign, whereby his said majesty directed the said sheriff that he should command Robert Woodford, Esq. that justly and without delay he should render to the said William Mayhew, among other things, the several messuages, lands, tenements, and premises in the said declaration mentioned which he claimed to be his right and inheritance, and into which the same Robert had not entry, but after the disseisin which Hugh Hunt unjustly, and without judgment, had made to the aforesaid William within thirty years then last past, as he said, and whereof he complained that the aforesaid Robert deforced him, and unless he [58] should so do, and if the said William should give security to prosecute his suit, that then he should summon by good summoners the said Robert, that he should be before the king's justices at Westminster on the Morrow of All Souls to shew why he would not do it: at which said day, before Sir William de Grey, knt., and his brethren, then justices of our lord the king, of the bench at Westminster aforesaid, came as well the said William Mayhew as the said Robert Woodford, in their proper persons, whereupon the said William Mayhew then and there demanded against the said Robert Woodford all the several tenements and premises with the appurtenances in the said writ of entry mentioned, as his right and inheritance, and into which the said Robert had not entry, but after the disseisin which Hugh Hunt thereof unjustly, and without judgment had made to the said William within thirty years, &c. and whereupon he the said William said that he was seised of the said tenements and premises with the appurtenances in his demesne as of fee, in time of peace, in the time of our lord the present king, by taking the profits thereof, to the value, &c. and into which, &c. and therefore he brought this suit, &c. and the said Robert in his own proper person came and defended his right, when &c. and thereupon vouched to warranty the said Sarah Williams, who was then and there present in court in her proper person, and freely warranted the said tenements and premises with the appurtenances in manner aforesaid, &c. and thereupon he said that he was seised of the said premises in his demesne as of fee, and in right, in the time of peace, in the time of the lord the present king, by taking the profits thereof, to the value, &c. into which, &c. and thereof he brought his suit, &c. and the said Sarah tenant by her own warranty came and defended her right, when, &c. and thereupon further vouched to warranty Thomas Francis Martin, who was likewise present there in court in his proper person, and freely warranted to her the said

several tenements and premises with the appurtenances, and thereupon the said William demanded against the said Thomas Francis tenant by his own warranty, the several tenements and premises with their appurtenances in manner aforesaid, and thereupon he said that he was seised of the same premises in his demesne as of fee and right in time of peace, in the time of the lord the present king, by taking the profits thereof to the value, &c. into which, &c. and thereof he brought his suit, &c. And the said Thomas Francis tenant by his own warranty, defended his right, when, &c. and said that [59] the said Hugh did not disseise the said William of the said premises as the said William by his writ and declaration therein had supposed, and of that he put himself upon the country, &c. And the said William thereupon craved leave to imparle, and he had it, &c. And afterwards the said William came again there into court in the same term in his proper person, and the said Thomas Francis, although solemnly called, came not again, but departed in contempt of the court, and made default; therefore it was considered that the said William should recover his seisin against the said Robert of the same tenements and premises with the appurtenances, and that the said Robert should have of the lands of the said Sarah to the value, &c. and further that the said Sarah should have of the land of the said Thomas Francis to the value, &c. and that the said Thomas Francis should be in mercy, &c. and thereupon the said William prayed the king's writ to be directed to the sheriff of the county of Essex, to cause full seisin to be delivered to him of the same several tenements and premises with the appurtenances in the declaration within mentioned, and it was granted to him, &c. And thereupon a certain writ of our lord the king was issued out of the said court of our said lord the king of the bench at Westminster, bearing teste the 6th day of November, in the nineteenth year of the reign of our lord the now king, directed to the sheriff of Essex, whereby our said lord the king commanded the said sheriff that without delay he should cause the said William to have full seisin of the said several tenements with the appurtenances, and in what manner he should have executed that precept, he should make appear to our said lord the king's justices at Westminster, in fifteen days of St. Martin, and should have then there that writ, and which said writ was afterwards and before the return thereof delivered to William Lushington, Esq. then and there being sheriff of the said county of Essex, to be executed by him in due form of law. And the jurors aforesaid, on their oath aforesaid, further say, that in the said fifteen days of St. Martin the said William Mayhew came into the said court of our said lord the king of the bench at Westminster aforesaid, in his proper person, and the sheriff of the said county of Essex, namely, the said William Lushington, Esq. then returned, that he by virtue of the said writ to him directed on the 10th day of November in the same term did cause full seisin of the premises therein mentioned to be delivered to the said William Mayhew as by the said writ he was commanded. And the jurors aforesaid, on their oath aforesaid, further say, that the several messuages, lands and [60] premises in the said recovery mentioned, are the same lands and premises as are mentioned in the indenture bearing date the 20th day of November 1778, and of which the premises in the said declaration are parcel, and that by virtue of the same last mentioned indenture and recovery the said Sarah Williams entered into the said tenements with the appurtenances in the said declaration mentioned, and became and was seised of such estate and interest therein as could lawfully pass to her under and by virtue of the same indenture and recovery, and being so seised, the said Sarah Williams by indenture of bargain and sale dated the 17th day of June 1779, between the said Sarah Williams of the one part, and The Right Honourable Richard Rigby of Mistley Hall, in the county of Essex, one of his Majesty's Most Honourable Privy Council, of the other part, in consideration of 10,545*l.* paid by the said Richard Rigby to the said Sarah Williams, she the said Sarah Williams did appoint, direct, limit, grant, bargain, sell, and confirm unto the said Richard Rigby, his heirs and assigns, all the tenements with the appurtenances in the said declaration mentioned, to have and to hold the same unto the said Richard Rigby, his heirs and assigns for ever, which said indenture was duly inrolled in the Court of Chancery, being first duly stamped according to the form of the statute in such case made and provided. And the jurors aforesaid, on their oath aforesaid, further say, that on the Morrow of the Holy Trinity, in the nineteenth year of the reign of our lord the now king, a fine sur consuance de droit come ceo, &c. was duly levied in the Court of Common Pleas before the justices of the said court, between the said Richard Rigby, Plaintiff,

and the said Sarah Williams, Deforceant, of the several lands and tenements in the said declaration mentioned, whereby the said Sarah Williams did acknowledge all the said premises in the said declaration mentioned to be the right of him the said Richard Rigby, as those which the said Richard had of the gift of the aforesaid Sarah, and those she did thereby remise and quit-claim from her and her heirs to the aforesaid Richard Rigby and his heirs for ever, and moreover that the said Sarah had granted for her and her heirs that they would warrant to the aforesaid Richard and his heirs, the aforesaid premises against her the said Sarah and her heirs for ever: And the said fine was afterwards duly proclaimed in the said term, and in the three next following terms in the said court, according to the form of the statute in that case made [61] and provided, by virtue of which said last mentioned indenture and fine the said Richard Rigby entered into the said tenements with the appurtenances in the said declaration mentioned, and became and was seised of such estate and interest as therein could lawfully pass to him under and by virtue of the said indenture and fine. And the jurors aforesaid, on their oath aforesaid, further say, that the said Sarah Williams afterwards, to wit, on the 22d day of September 1782, died without issue, and that after her death and within five years next after the death of the said Sarah Williams, and within one year next before the commencement of this suit, to wit, on the 13th day of September 1787, the said Michael Burton the lessor of the said Cornelius, actually and in fact entered into and upon the tenements with the appurtenances in the said declaration mentioned claiming title thereto, and then and there claimed the same as his estate and freehold for the purpose of avoiding the said fine so levied by the said Sarah Williams as last aforesaid, and ejected the said Richard Rigby therefrom, and became and was seised thereof, and being so seised thereof, afterwards, to wit, on the 16th day of September, in the said declaration mentioned, demised the said several tenements with the appurtenances to the said Cornelius, to hold the same respectively to the said Cornelius and his assigns in manner and form as the said Cornelius hath in his said declaration within alleged, by virtue of which said several demises in the said declaration within mentioned, the said Cornelius afterwards, to wit, on the days respectively in that behalf in the said declaration mentioned, entered into the said tenements with the appurtenances, and was possessed thereof, and the said Cornelius being so possessed thereof, the said Francis Hall, Ann Barnard, and Martha, claiming title under the said Richard Rigby, afterwards, to wit, on the 18th day of September, in the said declaration mentioned, with force and arms entered into the several premises with the appurtenances so respectively demised to the said Cornelius as aforesaid, for the several terms as aforesaid, which were not then expired, and ejected the said Cornelius therefrom as the said Cornelius hath within thereof complained against them. But whether upon the whole, &c. &c. &c.

On the part of the Plaintiff, Bond, Serjt., made two points of argument, 1. That Sarah Williams had not a sufficient estate tail vested in her, to enable her to suffer a recovery and bar the [62] remainders over. 2. That supposing she had a sufficient estate for that purpose, yet the recovery in question was bad, because it appeared from the return of the sheriff, that he had executed the writ of seisin on the 10th of November 1778, but the tenant to the præcipe was not made till the 19th and 20th of November (a) in that year. As to the first point, he suggested that under the marriage settlement 1738, an estate for life was limited to Sarah Williams (then Bishop), and after other estates interposed, a remainder to the heirs of her body, but that by the act of Parliament which passed on the bankruptcy of Richard Williams, her estate for life was taken away, and a new one created, the limitation to the heirs of her body remaining unaltered; so that there were two estates created by two different instruments, which could not unite so as to give her a vested estate tail, and enabled her to suffer a recovery, and bar the remainder in fee, which was become vested in Henry Burton. But this objection the Court immediately overruled, and said there could be no doubt on the words of the act, that it operated merely to confirm the estate tail which Sarah Williams took by the marriage settlement: that the same objection had been made in the case of *Driver v. Hussey* (b), and

(a) The date of the conveyance to Robert Woodford.

(b) Ante, vol. i. 269. As the principal point in that case, was of a different nature, and this objection but slightly mentioned, and not insisted upon, it was omitted in the report.

the validity of it denied. In this Bond acquiesced, and applied himself to the second ground of argument, viz. that the recovery was void, on account of the time when seisin of the freehold was stated by the sheriff to have been delivered.

On that ground, he argued, that it appeared on the record that seisin was given by the sheriff ten days before the date of the conveyance to the tenant of the freehold, when in fact Sarah Williams was in possession of the lands. This was repugnant, and vitiated the whole proceeding. A recovery is not complete before execution; being a conveyance to uses, the nature of the estate is not altered, nor does there arise any new use to the recoverer, till the writ of seisin is properly executed. Pigot on Recov. 153, Moore, 141, Sir W. Jones, 10. Neither is this case within the stat. 14 Geo. 2, c. 20, s. 5, which arose from the fictitious relation to the first day of the term, and was made for a different purpose, viz. to prevent recoveries from being set [63] aside, where the tenant to the præcipe is created by deed executed after the award of the writ of seisin. Pigot, 58. Wilson on Fines, 348. The words of the sixth section of the act are, "executed after the time of the judgment given, and the award of the writ of seisin." But there is a material difference between the award and the execution of the writ, and the 7th and 8th sections expressly provide that the act shall not be extended beyond its strict limits.

The counsel on the other side were stopped by the Court, who said, that though there might have been some doubt, if it had been found as a fact, that seisin was actually given on the 10th of November, yet the day named in the return was immaterial; for it was not necessary to name any particular day, and the return would have been good without it. All that was necessary was, that seisin should be delivered after the judgment, and before the return of the writ, and that the proceedings should all be in the same term. That those requisites were complied with in the present case, which was directly within the statute 14 Geo. 2, s. 5 & 6. As therefore the day mentioned in the sheriff's return was repugnant to the rest of the proceedings, it was to be rejected, and there must be

Judgment for the defendant.

RONDEAU *against* WYATT. Wednesday, June 27th, 1792.

A. and B. enter into a verbal agreement for the sale of goods, to be delivered to A. at a future period: there is neither earnest paid, a note or memorandum in writing signed, nor any part of the goods delivered; this contract is void, being within the statute of frauds (a), though it is executory, and though it has been admitted by B. in his answer to a bill in Chancery filed by A.

[S. C. in Chancery, 3 Bro. C. C. 154. Approved and applied, *Cooper v. Elston*, 1796, 7 T. R. 16. Referred to, *Bailey v. Swetling*, 1861, 9 C. B. N. S. 858.]

This was an action on the case, for the non-performance of a special agreement. The first count of the declaration stated, that it was agreed between the Plaintiff and the Defendant, that the Plaintiff should buy of the Defendant 3000 sacks of flour of the Defendant and divers other persons carrying on trade in copartnership, by the name, style and firm of the Albion Mill Company, at the price of 41s. per sack, but upon condition, and it was then and there understood between the said Plaintiff and Defendant, that the Plaintiff was to export the said flour to foreign parts; and it was then and there agreed &c. that the Defendant should deliver, or cause to be delivered to the Plaintiff, on board of ships or vessels in the river Thames, the said 3000 sacks of flour; that the Plaintiff requested the Defendant to deliver the said 3000 sacks of flour to the Plain-[64]-tiff, on board certain ships in the said river, which the said Plaintiff had procured to receive the same according to the said promise, &c. Yet the Defendant not regarding, &c. did not deliver, &c. on board, &c. whereby the Plaintiff lost divers gains and profits, which he would have acquired by exporting and reselling the said 3000 sacks of flour, &c. &c. The other counts did not materially differ from the first. Plea, the general issue.

(a) [The principle of this decision has been frequently recognized in subsequent cases; vide *Cooper v. Elston*, 7 T. R. 14; *Groves v. Buck*, 3 M. & S. 178. *Garbutt v. Watson*, 5 B. & A. 613.]

At the trial, which came on before Lord Loughborough, at Guildhall, at the sittings after last Michaelmas term, it appeared that the Defendant, who was one of the proprietors of the Albion Mill, had entered into a verbal agreement to sell and deliver 3000 sacks of flour to the Plaintiff, to be put in sacks which the Plaintiff was to send to the Mill, and shipped on board vessels to be provided by him in the river, on an express condition that the flour should be exported to foreign parts, from some port which the Plaintiff was to open, and should not meet the Defendant and the Company again in the home market. In order to carry the scheme of exportation into effect, the Plaintiff sent down to Shoreham in Sussex, a large quantity of corn and flour merely to reduce, by collusion and a fictitious sale, the market price to the level prescribed by act of Parliament (13 Geo. 3, c. 45, s. 5). But this intended trick being discovered by Government, the exportation was prevented, as the price was then very high, and an apprehension of a scarcity in this country prevailed. As the Plaintiff therefore could not legally comply with the condition contained in the contract, the Defendant refused to deliver the flour. In consequence of this, the Plaintiff filed a bill in Chancery (a)¹ against the Defendant, praying a specific performance, a discovery of facts, &c. and the names of the partners in the undertaking. In his answers to the bill the Defendant admitted the agreement, but pleaded the statute of frauds, and averred that there was no note, or memorandum in writing, nor a delivery of any part of the flour to the Plaintiff, &c. following the words of the statute. That plea being over-ruled, the present action was brought, in which the Plaintiff obtained a verdict, contrary to the opinion of Lord Loughborough, before whom the cause was tried, who thought that on grounds of public policy, but chiefly because the contract seemed to him to be within the statute of frauds, the Plaintiff was not entitled to recover. And now a rule having been granted to shew [65] cause why the verdict should not be set aside and a nonsuit entered, Adair and Bond, Serjts., shewed cause, contending that the contract did not come within the statute of frauds: first, because it was executory; secondly, because it was admitted by the answers in Chancery. 1. The agreement being to deliver the flour on board some ships in the river, it could not be performed till the time and place of delivery were fixed, it was therefore clearly executory, and being executory it was not within the statute according to a series of authorities. *Simon v. Metivier*, 5 Burr. 1921. 1 Black. 599. Bull. N. P. 280. *Towers v. Osborne*, Stra. 506. *Clayton v. Andrews*, 4 Burr. 2101. *Alexander v. Comber*, ante, vol. i. 26. 2. As one great object of the statute was to prevent perjury in transactions of this kind, the case does not fall within it, where there is no danger of perjury by the agreement being admitted, and in the present instance the agreement was admitted by the answers in Chancery. This doctrine has been laid down both in law and equity, in the former by Lord Mansfield, 1 Black. 600, in the latter, 2 Atk. 155. 1 Vezey, 218, 221. Ambl. 586.

Lawrence and Marshall, Serjts., in support of the rule. Though by the terms of the agreement the flour was to be delivered on the river, yet it was not necessarily executory, for the delivery might have been immediate if the ships had been ready. But admitting that the delivery was to be at a future period, the contract was not, on that account, without the statute, the words (a)² of which are fully sufficient to comprehend it. There can be no good reason why the future delivery of goods should prevent the operation of the statute; on the contrary, there is much more danger of perjury being committed, and mistakes happening, where a verbal agreement is not to be executed till a distant period, than where it is to be completed as soon as it is entered into. With respect to the case of *Towers v. Osborne*, there was something in the contract besides the mere sale of goods, namely, the work and labour of making the chariot: but at best it is a loose note of a decision at Nisi Prius, and on that case the opinion of the Court in *Clayton v. Andrews* was founded, as also in *Alexander v. Comber*. As to [66] *Simon v. Metivier*, the principle of that case was,

(a)¹ See 3 Brown, Cas. in Chan. 154.

(a)² 29 Car. 2, c. 3, s. 17. "No contract for the sale of any goods, wares and merchandizes, for the price of 10l. sterling or upwards, shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part payment, or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized."

that the auctioneer was the agent of both the buyer and seller. And when the present case came before Lord Thurlow in Chancery, his Lordship said, "I should have thought that the mere fact of the corn not being to be delivered immediately, would not have taken it out of the statute," and afterwards, "I do not go upon its being out of the statute; but if it is a measuring east, and upon cases at law, which must stand till they are revised by a court of law, it is held to be out of the statute, I cannot, sitting in a court of equity say, that the cases are improperly settled at law." 3 Brown, Cas. in Chan. 155. It is plain therefore, that his lordship doubted the validity of those cases. As to the argument, that the contract was admitted by the Defendant in his answers in Chancery, the true rule seems to be, that if a party admits an agreement in his answer, without insisting upon the Statute of Frauds, the Court will hold it to be good. Prec. in Chan. 208, 374, 533, but where the statute is pleaded, and the exceptions of it negatived, the Court of Chancery will not compel the Defendant to execute it: *Whaley v. Bagenal*, 6 Brown's Parl. Cas. 45, *Whitchurch v. Beris*, 2 Brown's Cas. in Chan. 556. Thus also the Court of Exchequer has holden, that if the Defendant by his answer insists upon the statute, a specific performance cannot be decreed, though he confesses the agreement. *Stewart v. Careless*, in Seacc. April 10, 1785. *Eyres v. Iveson*, in Seacc. Trin. 1785, cited in *Whitchurch v. Beris*, 2 Brown's Cas. in Chan. 563, 564. In the present case, the Defendant in his answer insists on the statute, and denies the exceptions contained in it.

Cur. advis. vult.

On this day Lord Loughborough, after stating the facts of the case, pronounced the judgment of the Court (a), to the following effect.

The only point to be decided is that which arises on the Statute of Frauds; and we who are now in Court think that the objection made on the statute is well grounded, and therefore that the Plaintiff ought to be nonsuited. It was said in the argument: 1. That the statute does not extend to cases of executory contracts; and 2dly, That it was not applicable, [67] where the agreement, which was the subject of the action, stood confessed by the Defendant's answer to a bill in equity; and that in the present case the agreement did appear on the face of the proceedings in Chancery. To try the validity of the first objection, it will be necessary to advert to that clause (sect. 17) of the statute on which the question arises, and which directs that "No contract for the sale of any goods, wares and merchandizes, for the price of 10l. sterling or upwards, shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part of payment, or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized." Now it is singular that an idea could ever prevail that this section of the statute was only applicable to cases where the bargain was immediate, for it seems plain from the words made use of that it was meant to regulate executory as well as other contracts. The words are "No contract for the sale of any goods, &c." And, indeed, it seems that this provision of the statute would not be of much use, unless it were to extend to executory contracts; for it is from bargains to be completed at a future period that the uncertainty and confusion will probably arise which the statute was designed to prevent. The case of *Simon v. Melivier* (Bull. N. P. 280. 3 Burr. 1921) was decided on the ground, that the auctioneer was the agent as well for the Defendant as the Plaintiff, and therefore that the contract was sufficiently reduced into writing. The case of *Towers v. Sir John Osborne* (1 Stra. 506) was plainly out of the statute, not because it was an executory contract, as it has been said, but because it was for work and labour to be done, and materials and other necessary things to be found, which is different from a mere contract of sale, to which species of contract alone the statute is applicable (c). In *Clayton v. Andrews* (4 Burr. 2101), which was on an agreement to deliver corn at a future period, there was also some work to be performed, for it was

(a) In which his Lordship, Mr. Justice Gould, and Mr. Justice Heath, were unanimous. But his Lordship mentioned, a few days before, that Mr. Justice Wilson, who was now sitting in Chancery as one of the Lords Commissioners of the Great Seal, had declared himself to be of a different opinion.

(c) [*Towers v. Osborne* is an extreme case, and ought not to be carried further." Per Abbott, C.J. *Garbutt v. Watson*, 5 B. & A. 614.]

necessary that the corn should be threshed before the delivery. This perhaps may seem to be a very nice distinction, but still the work to be performed in threshing, made, though in a small degree, a part of the contract. Some of the cases in the Court of Chancery seem to have been founded on the nature of the proceedings in equity, where the Court will lay hold of some circumstance of his own admission to compel a party to the performance of his agreement. But the same rule is not applicable to courts of law; for if a parol agreement were stated in a court of law, and there was a demurrer, which would admit the agreement, yet still advantage might be taken of the statute (e). The early cases in Prec. in Chan. 208 (*Croyston v. Baynes*) and 374 (*Symondson v. Tweed*) do not seem fairly to admit any other construction than this, namely, that the Court thought that where a parol agreement was admitted by the Defendant's answer, he might or might not take advantage of the statute, at his option. I say the Court seem to have thought so, because in fact no such decree was made in those cases, which contain merely the extra-judicial opinions of the Lord Keeper and the Master of the Rolls. It is said in those cases, and has been adopted in the argument, that when the Defendant confesses the agreement, there is no danger of perjury, which was the only thing the statute intended to prevent. But this seems to be very bad reasoning, for the calling upon a party to answer a parol agreement certainly lays him under a great temptation to commit perjury. But though the preventing perjury was one, it was not the sole object of the statute: another object was to lay down a clear and positive rule to determine when the contract of sale should be complete. Accordingly, the statute has made it necessary that either the party buying should accept and receive part of the goods sold, or give something in earnest to bind the bargain, or that there should be some note or memorandum in writing signed by the parties to the contract. Something therefore direct and specific is to be done, to shew that the agreement is complete, that there may be no room for doubt and hesitation. This was the intention of the statute in all contracts of sale, above a certain value, in order to prevent confusion and uncertainty in the transactions of mankind; and we think it wise to adhere to that rule. It is not necessary, in a court of law, to inquire into the modes of proceeding by which courts of equity are guided, but it is observable that the case of

(e) [This must be understood of a demurrer to a plea in which the agreement is not stated to have been in writing, when it ought so to appear; in which case, as the demurrer only admits what is sufficiently pleaded, it does not admit the agreement. But if the agreement is stated in a declaration, where it need not appear to have been in writing, as it is then sufficiently pleaded, a demurrer will admit it. As to the rule that a demurrer does not admit matters informally pleaded, see *Heard v. Baskerville*, Hob. 232, 232. 1 Freeman, 39, 199. *Steel v. Houghton*, ante, vol. i. p. 62. *Duncan v. Thwaites*, 3 B. & C. 584. 1 Saund. 337 b. 5th edit. It may perhaps be doubted how far this rule is, in its terms, correct. It seems that a demurrer admits the facts stated, whether they be formally or informally pleaded, but that in the latter case the party who has pleaded informally, cannot avail himself of any of the matters stated in his plea, and confessed by the other party, because he has neglected to state them in the form and manner prescribed by law. When once the plea is declared by the judgment of the Court to be bad for informality, it becomes no plea, and is wholly annihilated, so that the admissions of the other party can avail nothing. But until it appears by the judgment of the Court, that the plea is informally pleaded, it must be taken that all the facts stated in it are admitted, though when that judgment is pronounced, the admission is destroyed together with the plea which it admits.]

When a party demurs for matter of substance, he says, 'I admit the facts to be true, but I say that though true, the party pleading them cannot take advantage of them, because they state no matter of law sufficient to support the pleading.' When he demurs for matter of form, he says, 'I admit the facts to be true, but I say, that though true, the party pleading them cannot take advantage of them, because they are not pleaded in the formal manner required by law.'

The proposition that a demurrer does not admit facts informally stated, though incorrect in point of expression, is true in effect. By the terms of that proposition it is conceded that the matters are informally pleaded, and consequently the pleading must be set aside by the Court; and when once set aside, the admission is gone also, and it is the same thing as if it had never been made.]

*Whaley v. Baynal (a)*¹, in the House of Lords, coincides with the present determination of the Court.

Rule absolute to enter a nonsuit.

[69] GRANT *against* SIR CHARLES GOULD AND OTHERS. Saturday, June 16th, 1792.

[Considered, *Dawkins v. Paullet*, 1869, L. R. 5 Q. B. 119. Referred to, *Dawkins v. Rokely*, 1873-75, L. R. 8 Q. B. 271; L. R. 7 H. L. 744.]

The receiving pay as a soldier subjects the receiver to military jurisdiction (*a*)². This court therefore will not grant a prohibition to prevent the execution of the sentence of a court-martial passed against A., who has received pay as a soldier (but has assumed the military character merely for the purpose of recruiting, in the usual course of that service) though the proceedings of the court-martial appear to be in some instances erroneous.

This case arose on a motion for a prohibition to prevent the execution of a sentence passed against the Plaintiff by a general court-martial holden at Chatham Barracks.

The motion was grounded on the following suggestion and affidavit:—

Easter Term, in the Thirty-second Year of the Reign of King George the Third.

England (to wit)—Be it remembered, That on the eighth day of May, in this same term, comes here into the court of our lord the king of the bench, Samuel George Grant, by John Martin his attorney, and gives the Court here to understand and be informed, that whereas by the statute called The Great Charter of the Liberties of England, it is declared and enacted, That no freeman may be taken or imprisoned, or be disseised of his freehold or liberties, or his free customs, or be outlawed, or exiled, or in any manner destroyed, but by the lawful judgment of his peers, or by the law of the land: and whereas, by the laws and customs of this realm, no person ought to be forejudged of life or limb, or subjected in time of peace to any kind of punishment within this realm by martial law who is not a soldier, and subjected to such law: and whereas, by the laws and customs of this realm, no evidence ought to be received or permitted to be read upon the trial of any person charged with any offence punishable by martial law, but such as is admissible according to the known rules of evidence prescribed and established by the common law of England: and whereas by the laws and customs of this realm no person ought to be convicted or punished by martial law of or for any offence not cognizable by the same; nor ought any person to be tried or convicted by any court within this realm for any offence whatsoever, unless such person has been distinctly charged with such offence, and called upon to answer thereto previous to such trial, and unless such person has been permitted to make his defence to such charge, and to call and examine his witnesses in support of defence: nevertheless William Wynyard, Esq. well knowing the premises, but contriving and intending unjustly to ag-[70]-grieve, oppress and injure the said Samuel George Grant, contrary to the said laws and customs of this realm heretofore, to wit, on the 21st day of March in the year of our Lord 1792, at Chatham in the county of Kent, did exhibit to and before a general court martial then and there convened and holden, a certain charge against the said Samuel George Grant, “for having advised and persuaded (*a*)³ Francis Heretage and Francis Stephenson, drummers in the Coldstream regiment of Foot Guards, to desert his Majesty’s service, and to enlist into the service of the East India Company, knowing them at the same time to belong to the said regiment of Foot Guards;” and such proceedings were thereupon had, that afterwards, to wit, on the said 21st day of March in the year aforesaid, at Chatham aforesaid, the said Samuel George Grant was brought to a trial upon such charge by and before the said court-martial, and thereupon it became a material question, “Whether the said Samuel George Grant was a soldier or not?” and upon that question the said court-martial then and there received and permitted to be read as substantive evidence

(*a*)¹ 6 Brown’s Cas. in Parl. 45 [8vo edit. vol. i. p. 345].

(*a*)² [Vide *Bradley v. Arthur*, 4 B. & C. 308.]

(*a*)³ [See stat. 37 G. 3, c. 70.]

against the said Samuel George Grant, certain letters written by Captain Alexander Campbell to Messrs. Bishop and Brummell or to certain other persons or persons, and also a certain return or certificate of the said Captain Alexander Campbell, wherein the said Alexander Campbell returned or certified that the said Samuel George Grant had been enlisted as a soldier on the 25th day of June 1791; which said return or certificate the said court-martial then and there knew to have been made by the said Captain Alexander Campbell after the time of the said supposed offence was committed, and for the purpose of being produced as evidence against the said Samuel George Grant, although the said Captain Alexander Campbell was then alive and in full health, and residing in the county of Cornwall, and although it was then and there objected, that neither the said letter nor the said return or certificate could or ought in anywise to affect or be used as evidence against the said Samuel George Grant; and although there was not then and there any legal evidence or colourable proof adduced against the said Samuel George Grant, to shew that he was or ever had been a soldier, yet the said Samuel George Grant then and there was ready and willing to have called divers witnesses, that is to say, one Nathaniel Lindergreen, one Robert Abington, Esq. and one William Addington, Esq. the said William Wynyard, one Samuel Lunt, and one Joseph Turtle, to prove that the said Samuel George Grant was not nor ever had [71] been a soldier, and to satisfy the said Court that they had no jurisdiction to try the said Samuel George Grant; but the said Court then and there wholly refused to permit the said witnesses to be called, or to hear their testimony on behalf of the said Samuel George Grant, and such proceedings were thereupon had, that the said court being cleared, came to a determination that no more evidence was necessary to be produced for or against the circumstance of the said Samuel George Grant being in pay as a soldier in his Majesty's 74th regiment; and the Court having duly weighed and considered the evidence already produced, were of opinion that the said Samuel George Grant was and had been in pay as a soldier in his Majesty's 74th regiment since the 25th day of June last, and therefore considered themselves competent to proceed to the trial of the said Samuel George Grant for the charge exhibited against him, with which he had been arraigned, and to which he had pleaded Not Guilty; and the said court-martial, in order to support the said charge, then and there received and permitted and suffered to be read as evidence upon the said trial against the said Samuel George Grant, a certain certificate, purporting to be a certificate of a supposed conviction of the said Samuel George Grant, by and before William Addington, Esq. one of the justices of our lord the king, assigned to keep the peace of our said lord the king, in and for the county of Middlesex, for a supposed offence against a certain act of Parliament, made in the 31st year of his present majesty, intituled "An Act for Punishing Mutiny and Desertion, and for the better Payment of the Army and their Quarters," without calling for or requiring the production of the said supposed conviction, under the hand and seal of the said justice, and without calling for or requiring any other or better evidence of such supposed conviction than such certificate, although the said William Addington was then alive and in full health, and residing in the county of Middlesex aforesaid; and although the said Samuel George Grant then and there objected that the said certificate ought not to be received or read as evidence of the said supposed conviction; and that the said court-martial also then and there permitted and suffered to be read as evidence upon the said trial, a certain deposition in writing of the said Francis Heretage, then taken before the said William Addington as such justice as aforesaid, although the said Francis Heretage was then and there present at the said court-martial, and might have been there examined *vivâ voce*, touching the facts contained in the said deposition, and although the said Samuel George Grant then and there ob-[72]-jected to the said deposition being read as evidence against him, and the said Samuel George Grant then and there called one Samuel Lunt, who was present at the said trial, and would have been a material witness in support of his defence against the said charge, and requested that the said Samuel Lunt might be sworn, and that the said Samuel George Grant might be permitted to examine the said Samuel Lunt as such witness; but the said court then and there arbitrarily and peremptorily refused to permit the said Samuel Lunt to be sworn, or to be examined as a witness for the said Samuel George Grant; and such further proceedings were thereupon had in and by the said court, that afterwards, to wit, on the 29th day of March, in the year aforesaid, at Chatbam aforesaid, the said court having maturely

considered the evidence given in support of the said charge against the said Samuel George Grant, with that produced in his defence, were of opinion that he, the said Samuel George Grant, "was guilty of having promoted and having been instrumental towards the inlisting of Francis Heretage and Francis Stephenson into the service of the East India Company, knowing them at the said time to belong to the said regiment of Foot Guards, and deeming this crime to be precisely of the same nature with that which is set forth in the charge, and to differ only in this, that it is rather inferior, but in a very slight degree in point of aggravation, they did adjudge him to be reduced from the rank and pay of a serjeant, and to serve as a private soldier in the ranks; and the said court did adjudge him to receive one thousand lashes on the bare back, with a cat-o-nine tails, by the drummers of such corps or corp, at such time or times, and in such proportions, as his Majesty should think fit to appoint:" whereas, in truth and in fact, the said Samuel George Grant, at the time of committing the said supposed offence was not, nor was he at the time of exhibiting the said charge aforesaid, a soldier, or subject to martial law: whereas, in truth and in fact, the evidence so received by the said court martial against the said Samuel George Grant as aforesaid, was not admissible, nor ought the same to have been received by the said court according to the known rules of evidence, prescribed and established by the common law of England: and whereas, in truth and in fact, the supposed offence, whereof the said Samuel George Grant was so convicted as aforesaid, was not, nor is an offence cognizable by martial law: and whereas, in truth and in fact, the said Samuel George Grant was never, previous to the said trial and conviction, charged [73] with or called upon to answer the said supposed offence, whereof he was so convicted as aforesaid: and whereas, in truth and in fact, the said court-martial ought to have permitted the said Samuel George Grant to call and examine his said witnesses, to prove that he the said Samuel George Grant was not, nor ever had been a soldier, and also in support of his defence against the said charge; and the said Samuel George Grant gives the Court here further to understand and be informed, that Sir Charles Gould, Knt., his Majesty's Judge Martial and Advocate General for the Army, contriving and intending as aforesaid, threatens to proceed upon and enforce the execution of the said sentence, to the great damage, terror and injury, of the said Samuel George Grant, and contrary to the laws and customs of this realm; all which premises the said Samuel George Grant is ready to verify and prove as the Court here shall direct: wherefore the said Samuel George Grant, humbly imploring the aid and assistance of this court, here prays relief, and his majesty's writ of prohibition to be directed to the said Sir Charles Gould, or to some other competent person or persons in that behalf, to prohibit him from proceeding upon or enforcing the execution of the said sentence, &c.

SAMUEL MARSHALL.

Affidavit of the Plaintiff.

Samuel George Grant, formerly of Charing-cross, within the liberty of Westminster, in the county of Middlesex, victualler, but now a prisoner in his majesty's garrison at Chatham, in the county of Kent, maketh oath, and saith, that on or about the 25th day of December, 1790, this deponent did enter into articles of agreement with one James Rutherford, of Charing-cross, aforesaid, victualler, reciting—That whereas the said James Rutherford was engaged on behalf of his majesty, and of the Honourable the Company of Merchants trading to the East Indies, to enlist men to serve in the respective land forces and marines; and this deponent further saith, that by the said articles it is witnessed that the said parties in consideration of the mutual confidence and fidelity they had and reposed in each other and for each other's benefit, and also in consideration of the sum of one hundred and five pounds to the said James Rutherford in hand paid by this deponent, the said James Rutherford and this deponent agree to become copartners in [74] the inlisting and raising men to serve his majesty and the said Company of Merchants, and in the profits and advantages to arise therefrom; and this deponent further saith, that by the said articles of agreement it was agreed that the said copartnership business should be carried on and conducted at the house known by the name or sign of the King's Arms public-house, situate at Charing-cross aforesaid, or at such other premises and places as the said parties should, from time to time during their said copartnership, agree upon and appoint for that purpose at their mutual and equal expence and loss, and for their

mutual and equal benefit and advantage; and this deponent further saith, that he was employed to raise recruits for different regiments, and particularly he was employed by Lieutenant Grey of the 76th regiment, on or about the 6th day of April, 1791. This deponent was also employed by Captain Alexander Campbell of the 74th regiment of foot, and this deponent did receive beating orders from the said Lieutenant Grey and Captain Campbell respectively, authorizing the deponent to raise men for the said 76th and 74th regiments: and this deponent further saith, that the terms on which this deponent did agree with the said Captain Campbell for such service, were, that this deponent should furnish at least 20 recruits for the said 74th regiment every year, for each of whom this deponent was to be paid the bounty money allowed by government; and this deponent further saith, that the said Captain Campbell further agreed with this deponent to allow him for such service a salary equal to the pay and cloathing of a serjeant of the said 74th regiment; and this deponent further saith, that he did assume the character of a serjeant of the said 74th regiment, and of the other regiments for which he was employed to recruit as aforesaid, in order to enable him to carry on the said business of a recruiting-agent, but that this deponent was never actually enlisted as a soldier in the said 74th regiment, or in any other regiment; and this deponent further saith, that he did receive money from Messieurs Bishop and Brummell, agents for the said 74th regiment, and for the said Captain Campbell on account of the said service; and this deponent did also apply to the said Messieurs Bishop and Brummell for the salary due by the said Captain Campbell to this deponent, and in the receipt or receipts granted by this deponent, he did acknowledge the money therein mentioned to be for his pay and subsistence; and this deponent believes that he did in such receipt or receipts annex to his subscription the [75] words and figures following, to wit, "Serjeant, 74th regiment," or words and figures to that effect; but this deponent says, that at the time he so received the money mentioned in the said receipt or receipts, and at the time he wrote the words annexed to his subscription to the said receipt or receipts, denoting this deponent to be a serjeant of the said 74th regiment as aforesaid, he did not consider himself to be truly and really a serjeant of the said 74th regiment of foot; and such words were added to his subscription merely that this deponent might appear to be a serjeant, in order to give effect to his enlistments; and this deponent further saith, that on or about the 26th day of January last two young men, named Francis Heretage and Francis Stephenson, were, as this deponent has been informed and believes, enlisted in this deponent's house as soldiers for the service of the East India Company; and it having been afterwards found that the said Francis Heretage and Francis Stephenson were deserters from the Coldstream regiment of Guards, they were delivered up to the said regiment; and this deponent further saith, that on or about the 3d day of February last, an information was exhibited against this deponent before William Addington, Esq. one of his majesty's justices of the peace for the county of Middlesex, for having, as this deponent has been informed and believes, knowingly exchanged or received from the said Francis Heretage and Francis Stephenson, knowing them to be soldiers and deserters, certain articles of clothes belonging to the King; and thereupon, on the oaths of the said Francis Heretage and Francis Stephenson, this deponent was convicted in the penalty of five pounds for each of the said offences, and the said penalty amounting to ten pounds has been levied by warrant under the hand of the said justice, by distress and sale of the goods and chattels of this deponent; and this deponent further saith, that on the 7th day of February last this deponent was arrested by Joseph Turtle, a serjeant in his majesty's Coldstream regiment of Foot Guards, and this deponent was then taken by the said Joseph Turtle to the recruit-house in Savoy-square, where he was delivered by the said Joseph Turtle to Samuel Lunt, a serjeant-major of the said Coldstream regiment; and this deponent further saith, that on the same day he was taken by the said Samuel Lunt to his majesty's prison of the Savoy, and was delivered into the custody of William Hannam, the provost-marshal, or keeper of the said prison of the Savoy; and this deponent further saith, that at the time he was so imprisoned in the said prison of the Savoy, a paper writing was read in the hearing of this deponent, purporting to be a warrant by the [76] said Samuel Lunt as such serjeant-major as is aforesaid, requiring the said William Hannam, as such provost-marshal as is aforesaid, to receive into the Savoy prison this deponent by the name and description of George Grant, serjeant in the 74th regiment of foot, for enlisting drummers Heretage and Stephenson of the Coldstream regiment,

into the India Company's service, knowing them to belong to the above regiment, by order of his Royal Highness the Duke of York; and this deponent further saith, that he did cause his majesty's writ of Habeas Corpus to be sued out, directed to the provost-marshal of the said prison of the Savoy, whereby the said provost-marshal was commanded to have before the Right Honourable Lord Kenyon, Chief Justice of his Majesty's Court of King's Bench, at his Lordship's chambers in Serjeants' Inn, Chancery Lane, London, immediately after the receipt of the said writ, the body of the said Samuel George Grant with the day, and cause of his taking and retainer, to undergo and receive all and singular such things as the said Chief Justice should then and there consider of concerning him in that behalf; and this deponent further saith, that the said writ was allowed by the said Lord Kenyon and delivered to the provost-marshal, as this deponent has been informed and believes, on or about the 6th day of March last, and on the 7th day of the said month of March last this deponent was carried before the said Lord Kenyon, at his house in Lincoln's-Inn-Fields; and this deponent further saith, that Messieurs Joseph White and Thomas Lowten attended to oppose the discharge of this deponent, and prayed farther time to prepare the return of the said writ, which was granted, and this deponent was remanded; and this deponent further saith, that he was again brought before the said Lord Kenyon on the 13th day of the same month of March last, at his Lordship's house in Lincoln's-Inn-Fields aforesaid, when the return was made to the said writ of Habeas Corpus by the said William Hannam, as such provost-marshal aforesaid, purporting that by certain articles of war, formed, made, and established by his majesty, in pursuance of, and according to the force of the statute in that case made and provided for the better government of his majesty's forces, it is ordained and established, "that whatever officer, non-commissioned officer, or soldier shall be convicted of having advised or persuaded any other officer or soldier to desert his said majesty's service, shall suffer such punishment as by the sentence of a general court-martial shall be awarded;" and the said William Hannam, as such provost-marshal as aforesaid, did further [77] certify and return, that, on the 17th day of February, in the 32d year of his Majesty's reign, Samuel George Grant, in the said writ of Habeas Corpus named, being then a non-commissioned officer and soldier in his Majesty's service, in the 74th regiment of foot, was taken by Joseph Turtle, a serjeant in his Majesty's Coldstream regiment of Foot Guards, and delivered into the custody of him the said William Hannam, being such provost-marshal as aforesaid, charged with having advised and persuaded Francis Heretage and Francis Stephenson, soldiers in the said Coldstream regiment, to desert his Majesty's service, and to enlist into the service of the East India Company, knowing them at the same time to belong to the said Coldstream regiment of Foot Guards; and he the said William Hannam, as such provost-marshal as aforesaid, did further certify, that the body of the said Samuel George Grant, having been so delivered to the care and custody of him the said William Hannam, being such provost-marshal as aforesaid, was then detained in his custody to answer the said charge, and also by virtue of an order from his Majesty's Secretary at War, bearing date the 18th day of February aforesaid, requiring him the said provost-marshal to detain in his custody the said Samuel George Grant, by the name of Serjeant George Grant, of the 74th regiment, it being intended to bring the said Grant to trial before a general court-martial, for having advised and persuaded two soldiers of the Coldstream regiment of Foot-Guards to desert his Majesty's service, and to enlist in the East India Company's service; and that this is the cause of taking and of detaining the said Samuel George Grant; and this deponent further saith, he was remanded by the said Lord Kenyon; and this deponent was taken to his Majesty's garrison at Chatham aforesaid, where he has been detained a prisoner ever since; and this deponent is now a prisoner in the said garrison as aforesaid; and this deponent further saith, that, on Wednesday the 25th day of March last, this deponent was brought to be tried before a general court-martial, held in the said garrison of Chatham, pursuant to his Majesty's royal warrant, charged with having advised and persuaded the said Francis Heretage and Francis Stephenson, drummers in the Coldstream regiment of Foot Guards, to desert his Majesty's service, and to enlist into the service of the East India Company, knowing them at the same time to belong to the said regiment of Foot Guards; and this deponent having been then asked by Major Brownrigg, the Deputy Judge Advocate of the said court-martial, if he acknowledged himself to be Serjeant Samuel George Grant of the 74th regiment, the deponent did answer to such question, that [78] he was not Serjeant Samuel

George Grant of the 74th regiment of foot: To which the said Major Brownrigg replied, that this deponent was Serjeant Samuel George Grant, of the 74th regiment of foot, and that he was then ready to prove it; and this deponent further saith, that he did then, as he does now, deny that he is, or that he ever was, a soldier, notwithstanding the court-martial did allow witnesses to be examined, in hopes of proving that this deponent was a soldier; and for that purpose the court-martial did admit as evidence certain letters written by the said Captain Campbell, to Messrs. Bishop and Brummell, or to some other person or persons, in which letters the said Captain Campbell mentions this deponent to be a serjeant; and also did admit as evidence a return or certificate of the said Captain Campbell, in which he certifies or returns that this deponent inlisted as a soldier on the 25th day of June 1791, which return or certificate was made up by the said Captain Campbell, and was received by the said Messrs. Bishop and Brummell, a few days only previous to this deponent's trial, and which return was, as the deponent believes, made up by the said Captain Campbell, for the purpose of being produced against him on the said trial; and this deponent saith, that in order to discredit the said letters and returns, this deponent did produce and prove two letters from the said Captain Campbell to this deponent, dated long after the said 25th day of June, to wit, the first dated the 13th day of September 1791, in which Captain Campbell writes to this deponent, that he had received this deponent's letter of the 17th, by which he was happy to see that this deponent had been so successful, and in which letter are the following passages: "You must be approved of at Chatham, and leave your own attestation there. I have, by last post, received a letter from the agent, inclosing a charge of one pound fourteen shillings and sixpence, made by you for pay to men deserted and rejected; they very properly have refused paying it, as Government will not admit it; and you know my agreement with you is, that as I am to have no profit by the men you get, I am to sustain no loss: if Government would allow the charge, you should be welcome to it, but you cannot in reason expect me to pay it out of my own pocket: if you look into the War-Office letter to General Townsend, of the 4th of October 1788, which I left with you, it will shew you that subsistence is allowed only for such rejected or deserted men as have been previously approved of by Field-officers appointed by General Townsend." And this deponent further saith, that the other [79] of the above-mentioned letters from the said Captain Campbell to this deponent, is dated the 14th day of December 1791, in which the said Captain Campbell writes to this deponent as follows: "You must know, as well as I can tell you, that I cannot give you an order to receive either your bounty or pay, till you are approved of, and your attestation lodged at Chatham; neither of which has, I believe, been done. I hope and trust that you have got some men for the 74th this month, although the East India Company's offices are open: I was sorry to observe by your last return, that you had not inlisted a man for me since October." And this deponent further saith, that the said Court did not allow this deponent to call his witnesses to prove that this deponent was not a soldier, but, on or about the 22d day of March, "came to a determination that no more evidence was necessary to be produced for or against the circumstances of this deponent being in pay as a soldier in his majesty's 74th regiment; and the Court, having duly weighed and considered the evidence already produced, were of opinion that this deponent was and has been in pay as a soldier in his Majesty's 74th Regiment since the 25th day of June last, and therefore considered themselves competent to proceed to the trial of this deponent, Serjeant Samuel George Grant, of the 74th regiment of foot, aforesaid, for the charge exhibited against him, and for which he has been arraigned, and to which he has pleaded Not Guilty." And this deponent further saith, that the said Francis Heretage was then called as a witness, and this deponent did require the Deputy Judge Advocate, Major Brownrigg, to examine the said Francis Heretage, as to the nature and religious obligation of an oath, and as to the penalties of perjury; and this deponent did require the following question to be put to the said Francis Heretage, to wit, "Do you know for what purpose an oath is now administered to you?" And this deponent intended further to have put the following, among other questions, to the said Francis Heretage, to wit, "Do you know the religious obligation of an oath? Do you believe in a future state, after your death? What do you expect will then become of you, if you should this day wilfully declare what is false to the Court?" But the Court refused to allow the said first question to be put to the said Francis Heretage, and to examine him as to the nature and the religious obligation of an oath. And this deponent further saith,

that previous to the examination of the said Francis Heretage, the prosecutor prayed that William Davies, a clerk in the public office in [80] Bow Street, might be called; and he having produced and proved an information or deposition of the said Francis Heretage and Francis Stephenson, taken before William Addington, Esquire, on or about the 3d day of February last, the prosecutor prayed that such information or deposition might be read over in the presence of the witness, Francis Heretage, against which this deponent objected; but the Court over-ruled the objection, and the said information or deposition was accordingly read over to the witness, Francis Heretage, and he then swore that the contents of the said information or deposition were true, which information or deposition verified, was admitted and read by the Court as evidence of the truth of the facts therein sworn. And this deponent further saith, that he did require several questions material to his defence, to be put to the said Francis Heretage and Francis Stephenson, and other witnesses on behalf of the prosecution, which question the Court refused to put to the witnesses; and this deponent further saith, that he was advised, and does believe, that Samuel Thornhill, then a prisoner in the Savoy, was a material witness for this deponent; and this deponent believes that an order was made by the Secretary at war, that the said Samuel Thornhill should be taken to Chatham to be examined as a witness for this deponent, on his said trial, but that the said Samuel Thornhill, though called on, was not produced, or was there any notice given to this deponent that the said Samuel Thornhill would not attend the said trial, or was any affidavit or other evidence produced, to prove to the Court that he could not through indisposition attend the said trial; and this deponent further saith, that Captain Wynyard, the prosecutor, having suggested that the said Samuel Thornhill could not attend on account of his bad state of health, but without offering any evidence of the fact to the Court, this deponent did pray that the Court would either allow the said Samuel Thornhill to be examined by deputation, or otherwise; but the Court refused to grant such his request; and this deponent further saith, that the said William Addington was also a material witness for the deponent, and, as this deponent has been informed, and believes, summoned by Sir Charles Gould, Knight, his Majesty's Judge Martial and Advocate General, to give evidence on the said trial on behalf of this deponent, and also to produce the record of the conviction of this deponent, dated on or about the 3d day of February last, with the informations and other proceedings on which the said conviction was made, but that the said William Addington did not attend pursuant to the said summons: and this deponent further saith, that in the course of the said trial Captain [81] Wynyard, the prosecutor, mentioned that the said William Addington had declared to him his readiness to attend, but that the prosecutor did on that occasion inform the said William Addington that his attendance would not be necessary; and this deponent saith, that he being desirous of having this proved and entered upon the proceedings, did, for that purpose, call the prosecutor to state the said conversation upon his oath, and to give his reason for desiring the said William Addington to disobey the said summons, but that the Court refused to allow the said Captain Wynyard to be sworn and examined by this deponent; and this deponent further saith, that he also called Joseph Turtle, a serjeant in the Coldstream regiment of Foot Guards, as a witness for him, but that the Court, after two or three introductory questions had been asked, refused to permit this deponent to proceed in the examination of the said Joseph Turtle, and he was accordingly dismissed by the Court, although this deponent says that the questions which he had previously put, and the questions which he intended to have put, were, as he was advised and believes, material and necessary; and this deponent further saith, that he also called Samuel Lunt, a serjeant major in the said Coldstream regiment of Guards, as a witness for this deponent, and the said Samuel Lunt to attend the Court, to give his evidence accordingly, but the Court refused to admit the said Samuel Lunt to be sworn and examined by this deponent; and this deponent further saith, that on Saturday, the 24th day of March last, the prosecutor declared the evidence for the prosecution to be closed, and this deponent was advised that it would be necessary to detain one Malone as a witness, and he was accordingly dismissed on the said 24th day of March; and this deponent further saith, that he believes that the said Malone would have contradicted and discredited the testimony of Stephen Betty, a corporal, residing in the garrison of Chatham; and that the reason for dismissing the said Malone was, that the prosecutor had closed his evidence without having called the said Betty as a witness; and this deponent has

been informed, and believes, that on the 24th day of March last, the said Malone left Chatham and returned to London; and this deponent further saith, that on or about Thursday the 29th day of March last, this deponent did declare the evidence of his defence to be closed, when the prosecutor prayed to be again permitted to examine witnesses in support of his charge; to this the deponent objected, as being contrary to every judicial proceeding, [82] to permit a prosecutor, after finding his case to be totally overturned, to begin the prosecution again, and examine other witnesses in support of his charge; but the Court permitted the prosecutor to examine witnesses, not only in respect of any new matters arising out of this deponent's defence, but in support of his charge; and the said Captain Wynyard, the prosecutor, and Stephen Betty, were examined accordingly; and this deponent further saith, that he then prayed the Court to adjourn, that he might send an express to London to bring back Malone, that he might be examined to contradict the testimony of the said Stephen Betty, and the prosecutor objected to this; and this deponent's request was disallowed by the Court; and this deponent further saith, that in order to prove the conviction of this deponent before the said William Addington, as aforesaid, the said Captain Wynyard, the prosecutor, produced a certificate of such conviction, under the hand of the said William Addington, he, the said William Addington, being then living, and dwelling and residing, as this deponent has been informed and believes, within the county of Middlesex; and this deponent did object against such certificate, that it was not evidence of the conviction, and that the record of the conviction itself must be produced; but this deponent saith, that the said court-martial did admit such certificate as evidence of the said conviction, upon the evidence of Captain Wynyard alone; that he saw the said William Addington sign the said certificate, although the said Captain Wynyard, at the same time, admitted that he did not even examine the said certificate with the record of the said conviction; and he would not swear that the said record was duly certified; and this deponent further saith, that he has been informed and believes, that after the conclusion of the said trial, a sentence has been drawn up by the said court-martial, as follows: to wit, "The Court having maturely considered the evidence given in support of the charge against the prisoner, Serjeant Samuel George Grant, with that produced in his defence, are of opinion, that he, the said Serjeant Samuel George Grant, is guilty of having promoted, and having been instrumental towards the inlisting of Francis Heretage and Francis Stephenson into the service of the East India Company, knowing them at the same time to belong to the said regiment of Foot Guards; and deeming this crime to be precisely of the same nature with that which is set forth in the charge, and to differ only in this, that it is rather inferior, but in a very slight degree, in point of aggravation, they do adjudge him to be reduced from the rank and pay of a [83] serjeant, and to serve as a private soldier in the ranks; and the Court do further adjudge him to receive one thousand lashes on the bare back, with a cat-o'-nine tails, by the drummers of such corp or corps, at such time or times, and in such proportions as his Majesty shall think fit to appoint." And this deponent further saith, that he has been informed, and believes, that the proceedings of the said court-martial having been transmitted to the said Sir Charles Gould, they were afterwards returned to the said court-martial, to be by them revised; and that the same have been so revised, and have been returned to the said Sir Charles Gould; and the said sentence has been confirmed by his Majesty; and this deponent further saith, that he has directed actions to be brought in this Honourable Court (a), against his Royal Highness Frederick Duke of York, Matthew Lewis, Esq. William Hannam, Samuel Lunt, and Joseph Turtle, and this deponent has been informed, and believes, that such actions are brought accordingly, to obtain redress for his said illegal and unconstitutional caption, imprisonment, and trial; and this deponent has also caused to be presented his humble petition to his Majesty, praying that his Majesty would be graciously pleased to arrest the execution of the sentence of the said court-martial against this deponent, that this deponent might not be sent out of his native land, or be subjected to any military punishment, until a jury of his country shall have cut him off from civil society, and shall have determined whether he is or is not amenable to martial-law; and this deponent further saith, that the

(a) [That an action will lie by an inferior officer against his superior, who wrongfully imprisons him under colour of military authority, see *Warden v. Baileu*, 4 Taunt. 67. 4 M. & S. 400, S. C. in error.]

said sentence of the said court-martial hath not yet been executed against this deponent.

SAMUEL GEORGE GRANT.

Sworn at his Majesty's garrison, at Chatham, aforesaid, the 1st day of May, in the year of our Lord, 1792, before me,

JOHN GIBBS, a Commissioner, &c.

Marshall Serjt., in support of the motion for a prohibition, argued in the following manner. He began by observing that martial-law, being dangerous to public liberty, ought to be strictly confined within its proper limits. The establishment of a standing army in England, and of its necessary concomitant, martial-law, in time of peace, is an innovation on the true principles of the British government. At common law, "If a lieutenant, or other, hath commission of martial authority, in time of peace, and hang or otherwise execute any man by colour of martial-law, this is murder; for it is against Magna Charta, cap. 29, and is done by such power and strength as the party cannot defend himself, and here the law implieth malice." 3 Inst. 52.

"Martial-law is built on no settled principles, but is entirely arbitrary in its decisions, and is in truth no law, but something indulged rather than allowed as law, a temporary exorcism bred out of the distemper of the state, and not any part of the permanent and perpetual laws of the kingdom. The necessity of order and discipline is the only thing which can give it countenance, and therefore it ought not to be permitted in times of peace, when the king's courts are open for all persons to receive justice, according to the law of the land." 1 Black. Com. 413, Hale, Hist. C. L. 34 (last edit.).

These are principles which cannot be controverted, and which have been established ever since the time of Ed. 2, Hale, Hist. C. L. 35.

But though they have been always indisputable, they have been in former times violated by the kings of England, who frequently enforced obedience to their arbitrary will by the assistance of military tribunals erected without any legal authority.

In the reign of Philip and Mary, a proclamation was issued declaring that whoever was possessed of heretical books, and did not presently burn them without reading them, or shewing them to others, should be deemed a rebel, and executed immediately by martial law. And in the succeeding reign of Elizabeth, the exercise of martial-law was no less an object of complaint, for in cases of insurrection it was not only exercised on military men, but on the people in general, and was extended even to those who brought papal bulls, &c. from Rome: any person might be punished as a rebel, or as an aider or abettor of rebellion, whom the provost-marshal or lieutenant of a county pleased to suspect. Hume, Hist. Engl. vol. iv. p. 419, vol. v. 454.

Lord Bacon says, that the trials at common law granted to the Earl of Essex and his fellow conspirators, were deemed a favour, for that the case would have borne and required the severity of martial-law. But the most extraordinary act of her reign was her "commission to Sir Thomas Wilford as provost-marshal granting him authority, and commanding him upon [85] signification from the justices of peace of London or the neighbouring counties, of idle vagabonds and riotous persons, worthy to be speedily executed by martial-law, to take them, and according to the justice of martial-law, to execute them on the gallows or gibbet near the place where they committed their offences." Ibid. 456.

One of the principal causes of the discontents in the beginning of the reign of Charles I., was the granting commissions under the Great Seal to proceed by martial law, under pretext of which some persons were put to death, who, if guilty of any offence, ought to have been tried by the common law. These commissions were by the petition of right annulled and declared to be illegal.

From that time the people of England have always entertained a great jealousy of standing armies, and particularly of martial law, which in every principle is so much at variance with the mild administration of justice by the common law.

That jealousy cannot be better expressed than in the preamble to the annual mutiny act, which recites that "Whereas the raising or keeping a standing army within this kingdom in time of peace, unless it be with the consent of Parliament, is against law; and whereas it is adjudged necessary by his Majesty and his present Parliament, that a body of forces should be continued for the safety of the kingdom, the defence of the possessions of the crown of Great Britain, and the preservation of the balance

of power of Europe": (and after reciting the number of troops to be kept on foot, it proceeds) "And whereas no man can be forejudged of life or limb, or subjected in time of peace to any kind of punishment within this realm, by martial law, or in any other manner than by the judgment of his peers, and according to the known and established laws of this realm."

Mr. Justice Blackstone, who was never accused of any disposition to loose the bands of society, or to weaken the necessary powers of government, expresses himself to the same effect on the subject of standing armies and martial law. Vide 1 Bl. Com. 144, 145, 416, &c.

Such being the nature of martial law, and such being the natural apprehensions which the least extension of it must ever excite in the minds of a free people, it is needless to dwell on the necessity of confining this vast and formidable power rigidly within the limits prescribed to it. The power of confining [86] it within those limits, is happily lodged by the constitution in the Supreme Courts of Westminster, the sure refuge to which alone every oppressed subject can or ought to fly for protection from military despotism.

If the Courts of Westminster will restrain an inferior court from proceeding in a cause, of which it has original jurisdiction, merely because a matter incidentally occurs, which is properly triable by the common law, with what watchful solicitude will they observe the conduct of a court-martial, deciding on the important question, whether soldier or not? a question which involves in it the dearest birth-right of every Englishman, the trial by jury!

There are four grounds, upon each of which it is submitted that the Court ought to grant a prohibition:—

First, That the Plaintiff Grant was not a soldier, and therefore not liable to be tried by martial law.

Secondly, That evidence was received against him contrary to the rules of the common law; and evidence for him, which was admissible, was rejected.

Thirdly, Supposing him to have been a soldier, yet he ought not to have been convicted of any offence with which he was not specifically charged previous to his trial.

Fourthly, The offence of which the Plaintiff was convicted is not an offence cognizable by martial law.

1. The Plaintiff was not a soldier, and therefore not liable to be tried by martial law.

If there be a case in which above all others it becomes the Courts of Westminster to be peculiarly watchful over the right of the subject, it is in the case of a court-martial deciding on the extent of its own jurisdiction. It is not disputed that a court-martial has power to try the question, whether soldier or not? That power must be inseparable from their jurisdiction. But they exercise it at their peril; and it behoves them to have the most explicit and unequivocal proof that a man is a soldier, before they venture to put him on his trial for any offence whatever. If it shall be in the power of any military commander to take up a man under pretence of some supposed military offence, and it shall be in the power of a court-martial to give themselves jurisdiction over him, by deciding him to be a soldier, upon evidence such as has been received in the present instance, the liberty of the subject is at an end, and the army [87] may, as soon as its commanders shall think fit, become the sovereign power of this country. That in fact the Plaintiff was not a soldier, appears from the proceedings before the court-martial (a).

2. Evidence was received against the Plaintiff which was not admissible by the rules of the common law, and evidence for him rejected which ought to have been received. Every court which assumes the name of a court of justice, must have some principles or rules for its guidance in the investigation of truth. The rules of evidence of the common law, at least so far as they are applicable to criminal proceedings, are neither numerous nor complex, but plain and simple, and are founded in wisdom and established by the experience of ages. The rules of evidence are perhaps those, of all others, which ought to be kept inviolate with the most religious veneration. The whole administration of justice, both civil and criminal, in a great measure depends on them.

(a) Vide the suggestion and affidavit.

A court-martial is the mere creature of the annual mutiny act, and has not the smallest shadow of authority but what it derives from that act; it is impossible that it can have any ancient or immemorial rules of evidence peculiar to itself. Now it may be laid down as a clear and indisputable principle of law, that wherever an act of Parliament erects a new judicature, without prescribing any particular rules of evidence to it, the common law will supply its own rules, from which it will not suffer such new-erected court to depart. This would hold even in matters merely civil, and surely much more strongly in questions of a criminal nature.

This is not mere theory, but the law of the land; and the general practice of courts martial is conformable to it.

This appears by every treatise that has been published on the subject of either naval or military courts martial. Ayde on Courts Martial, 174. Sullivan's Thoughts on Martial Law, 45, 55. Military Arrangements, 121. MacArthur's Treatise on Naval Courts Martial, 107, 112, and *Frye's case*, Append. No. 13, p. 62.

1. Improper evidence was received. The return of subsistence from the 25th of June to the 24th of December was not authenticated, nor was it said by whom or to whom it was made. All [88] the letters from Captain Campbell, and his return dated 16th of March 1792, may be false. There is ground for suspicion, inasmuch as he had never, till just before the trial, made any return to his agent, though by stat. 23 Geo. 3, c. 50, s. 34, he was bound to make a return every two months. But Captain Campbell himself ought to have been called, he alone could give the best evidence which the nature of the thing admitted of, to prove the Plaintiff a soldier; the not calling him affords a presumption that some falsehood was concealed, which he could have detected. The muster return was not authenticated, and is liable to the same suspicion. Captain Williamson who produced it did not swear when it was received at Chatham, but believed in January last; conceiving that Captain Campbell would not make a false return, he thought the return a sufficient proof of the Plaintiff being a soldier. This hypothetical mode of swearing is decisive to shew the necessity of authenticating the return. Captain Hewgill's account of the opinion of Lord Kenyon, that the Plaintiff might be proceeded against as a soldier, was not evidence, it was merely an extra-judicial dictum dropped in conversation. The written examination of Francis Heretage was received, but he was not asked, whether it was true, but only whether it was the deposition sworn to by him. The next day indeed, when it was offered to be read as Stephenson's evidence, the objection prevailed.

2. Proper evidence was rejected, viz. that of Turtle and Lunt (a).

Now for receiving improper evidence, even after sentence, a prohibition will lie. Thus in *Bredon v. Gill*, 2 Salk. 555. 5 Mod. 271. 1 Ld. Raym. 212. On an appeal from the commissioners of excise to the commissioners of appeals, under the 12 Car. 2, c. 23, the commissioners of appeals received as evidence the depositions of witnesses written down by the clerk of the commissioners of excise, without examining the witnesses themselves *vivâ voce*. A prohibition was moved for after sentence, which was at first refused, because this had been the course ever since the passing the statute. But the Court, having changed their opinion, held that the witnesses ought to have been examined *de novo*; that this was the intent of the act, and was just, because the depositions might misrepresent, or not represent the whole case, and it was compared to appeals upon orders of justices, where the examinations are always *de novo*.

[89] Upon a declaration in prohibition it appeared that the Plaintiff, who had been libelled against in the spiritual court for a legacy, pleaded payment, and offered to prove it by a single witness, which the Court refused, though the witness was unexceptionable, and thereupon sentence was given against the Plaintiff in prohibition, which sentence was now pleaded, and upon demurrer to the plea, the Court after much argument held that the prohibition should be granted; and they said a prohibition might be granted as well after sentence as before. *Shotter v. Friend*, 3 Mod. 283. 2 Salk. 547. 1 Show. 158, 172. It is true that a prohibition does not lie after sentence, unless the want of jurisdiction appear on the face of the proceedings according to the doctrine of *Blacquiere v. Hawkins*, Dougl. 377. But where the objection is not the want of jurisdiction but some irregularity or abuse of jurisdiction, it is not

(a) These and the other circumstances respecting the evidence, appeared on the minutes of the court-martial, which were laid before this Court. Vide also the suggestion and affidavit.

to be expected that it should appear on the face of the proceedings: nor is it necessary that it should, to entitle the party to a prohibition. *Adriel Mill's case*, Skinn. 299; for if after sentence a collateral matter not appearing on the face of the proceedings be the ground of the application, it is sufficient if the suggestion be supported by affidavit. *Buggin v. Bennet*, 4 Burr. 2037, per Lord Mansfield, Yates, and Aston, J.

Thus it appears that the supreme courts have power not only to confine all other courts within their proper jurisdiction, but also to control and correct their irregular proceedings, and compel them to conform to the proper rules of evidence.

3. Supposing the Plaintiff to have been properly found to be a soldier; yet he ought not to have been convicted of an offence, with which he was not specifically charged previous to his trial.

It is a principle of natural justice, and therefore it is a rule of the law of England, that no man shall be put upon his trial for any offence before any court of judicature, unless previous to such trial he has been distinctly and specifically charged with such offence, and called upon to answer it; for it is impossible for any man to come prepared to defend himself against a charge of which he is ignorant. This rule was early recognized, and solemnly established by several judgments in parliament. The want of a previous charge was the principal error upon which the judgment against the Mortimers in the time of Ed. 2 was reversed in parliament in the 1st Ed. 3, 2 Hale, P. C. 217.

[90] So the like was done in the case of *The Earl of Lancaster* in 1 Ed. 3, 1 Hale, P. C. 314.

And in Hale there are many instances and authorities to prove, that no man can be convicted or attainted of any crime without arraignment and being put to answer it. 1 Hale, P. C. 346.

It is upon the plea of Not Guilty alone that the party accused can be put upon his trial, nor can he (except in the case of a confession or standing mute, which is equivalent) receive sentence, but upon that plea. Here the plaintiff never pleaded to a charge that was not made. The charge is, the having advised and persuaded Heretage and Stephenson to desert, and to enlist in the India Company's service. The first part of this charge is within one of the Articles of War, sect. 6, art. 5, p. 24, the rest is merely aggravation, and not being within any of the articles of war, should not have been inserted in the charge.

The nature of this offence is that of an accessory before the fact; for it goes on the idea that the men had not yet deserted. The conviction is having promoted, and having been instrumental towards the inlisting of Heretage and Stephenson into the service of the India Company, knowing them to belong to the Coldstream regiment of Foot Guards.

This conviction is founded on a supposed prior desertion; and indeed it is so apparent that the men had deserted before they came to the Plaintiff to be enlisted, that the court-martial could not proceed upon any other idea. Consequently the offence found is, promoting and being instrumental in the inlisting of men, for the India Company, who had already deserted. This, therefore, taking it to be an offence at all, is that of an accessory after the fact.

The desertion of the men was already complete, and being instrumental to their being enlisted with the India Company, was perfectly different from the offence of persuading them to desert. Persuading to desert is the substance of the offence, inlisting is only a circumstance. It is true, that a man charged with a capital crime may be convicted of an offence of an inferior degree, but then it must be of the same nature with the offence charged. But the offence found on this sentence, is not of the same nature. The charge contains an offence prohibited by the articles of war: it also contains a circumstance which is [91] there added by way of aggravation, but which (as will be proved hereafter) is no offence either by the articles of war, or by the mutiny act. Now the offence found is only this matter of aggravation, which is subjoined to the charge, and not the charge itself, or any inferior species or degrees of it: and even that is found different from the charge. The charge in that respect is, advising and persuading to enlist into the service of the India Company.

The offence found is, promoting and being instrumental towards the inlisting.

Suppose a person indicted as an accessory before the fact in feloniously advising and persuading J. S. to steal my goods, and the jury find that at such a time and place J. S. stole my goods, and that the Defendant received the same goods knowing

them to have been stolen; this verdict would be void as finding a matter not in issue. And no court, which was guided by the rules of law, could give judgment against the Defendant on a verdict convicting him of an offence for which he was never arraigned, and to which it was impossible for him to be prepared with any defence.

Taking this to be of the nature of a special verdict, the Court in construing it must confine itself to the facts expressly found, and cannot supply the want of them by any argument, intendment, or implication whatever: in this, all the writers on courts martial before cited agree. *Adye*, 207. *Sullivan*, 75. *MacArthur*, 143.

But it is only in felony that a man can be convicted of a crime of an inferior degree to the crime charged. In misdemeanors there can be no inferior degree, all are misdemeanors; and any other degree must be a different offence. But even supposing that the offence found could be deemed to be of the same nature with the offence charged, yet the prisoner should have been acquitted of the offence charged, and for want of such acquittal the sentence is void. "If a man be indicted for murder and found guilty of manslaughter without saying any thing of the murder, the verdict is insufficient and void, as being only a verdict for part. 2 Hawk. P. C. 440. If a special verdict only find part of the matter in issue, or do not take in the whole issue, or if the imperfection be such that judgment cannot be given, it is bad." 2 Lord Raym. 1521, 1522. 2 Stra. 844.

4. The matter of which the Plaintiff is convicted, is not an offence cognizable by martial law.

[92] The necessity of confining courts martial strictly within their jurisdiction, has already been shewn: and it is not only necessary to confine them strictly within the limits of their authority with respect to the persons accused, but also with respect to the offence with which they are accused. The offence found is "the having promoted, and having been instrumental towards the inlisting of Heretage and Stephenson into the service of the East-India Company, knowing them at the same time to belong to the Coldstream regiment of Foot Guards, and deeming this crime to be precisely of the same nature with that which is set forth in the charge, and to differ only in this, that it is rather inferior, but in a very slight degree, in point of aggravation, they do adjudge," &c.

But what, it may be asked, is the meaning of "promoting and being instrumental towards their inlisting?" By what means did the Plaintiff promote or become instrumental to this? This ought to have been explicitly stated; as the sentence stands, it is vague and fallacious.

But taking it for granted, that the court martial had convicted the Plaintiff in express words of inlisting these men into the service of the India Company, knowing them to be deserters from the Guards; this offence is neither within the articles of war, nor the mutiny act, unless it be within the 53 s. of the act, which imposes a penalty of 5l. on any person who shall harbour, conceal, or assist any deserter, knowing them to be such, on conviction before a justice of peace, to be levied by distress, and for want of a distress, three months' imprisonment.

But merely inlisting a soldier who has already deserted, even though the party knows him to be a deserter, is no offence either against the mutiny act or the articles of war. If it had been within either the one or the other, the court-martial would have shewn it in their sentence, as is usual. *Sullivan*, 101. The offence, if any, seems to have been that of harbouring or concealing the men; but that is totally different from promoting and being instrumental towards their inlisting.

The superior courts of Westminster have a superintending power over all inferior courts of what nature soever, and are by the principles of the constitution entrusted with the exposition of such laws and acts of parliament as prescribe the extent and boundaries of their jurisdiction. So that if such courts assume a greater or other power than is allowed them [93] by law, the supreme courts will prohibit and control them. 4 Bac. Abr. 241, and the authorities there cited.

Hence it lies to all courts which differ from the common law in their proceedings.

Besides the Ecclesiastical Courts and the Courts of Admiralty, it lay to the High Commission Court, to the delegates, to the convocation, to the Court of the constable and marshal. 4 Inst. 333, 334.

A court-martial, like every other court, may exceed or abuse its authority. In that case, if no prohibition lies, there is no remedy for such abuse, which is absurd.

The Court of Common Pleas may grant prohibitions in all cases, without any

exception. 4 Inst. 99, 100. This was agreed by all the Judges of England. In 4 Inst. Lord Chancellor Egerton called Fleming, Chief Justice of B. R., and the other judges of that court, and Tanfield, Chief Baron, and the other Barons of the Exchequer, to consider whether the Court of Common Pleas had authority to grant prohibitions without any writ of attachment or plea depending. They were unanimous in the affirmative, according to a multitude of precedents. The Justices of the Common Pleas were not called, having often before determined the point. "So now," says Lord Coke, "this question is at peace, being resolved by all the Judges of England."

The difference between the Courts of King's Bench and Common Pleas is this, that in the King's Bench a prohibition may be awarded upon a bare surmise, without any suggestion on record, and such writ is only in the nature of a commission prohibitory, which is discontinued by the demise of the king (a); but that as to a prohibition issuing out of the Common Pleas the suggestion must be on record, and therefore is considered as the suit of the party, in which he may be nonsuited, and is not discontinued by the death of the king. Noy, 77. Latch, 114. Palm. 422. Prohibitions also are not granted *ex gratiâ* by the Court, but *ex debito justitiæ*. If the Spiritual Court exceeds its jurisdiction, upon information, either by the party or a mere stranger, the king's courts will prohibit them, for "prohibitions are not of favour, but of justice to be granted." Art. Cleri. [94] 2 Inst. 607. "Serjt. Morton libelled in the Admiralty; a prohibition was prayed in the King's Bench, Wild, King's Serjt., prayed that the Court would allow Morton his privilege of being sued in the Common Pleas. The Court doubted whether this privilege should be allowed in prohibition. But *ex assensu partium* it was ordered that the Plaintiff should sue for his prohibition in the Common Pleas. But because the Common Pleas refused the prohibition, it was moved again in the King's Bench; and all the Court were of opinion that prohibitions are grantable *ex debito justitiæ* (and not in the discretion of the Justices, as Hobart, 67, says), and after sentence and appeal." 1 Sid. 65, *Serjt. Morton's case*. "All the Judges agreed that the granting prohibitions is not a discretionary act of the Court, but they are grantable *ex merito justitiæ*; and they denied Lord Hobart's opinion in his Reports, 67, which Rolle, Chief Justice, had frequently done before." Sir T. Raym. 3, *Woodward v. Bonithan*.

It was one of the articles of impeachment against Sir Robert Berkley, a Judge of the King's Bench, that he had deferred to grant a prohibition to the Ecclesiastical Court, on a suggestion that the suit was for tithes of houses in Norwich, although it was moved by counsel many several times; and that on various other occasions he had deferred to grant prohibitions, where by law he ought to grant them. 1 State Trials, 713. And where Holt and the Court refused to grant a prohibition, they ordered that the suggestion should be entered on the record, that they might enter the reasons of their denial. 1 Salk. 136, *Bishop of St. David's v. Lucy*. A prohibition is *ex debito justitiæ*, if the Court of Admiralty proceed contrary to an act of Parliament, per Lord Mansfield, 4 Burr. 1950, *Howe v. Napier*. Prohibitions being to keep every jurisdiction within its proper limits, the law, as to prohibitions, and the form of them, cannot be altered but by act of Parliament. 2 Inst. 601, 602.

With respect to the practice in prohibition; anciently, prohibitions seem to have been granted as a mere matter of course, and the proceedings in the court below were staid, till it could shew its jurisdiction: almost all the questions of jurisdiction therefore arose on applications for a consultation. Afterwards a suggestion or surmise became necessary, which was not required to be proved, but the Plaintiff was bound to make his declaration exactly conformable to it; for if the Court found that the declaration did not warrant the surmise, they forth-[95]-with granted a consultation. 2 Inst. 605. This appears by the complaint of the Bishops in the *Articuli Cleri*, where they allege that there was great delay and difficulty in obtaining consultations while prohibitions were granted by any one of the judges out of court, at their chambers. 2 Inst. 605. The stat. 2 Ed. 6, c. 13, s. 14, requiring proof of the suggestion in the case of tithes, was made in favour of the clergy, for such proof was not necessary at common law. If no such proof was necessary in the case of tithes, it

(a) But quære, whether the words of the stat. 1 Ed. 6, c. 7, s. 1, be not extensive enough to include a prohibition, though it be not considered as a suit between party and party?

was not in any other case, and therefore the practice of proving the suggestion must have begun since that statute. Persons interested, as parishioners, who may not be competent witnesses at the trial, may be sufficient witnesses to prove the suggestion under that statute, and after recording the proof of the suggestion, nothing is to be objected against the persons of the witnesses or their evidence. 4 Bac. Abr. 246. It seems therefore that slight proof of the suggestion is sufficient. As to the declaration, "when the matter seems doubtful to the Court, upon a question of fact or law, the Plaintiff has leave to declare, that the parties may have the fact properly tried by a jury, or the law solemnly considered." 1 Burr. 198. *Ree v. The Bishop of Ely*. If the Court therefore have any doubt in this case, they will allow the Plaintiff to declare in prohibition.

Adair and Bond, Serjts., argued against the motion to the following effect:—

It is not disputed, that martial law can only be exercised in this country, so far as it is authorized by the mutiny act and the articles of war. The power of the Court to grant a prohibition to a court-martial in certain possible cases, is also allowed. But great caution should be observed not to interfere with military discipline. It is not an affidavit on a mere suggestion, which might be used in every case to avoid or delay punishment, that will of course obtain a proceeding dangerous to all order and regularity in the fleet and army. If the offender and the offence be clearly within the jurisdiction of a court-martial, there can be no ground for either a prohibition or a review in a court of civil judicature.

The first ground on the other side is, that the Plaintiff was not a soldier. But it is not necessary, in order to make a man amenable to military law that he should be a soldier. The act expressly subjects to military law those persons who receive pay as such, whether they are really soldiers or not. The old statutes on the subject likewise fix on that circumstance as the [96] criterion by which the engagement is decided: the receiving money, though the person was not enrolled, and afterwards deserting, is felony by those statutes, 18 Hen. 6, c. 19. 7 Hen. 7, c. 1. 3 Hen. 8, c. 5. 5 Eliz. c. 5. Jenk. Cent. 271. The 23d section of the articles of war, article 2, directs, "that all crimes not capital, and all disorders and neglects, which officers and soldiers may be guilty of, to the prejudice of good order and military discipline, though not specified in the said rules and articles, are to be taken cognizance of by a general or regimental court-martial, according to the nature and degree of the offence, and to be punished at their discretion." Now, the Plaintiff having admitted himself to be a soldier, and having been guilty of an act to the prejudice of good order and military discipline, was liable to the jurisdiction of the court-martial; no prohibition therefore ought to issue.

But in fact the Plaintiff was a soldier, and the only objection to the court-martial on this head, is too great indulgence to the Plaintiff: a court of common law would not have suffered him to give evidence to contradict his own admission under his hand-writing, and his own repeated acts in the character of a serjeant. It would be enough to say, that there was evidence on both sides before the Court, and that they have formed a conclusion upon it, being a matter clearly within their cognizance; for it would be absurd to say that a court instituted for the purpose of trying soldiers, should not have a power of trying whether they are soldiers or not. The receiving pay as a soldier is decisive evidence that the Plaintiff was subject to their jurisdiction. All the comments made on the return and the letters, are immaterial; but a return made to and by the proper officer is evidence in itself, and does not require to be verified.

With respect to the second objection, an error in receiving or rejecting evidence, is not a ground for prohibition. But the objection itself is not founded in facts applied to Captain Campbell's letters and Heretage's deposition (*a*). Campbell's letters were called for by the prisoner, not produced against him, and Heretage's deposition was read without any objection being made. When an objection was made to the reading Stephenson's deposition, it was allowed. And in reality there was no prejudice to the Plaintiff in reading it, as the witness was fully examined *vivâ voce*. The evidence which was rejected, as stated [97] in the affidavit was, first, that of Turtle, who was examined; and secondly, that of Lunt; for the admission of which no case was stated, nor is it now explained in the affidavit. The object of calling both of

(a) Vide the suggestion and affidavit.

them was only to furnish the prisoner with evidence in an action against them, and had no relation to the charge before the Court.

As to the third and fourth grounds, a man cannot be convicted of an offence not included in the charge, and not of the same nature; but of an offence of an inferior degree and of the same nature, he may. Thus, on an indictment for an assault, with intent to commit murder, a man may be convicted of a common assault. The charge is, "advising and persuading the two drummers to desert, and enlist in the service of the East India Company, knowing them to be drummers of the Coldstream regiment of Guards." The sentence states, "that the prisoner was instrumental to, and promoting the enlistment," which is stated to be an offence of the same nature, though of an inferior degree. The evidence shews the meaning of the sentence, viz. the sending the men to disguise themselves, and furnishing them with disguises, in order to desert, and enlist in the Company's service.

The Court seems to have doubted, whether advice and persuasion could be by an act only without words, and they refer to the acts done, as included within the charge, which they certainly are. Thus according to Lord Coke, the term aiding, comprehends "counselling, abetting, plotting, assenting, consenting and encouraging to do the act." 2 Inst. 182. The inlisting with the East India Company was an act of desertion, and the only act that could subject the men to the charge of desertion.

Marshall, in reply, insisted upon his former grounds of argument, and urged farther, that receiving pay as a soldier would not alone make the person who received it a soldier; or, at most, he could only be treated as a soldier while he continued to receive it. Now the Plaintiff here received no pay after the month of December 1791. Nor was the circumstance of the Plaintiff signing himself Serjeant, conclusive evidence that he was a Serjeant, this being a criminal proceeding, any more than if A. B. were to personate the character of a soldier, it would make him liable to be punished as a deserter, though he would be guilty of a fraud. So if a man and woman live together as husband and wife, in a civil action, the husband would [98] not be permitted to deny his marriage, yet in an indictment for bigamy, the marriage must be strictly proved.

Cur. advis. vult.

On this day, the judgment of the Court was thus given by

LORD LOUGHBOROUGH. In this case, which arises on a motion for a prohibition, the novelty of the application was a sufficient reason why the Court should grant a rule to shew cause, and give it that consideration which the importance of it seemed justly to demand. It has been very fully argued on both sides, and with great ingenuity and ability. Every thing has been said in support of the motion by my Brother Marshall, that any talents, ability, or ingenuity should suggest. But upon the result of the whole, the Court are clearly of opinion that the prohibition ought not to issue.

The suggestion begins by stating the laws and statutes of the realm respecting the protection of personal liberty. It goes on to state, that no person ought to be tried by a court-martial for any offence not cognizable by martial law, and so on. In the preliminary observations upon the case, my Brother Marshall went at length into the history of those abuses of martial law which prevailed in ancient times. This leads me to an observation, that martial law such as it is described by Hale, and such also as it is marked by Mr. Justice Blackstone, does not exist in England at all. Where martial law is established, and prevails in any country, it is of a totally different nature from that which is inaccurately called martial law, merely because the decision is by a court-martial, but which bears no affinity to that which was formerly attempted to be exercised in this kingdom, which was contrary to the constitution, and which has been for a century totally exploded. Where martial law prevails, the authority under which it is exercised, claims a jurisdiction over all military persons, in all circumstances. Even their debts are subject to enquiry by a military authority: every species of offence, committed by any person who appertains to the army, is tried, not by a civil judicature, but by the judicature of the regiment or corps to which he belongs. It extends also to a great variety of cases, not relating to the discipline of the army, in those states which subsist by military power. Plots against the sovereign, intelligence to the enemy, and the like, are all considered as cases within the cognizance of military authority.

[99] In the reign of King William, there was a conspiracy against his person in

Holland, and the persons guilty of that conspiracy were tried by a council of officers. There was also a conspiracy against him in England, but the conspirators were tried by the common law. And within a very recent period, the incendiaries who attempted to set fire to the Docks at Portsmouth, were tried by the common law. In this country, all the delinquencies of soldiers are not triable, as in most countries in Europe, by martial law; but where they are ordinary offences against the civil peace, they are tried by the common law courts. Therefore it is totally inaccurate to state martial law as having any place whatever within the realm of Great Britain. But there is by the providence and wisdom of the Legislature an army established in this country, of which it is necessary to keep up the establishment. The army being established by the authority of the Legislature, it is an indispensable requisite of that establishment that there should be order and discipline kept up in it, and that the persons who compose the army, for all offences in their military capacity, should be subject to a trial by their officers. That has induced the absolute necessity of a mutiny act accompanying the army. It has happened indeed, at different periods of the Government, that there has been a strong opposition to the establishment of the army. But the army being established, and voted, that led to the establishment of a mutiny act. A remarkable circumstance happened in the reign of George the First, when there was a division of parties on the vote of the army: the vote passed, and the army was established, but from some political incidents which had happened, the party who opposed the establishment of the army would have thrown out the mutiny bill. Sir Robert Walpole was at the head of that opposition, and then some of their most sanguine friends proposed it to them: they said as there was an army established, and even if the army was to be disbanded, there must be a mutiny act for the safety of the country. It is one object of that act to provide for the army; but there is a much greater cause for the existence of a mutiny act, and that is, the preservation of the peace and safety of the kingdom: for there is nothing so dangerous to the civil establishment of a state, as a licentious and undisciplined army; and every country which has a standing army in it, is guarded and protected by a mutiny act. An undisciplined soldiery are apt to be too many for the civil power; but under the com-[100]-mand of officers, those officers are answerable to the civil power, that they are kept in good order and discipline. All history and all experience, particularly the experience of the present moment, give the strongest testimony to this. The object of the mutiny act, therefore, is to create a court invested with authority to try those who are a part of the army, in all their different descriptions of officers and soldiers; and the object of the trial is limited to breaches of military duty. Even by that extensive power granted by the Legislature to his majesty to make articles of war, those articles are to be for the better government of his forces, and can extend no further than they are thought necessary to the regularity and due discipline of the army. Breaches of military duty are in many instances strictly defined; they are so in all cases where capital punishment is to be inflicted: and in other instances, where the degree of offence may vary, it may be necessary to give a discretion with regard to the punishment, and, in some cases, it is impossible more strictly to mark the crime than to call it a neglect of discipline.

This Court being established in this country by positive law, the proceedings of it, and the relation in which it will stand to the courts of Westminster Hall, must depend upon the same rules, with all other courts which are instituted, and have particular powers given them, and whose acts, therefore, may become the subject of application to the Courts of Westminster Hall for a prohibition. Naval Courts Martial, Military Courts Martial, Courts of Admiralty, Courts of Prize, are all liable to the controlling authority, which the Courts of Westminster Hall have from time to time exercised, for the purpose of preventing them from exceeding the jurisdiction given to them: the general ground of prohibition being an excess of jurisdiction, when they assume a power to act in matters not within their cognizance.

Another ground of prohibition, which is indeed but a species of the other, is where an act has passed with respect to any authority resident in other courts, as in the Ecclesiastical Court, in which there is an inherent jurisdiction. In such a case, the courts of Westminster Hall have conceived that where the authority is limited by an act of Parliament the court which acted differently from the prescription of the act was in that instance exceeding its jurisdiction, and therefore liable to a prohibition. Beyond these two grounds it does not occur to me that there is any other that can be

stated, upon which the [101] Courts of Westminster Hall can interfere in the proceedings of other courts, where the matter is clearly within their jurisdiction (a)¹. That they have decided wrong, may be a ground of appeal, may be a ground of review, but not a ground of prohibition. That has been distinctly laid down both in this court and in the court of King's Bench with respect to the Courts of Prize (a)², and it is unnecessary to quote authorities upon a point which leave it without a contradictory opinion. With respect to the matter of evidence, where the inferior courts proceed upon the admission of evidence that could not be admitted in a court of law, or upon the rejection of evidence that would be admitted in a court of law, the 12th article of the complaint made against the judges in the reign of James the First (b), and the answer to that article of complaint, shew distinctly the law upon that subject. The 12th article of complaint is, that the Courts have granted prohibitions to the Ecclesiastical Court upon the ground that the Ecclesiastical Court would not allow the testimony of a single witness to be sufficient in cases where in the common law courts the testimony of one witness would be sufficient, and their interference is the subject of complaint. The answer the judges make to it is, that in matters subject to the exclusive jurisdiction of the Ecclesiastical Courts, as the setting out of tithes, proofs of a legacy, proofs of a marriage, the Courts do not prohibit, though the rule of the Ecclesiastical Court requires more evidence than the common law, to establish the fact; but that where incidentally a matter comes before them, there the Courts of Westminster Hall, upon such surmise, will grant a prohibition.

I have stated the observations generally, upon the nature of an application for a prohibition. The foundation of it must be, that the inferior court is acting without jurisdiction. It cannot be a foundation for a prohibition, that in the exercise of their jurisdiction the Court had acted erroneously. That may be a matter of appeal where there is an appeal, or a matter of review: though the sentence of a court-martial is not subject to a review, there are instances, no doubt, where, upon application to the crown, there have been orders to review the proceedings of courts martial.

My Brother Adair justly and correctly said, that a prohibition to prevent the proceedings of a court-martial, is not to be granted without very sufficient ground and due consideration. Not that it is not to be granted, because it would be dangerous, [102] in all cases to grant prohibitions; for it would be undoubtedly dangerous if there was a facility in applying for prohibitions, and the sentence were to be stopped for asking it to be further enquired into. But in such cases it is the duty of the court to consider the matter fully and deliberately upon the motion to prohibit, and the Court could not without great danger take the course in such a case which they have done in others where there is no danger in the delay to put the matter in prohibition, and determine it upon the record.

In this case, there are four grounds stated of prohibition. The first is a material one, because if the first ground is made out, that the Court had no jurisdiction over the person, then of course they were proceeding in a case in which by law they ought not to have been proceeding. In considering that ground, it turns upon the allegation that Grant, the person applying for the prohibition, was not subject to military law. I take it up, first, upon his affidavit, and where a prohibition is moved upon that ground, it is very material to consider what the party himself has said. In reading over this affidavit it is calculated to convey an opinion by argument, that Grant was not subject to military law; but he does not maintain any direct assertion upon which there could be an assignment of perjury, that he is not an object of military jurisdiction. Stating the engagement he had entered into with Captain Campbell, he says, "he did assume the character of serjeant in the 74th regiment, in order to enable him to carry on the business of a recruiting agent; but that the deponent was never actually enlisted as a soldier." When one knows more of the case as we do by reading the proceedings of the court martial, it appears that he was never actually enlisted as a soldier, and therefore if he commenced originally as a serjeant, the assertion is true; but it affords no conclusion on this affidavit. He says nothing of an

(a)¹ [Vide *Wade's Case*, 2 M. & S. 429 (n).]

(a)² See *Brymer v. Atkins*, ante, vol. i. 164, and *Home v. Earl Camden*, ibid. 476, and 4 Term Rep. B. R. 382.

(b) 2 Inst. 608, Articuli Cleri.

attestation, there is no denial that he ever was attested; and there is a circumstance in the proceedings of the court-martial, that gives strong reason to think that it is not a mere omission; because in the letters he produced himself from Captain Campbell to him, Captain Campbell tells him, (the expression is not "unless you get your attestation" but) "unless you take your attestation to Chatham, and have it entered there." So that the letter speaks of an attestation existing, but not deposited in the proper office. He goes on further and states, "that he did receive money from Messrs. Brummell, and in the receipts granted by the deponent he [103] did acknowledge the money there mentioned for his pay, and he believes he did annex the words following 'serjeant in the 74th regiment,' but he says, that at the time he so received the money, and wrote those words, he did not consider himself to be really and truly a serjeant in the 74th regiment, and such words were added to his subscription that it might appear to give it effect." He does not deny that he was a serjeant, he does not take that as a matter in issue. The assertion is simply of what passed in his own mind; and when he states that it was for the purpose of giving it effect, he cannot be allowed to say, "I did not mean by this to become truly and really a serjeant; I mean to take the situation, receive the pay, and describe myself as such, and not to be liable to the consequences." That cannot be permitted in any case. But after these comments, it comes to this, the party applying for the prohibition, when he is to state his own case, states himself to be a person not subject to military law: this the Court will require in all such cases. But if he will not venture to assert that he is neither soldier nor serjeant nor of any military description, it is impossible for the Court to enter into the argument, and say from the argument and circumstances that have been stated this man shall not be considered as such, and therefore there is a ground laid for prohibition.

But when we come to compare the proceedings of the court-martial with the affidavit and the act of parliament, there is one circumstance in the act which specifically applies. The act does not leave it to a question whether his enlistment and attestation is regular or not, but it says, "any person who shall be enlisted or receive pay as a soldier." The being in pay as a soldier, fixes the military character upon him, and very wisely; and my Brother Bond has shewn that this has been the course of all the acts of parliament which have passed relative to the military engagement. The mutiny act squares itself with the number of statutes which had passed relative to the military services, and the persons who are engaged to serve. It was not left to be discussed where there was a remedy by indictment, what was the nature of the engagement, or how it was contracted, but the mere circumstance of being in pay or having received prest-money, fixed on him the military character so as to subject him to the consequences of a felony if he acted in breach of that character. Grant has therefore been in pay as a soldier; it appears so upon his affidavit. The objection [104] to the proceedings of the court-martial upon this head, seems to me very fairly to be met by the answer that my Brother Adair gave to it; for after the introduction of the receipt it was clearly shewn that he was in pay as a soldier, and there was an end to the enquiry upon that head. It is said, and my Brother Marshall put it very ingeniously, that he will only be liable while he is so receiving pay, and that the last receipt of his pay does not prove he was actually in pay at the time of this offence. Whether he was or not, does not appear, and it is not necessary that it should, for a person in pay as a soldier is fixed with the character of a soldier; and if once he becomes subject to the military character, he never can be released, but by a regular discharge. Upon the first part of the case, therefore, I see no kind of doubt that can be entertained, but that this person was in a situation that made him the object of a military tribunal, and that the court-martial were proceeding against a person within their jurisdiction. But it was argued with a great deal of ingenuity, that there was a contrivance here; that by concert between the recruiting officer and him, he was put into this situation; and it was well understood between the officer and him that he was so far only in a military situation as to enable him to receive the pay, and do the recruiting service.

I think, allowing all the extent to that argument, it does not give the case much the more favour, when it comes to be considered that this is the case of a person putting himself into that situation, and visibly having made himself a party to it. But he is a soldier beyond all possibility of doubt; and after having stated that, perhaps it would not be necessary to go a great deal further.

But the second ground is the reception of improper, and the rejection of proper evidence. Here I must again recur to the answer to the complaints of the judges. That all common law courts ought to proceed upon the general rule, namely the best evidence that the nature of the case will admit, I perfectly agree. But that all other courts are in all cases to adopt all the distinctions that have been established and adopted in courts of common law, is rather a larger proposition than I choose directly to assent to. If, for instance, a witness excommunicated for contumacy were offered, he would not be received in a court of common law (a): it is an established rule, and we are bound by it. But I do not hold that to be quite so extensive, as that it should go to courts martial, naval or military. There are other [105] formal objections that do not affect the credibility of the witness, but in the present case I do not find the objections to be founded in fact. The first objection is the production of the letters of Captain Campbell. The affidavit states, that the letters were produced in evidence; but it suppresses in what manner they were produced; it does not state that they were produced as evidence against the Defendant. In fact therefore, the Court would find themselves unable to proceed upon that; and he shews immediately afterwards, by resting upon these letters, that of the letters of Captain Campbell he thought he had a right to avail himself, and did avail himself. It therefore amounts only to this, that the letters of Captain Campbell were produced. The first of them were brought out at the prisoner's request, and for the whole of his defence he rests upon the letters of Captain Campbell upon that part of the charge. As to the deposition of Heretage the objection is, that he was asked whether the contents were true as sworn, and the question was not put whether he acknowledged it to be his hand-writing. But in fact, Heretage is examined completely and perfectly, and when an objection was made with respect to Stephenson, the Court allowed the objection. What injury could he possibly sustain, when this deposition was read over?

The objection is, that Heretage had been first examined, and then his deposition read. It was read for the purpose of cross examination: the information could not have been come at if he had not been examined, and there would have been nothing to furnish the matter of a cross examination. Then the return was objected to. That the return may be falsified, my Brother Adair never disputed; but that the return need not be verified, he contended rightly. It is then objected, that the question was never asked, how came it that Captain Campbell did not attend? But the prisoner summoned, by the Judge Advocate, all the witnesses he thought proper to call. The next objection is, the stopping the examination of Turtle, and the not examining Lunt. Now it appears, that it is not stated in the first place, in the affidavit, to what purpose they were to be examined; and therefore there the application would fail, because it is necessary to shew the Court the intent of their examination. For it is not the demand simply that such a witness should be examined, that a court-martial proceeds upon: but they will ask, for what purpose is such a witness to be called. In another part of the affidavit Grant states, that he was not permitted to [106] prove by witnesses that he was not a soldier: but he does not name any one witness, from whom that proof was to result: upon that ground therefore, if it could be a ground for prohibition, I think there is not such a statement appearing on the affidavit, or supported by the proceedings, that if it were an application to us to grant a new trial, supposing this matter had been tried in this Court, we should have any reason to say, that the Court at the trial had done wrong in their rejection of some part of the evidence, or in the conclusions they drew from the other.

Then the other two grounds are, that Grant has not been convicted of the crime contained in the charge: and that the crime, of which he is convicted, is not an offence which makes him liable to the mutiny act. The charge is, the having advised and persuaded two men to enlist in the service of the East India Company, knowing them to be soldiers in the Coldstream regiment of Guards. This charge is distinct and specific, and the evidence which has been adduced in support of it, fully, in my apprehension, verifies and proves it. In drawing up the judgment of the court-martial they have taken a distinction, which, I confess, I do not perfectly understand. They say that the evidence amounted to a proof that the prisoner had encouraged and promoted the enlistment with the East India Company, which was a smaller shade of the offence described by the particular words in the charge. Upon the circumstances

of this case, as they stood in the evidence before the Court, the enlistment with the East India Company was the act of desertion. There was no desertion, no quitting the service, in the two men getting drunk at different ale-houses, for the changing their clothes, and taking measures in order to desert, would all have been at an end, and entirely at an end, if the next day they had gone back to their regiment. The only thing that fixed them, was their attestation for the service of the Company; and therefore by that they had deserted from the service, in which they were engaged. Therefore the enlisting them into the service of the East India Company under the circumstances of this case, was conducting them in a direct act of desertion, and was not only advising and persuading, but doing something more; because Grant not only suggested to them the idea of leaving the service in which they were, but was the means of their doing it. Instead therefore of an inferior degree, it appears to me directly and plainly within the words of [107] the charge. If a difference were to be made, it rather tended to an aggravation of the charge; and I think it would be totally unprecedented to make that the subject of a prohibition.

Taking the whole of the case together, it is clear that there is ground to suppose that they meant to convict him of the charge. But if by the nicety which they used in penning the sentence, that sentence were to be invalidated, it could not be by a prohibition, whatever it might be by a review, or by an appeal. The most that can be made of it, is an error in the proceedings; but we cannot prohibit upon that account. The sentence in the case of an unfortunate admiral, was certainly an accurate one. The question there was, whether the Court had not mistaken the law, yet a prohibition was not thought of (a). But it is unnecessary to discuss the sentence further; it

(a) It is presumed, that his Lordship here alluded to the sentence against the unfortunate Admiral Byng, which was as follows:—

“The Court, pursuant to an order from the Lords Commissioners of the Admiralty, to Vice Admiral Smith, dated 14th December 1756, proceeded to inquire into the conduct of the Honourable John Byng, Admiral of the Blue Squadron of his majesty's fleet, and to try him upon a charge, that during the engagement between his majesty's fleet under his command, and the fleet of the French king, on the 20th of May last, he did withdraw or keep back, and did not do his utmost to take, seize and destroy the ships of the French king, which it was his duty to have engaged, and to assist such of his majesty's ships as were engaged in the action with the French ships, which it was his duty to have assisted; and for that he did not do his utmost to relieve St. Philip's Castle, in his majesty's Island of Minorca, then besieged by the forces of the French king, but acted contrary to, and in breach of his majesty's command; and having heard the evidence, and prisoner's defence, and very maturely and thoroughly considered the same, they are unanimously of opinion that he did not do his utmost to relieve St. Philip's Castle; and also that, during the engagement between his majesty's fleet under his command, and the fleet of the French king, on the 20th of May last, he did not do his utmost to take, seize and destroy the ships of the French king, which it was his duty to have engaged, and to assist such of his majesty's ships as [108] were engaged in fight with the French ships, which was his duty to have assisted; and do therefore unanimously agree that he falls under part of the 12th article of an act of parliament of the 22d year of his present majesty, for amending, explaining and reducing into one act of parliament the laws relating to the government of his majesty's ships, vessels and forces by sea; and as that article positively prescribes death, without any alternative left to the discretion of the Court, under any variation of circumstances, the Court do therefore unanimously adjudge the said Admiral John Byng to be shot to death, at such time, and on board such ship, as the Lords Commissioners shall direct.

“But as it appears by the evidence of Lord Robert Bertie, Captain Gardner, and other officers of the ship, who were near the person of the admiral, that they did not perceive any backwardness in him during the action, or any mark of fear or confusion, either from his countenance or behaviour, but that he seemed to give his orders coolly and distinctly, and did not seem wanting in personal courage, and from other circumstances, the Court do not believe that his misconduct arose either from cowardice or disaffection, and do therefore unanimously think it their duty, most earnestly to recommend him as a proper object of mercy.” M'Arthur on Naval Courts Martial, Append. No. 35. But now, by 19 Geo. 3, c. 17, s. 3, a court-martial may either

would be extremely absurd to comment upon it as if it was a conviction before magistrates, which was to be discussed in a court where that conviction could be reviewed.

I have thus gone through all the circumstances of the case, in order, as far as I can, to shew that the Court have paid great attention to the arguments which have been urged.

With respect to the sentence itself and the supposed severity of it, I observe that the severe part is by the Court deposited, where it ought only to be, in the breast of his majesty. I have no doubt but that the intention of that was to leave room for an application for mercy to his majesty, from the goodness and clemency of whose disposition, applications of this nature are always sure to be duly considered, and to have all the weight they can possibly deserve.

Rule discharged.

ALSEPT against EYLES. Saturday, June 16th, 1792.

An action of debt will lie against a gaoler, for the escape of a prisoner in execution, though the escape were without the knowledge of, and without any fault whatsoever on the part of the gaoler; who in such case can avail himself of nothing but the act of God or the king's enemies as an excuse.

This was an action of debt against the warden of the Fleet for the escape of Francois Gabriel de Vertillac, a prisoner in execution.

The declaration stated a judgment recovered in the King's Bench, that the prisoner was committed to the custody of the marshal, and afterwards removed by habeas corpus to the Fleet, and that the Defendant wrongfully and unlawfully, and without the leave and licence of the Plaintiff, permitted and suffered him to escape, &c.

Pleas. 1. Nil debet. 2. That the King granted the office of Warden of the Fleet to the Defendant by letters patent; that from the time of the granting of the said office, the said prison hath been, and of right ought to have been, and still of right ought to be maintained and repaired by and at the expence of his majesty, and not by and at the expence of the Defendant; that the Defendant took all due and possible care in his power to prevent the escape; that notwithstanding such care, the said Francois Gabriel without the consent, privity or knowledge of the Defendant or his servants, &c. did contrive, conspire, confederate and agree, together with two other persons, whose Christian names were unknown, but whose surnames were Valmer and Imber, unlawfully to break the said prison by and in behalf of the said Francois Gabriel, and to effect his escape from and out of the same: that the said unlawful combination, con-[109]-spiracy, &c. having been so entered into, the said two persons unknown in pursuance of such unlawful combination, &c. and in order to effect the escape of the said Francois Gabriel, and just before the said escape in the declaration mentioned, did unlawfully, secretly and clandestinely, and without the consent, &c. of the Defendant or his servants, &c. fling, cast and throw, and cause to be flung, cast and thrown, over and across a certain external wall of the said prison, contiguous and next adjoining to a certain house, part of certain premises situate in London aforesaid, commonly called and known by the name of The Bell Savage Inn, not then and there belonging to the said prison, a certain rope ladder, then and there being fastened to and suspended from one of the windows of the said house, so contiguous and adjoining to the said prison as aforesaid, overlooking the said wall of the said prison, for the purpose of thereby then and there effecting the escape of the said Francois Gabriel from and out of the said prison, over the aforesaid wall thereof; and the said Francois Gabriel did thereby, and by means thereof, and in consequence of the insufficient height of the said wall of the said prison, then and there at the said time when, &c. secretly, privately and clandestinely escape from and out of the said prison, over the said wall thereof, without the consent of, or any negligence or default in the Defendant, or any or either of his deputies or servants, &c. That immediately

“pronounce sentence of death, or inflict such other punishment as the nature and degree of the offence shall be found to deserve.”

after the said escape of the said Francois Gabriel, he made fresh pursuit, &c. ; that notwithstanding such fresh pursuit, the said Francois Gabriel, together with the said two other persons, before the said Francois Gabriel could be retaken, or the said two other persons could be apprehended, and also before the exhibiting of the said bill of the said Plaintiff against the said Defendant, to wit, &c. fled and departed from this kingdom into certain foreign parts, out of the reach of the process of any of the courts of this country, to wit, into the kingdom of France, and there from thence continually hitherto have remained and continued, and still are resident and abiding ; that at the time of the said unlawful combination, conspiracy, confederacy and agreement, herein mentioned, and also at the time of the said escape of the said Francois Gabriel, be the said Francois Gabriel, and the said other two persons were aliens, and each and every of them was an alien, born out of the liegeance of our said lord the now king, to wit, in the said kingdom of France, of parents then and there being subjects of that kingdom ; and that they [110] the said Francois Gabriel, and the said two other persons have not, nor had either of them at any or either of the times aforesaid, any lands, tenements or other property, in this kingdom, whereby they could be amenable to the laws or justice of this country, for or in respect of the said escape of the said Francois Gabriel, &c. ; that the said escape in that plea mentioned, and the said escape in the said declaration mentioned, were one and the same, and not other or different ; and that the Defendant was not warden of the said prison of the Fleet, otherwise than in respect of the said letters patent, &c.

The third plea did not differ in any material respect from the second.

The replication to the second plea, protesting against the several matters alleged in it, concluded with a traverse, "without this, that the said Francois Gabriel did escape from and out of the said prison, without any negligence or default in the said Defendant or any or either of his deputies or servants, &c."

The replication to the third plea concluded with a similar traverse.

The rejoinder took issue on each of the traverses.

At the trial a verdict was found for the Plaintiff. But a rule was now obtained to shew cause why the verdict should not be set aside, and a new trial granted. The grounds on which this rule was moved for were two: one, that an action of debt would not lie for a negligent escape ; the other, that the matters disclosed in the plea, which were proved, shewed that there was in fact no negligence on the part of the Defendant.

Against the rule *Le Blanc* and *Runnington*, Serjts., shewed cause. In answer to the first objection, they urged that there was no distinction, as to the action of debt, between a negligent and a voluntary escape ; but that debt would lie on every escape of a prisoner who was in execution. The stat. West. 2 (13 Elw. 1, st. 1, c. 11), first gave a writ of debt against a gaoler, for the escape of a servant or accountant, at the suit of his master. The 1 Ric. 2, c. 12, which was made expressly for the purpose of regulating the confinement of prisoners in the Fleet, extends the action of debt against the warden to all cases of escapes in execution : and no distinction is made by Lord Coke in commenting on these statutes between voluntary and negligent escapes. 2 Inst. 382. In *Bonafous v. Walker*, 2 Term Rep. B. R. 127, the distinction was so little regarded, that evidence of a negligent escape was holden [111] to be good under a count for a voluntary escape. That in truth debt as well as case will lie for the escape of a prisoner in execution, appears from Cro. Eliz. 767. Cro. Jac. 288. Plowd. 35. Latch, 168. 2 Bulstr. 310. 3 Co. 52 a. 1 Roll. Abr. 809. 1 Ventr. 211, 217. 1 P. Wms. 685. F. N. B. 93. 2 Stra. 873. 5 Burr. 2812. 2 Term Rep. B. R. 126. With respect to the second ground, on which the rule was obtained, the facts stated in the plea only shew that the escape was not a voluntary one. But it was not necessary to state, on the part of the Plaintiff, any specific act of negligence in the Defendant, every escape which does not arise from the act of God or the king's enemies, being by construction of law a negligent escape, 1 Roll. Abr. 808, tit. Escape, Dyer, 66 b. 4 Co. 84 a. And though the reason given in both Dyer and Coke, why the gaoler is liable, where the prison is broken by persons not alien enemies, (though their force was irresistible,) is, that he has a remedy against them, yet it appears from the year-book 33 Hen. 6, 1, that "if a number of the king's subjects who are unknown break open the prison in the night and set the prisoners loose, in that case the marshal shall be charged, for negligently keeping them." So that the liability of the gaoler does not depend on his having a remedy over, against the persons who caused the

escape (a). But public policy requires, that the keepers of prisoners should be strictly responsible for the safe custody of prisoners, in the same manner as common carriers are for the safe carriage of goods, and that nothing short of the act of God or the king's enemies should excuse them. It was on this principle, that after the gaols in the Metropolis were destroyed by the rioters in the year 1780, an act of Parliament (b) was passed to indemnify the gaolers from the consequences of their prisoners escaping; though no actual negligence could be imputed to them, as it was impossible for them to prevent such escapes.

[112] Adair, Bond, and Marshall, Serjt., in support of the rule, argued that it had never been decided that the law with respect to gaolers was the same as with respect to common carriers, and that they were answerable to the same extent, for every escape, except that which was occasioned by the act of God or the king's enemies. In truth a gaoler and a carrier stand in very different situations. According to the doctrine of the cases cited on the other side, a gaoler is liable because he has a remedy over, but that is not the ground of a carrier's liability: according to those cases also, a sudden fire, by means of which the prisoners escape, is a matter of defence of which the gaoler may avail himself, but a carrier still remains chargeable though the goods committed to his care are destroyed by fire, without any negligence on his part, unless the fire were occasioned by lightning. 1 Term Rep. B. R. 27. Admitting the law to be, that a gaoler is liable for an escape, effected by persons not of the description of the king's enemies, because he has a remedy against them; in the present case the Defendant ought clearly to be discharged, because it appears, on the record, that the two persons who assisted the prisoner in his escape, were aliens, and had no property in this kingdom, by which they could be amenable to our laws. With respect to the form of the action, there is no decided authority to shew that an action of debt will lie for an escape, where no fault could be imputed to the gaoler. All the cases, where debt has been brought, have been of voluntary escapes. The remedy which the common law points out, is an action on the case, in which it would be open to the Defendant to shew that he was not in fault, and the jury would assess damages accordingly. The statutes West. 2 and 1 Ric. 2, which gave an action of debt on an escape, clearly refer, by fair construction only, to an escape with the knowledge and actual permission of the gaoler and warden; but as in the present case, the escape was entirely without the knowledge or assent of the warden, the common law remedy ought to have been pursued. As every escape of this kind is holden to be a negligent escape by mere construction of law, the replication was wrong in taking a traverse on a matter of legal inference.

Cur. advis. vult.

LORD LOUGHBOROUGH. In this case the Plaintiff is intitled to judgment, it being clear that an action of debt will lie for the escape of a prisoner in execution. In the year-book [113] 33 Hen. 6, c. 1 (pl. 3) the action was debt for an escape which was evidently involuntary. In Plowden, 35, it is debated, whether the action lay at common law, by the statute West. 2, or by that of Ric. 2, and an instance is cited (45 Ed. 3), before the time of Ric. 2, of debt being brought for an escape: but the Court held, that whether it was by the common law or by either of those statutes, yet that the action laid. Lord Coke in 2 Inst. 382, refers the action to the construction of the statute of West. 2, and in Plowden it is said, that the statute of Ric. 2 extends to all gaolers, like the statute de circumspectu agatis (13 Ed. 1, st. 4), to all bishops, as well as the bishop of Norwich. To the same effect also is 1 Ventr. 217. The question therefore is not now open to argument, and the verdict must be entered for the whole

(a) The argument here used is, that as the persons who break open the prisons are unknown, and therefore there can be no remedy against them, the true reason why the gaoler is liable, is not that which is given by Dyer and Lord Coke. This indeed seems to be supported by the position of Prisot in the year-book: but in the same case Danby expressly distinguishes between the acts of the king's enemies, against whom the gaoler could have no remedy, and those of persons within the king's liegeance, against whom an action might be brought. Besides, in that case there was no decision. So that upon the whole, the reasoning in Dyer, 66 b. and 4 Co. 84 a. does not appear to be contradicted by the year-book.

(b) 20 Geo. 3, c. 64. There is also a similar provision to indemnify the marshal of the King's Bench prison, in the last section of the stat. 12 Geo. 3, c. 23.

sum. With respect to the other point, it is impossible to take that ground. As the law stands, nothing but the act of God or the king's enemies will be an excuse. I take the notion of fire being an excuse, to have arisen from some short expressions in the books. In the year-book the words are "sudden tempest of fire" (a)¹, but Rolle (1 Roll. Abr. 808, pl. 6) in his Abridgment, and Dyer (Dyer, 66 b.) from whom he cites, says, "fire which is the act of God," which seems to mean fire by lightning.

Judgment for the Plaintiff (d).

WARRE *against* HARBIN. Saturday, June 16th, 1792.

In an action for bribery on the statute 2 Geo. 2, c. 24, it is not a material variance if the declaration state the precept to have issued to the bailiffs of the borough, but the precept produced in evidence is directed to the bailiff (a)².

This was an action of debt, for the penalty of the statute 2 Geo. 2, c. 24, for bribery at the last election for the borough of Seaford. The declaration stated the writ, and that the Lord Warden issued his precept to the bailiffs and jurats of Seaford; but the precept produced in evidence was directed to the bailiff (in the singular number) and jurats. Mr. Baron Hotham who tried the cause, thought this a material variance, and therefore the Plaintiff was nonsuited.

A rule having been granted to shew cause why the nonsuit should not be set aside, Rooke, Serjeant, shewed cause. Admitting that a slight variance in the precept is not material, according to the doctrine laid down in *King v. Pippet*, 1 Term Rep. B. R. 235, yet here an integral part of the corporation is mistaken, and a variance in the name of a corporation is fatal [114] in a lease or in a contract. Gilb. Hist. C. P. 228. 2 Lord Raym. 1516. Stra. 787. The declaration states a precept giving a false description of the corporation: and this being a penal action, is to be strictly construed.

Bond and Runnington, Serjts., contra. Penal actions are to be considered as civil suits. Cowp. 382, *Atcheson v. Everitt*, and the variance is in a mere matter of inducement. In *Cuming v. Sibly* (b), the declaration stated the precept to be directed to the Mayor only, but the precept given in evidence was directed to the Mayor and Burgesses, which was holden to be an immaterial variance. This is not in fact a mistake in the name of a corporation, Seaford not being a corporation; the cases therefore which regard the proper denomination of a corporation are not applicable.

Cur. advis. vult.

The Court were afterwards clearly of opinion, on the authority of *Cuming v. Sibly*, that the variance was immaterial, and therefore made the

Rule absolute to set aside the nonsuit.

BRIGGS *against* SIR FREDERICK EVELYN. Saturday, June 16th, 1792.

The lord of a manor, who is also a justice of the peace, is intitled to a month's notice of an action brought against him for taking away a gun in the house of an unqualified person, by stat. 24 Geo. 2, c. 44, for it will be presumed that he acted as a justice (a)³.

Trover for a gun. The facts of the case were these; the Plaintiff, who was a game-keeper of the manor of Effingham in Surrey, sent a gun to a blacksmith, between

(a)¹ But in the latter part of the case the expression is, "Si fuit per sodein aventure de feu," &c.

(d) See 4 Term Rep. B. R. 789, *Elliot v. The Duke of Norfolk*.

(a)² [Vide *Dickson v. Fisher*, 4 Burr. 2269. *Rec. v. Leeke*, 2 Campb. N. P. C. 139. *Draper v. Garratt*, 2 B. & C. 2. Vide ante, vol. i. 49, 162.]

(b) East, 9 Geo. 3, C. B. cited by Buller, J., in *King v. Pippet*, 1 Term Rep. B. R. 239.

(a)³ [The protection of the statute 24 Geo. 2, c. 44, and of similar statutes, extends to all persons intending to act within them. Therefore an excise officer, who, acting as such, receives money for duties under a statute which has been repealed, is entitled to notice under 23 Geo. 3, c. 70, s. 30, *Greenway v. Hurd*, 4 T. R. 553. "It has been

the 20th and 30th of August 1791, to be mended. The blacksmith having repaired it, kept it some time in his house, but did not use it. The Defendant, who was Lord of an adjoining manor, in which the blacksmith lived, and also a justice of the peace, on the 17th of September went together with his own game-keeper to the blacksmith's house to search for guns and other engines used for the destruction of the game, and finding the gun in question, took it away. It was objected at the trial, that the Defendant ought to have had a month's notice of the action, according to the stat. 24 Geo. 2, c. 44, having acted as a justice of the peace, under the powers given by stat. 5 Anne, c. 14, s. 4, and on that objection the Plaintiff was nonsuited.

A rule having been granted to shew cause why the nonsuit should not be set aside, Mr. Justice Gould, who tried the cause, stated the evidence, and that he was of opinion at the trial, that the Defendant was intitled to notice, having acted, though erroneously, in his character of a justice of the peace. And he [115] mentioned the case of *Stiles v. Coxe*, Vaugh. 111, in which it was holden, that justices and other officers of the peace, who acted in such official capacity, though wrong, were intitled to have the venue laid in the county where the trespass was committed, by stat. 21 Jac. 1, c. 12.

Bond, Serjt., shewed cause. The principle of *Stiles v. Coxe* is applicable to the present case, viz. that justices and other peace-officers are intitled to the favour of the law, where they have intended to act within the line of their authority, but by mistake have exceeded it, under which circumstances, they are to have a month's notice of the action, that they may have an opportunity of tendering amends, and pleading the tender. Now the stat. 5 Ann. c. 14, empowers a justice personally to seize any engine for the destruction of the game, in the custody of an unqualified person; the Defendant under that power took the gun; and whether the taking were justifiable or not, he was intitled to notice by 24 Geo. 2, c. 44.

Adair, Serjt., in support of the rule. Admitting the proposition that the provisions of the Legislature were intended for the protection of persons supposed to have acted wrong, but in the exercise of a legal authority, yet here, the Defendant was not acting as a justice, and cannot therefore avail himself of that character; he

frequently observed by the Courts, that the notice which is directed to be given to justices and other officers before actions are brought against them, is of no use to them when they have acted within the strict line of their duty, and was only required for the purpose of protecting them in those cases where they intended to act within it, but by mistake exceeded it." Per Lord Kenyon, *ibid.* So one magistrate committing the mother of a bastard child is entitled to notice under 24 Geo 2, though two magistrates only have jurisdiction in such case, for he intended to act as a magistrate at the time, however mistakenly. *Wheller v. Toke*, 9 East, 364. And where he has authority over the subject-matter of the complaint, although the place where the offence was committed is not within his jurisdiction, he is still entitled. *Prestridge v. Woodman*, 1 B. & C. 12. See also *Graves v. Arnoll*, 3 Campb. N. P. C. 242. *Gaby v. Wilts Canal Company*, 3 M. & S. 580. *Theobald v. Crichmore*, 1 B. & A. 227. *Waterhouse v. Keen*, 4 B. & C. 200.

But where the act in question has not been done in the capacity of justice, &c. and cannot be referred to that character, but is wholly diverso intuitu, notice is not required; as where a revenue officer seizes goods not liable to seizure, and takes money to release them, in an action to recover such money no notice is requisite. *Irving v. Wilson*, 4 T. R. 485. So in an action against a tax-collector, not in respect of an act done in the execution of his office, but for his neglect to pay over money which he ought never to have taken, he is not entitled to notice under stat. 43 Geo. 3, c. 92, s. 70, which provides that no writ or process shall be sued out for any thing done in pursuance of that act till after one month's notice. *Umphelby v. M'Lean*, 1 B. & A. 42. So where the Defendant, who was a justice of the peace, and also mayor of a borough, had received a fee for granting a licence to a publican, it was held that such fee could not have been taken by him in his character of justice, and that he was not entitled to a notice. *Morgan v. Palmer*, 2 B. & C. 729. If it be equivocal in what capacity the party acted, notice should be given, *ibid.* 734.

Replevin is not an action within the statute. *Fletcher v. Wilkins*, 6 East, 283.

The case is equally within the statute, where the Plaintiff waives the tort, and brings an action of assumpsit. *Waterhouse v. Keen*, 4 B. & C. 211.]

acted as lord of the manor, and was attended by his game keeper. The statutes 22 & 23 Car. 2, c. 25, and 4 & 5 W. 3, c. 23, are the only acts which authorize the entering and searching houses for game, and engines for the destruction of game: the first of these requires that there shall be a warrant from a justice of peace to the game-keeper to authorize the search; the second empowers the constable to enter and search, having a similar authority from a justice. But neither of them empower the justice himself personally to enter. The statute 5 Ann. c. 14, indeed authorizes a justice of the peace to take away dogs, nets or other engines from unqualified persons, but gives him no authority to enter houses; and that act purposely omits guns, which must be used for the destruction of the game, otherwise are not liable to be seized. There is no pretence therefore to say that the Defendant in this case acted as a justice; and the Court will not extend the provision of the Legislature, merely because he happened to be a justice of the peace, as well as lord of the manor.

But the Court said, that though justices of the peace could not avail themselves of their privilege as justices, where they acted in any other capacity which was diverso intuitu, yet as in the present case the subject matter was within their jurisdiction, [116] the Defendant was to be taken to have acted as a justice, and therefore intitled to notice, previous to the commencement of the action.

Rule discharged.

BESFORD *against* SAUNDERS. Saturday, June 16th, 1792.

If a bankrupt after obtaining his certificate promise to pay a prior debt, when he is able, in a general indebitatus assumpsit brought on that promise, the Plaintiff must prove the ability of the Defendant to pay (a).

This was an action of assumpsit for money paid, lent, had and received, &c. Pleas, non assumpsit, and the general plea of bankruptcy.

At the trial, the Plaintiff proved two several applications to the Defendant, who admitted the debt after he had obtained his certificate, and said, "the Plaintiff should be no loser, but that he would pay when he was able."

Le Blanc, Serjt., contended, that this was not an absolute promise, but that the Plaintiff ought to shew the Defendant's ability to pay, at the time of the action brought. Lord Loughborough over-ruled this objection, and held, that the promise was absolute, and the benefit of the certificate waived, as to this debt. In consequence of which a verdict was found for the Plaintiff.

A rule being granted to shew cause why there should not be a new trial, Cockell, Serjt., shewed cause. He argued that it was a settled point, that a promise to pay after bankruptcy was a waiver of the certificate, the prior debt being a sufficient consideration for a new promise.

Le Blanc admitted there was a sufficient consideration, but said, that the promise must be taken as it was made, viz. conditional, and not absolute.

GOULD J., and HEATH, J., were of opinion that it was a conditional promise, and that the Plaintiff ought to have shewn that the Defendant was able to pay.

LORD LOUGHBOROUGH retained his former opinion, that the promise was not conditional, and that an inquiry into the circumstances of the Defendant could not be a point in considering whether there were a debt or not.

Rule absolute for a new trial.

End of Trinity Term.

During all this term Mr. Justice Wilson was sitting in the Court of Chancery as one of the Lords Commissioners of the Great Seal.

(a) [So in case of a promise to pay a pre-existing debt, by a person discharged under the Insolvent Act. *Campbell v. Sewell*, 1 Chitty's Rep. 609. So where the Defendant has promised to pay a debt barred by the Statute of Limitations, "if he can," it is a conditional promise, and the Plaintiff must prove his ability to do so. *Davies v. Smith*, 4 Esp. N. P. C. 36. But see *Thompson v. Osborne*, 2 Stark. N. P. C. 98. *Loweth v. Fothergill*, 4 Campb. N. P. C. 185. See, however, *Fleming v. Hayne*, 1 Stark. N. P. C. 371. By stat 6 G. 4, c. 16, s. 131, the promise must be made in writing signed by the bankrupt, or by some person thereto lawfully authorized in writing by such bankrupt.]

[117] CASES ARGUED AND DETERMINED IN THE COURT OF COMMON PLEAS, IN MICHAELMAS TERM, IN THE THIRTY-THIRD YEAR OF THE REIGN OF GEORGE III.

FLETCHER, ONE, &c. *against* AINGELL. Wednesday, June 21st, 1792.

[This Case was omitted by mistake in the Reports of the last Term.]

Bail sued on their recognizance by attachment of privilege, may render the principal on the appearance day of the return (a)¹.

The Plaintiff who was an attorney, having in last Hilary Term recovered judgment in the King's Bench, against the Defendant, on the 3d of February sued out an attachment of privilege against the bail in this court on their recognizance, tested on the 23d of January, and returnable on Wednesday next after the morrow of the Purification, which was the eighth of February. On the eleventh of February the Defendant was rendered and an exoneretur entered; notwithstanding which, the Plaintiff signed judgment against the bail, and then brought an action on that judgment in the King's Bench.

In consequence of this, a motion was made in that court to set aside the proceedings, and a rule there made to refer it to the prothonotaries to report as to the regularity of the proceedings in this court against the bail. But some difficulties having arisen, it was agreed to bring the matter on for argument in court, the only material question being at what time bail, when sued by attachment of privilege, ought to render their principal, whether on the return day of the writ, or on the quarto die post, as in common cases?

[118] Lawrence, Serjt., contended that the render on the 11th of February was good. An attachment of privilege is in the nature of an original writ, *Harward v. Denison*, Barnes, 410, and if the Plaintiff had brought his action of debt by the common process and not by attachment, the bail would have been intitled to time to render the principal in, till the quarto die post of the return of the writ (a)². *Impey's Pract. C. B.* 502.

Adair, Serjt., insisted, on the contrary, that, however the case might be, where the proceedings were between common persons, yet the established practice was, that where the Plaintiff sued by attachment of privilege, the bail could not render the principal after the return day of the writ. *Impey's Pract. C. B.* 502.

Per Curiam. The rule of practice ought to be uniform, as to the time in which bail may render the principal; and there is no good reason why they should not have the same time allowed, where the proceedings are by attachment of privilege, as in other cases, viz. till the appearance day of the return.

The prothonotaries afterwards reported to the Court of King's Bench that the render on the eleventh of February was regular.

GANESFORD *against* LEVY. Friday, Nov. 9th, 1792.

A Plaintiff who is resident abroad, is compellable to give security for costs, though no other circumstance than his residence be stated in the affidavit (a)³.

In this case a motion was made by Le Blanc, Serjt., that the Plaintiff should give

(a)¹ [Vide *Lardner v. Bassage*, post, 593.]

(a)² A different practice in this respect, prevails in the King's Bench, where if an action be brought on the recognizance, the bail have eight entire days in full term, next after the return of the writ, in which they may render the principal, and if there be but four days in the term after the return, then four days in the following term. *R. Trin. 1 Ann. 1 Lord Raym. 721. Imp. Pract. B. R.* 448.

In both courts where the bail are sued by scire facias, and the proceedings are by original, they have till the quarto die post of the return of the first scire facias, if scire feci be returned, or if nihil be returned, till the quarto die post of the return of the second scire facias, to render the principal. Where the proceedings are by bill in B. R. the time for rendering is the return day of the scire facias, and in all these cases it is absolutely necessary that the render be *male se lente curia*. [Vide post, 593.]

(a)³ [It is difficult to reconcile all the cases as to the practice of this court in requir-

security for costs, on an affidavit which stated simply "that his place of residence was at Bourdeaux in France," without any other circumstances. Adair, Serjt., shewed cause, and urged that in many cases (a)¹ the Court had refused to require a Plaintiff to give such security, merely because he was resident abroad, without other circumstances being stated. But

[119] Upon consideration, the Court made the rule absolute, and laid it down as a settled point to guide the practice in future, that when a Plaintiff resided in a foreign country, and so out of the reach of the process of the Court, he might be called upon to give security for costs, though no other circumstance were stated in the affidavit (b).

MALLETT against HILTON. Friday, Nov. 9th, 1792.

A peremptory undertaking to try, is alone sufficient cause to shew against judgment as in case of a nonsuit for not proceeding to trial, if it be the first default (a)².

Le Blanc, Serjeant, moved for judgment as in case of a nonsuit, on an affidavit stating that issue was joined in Easter Term last, and notice of trial given for the sittings after that term, and countermanded; that notice of trial was again given for the sittings in Trinity Term, and again countermanded.

Kerby, Serjt., shewed cause in the first instance, by offering to undertake peremptorily to try the cause at the sittings, in or after the present term, but did not give any reason, by affidavit or otherwise, why the Plaintiff had not proceeded to trial before.

Le Blanc objected to this, as being contrary to the practice both of this Court and the King's Bench, and evasive of the statute (14 Geo. 2, c. 17). But

The Court held, that in all cases where an application was made for the first time for judgment, as in case of a nonsuit, it was sufficient, in answer to such an application, to undertake peremptorily to try, without alleging any reason for not having before tried the cause; and that, whatever might have been the former practice, in future it should be understood that the first motion for judgment as in case of a nonsuit, was only a mode of obtaining a peremptory undertaking to try.

In this term also, the Court laid down the same rule in a case of *Price v. Green*.

ing security for costs. In the case of *Parquot v. Eling*, ante, vol. i. p. 106, the Court refused to grant a rule, on the mere ground of the Plaintiff being resident abroad, while in the principal case it is laid down as a settled point, that where a Plaintiff resides in a foreign country he may be called upon to give security for costs, though no other circumstance is stated in the affidavit. It is said in a note by the Reporter, post, 384, that the being resident abroad is of itself a ground upon which a rule to shew cause will be granted, but that such rule will not be made absolute unless some special circumstances appear to induce the Court to order the security. It seems, however, to be the present practice to make the rule absolute, unless some special circumstances are shewn on the part of the Plaintiff, to exempt him from the general rule. See Tidd's Pr. 579, 8th edit. Thus a foreign seaman serving on board an English ship cannot be called upon to give security. *Jacobs v. Stevenson*, 1 Bos. & Pul. 96. So a foreigner during his absence from this country on board his own ship, if he resides here part of the year. *Durall v. Matthuson*, 3 B. Moore, 33. *Nelson v. Ogle*, 2 Taunt. 253, S. P. So an English subject who is a prisoner in France. *Tulloch v. Crowley*, 1 Taunt. 18. *O'Lawler v. Macdonald*, 8 Taunt. 736, 3 B. Moore, 77, S. C. Security for costs will not be granted after the Defendant has agreed to take short notice of trial. *Michel v. Pareski*, post, p. 593.]

(a)¹ See ante, vol. i. p. 106, *Parquot v. Eling*.

(b) In two cases last term, viz. *Miche v. Airey*, and *Kelly v. Leemore*, there were similar decisions.

(a)² [But in K. B. some reason must be assigned for not proceeding to trial, or the Court will not compel the Defendant to accept a peremptory undertaking. *Walter v. Buckle*, 2 Chitty's Rep. 244. Tidd's Pr. 826. 8th edit.]

[120] SHEERS *against* BROOKS AND OTHERS. Thursday, Nov. 15th, 1792.

Bail above may justify the breaking and entering the house of A. (the outer door being open) in which the principal resides, in order to seek for him, for the purpose of rendering him. Such a justification is good without averring that the principal was in the house at the time. And in such a plea an averment that the defendants "duly became bail and entered into a recognizance" is sufficient, without stating that the principal was delivered to their custody (a)¹.

Trespass for breaking and entering the dwelling-house of the Plaintiff, making a noise and disturbance therein, and staying and continuing in the same for a long space of time, to wit, for the space of 12 hours, &c. &c.

Plea (after the general issue) "as to the breaking and entering the said messuage or dwelling-house, and making a noise and disturbance therein, and staying and continuing in the said messuage or dwelling-house, &c. for a short space of time, to wit, for the space of one hour, part of the said time in the said declaration mentioned," &c. &c. "That one Harry Phillips the elder had commenced a certain action or suit against one Robert Barry, one Nicholas Kempson, one Peter Solomous Duprey, and one Harry Phillips the younger, in the Court of our lord the King of the Bench here, to wit at Westminster aforesaid, in a certain plea of trespass on the case upon promises, to the damage of the said Harry Phillips the elder, of 280l. as it was said, &c.

"And the said George, Robert Smith, and John (the defendants) further say, that after the commencement of the said action or suit, and whilst the same was depending in the said court here, and before the said time when, &c. in the said declaration mentioned, to wit, in Easter Term, in the thirty-second year of the reign of our lord the now King, they the said George and John came before Alexander Lord Loughborough and his companions, then his Majesty's justices of the bench here, to wit, at Westminster aforesaid, and then and there, according to law duly became bail for the said Nicholas in the said action or suit, so as aforesaid depending in the said court here, by then and there entering into a recognizance to the said Harry Phillips the elder, whereby the said George and John did severally acknowledge to owe unto the said Harry Phillips the elder the sum of 280l. each. to be levied upon their several goods and chattels, lands and tenements, upon condition, that if the said Nicholas should be condemned in the said action he should pay the condemnation-money, or render himself a prisoner to the Fleet for the same, and if he should fail so to do, they the said George and John did undertake to do it for him; and the said [121] George, Robert Smith, and John further say that after they the said George and John had so as aforesaid entered into the said recognizance, whilst the said recognizance remained in due force, and whilst the aforesaid action or suit was depending in the said court here, to wit, at the said time when, &c. in the said declaration mentioned, the said Nicholas used, occupied and resided in the said messuage or dwelling-house of the said Sarah (the Plaintiff) in the said declaration mentioned, in which, &c. and whilst the said Nicholas used, occupied and resided in the said messuage or dwelling-house of the said Sarah, in the said declaration mentioned, in which, &c. they the said George and John as the bail of and for the said Nicholas as aforesaid, and the said Robert Smith in aid and assistance of them the said George and John, and at their request, at the said time when, &c. in the said declaration mentioned, broke and entered into the said messuage or dwelling house of the said Sarah, in the said declaration mentioned, in which, &c. by the outer door thereof, the said outer door thereof being then open (a)², in order to seek for, and if there found, to apprehend and take the said Nicholas in the said messuage or dwelling-house of the said Sarah, to surrender him to the said prison of the Fleet, in discharge of themselves the said George and John from the said recognizance so by them entered into as aforesaid, as they lawfully might for the cause aforesaid," &c. &c.

(a)¹ [The house of the Plaintiff was considered, in this case, to be the house of the principal; and therefore the justification of the party entering did not depend upon the fact of the principal being within at the time, as it would have done had the house been considered the house of a stranger. See *Hutchinson v. Birch*, 4 Taunt. 619. *Cooke v. Birt*, 5 Taunt. 765. *Johnson v. Leigh*, 6 Taunt. 246.]

(a)² See 5 Co. 91 b. *Semayne's case*, and Cpw. 1, *Lee v. Gansel*, and the cases there cited.

To this plea there was a general demurrer.

Lawrence, Serjt., in support of the demurrer, made two points of argument; 1st. That it did not appear that the defendants were in a situation to justify the taking of Kempson (the principal) in any place; 2d. That they had no right to take him in the house of the Plaintiff. As to the first he argued, that to intitle bail to take their principal, the principal must have been delivered to them as bail by the Court. 4 Inst. 178. 2 Hawk. P. C. 88, but the plea in the present case, shews only that the Defendants were sureties for the appearance of Kempson; it does not state that he was delivered to them as bail by the Court, and the difference between bail and mainprize is obvious. As to the second point, he urged that bail could not, in any event, enter the house of another, to take the principal, unless the principal were in the house at the time: now it is not averred in the plea, that Kempson was in the Plaintiff's house at the time of the entry. Cro. Eliz. 876. Nor could [122] such an entry be justified, merely because it was stated that the principal used, occupied and resided in the house, those being vague and equivocal terms, which might be applied to any one who had a temporary residence there, such as a visitor, or servant.

Bond, Serjt., contra. The Defendants were not mainpernors, but bail: the plea states that they "duly became bail;" this allegation is sufficient, and is not contradicted by stating that they entered into a recognizance, &c. As therefore they were bail, they had a right to take the principal, and were justified in searching for him at his usual place of abode. And in *S. mayne's case*, 5 Co. 91 a. it is laid down, that "the house of any one is not a castle or privilege but for himself, and shall not extend to protect any person who flies to his house."

LORD LOUGHBOROUGH. This plea appears to me to be good, both in form and substance. It shews that the Defendants were bail, and not mainpernors, for it states that they duly became bail and entered into a recognizance, the legal effect of which is, that the principal was in their custody; and a further averment of his being delivered to them would have been unnecessary: when a party is bailed, the bail have a right to go into the house of the principal, as much as he has himself; they have a right to be constantly with him, and to enter when they please, to take him. And I see no difference between a house of which he is solely possessed, and a house in which he resides by the consent of another.

GOULD, J. I think this plea is good, and sufficiently certain to a common intent, and that the subsequent statement of the entering into a recognizance is not sufficient to invalidate the prior allegation of the Defendants having duly become bail. It seems to me to be the same in effect, as if the principal had been sole occupier of the house; the Plaintiff received him into her house, subject to all the legal consequences, to which he would have been liable, if the house had been his. A contrary determination would affect the liberty of the subject, as it would make it extremely difficult to procure bail.

HEATH, J., of the same opinion.

Judgment for the Defendants.

[123] PHILLIPS against FIELDING. Monday, Nov. 26th, 1792.

[Distinguished, *Martin v. Smith*, 1805, 6 East, 561. Doubted, *Ferry v. Williams*, 1817, 8 Taunt. 67.]

By the conditions of the sale by auction of a copyhold estate, it was stipulated that the purchaser should pay down a deposit, and sign an agreement for payment of the remainder of the purchase-money at a certain time, on having a good title, and that he should have a proper surrender of the estate, on payment of the remainder of the purchase-money. In an action brought by the seller, for the non-performance of the conditions on the part of the purchaser, it was not sufficient to state that the seller had been always ready and willing, and frequently offered to make a good title to the said estate, and to make a proper surrender on payment of the purchase-money. But the declaration ought to have averred that the seller actually made a good title, and surrendered the estate to the purchaser, or a tender and refusal, and also to have shewn what title the seller had (a).

In this action of assumpsit for the non-performance of a special agreement, the

(a) [Vide *Glazebrooke v. Woodrow*, 8 T. R. 366. But where in a similar action the

declaration contained nine counts, the first of which stated, that the Plaintiff on the 10th of September 1791, at Westminster, in the county of Middlesex, "was about to expose to sale, and to sell by way of public auction, a certain copyhold estate of him the said William, (the Plaintiff) that is to say, a certain copyhold messuage or dwelling house, consisting of two parlours, a kitchen, and useful offices, with a garden behind the same, then in the occupation of one Edward Corey, situate and being in the parish of Titchfield, in the county of Hants, under the following conditions of sale, to wit, First, that the highest bidder should be the purchaser, and if any dispute should arise between two or more bidders, the estate should be put up again. Second, that no person should advance less than 2l. at each bidding. Third, that the purchaser should pay down immediately a deposit of 20l. per cent. in part of the purchase money (a), meaning the sum of 20l. upon each and every 100l. of the sum at which he should purchase such estate, and sign an agreement for payment of the remainder on or before Christmas Day then next, meaning the 25th day of December which was in the year of our Lord 1791, on having a good title. Fourth, that the purchaser should have a proper surrender of the estate at his own expence, on payment of the remainder of the purchase money according to the third condition, at which time the purchaser would be entitled to the rents and profits of the estate. Fifth, there being a duty on all sales of estates by auction of threepence halfpenny in the pound, to be levied on the buyer or seller as may be thought most proper, the said estates should be sold, subject to the buyer paying the said tax, exclusive of the sum the said estate should sell for. Sixth, if the purchaser should neglect or fail to comply with the conditions before mentioned, the deposit money should be forfeited, the proprietor should be at full liberty to re-sell the said estate, and the deficiency (if any) by such second sale, together with the charges attending the same, should be made good by the defaulter at such sale. Lastly, the purchaser [124] should pay the auctioneer one guinea at the fall of the hammer; of all which said premises, he the said George (the Defendant) afterwards, to wit, on the said 10th day of September, in the year 1791, aforesaid, at Westminster, in the said county of Middlesex, had notice, and thereupon afterwards, to wit, on the same day and year last aforesaid, at Westminster aforesaid, in the said county of Middlesex, in consideration that the said William at the special instance and request of the said George, had then and there undertaken and faithfully promised the said George to perform and fulfil every thing contained in the said conditions of sale on his part and behalf, as the vendor of the said estate, to be performed and fulfilled, he the said George undertook, and then and there faithfully promised the said William to perform and fulfil the said conditions of sale in all things therein contained, on the part and behalf of the buyer or buyers of the said estate to be performed and fulfilled, if he the said George should buy the same at the said sale. And the said William further saith, that the said intended sale of the said estate, afterwards, to wit, on the same day and year last aforesaid, at Westminster aforesaid, in the said county of Middlesex, was accordingly begun, made, and ended under the aforesaid conditions of sale; and the said George at the said sale became and was the highest bidder for the said estate, and then and there under the said conditions of sale, bought and purchased the said estate with the appurtenances, at and for the price or sum of 170l. of lawful money of Great Britain, and then and there signed a certain agreement in writing bearing date on the day and year last aforesaid, whereby he agreed to become the purchaser of the said premises, subject to the aforesaid conditions of sale, at and for the price or sum of 170l.; whereby and

Plaintiff averred that he was seised in fee of the land, and that the Defendant agreed to purchase it on having a good title, and that his title to the land was made good, perfect, and satisfactory to the Defendant; and that he (the Plaintiff) had been always ready and willing, and offered to convey the lands to the Defendant, the declaration was held good on demurrer. *Martin v. Smith*, 6 East, 555, and see *Ferry v. Williams*, 8 Taunt. 62. 1 B. Moore, 498, S. C. As the purchaser in the principal case was to have a proper surrender at his own expense, it appears not to have been the vendor's duty to prepare or tender the conveyance. See *Sugd. Vend. & Purch.* 222, 6th Ed. and the averment of readiness and willingness would therefore appear to have been sufficient. The case of *Phillips v. Fielding*, if not over-ruled by *Martin v. Smith*, must at all events be considered of doubtful authority, see 8 Taunt. 67.]

(a) But see 4 Co. 17 b. as to the office of an innuendo.

according to the said conditions of sale, and the said promises and undertakings of the said George, and the said agreement so by him in this behalf made as aforesaid, he the said George then and there became liable to pay to the said William the said sum of 170l. according to the aforesaid conditions of sale; and the said William further saith, that although he the said William hath well and truly performed and fulfilled the said conditions of sale in all things therein contained, on his part and behalf to be performed and fulfilled according to his said promises and undertakings, yet the said George not regarding the aforesaid conditions of sale, nor his said promises, undertakings and agreements so [125] by him in this behalf made as aforesaid, but contriving and fraudulently intending craftily and subtilly to deceive and defraud the said William in this respect, did not pay down immediately on such purchase being so by him made as aforesaid to the said William or any other person or persons for his use, a deposit of 20l. per cent. in part of the said purchase money or any deposit whatsoever, nor did he on or before the 25th day of December in the year 1791, aforesaid, pay, nor hath he at any other time whatsoever yet hitherto paid to the said William or to any other person or persons to or for his use, the said sum of 170l. being the purchase money for the aforesaid premises according to the aforesaid conditions of sale, and according to his said agreement or any part thereof, although so to do, he the said George was requested by the said William, afterwards, to wit, on the day and year last aforesaid, and often afterwards, to wit, at Westminster aforesaid, in the county of Middlesex, and although the time limited by the said conditions of sale for the payment of the said purchase money hath long since elapsed, and although the said William hath always been ready and willing, and hath frequently offered to make out a good title to the said estate, and to make a proper surrender of the said estate to the said George on payment of the said purchase money, but the said George to pay any deposit or to pay the said purchase money or any part thereof to the said William, hath hitherto wholly refused and still refuses so to do, and the said purchase money still remains and is wholly due and unpaid to the said William, contrary to the aforesaid conditions of sale, and the said promise and undertaking of the said George, and his said agreement so by him in this behalf made as aforesaid, to wit, at Westminster aforesaid, in the said county of Middlesex; by means of which said several premises, the said William hath wholly lost and been deprived of the benefit of the said sale by auction, and of the selling of his said estate, and the said William was thereby put to great and unnecessary expence of his money, and delay in the sale of his said estate, and by reason of the premises aforesaid, was and hath been and is otherwise much injured and damaged, to wit, at Westminster aforesaid, in the said county of Middlesex."

In the second, third, fourth, and fifth counts, the respective estates which the Plaintiff was about to sell, were described as being really different from each other, but in all other respects those counts were similar to the first, reciting the same conditions [126] of sale, and containing the same allegations. The remaining four were the common money counts.

To the first five counts there was a general demurrer, and to the four last Non Assumpsit was pleaded.

In support of the demurrer, Marshall, Serjt., argued as follows,

There are two objections to this declaration. 1st. The Plaintiff has not shewn a sufficient performance of the agreement on his part, by stating an actual surrender to the Defendant, or a tender and refusal, which is equivalent. 2nd. Though he states that he was ready and willing, and offered to make a good title to the estate and a proper surrender, yet he does not shew, what title.

1. By the third condition of sale, the purchaser is to pay down 20l. per cent. in part, and to sign an agreement to pay the remainder on or before Christmas Day, on having a good title: and by the fourth, he is to have a proper surrender of the estate at his own expence, on payment of the remainder. These two conditions taken together, amount to this; the purchaser is to pay the money at or before Christmas on having a good title, the seller is to make a good title on payment of the money. No terms could have been used more explicit to frame concurrent conditions. The promises are to be fulfilled at the same time, each being the condition upon which the other is to be performed; and though it is not certain that either party is bound to do the first act, yet if either would have a remedy at law for the non-performance of the other, he must perform his own part; for unless he can shew a performance of his part, or an offer to perform and a refusal by the other party, he cannot support an

action. Instead of this, the Plaintiff in the present case brings an action against the Defendant for not doing the first act: he says he has been always ready and willing, and frequently offered to "make out a good title to the estate and a proper surrender, on payment of the purchase money;" so that the allegation imports that if the Defendant had previously paid him the money, he would afterwards have made out a good title, thus making payment a condition precedent. The general rule laid down by Lord Holt has never been departed from, but in cases which have been afterwards overruled. That rule is, that in executory contracts if the agreement be that one shall do an act, and for doing it the other shall pay, &c. the doing the act is a condition precedent to the payment, for the party who is to pay shall not be compelled to part with his money till the thing be performed for [127] which he is to pay. *Thorpe v. Thorpe*, 1 Salk. 171. 1 Lutw. 245. 12 Mod. 455. 1 Ld. Raym. 662 and S. P. 1 Salk. 112, *Callonett v. Briggs*. The rule indeed is subject to some distinctions: as, if a day of payment be appointed, which falls before the thing can be performed, an action may be brought for the money before the thing be done, it then appearing that the party relied upon his remedy, and did not mean to make the performance a condition precedent. It follows therefore, that though the conditions be concurrent, yet if either party would bring an action against the other for non-performance, he turns his part of the contract into a condition precedent, and he must aver performance or a tender and refusal; the reason of which is, that when a man undertakes to do a thing, he ought to shew his utmost endeavour to do it, and if it be not done, the reason why it is not done. Bro. tit. Condition, pl. 62. *Lea v. Erelby*, Cro. Eliz. 888. *Lancashire v. Killingworth*, 1 Ld. Raym. 686. Com. Rep. 116. 12 Mod. 529. 2 Salk. 623. Thus in *Large v. Cheshire*, 1 Vent. 157, the Plaintiff declared on an agreement, whereby the Defendant covenanted to pay him such a sum, the Plaintiff making to him a sufficient estate in certain lands, before such a day, and avers that, although he was always ready to perform the agreement on his part, yet the Defendant had not paid the money. The Defendant pleaded that he offered to pay the money, if the Plaintiff would make him a good estate in the premises. The Plaintiff replied, that he sealed a deed of feoffment, and came on the premises before sun-set on the day, to deliver seisin, but neither the Defendant nor any person for him, came to receive it. On demurrer to this replication, the Court held, that the words "making him a sufficient estate," were a condition precedent, and therefore the Plaintiff should have averred performance particularly, and not in such general words. Thus also in *Russell v. Ward*, Sir W. Jones, 218, cited by Lord Holt in *Thorpe v. Thorpe*, 1 Ld. Raym. 665, the executor of A. declared against B. that in consideration, A., in his life-time, had promised to assure certain lands to B. before Michaelmas next, B. promised to pay him so much for the land; that is, the assurance was to be made before Michaelmas, and the money was to be paid for the land; it was adjudged, that the action would not lie for the money without making an assurance of the land.

Even where the promises are mutual and independent, yet if one be the consideration of the other, each is a condition precedent to the other, and performance must be averred, unless a [128] certain day be appointed for the performance. Thus, if A. agree to pay 100l. to B. in six months, B. transferring so much stock to A., and B. gives a note to transfer the stock to A., he paying the 100l.; if B. sues for the 100l. he must aver that he transferred, or a tender and refusal: and if A. sues for not transferring, he must aver and prove payment, or a tender and refusal of the 100l. *Wyvill v. Stapleton*, 8 Mod. 68, 381. And the manner of the performance must be shewn. Thus, in *Austin v. Jervoise*, Hob. 69, 77, the Plaintiff declared, that he had bought a horse of the Defendant for 22s. paid down, and 11l. more to be paid at the death or marriage of the Plaintiff, for which he should become bound with sufficient surety by writing obligatory, and that the Defendant, in consideration thereof, promised to deliver the horse when he should be required, and averred that afterwards he offered to become bound to him, but the Defendant had not delivered the horse. On non assumpsit, and verdict for the Plaintiff, the judgment was arrested, because the Plaintiff had not stated that he had tendered the obligation sealed, nor what security he had offered. This doctrine, viz. that either a performance or a tender and refusal, which is equivalent to it, must be shewn, is fully recognized by recent authorities, *Jones v. Barkley*, Dougl. 684, 8vo. edit. *Kingston v. Preston*, there cited, and *Goodisson v. Nunn*, 4 Term Rep. B. R. 761.

2. But supposing the Plaintiff had stated explicitly and formally, that he had

offered to make a good title to the Defendant, and that the Defendant had refused to accept it; yet the declaration would still be bad, because it does not shew what title. If the Plaintiff had no title, he could not recover damages against the Defendant for not paying for an estate to which the seller could not make a title, though the Defendant would have had a remedy against him for his breach of contract. The title therefore is an essential part of the case. But whether a title be good or not, is a question for the Court to decide, and therefore it ought to appear with sufficient certainty, on the face of the record. If it be so stated, the Defendant will be able to take issue on any fact alleged if untrue, or demur if the title set forth be defective. But the merely alleging that he was ready and willing to make a good title, is not an averment of his title, upon which an issue can be taken either of law or fact. If it be stated that a person is patron of an advowson or heir, it must be shewn how he is patron or heir, for no issue can be taken on patron or heir. 1 Ld. Raym. 202. Still less can an [129] issue be taken on the word title, being much more vague and less appropriated in its signification. In an action upon a covenant to enjoy without eviction, the breach must shew what title the person had who recovered. Cro. Jac. 315, *Kirby v. Hansaker*, S. P. *Broking v. Cham*, Cro. Jac. 425. So in covenant for quiet enjoyment, the breach assigned was, that A. B. habens legale jus et titulum entered upon the Plaintiff; after verdict for the Plaintiff, this was holden to be no breach without shewing what title A. B. had. *Woolton v. Hele*, 1 Sid. 466. 2 Saund. 177. Thus also where the Plaintiff declared, that in consideration he would acquit one T. O. of a debt, and permit him to carry his goods off the premises, the Defendant promised to pay the Plaintiff 10l. at a certain day: and averred that he acquitted and discharged the said T. O., and suffered him to carry away his goods; but the Defendant had not paid the 10l.; after verdict for the plaintiff the judgment was arrested, because the plaintiff did not shew how he acquitted T. O., for it could not be without deed, which ought to have been particularly shewn. Cro. Jac. 503, *Leneret v. Livet*. So in debt on an obligation, the Defendant pleaded, that it is indorsed, that if the Defendant should come to Bristol such a day, and shew the Plaintiff a sufficient discharge of an annuity, that then, &c. and averred that he came to Bristol on the day, and tendered to shew a sufficient discharge of the annuity, and that the Plaintiff refused to see it. The Plaintiff demurred, and after great argument it was held to be no plea by all the justices, because the Defendant did not shew what discharge he tendered. Bro. tit. Condition, pl. 183.

So too the Plaintiff declared, that in consideration that he would relinquish a rent charge which he had out of the Defendant's land, the Defendant promised to pay him 30l. and averred that he did relinquish it. After verdict for the Plaintiff, this was held insufficient, without shewing how he relinquished it: for it might be by parol, which is no discharge. Cro. Eliz. 292, *Gregory v. Nevill*. Thus likewise in assumpsit on an agreement, by which the Defendant was to take of the Plaintiff certain premises with the fixtures, &c. or else to forfeit a deposit of 5l. 5s. with a penalty of 5l. to be paid by the party who should fail; the Plaintiff averred that he was ready and willing to deliver the premises, &c. to the Defendant, at such an appraisement in pursuance of the agreement, but the Defendant did not accept the said premises, &c. On demurrer, the Court (without hearing the Defendant's counsel) held, that as the Plaintiff was [130] to deliver possession, he ought to do so; and to do that, he should have shewn that he had an interest in the premises. *Luston v. Robinson*, Dougl. 620. And nearly the same objections as are now taken to this declaration, were made in the case of *The Duke of St. Albans v. Shore*, (ante, vol. i. 273,) and though the Court in that case gave judgment on the plea, yet a strong opinion was intimated that those objections would, of themselves, have been fatal.

Cockell, Serjt., contra. It appears on the face of the declaration that there is a sufficient inducement to the promise of the Defendant for the breach of which he is liable. It is stated that the Plaintiff was about to sell by auction "an estate of him the said Plaintiff," and afterwards, that "although he hath frequently offered to make a good title," yet the Defendant refused to perform his part; and it is objected, that these allegations are insufficient. Now supposing the objection to be well founded, it being a matter of form, ought to have been pointed out by a special demurrer, but cannot be taken advantage of on a general demurrer. But in truth the allegations are sufficient to enable the Plaintiff to maintain his action. It is not necessary to set out the title particularly, unless the Defendant makes it so by pleading: it is sufficient

prima facie, to state the contract, and if the Defendant object to the want of title, it lies upon him to impeach it. Here the Defendant was to do the first act, to pay for, and consequently prepare the surrender, a more distinct averment therefore was not necessary, on the part of the Plaintiff; but paratus fuit et obtulit is sufficient. *Davis v. Ridgeway*, 1 Roll. Abr. tit. Condition, 465, pl. 31. And that "licet" makes an express averment, appears from Com. Dig. tit. Pleader (C, 77) and the authorities there cited. But if it be not certain, which party is to do the first act, but both are to do something at the same time, and one refuse to do his part, in that case, he who was ready and offered to perform his part, may maintain an action against the other, according to the mode of reasoning adopted in *Jones v. Barkley*, and *Kingston v. Preston*.

Marshall in reply. These cannot be considered as independent conditions, where each party relies on his remedy for the performance of the other; for if they were, then the Plaintiff might bring an action for the money without conveying, and the Defendant might sue for a conveyance without paying. As to the argument, that paratus fuit et obtulit is sufficient, the true distinction is, that if the consideration is to be performed before the action is brought, performance must be expressly and [131] fully averred, and the general allegation "paratus fuit et obtulit" is not sufficient. Cro. Jac. 583. But if nothing is to be done on the part of the Plaintiff, till the Defendant has done a prior act, there it is sufficient; as if the Plaintiff being a bailiff, agree for 10l. to arrest I. S. at the suit of the Defendant, it is sufficient to aver that he was ready and willing, and offered, but the Defendant did not deliver him the writ, which was the case of *Davis v. Ridgeway*, 1 Roll. Abr. tit. Condition, 465, cited for the Plaintiff. So also if a request be part of an agreement, and the debt or duty is to commence on the request, it must be specially alleged with time and place; as if in consideration that the Plaintiff would assure certain lands to I. S., the Defendant promised that if I. S. did not pay so much on request, he would pay it: it is not enough to say, that I. S. licet sepius requisitus did not pay, for the request to I. S. is material, to make the Defendant chargeable, and must be specially alleged. Cro. Eliz. 85. But where the debt or duty exists before any request, there the general request "licet sepius requisitus" is sufficient; and even that is not necessary, because the bringing the action is itself a request.

LORD LOUGHBOROUGH, after censuring in very strong terms the length of the declaration (a), held, that it was clearly bad, on both the grounds insisted on in the argument; First, Because the Plaintiff had not distinctly averred a sufficient performance of his part of the agreement, by stating an actual surrender to the Defendant or a tender and refusal; and Secondly, Because he had not shewn what title he had to the estate; for whatever his interest was, it ought to have been specially set forth.

GOULD, J., was of the same opinion. He remembered the cause of an indictment for forgery, in which there were three counts for the forgery, and three for the utterance; in the first count the prisoner was particularly described, and the grand jury having rejected the three first counts, an objection was raised, that the remaining counts described him "the said A. B." by reference to the first: but all the judges held, that the description was good, and that the latter counts might refer to the former. So in the present case, the declaration, [132] which was swelled to a very improper and unnecessary length, might have referred generally to the conditions of sale set forth in the first count, without repeating them over again in the subsequent counts.

HEATH, J., was of the same opinion.

Judgment for the Defendant.

End of Michaelmas Term.

In the beginning of Hilary Term 1793, Lord Loughborough, Lord Chief Justice of this Court, was appointed Lord High Chancellor of Great Britain.

On Monday Feb. 4. The Chancellor came into court to take the oaths on his new appointment, and sat for a short time as Chief Justice. Before he retired, his Lordship took leave of the Bench and the Bar in a very elegant address, expressive of his

(a) But the fact was stated in court to be, that there were five different estates, sold in five separate lots, for the purchase of which the Defendant signed five separate agreements.

gratitude for the uniform attention and respect which he had received, during the time he had presided in this Court.

To which Mr. Serjt. Adair, as senior Serjeant, answered in the name of his Brethren.

At the end of the Term, Sir James Eyre, Knt., Lord Chief Baron of the Exchequer, was appointed Lord Chief Justice of this Court.

During the Term, no material Cases were decided.

[133] CASES ARGUED AND DETERMINED IN THE COURT OF COMMON PLEAS, IN EASTER TERM, IN THE THIRTY-THIRD YEAR OF THE REIGN OF GEORGE III.

TATEM *against* CHAPLIN. Friday, May 3rd, 1793.

[Applied, *Williams v. Earle*, 1868, L. R. 3 Q. B. 750; *Fleetwood v. Hull*, 1889, 23 Q. B. D. 37; *White v. Southend Hotel Company*, [1897] 1 Ch. 771.]

A covenant in a lease that the lessee, his executors and administrators, shall constantly reside upon the demised premises during the demise, is binding on the assignee of the lessee, though he be not named.

This was an action of covenant, brought by the lessor of a farm against the assignee of the lessee, for the breach of the following covenant. "And the said Samuel Norfolk, (the lessee,) for himself, his executors and administrators, did covenant, promise and agree, to and with the said (George Tatem (the lessor), his heirs and assigns, that he the said Samuel Norfolk, his executors and administrators, should and would constantly during that demise, with his and their family and servants reside, inhabit and dwell in and upon the said demised messuage or tenement, farm and lands, and in default thereof, would pay or cause to be paid to the said George Tatem, his heirs or assigns, the sum of five pounds of lawful money of Great Britain, as a penalty for every month he or they did not or should not reside, inhabit or dwell in and upon the said demised premises, over and above the yearly rent then and there reserved, &c.

The breach assigned was "that the said Richard Chaplin (the assignee) after the said assignment of the said demised premises to the said Richard, and during his possession thereof, to wit, from the 9th day of May in the year of our Lord 1790, to the day of filing the original writ of the said George, hath not, nor did during such time as aforesaid, [134] with himself, his family and servants, reside, inhabit and dwell, nor does he now reside, inhabit, and dwell, in and upon the said demised messuage or tenement, farm or lands, but on the contrary hath totally absented himself with his family and servants from the same, for a long space of time, to wit, for the space of two years and three months, yet the said Richard Chaplin hath not paid or caused to be paid to the said George Tatem the sum of 5l. of lawful money of Great Britain, as a penalty for each and every month he the said Richard Chaplin with his family and servants as aforesaid, have not resided, inhabited, and dwelt, in and upon the said demised premises, over and above the yearly rent so then and there reserved, or any part thereof, but hath therein wholly failed and made default, contrary to the form and effect of the aforesaid covenant of the said Samuel Norfolk, so made with the said George Tatem, in that behalf as aforesaid, &c." To this there was a general demurrer.

There were also issues joined on the breaches of other covenants.

Runnington, Serjt., argued in support of the demurrer, and the only material point of his argument was, that the covenant in question did not run with the land, and therefore did not bind the assignee, who was not named in it, within the principle of the third resolution in *Spencer's Case*, 5 Co. 16 a. He also cited *Mayo v. Buckhurst*, Cro. Jac. 438. *Brewster v. Kitchen*, 1 Lord Raym. 317. *Churchwardens of St. Saviour's v. Smith*, 3 Burr. 1271.

On the other side Bond, Serjt., contended that the covenant ran with the land, and was binding on the assignee, though not named: that the third resolution in *Spencer's Case* related only to personal covenants, and therefore did not affect the present case, but that the first resolution was, "when the covenant extends to a thing in esse,

parcel of the demise, the thing to be done by force of the covenant is quodam modo annexed and appurtenant to the thing demised, and shall go with the land, and shall bind the assignee, although he be not bound by express words." And the sixth resolution, If lessee for years covenants to repair the houses during the term, it shall bind all others as a thing which is appurtenant, and goeth with the land, in whose hands soever the term shall come, as well those who come to it by act of law, as by [135] the act of the party, for all is one having regard to the lessor. And if the law should not be such, great prejudice might accrue to him; and reason requires, that they who shall take the benefit of such covenant when the lessor makes it with the lessee, should on the other side be bound by the like covenant when the lessor makes it with the lessor." So also in *The Dean & Chapter of Windsor's Case*, 5 Co. 24 a. it is laid down, that "such covenant which extends to the support of the thing demised, is quodam modo appurtenant to it, and goes with it."

Now in the present instance the covenant clearly extended to the support of the thing demised.

The Court said, though the deed was very ill drawn, they were clearly of opinion, that the covenant in question was quodam modo annexed and appurtenant to the thing demised, according to the first and sixth resolutions in *Spencer's case*, which were directly in point, and therefore that the assignee was bound, though he was not named.

Judgment for the Plaintiff.

NIXON AND OTHERS, Assignees of Whitesett, a Bankrupt, against JENKINS.

Friday, May 10th, 1793.

[Principle approved, *Heilbut v. Nevill*, 1870, L. R. 5 C. P. 480.]

A trader on the eve of bankruptcy makes a collusive sale of goods to A. The assignees cannot maintain trover for them, without proving a demand and refusal (a).

Whitesett, in contemplation of insolvency, and with a view to defeat the claims of his creditors, sold a large quantity of goods to the Defendant Jenkins. Soon after the sale he committed an act of bankruptcy, and his assignees brought this action of trover to recover the value of the goods. But having failed to prove at the trial a demand and refusal to deliver, the Lord Chief Justice was of opinion that they could not recover, there being no evidence of a conversion. But it was agreed that the opinion of the Court should be taken, and a rule was accordingly obtained to shew cause why a nonsuit should not be entered; against which Lawrence, Serj., now shewed cause. He contended that a demand and refusal was necessary to support an action of trover, only in cases where the possession was originally lawful; here it was a wrongful possession, inasmuch as the bankrupt had no right to make a fraudulent sale of his effects in order to cheat his creditors. And he cited 1 Sid. 264. 1 Leon. 223. 4 Burr. 2477. Hob. 187.

But the Court held, that a demand and refusal were necessary to maintain the action. When the sale was made, the parties were competent to contract; there was no unlawful [136] taking of the goods, though the transaction was liable to be impeached by the assignees. They might either affirm or disaffirm the contract, and if they thought proper to disaffirm it, they ought to have demanded the goods, a refusal to deliver which would have been evidence of a conversion.

Rule absolute for entering a nonsuit.

(a) [But a sale of a ship (afterwards lost at sea) made by the Defendant, who claimed under a defective conveyance from a trader before his bankruptcy, is a sufficient conversion to enable the assignees to maintain trover without a demand and refusal. *Bloxam v. Hubbard*, 5 East, 407. And a bankrupt may bring trover against his assignees, in order to try the validity of the commission without any previous demand and refusal. *Summersett v. Jarvis*, 3 Brod. & Bing. 2. See also 2 Saund. 47 g. (notes).]

BUCKLAND, Executor of Elizabeth Barton, *against* BARTON. Monday,
May 13th, 1793.

[Referred to, *Bai Mootwahoo v. Bai Mamoo bai*, 1897, L. R. 24 Ind. App. 103.]

A bond conditioned for the payment of a sum of money to such person as A. B. shall by will appoint, is not forfeited by non-payment to the residuary legatee of A. B. no specific appointment having been made. A power of appointment by will is not executed by a mere devise of the residue (a).

This was an action of debt, on a bond conditioned for the payment of an annuity of 40l. a year to the testatrix during her life, "and also in case she the said Elizabeth Barton shall happen to depart this life at any time during or before the expiration of five years from the day of the date of the above written obligation, then, and in that case, if he the said James Barton, (the Defendant,) his heirs, executors and administrators, or any or either of them, do and shall well and truly pay, or cause to be paid, to such person or persons as she the said Elizabeth Barton shall in and by her last will and testament in writing, or in and by any writing purporting to be her last will and testament, to be by her signed and sealed in the presence of two or more credible witnesses, nominate, direct or appoint to have or receive the full and just sum of one hundred pounds of lawful money of Great Britain, without any deduction, defalcation or abatement whatsoever out of the same, for or on account or pretence of any matter, cause, or any thing whatsoever, within the time or space of six months next after the time of the decease of her the said Elizabeth, then the above written obligation shall be void, &c."

The Defendant, after oyer of the bond and the above condition, pleaded that "the said Elizabeth Barton did not in and by her last will and testament, &c. nominate, direct or appoint any person or persons to have or receive the said sum of 100l. &c."

The Plaintiff replied, that "the said Elizabeth Barton did duly make her last will and testament, &c. and did thereby nominate, direct and appoint the said Plaintiff to have and receive the said sum of 100l. &c. &c." Upon which fact an issue was taken in the rejoinder. The will of Elizabeth Barton referred to a former bond given by the Defendant for the securing her an annuity of 30l. a year, and which was afterwards cancelled, but took no notice of the bond in question, or of any [137] power of appointment; but in support of the affirmative of the issue, the Plaintiff relied on the following residuary clause, "And as to all the rest, residue and remainder of my ready money, personal estate, and effects whatsoever and wheresoever, not hereinbefore given and disposed of, (except the sum of 10l. which I gave and bequeath to A. B. to be paid to him by my executor immediately after my decease) I give and bequeath the same to the said Marmaduke Buckland (the Plaintiff) for his own use, &c." and obtained a verdict. But a rule was granted to shew cause why the verdict should not be set aside, and a nonsuit entered, against which

Bond, Serjt., shewed cause, contending that the property of the 100l. was vested in the testatrix Elizabeth Barton; and that though no specific appointment was made of it, yet it passed to her devisee under the residuary clause in her will. That though the case of *Pease and another v. Maud*, Hob. 7, and *Moore*, 855, might be cited on the other side, that was over-ruled by subsequent decisions, 2 Atk. 172, *Bainton v. Ward*, 2 Vern. 319, *Thompson v. Towne*, 465, *Lassels v. Ld. Cornwallis*, 181, *Robinson v. Dugdale*, in which last case there were no equitable considerations in favour of creditors, but "I. S. having devised his lands to A. for life, remainder to B. in fee, he paying four hundred pounds, whereof two hundred to be at the disposal of his wife, in and by her last will and testament, to whom she should think fit to give the same," and the wife dying intestate, it was decreed that her administrator was intitled to the 200l. the property being vested in her. If therefore in that case the money went to the representative of the wife, so ought it to go in the present instance, where there is a specific devise of the residue of her effects.

Le Blanc, Serjt., in support of the rule. The question on these pleadings, on

(a) [Vide *Roe d. Reade v. Reade*, 8 T. R. 118, and *Doe d. Nowell v. Roake*, 2 Bingh. 497, in which most of the modern cases on the subject of the execution of powers are cited.]

which the issue is taken, is, whether the Plaintiff Buckland were appointee of the testatrix? Now as another bond is referred to in the will, and that in dispute not mentioned, it is to be presumed that she did not mean to make any appointment under that bond. With respect to the authorities cited on the other side, the cases of *Bainton v. Ward*, *Thompson v. Towne*, and *Lassels v. Ld. Cornucallis*, proceeded on the ground of a court of equity interfering for the payment of creditors, in preference to other persons; and in *Robinson v. Dugdale*, the grounds of the decision are not fully stated. But the case of *Pease v. Meade*, is good law, where, as it is reported Godb. 192, Cook made this distinction, "if I be [138] bounden to pay 10l. to the assignee of the obligee, and his assignee makes an executor, and dieth, the executor shall not have the 10l. But if I be bounden to pay 10l. to the obligee or his assignees, there the executor shall have it, because it was a duty in the obligee himself." And other cases are expressly in favour of the Defendant, and shew that a mere devise of the residue is not an execution of a power of appointment. *Molton v. Hutchinson*, 1 Atk. 558. *Ex parte Caswell*, 559. *Andrews v. Emmot*, 2 Brown. Rep. Chan. 297.

EYRE, Lord Chief Justice. I cannot consider the 100l. in this case as any part of the wife's estate, and unless that point can be established, it clearly cannot pass under the devise of the residue. As to the cases which have been cited from 2 Vern. 319, and 465, in those cases the money subject to the power was the party's own money; in one secured by bond, in the other by a charge on the estate, and if not disposed of, it resulted back; and the Court held, that though there was no appointment executed, yet being the party's own money, it was assets for the benefit of creditors; so that in those cases the money was only left where it was before. With respect to the case in 2 Vern. 181, it is difficult to say that the money was vested in the wife, though the Court are stated to have holden that doctrine; for if it were vested in her, she might have called for it in her lifetime (a).¹ But a reason may be given why the Court in that case might hold that it was vested in her, which is this, the payment of 400l. was a condition precedent to the vesting of the land in the party who was to pay it; it was therefore a liberal construction, and for the benefit of the party, because, being a condition precedent, the estate might be considered as not vested in him without it. But the case of *Pease v. Meale* is directly in point, and the reason given by Cook in the report in Godbolt, is the true one, that if a man be bound to pay a sum of money to the obligee or his assigns, there the executors shall have it, because it was a duty in the obligee himself. So if in the present case it could be shewn that there was a duty in the wife herself, that instance would be applicable; but she was not to take, there was no duty in her, and therefore the money could not pass to her assignee in law, it being in that character only that her executor could claim it. For it is sufficiently clear from the latter cases cited by my Brother Le Blanc, that a mere devise of the residue does not amount to an execution of a power of appointment. As to the cases, where money so circumstanced has been made assets in favour of creditors, those cases have been decided on principles [139] peculiar to a court of equity; but decisions in a court of equity afford no authority for a court of law, unless they proceed on legal grounds. It is a matter for a court of equity to supply the defective execution of a power, but all we can do is, to see whether the money passed to the executor, that is, whether it were part of the wife's personal estate. But there is no case which has gone that length, where a bond has been conditioned for the payment of money to the nominee of a third person.

GOULD, J., of the same opinion.

HEATH, J., of the same opinion.

The true rule as to powers of appointment by will is laid down in *Sir Edward Clere's case* (6 Co. 17 b.), viz. that where one has a power to appoint by will, but makes a will without any reference to the power, the appointment shall have no effect, unless the will would otherwise have no operation: which principle is alluded to in the case in equity last cited by my Brother Le Blanc (a).²

WILSON, J., of the same opinion.

End of Easter Term.

(a)¹ [But a gift of a sum to the testator's wife, to be disposed of as she thinks proper, to be paid after her death, is not a power, but vests the whole interest in the legatee. *Hevon v. Oliver*, 13 Ves. 108, and see Sugd. on Powers, 102, 2d. edit.]

(a)² *Andrews v. Emmot*, 2 Brown's Reports Chan. 297.

[141] CASES ARGUED AND DETERMINED IN THE COURTS OF COMMON PLEAS, AND EXCHEQUER CHAMBER, IN TRINITY TERM, IN THE THIRTY-THIRD YEAR OF THE REIGN OF GEORGE III.

MASTER *against* MILLER. Wednesday, June 5th, 1793.

[In the Exchequer Chamber in Error.]

See the declaration and special verdict at length, 4 Term Rep. B. R. 320.

[And see S. C. in error, 1 Austr. 225.]

[See *Davidson v. Cooper*, 1844, 13 Mee. & W. 343; *Aldous v. Cornwell*, 1868, L. R. 3 Q. B. 576; *Hirschman v. Budd*, 1873, L. R. 8 Ex. 173; *Suffell v. Bank of England*, 1882, 9 Q. B. D. 560; *Bradlaugh v. Newdegate*, 1883, 11 Q. B. D. 11; *Bradford Corporation v. Ferrand*, [1902] 2 Ch. 662.]

An alteration of the date of a bill of exchange, by which the day of payment would be brought forward, vitiates the bill, and no action can be maintained upon it after such alteration, though in the hands of an innocent indorsee for a valuable consideration (a)¹.

On behalf of the Plaintiff, Wood argued as follows. It has been contended, on the other side, in the Court below, that the acceptor of the bill was discharged from his acceptance by the alteration of the date, though made without the knowledge of the holder: but no case has been cited to shew, that an alteration, such as was made in the present instance, would vitiate a written instrument, except it were a deed. But there is a material difference between deeds and bills of exchange. Deeds seldom, if ever, pass through a variety of hands, and [142] are not liable to the same accidents to which bills are, from their negotiability, exposed. There is therefore good reason in the rule which requires that deeds should be strictly kept, and which will not suffer the least alteration in them; but the same rule is not applicable to bills. In ancient times the Court decided on the inspection of deeds, for which reason a profert was necessary, that they might see whether any rasure or alteration had taken place: but bills of exchange were always within the cognizance of the jury. The form of the issue on a deed also, is different from that on a bill; in the one it is, that it is not then, i.e. at the time of plea pleaded, the deed of the party, 11 Co. 27 a. *Pigot's Case*, but the issue on a bill is, that the Defendant did not undertake and promise. Here the jury have expressly found that the Defendant did accept the bill, and the promise arises by implication of law from the acceptance. An alteration in the date, subsequent to the acceptance, will not do away the implied promise. In *Price v. Shute*, "a bill was drawn payable the first of January; the person upon whom it was drawn accepts the bill to be paid the first of March, the servant brings back the bill: the master perceiving the enlarged acceptance strikes out the first of March, and puts in the first of January, and then sends the bill to be paid; the acceptor then refuses: whereupon the person to whom the monies were to be paid, strikes out the first of January, and puts in the first of March again. In an action brought on this bill, the question was, whether these alterations did not destroy the bill? and ruled they did not. 2 Molloy 109 (a)²." In *Nicols v. Haywood*, Dyer, 59, it was holden in the case of a bond, that where the seal was destroyed by accident before the trial, the jury might find the special matter,

(a)¹ [The principle of this case is not confined to negotiable instruments: thus an alteration will avoid a broker's sale-note, *Powell v. Dwyett*, 15 East, 30; or a policy of insurance, *French v. Patten*, 1 Campb. N. P. C. 72. To avoid the instrument, the alteration must be in a material part, *Trapp v. Spearman*, 3 Esp. N. P. C. 57. *Marson v. Petit*, 1 Campb. N. P. C. 82 (n) and see *Tidmarsh v. Grover*, 1 M. & S. 735. *Cowie v. Halsall*, 4 B. & A. 197, and where the alteration is merely the correction of a mistake, it will not invalidate the instrument, *Kershaw v. Cor*, 3 Esp. N. P. C. 246. See also *Knill v. Williams*, 10 East, 431. *Cole v. Parkin*, 12 East, 471. *Bathe v. Taylor*, 15 East, 412. *Downes v. Richardson*, 5 B. & A. 674. *Kennerley v. Nash*, 1 Stark. N. P. C. 452. *Jacobs v. Hart*, 2 Stark. N. P. C. 45. *Brutt v. Picard*, 1 R. & M. N. P. C. 37.]

(a)² [Beawe's Lex Mercat. tit. Bill of Exchange, pl. 222.]

and being after plea pleaded, it could not be assigned for error, but the Plaintiff recovered. To the same point also is Cro. Eliz. 120, *Michael v. Stockwith*. So in the present case, it was competent to the jury to find the special matter, and an alteration in the bill subsequent to the time of the acceptance, ought not to prevent the Plaintiff from recovering. In *Dr. Leyfield's case*, 10 Co. 92 b. it is said, "in great and notorious extremities, as by casualty of fire, that all his evidences were burnt in his house, there, if that should appear to the judges, they may, in favour of him who has so great a loss by fire, suffer him upon the general issue to prove the deed in evidence to the jury by witnesses:" the casualty by fire is [143] only put as an instance, for the principle is applicable to all cases of accident. Thus also in *Read v. Brookman*, 3 Term Rep. B. R. 151, a deed was pleaded as being lost by time and accident, without a proferet: and the present case is within the reason and spirit of that determination.

Bearcroft, contrâ. On principles of law and sound policy, the Plaintiff ought not to recover. The reason of the rule, that a material alteration shall vitiate a deed, is applicable to all written instruments, and particularly to bills of exchange, which are of universal use in the transactions of mankind. And here there was a material alteration in the bill, inasmuch as the time of payment was accelerated. As to the case of *Price v. Shute*, it is but loosely stated, and that not in any book of reports; and it does not appear against whom the action was brought.

LORD CHIEF JUSTICE EYRE. I cannot bring myself to entertain any doubt on this case, and if the rest of the Court are of the same opinion, it is needless to put the parties to the delay and expence of a second argument. When it is admitted that the alteration of a deed would vitiate it, the point seems to me to be concluded; for by the custom of merchants, a duty arises on bills of exchange from the operation of law, in the same manner as a duty is created on a deed by the act of the parties. With respect to the argument from the negotiability of bills of exchange and their passing through a variety of hands, the inference is directly the reverse of that which was drawn by the counsel for the Plaintiff: there are no witnesses to a bill of exchange, as there are to a deed; a bill is more easily altered than a deed; if therefore courts of justice were not to insist on bills being strictly and faithfully kept, alterations in them highly dangerous might take place, such as the addition of a cypher in a bill for 100l., by which the sum might be changed to 1000l. and the holder having failed in attempting to recover the 1000l. might afterwards take his chance of recovering the 100l. as the bill originally stood. But such a proceeding would be intolerable. It was said in the argument that the Defendant could not dispute the finding of the jury, that they had found that he accepted the bill, and therefore that the substance of the issue was proved against him. But the meaning of the plea of non assumpsit is, not that he did not accept the bill, but that there was no duty binding on him at the time of the plea plead-[144]-ed (a). There are many ways by which the obligation of the acceptance might be discharged; for instance, by payment. And it was certainly competent to him to shew, that the duty which arises primâ facie from the acceptance of a bill, was discharged in the present case, by the bill itself being vitiated by the alteration which was made.

LORD CHIEF BARON MACDONALD. I see no distinction, as to the point in question, between deeds and bills of exchange: and I entirely concur with my Lord Chief Justice, in thinking there would be more dangerous consequences follow, from permitting alterations to be made on bills, than on deeds.

The other Judges declared themselves of the same opinion.

Judgment affirmed.

HAMILTON against LE GRANGE. Wednesday, June 5th, 1793

[In the Exchequer Chamber in Error.]

See 4 Term Rep. B. R. 613.

A memorandum indorsed on a bond, which was conditioned for the payment of 100l. by quarterly payments of 5l. each, and interest at 5l. per cent., "that at the end of each year the year's interest due was to be added to the principal, and then the 20l.

(a) See Dougl. 111 & 112, 8vo, *Sullivan v. Montague*, and the notes there.

received in the course of the year was to be deducted, and the balance to remain as principal, and so continue yearly till both principal and interest were fully paid," was not usurious.

This was an action of debt on a bond, conditioned for the payment of 100*l.* with interest at 5*l.* per cent. in yearly payments of 20*l.* by four quarterly payments of 5*l.* each, until the whole should be paid. There was also a memorandum indorsed as follows, "That it is the true intent and meaning of the parties, that at the expiration of each and every year, the year's interest due is to be added to the principal sum, and then the 20*l.* received during the course of the year to be deducted, and the balance to remain as principal, and so continue yearly, until both principal and interest be fully paid." The Defendant, after oyer of the condition and memorandum, pleaded usury, and obtained a verdict, which the Court of King's Bench afterwards set aside, being of opinion that the contract disclosed was not usurious. (4 Term Rep. B. R. 613.) A writ of error having been brought on the judgment of that Court, Reader now argued on the part of the Plaintiff in error, contending that it was a corrupt and usurious contract, being made with a view to receive more than 5 per cent. interest. The smallness of the sum of 100*l.* is the only thing which makes any difficulty in judging of the transaction. But suppose the bond to have been given for 10,000*l.* payable by 2000*l.* a year in [145] quarterly payments of 500*l.* the usury will then be manifest, for by the terms of the agreement, at the end of the year, the year's interest is to be added, (which must mean the year's interest on the whole sum, as no other is mentioned,) notwithstanding the several payments of the principal, at the end of the first, second, and third quarters, for which no allowance is to be made.

LORD CHIEF JUSTICE EYRE stopped Gibbs, who was going to argue on the other side, and said, the Court must strain the words of the contract in order to make it usurious: it was not the interest on 100*l.* but the interest due that was to be added to the principal at the end of the year, and the interest due could only be taken to mean what was legally due.

WILSON, J. Even admitting the construction contended for, there does not appear to me to be usury, for there was no loan, but the consideration of the bond was the giving up an annuity; the memorandum was part of the agreement, and the terms upon which the annuity was relinquished.

Judgment affirmed.

ILDERTON *against* ILDETON. Wednesday, June 19th, 1793.

[Referred to, *Jackson v. Spittall*, 1870, L. R. 5 C. P. 549.]

A marriage celebrated in Scotland (but not between persons who go thither for the purpose of evading the laws of England) will intitle the woman to dower in England. The lawfulness of such a marriage may be tried by a jury; a replication therefore to a plea of "*ne unques accouple*" in a writ of dower, alleging a marriage in Scotland, may conclude to the country: and in such replication, it is not necessary to state that the marriage was had in any place in England, by way of venue (*a*).

This was a writ of dower unde nihil habet, and the pleadings were as follows,

Northumberland to wit, Mary, otherwise Maria Ilderton, widow, who was the wife of Thomas Ilderton, Esquire, deceased, by Townley Ward, her attorney, demands against Robert Ilderton, the third part of ten messuages, ten barns, ten stables, four gardens, four orchards, one water corn mill, 2000 acres of land, 2000 acres of meadow, 2000 acres of pasture, 2000 acres of moor, and 200 acres of woodland, with the appurtenances, in the parish of Ilderton in the county of Northumberland, as the dower of the said Mary, otherwise Maria, of the endowment of the said Thomas Ilderton, heretofore her husband, whereof she has nothing, &c.

Plea. And the said Robert Ilderton by Henry Barney Mayhew his attorney comes and says, that the said Mary, otherwise Maria, ought not to have her dower in this behalf, as having been the wife of the said Thomas Ilderton deceased, because he says, that the said Mary, otherwise Maria, never was accoupled to the said Thomas

(a) [Vide 1 Saund. 8 a. (n) 5th Edit.]

Ilderton, deceased, in lawful matrimony. And this the said Robert Ilderton is ready to [146] verify, therefore he prays judgment if the said Mary, otherwise Maria, ought to have her dower of the messuages and tenements aforesaid, with the appurtenances.

Replication. And the said Mary, otherwise Maria, by the said Townley Ward her attorney aforesaid, says, that she ought not by any thing in the plea of the said Robert above alleged, to be barred from having her dower aforesaid, in this behalf, because she says, that she the said Mary otherwise Maria, on the 6th day of September, in the year of our Lord 1774, was accoupled to the said Thomas Ilderton deceased, in lawful matrimony, at Edinburgh, in that part of Great Britain called Scotland, and this she prays may be enquired of by the country, &c.

Demurrer. And the said Robert saith, that the said plea of the said Mary, otherwise Maria, in manner and form aforesaid above pleaded, by way of reply to the said plea of the said Robert by him above pleaded, and the matters therein contained, are not sufficient in law for the said Mary, otherwise Maria, to have or maintain her said action thereof against him, and that he the said Robert is not bound or obliged by the law of the land to make answer thereto, and this he is ready to verify, wherefore, for want of a sufficient replication in this behalf, the said Robert, as before, prays judgment, and that the said Mary, otherwise Maria, may be barred from having her dower aforesaid, in this behalf, and for causes of demurrer in law in this behalf, the said Robert, according to the form of the statute in such case made and provided, specially sets down and shews to the Court here, the causes following, (that is to say) that the said supposed marriage in the replication mentioned, and therein alleged to have been celebrated in that part of Great Britain called Scotland, is not a marriage whereby, or by reason whereof, the said Mary, otherwise Maria, can by law claim or intitle herself to any dower of the tenements above mentioned. "And also for that the said Mary, otherwise Maria, hath not laid any place by way of venue, where the said supposed marriage was had." And also for that the said replication is ill concluded, by being concluded to the country; and for that the said Mary, otherwise Maria, hath by her said replication and the conclusion thereof, attempted to put in issue, and draw to a trial of the country, a matter which is not by law triable by a jury of the country, "but which is of ecclesiastical cognizance, and which ought to be tried by the certificate of the bishop, to whom the right of certifying whether the said Mary, otherwise Maria, and [147] Thomas Ilderton deceased, were or were not accoupled in lawful matrimony, belongs. And also for that it does not appear to the court here, to what bishop, or other spiritual judge or person, any writ can or ought to be directed or sent, to inquire and certify whether the said Mary, otherwise Maria, was accoupled to the said Thomas Ilderton deceased, in lawful matrimony, or not," and also for that the said replication is in other respects defective and informal.

Joinder in Demurrer.

This cause was first argued in Michaelmas term 1791, by Le Blanc, Serjt., for the demandant, and Cockell, Serjt., for the tenant, and a second time in Hilary term 1792 by Lawrence, Serjt., for the demandant, and Bond, Serjt., for the tenant: after which, and before any judgment was given, the tenant died. In consequence of this a fresh writ was brought, and the pleadings being altered by the additional assignment of the causes of demurrer, marked with inverted commas (" "), a third argument came on in the present term, when Le Blanc, Serjt., argued for the demandant, and Adair, Serjt., for the tenant.

It was admitted, on these arguments, at the Bar, and assented to by the Bench, that the first cause of demurrer could not be maintained, it being taken as an undoubted proposition, that a marriage celebrated in Scotland was such a marriage as would intitle the woman to dower in England (a). The points, therefore, which were made on the part of the tenant, were two: 1. That the lawfulness of marriage was exclusively the subject of ecclesiastical cognizance, and therefore not to be tried by a jury of the

(a) But this proposition is quite clear of the question, whether marriages celebrated in Scotland, between persons who go thither in order to evade the laws of England, be valid in England. See the case of *Compton v. Bearcroft* before the delegates, shortly stated Bull. N. P. 113, 8vo. See also the observations on this subject, contained in a note Co. Litt. by Hargr. & Butl. p. 79 b. & 80 b. [See also *Dalrymple v. Dalrymple*, 2 Haggard, 54. *Serimshire v. Serimshire*, Id. 395. *Ruding v. Smith*, Id. 376 (n).]

country. 2. That some place within the kingdom of England ought to have been laid as a venue in the replication, where the marriage should have been alleged to have been celebrated.

1. Although the fact of marriage may be tried by the country, yet the lawfulness of it being a matter solely of ecclesiastical jurisdiction can be decided by no other mode than the certificate of the bishop, which is indispensable in the cases of dower and appeal. This principle, which arose from the circumstance of marriage being a sacrament of the Church of [148] Rome, is to be found in the earliest authorities in the law. Bracton lays it down "cum autem talis proponatur exceptio, quod dotem habere non debeat, eo quod non fuit tali viro (per quem petit) matrimonialiter desponsata, vel legitimo matrimonio copulata, huiusmodi inquisitio fieri non potest nec debet in foro seculari, cum sit spirituale; et ideo demandetur inquisitio facienda ordinario loci, sicut archiepiscopo, episcopo, vel aliis privilegiatis, quibus papa huiusmodi concesserit cognitionem," then follows the form of the writ to the archbishop or bishop, in which it is expressly said, quoniam huiusmodi cause cognitio ad forum spectat ecclesiasticum, &c. Bracton de Actione Dotis, 302 a. Thus also Fleta, lib. 5, c. 28, "Super contentionem autem desponsationis, et divortii celebrationem, non poterit iusticiarius procedere in foro seculari; indeoque demandetur inquisitio facienda archiepiscopo vel episcopo loci, quia huiusmodi causarum cognitio spectat ad forum ecclesiasticum, quod convocatis convocandis, veritatem diligenter inquirent, et inde certificent iusticiariis per literas suas patentes." So likewise Britton, cap. 107, 108, pp. 252, 255, *Exceptiones de concubinage* &c. is to the same effect. Thus too Glanville says, "Si quis versus aliquem hereditatem aliquam tanquam heres petat, et alius ei objiciat quod heres inde esse non potest eo quod ex legitimo matrimonio non sit natus, tunc quidem placitum illud in curia Domini Regis remanebit, et mandabitur archiepiscopo vel episcopo loci, quod de matrimonio ipso cognoscat; et quod inde judicaverit, id Domino Regi, vel ejus iusticiariis scire faciat," lib. 7, cap. 13, and then follows the writ to the bishop.

And this principle is recognized by Lord Coke, Co. Litt. 33 a. 134 a. 4 Co. 29 a. *Bunting v. Lepingwell*, Moore, 169. 2 Roll. Abr. 584, 585, tit. Trial. Style, 10. *Betsworth v. Betsworth*, Bro. Abr. tit. Trial, pl. 16. 2 Wils. 122, 127, *Robins v. Crutchley*. It being clear therefore that the lawfulness of marriage can only be tried by the certificate of an Ecclesiastical Judge, though episcopacy has been abolished in Scotland, and therefore there can be no certificate where the espousals were celebrated, yet it by no means follows that the trial shall be by the country: it ought rather to be by the certificate of the bishop in whose diocese the lands lie. Although there may be possibly no instance in dower, expressly in point, yet in similar cases the writ has gone to the bishop of the diocese where the lands were situated. Thus in an assise of Mort d'ancestor "the tenant pleaded bastardy in the demandant, who said he was Mulier and born in another diocese, and prayed a writ to the [149] bishop of that diocese to certify, and yet the writ was awarded to the bishop of the diocese where the action was brought," i.e. where the lands lay. 35 Ass. 7 Bro. Abr. tit. Certificate d' Evesque, pl. 14. So in a writ Sur. cui in vita, where bastardy was pleaded, and a marriage replied in the county of S., the writ was awarded to the bishop of E. where the lands were. Year Book, 7 Hen. 5, 7 & 8 Bro. tit. Trial, pl. 21. Thus also in an assise of novel disseisin of lands in the diocese of Winchester, where the plea of bastardy was set up, and a marriage alleged to have been had in London, the writ to certify was awarded to the bishop of Winchester, and not to the bishop of London. 38 Ass. pl. 30, p. 231.

2. It is a rule of law, that on every fact stated in pleading to have happened in a foreign country, a venue must be alleged within the realm of England for the purpose of trial. Co. Litt. 251 a. & b. 2 Keb. 315. Style, 342. 6 Co. 47. *Dowdale's case*, *Mostyn v. Fabrigas*, Cowp. 176, per Lord Mansfield; and undoubtedly Scotland, notwithstanding the union, is in this respect a foreign country. The replication therefore is bad in this point of view, and the defect is pointed out by a special demurrer.

On the part of the demandant, the arguments were as follow.

It is not denied, that the lawfulness of marriage is a matter of ecclesiastical cognizance, but it is manifest that in dower the writ to certify ought to be directed, not to the bishop in whose diocese the lands are situated, but to him in whose diocese the espousals were celebrated.

This plainly appears from the form of the proceedings in the Entries. Thus in Rast. Entr. 223 a. tit. Dower, to a count in dower the tenant pleads ne unques accouple, the demandant replies, that she at C. in the county of C. in the parish church of M. was accoupled to the said R. (her husband) in lawful matrimony, and this she is ready to verify, when and where the Court shall award.

The record goes on, "And because the conuzance of causes of this kind belongeth to the Ecclesiastical Court, therefore it is commanded W. bishop of C. and L. the diocesan of the said place, that he, convening before him those who ought to be convened, in this behalf, do diligently inquire into the truth of the fact, and what he shall find thereon he shall make appear to our justices at Westminster by his letters patent and close." Then follows the writ to the bishop, reciting the pleadings and issue, and the parish and church where [150] the espousals are alleged to have been had. So also in Rast. 223 b. there is a similar entry, though in neither instance is it clearly marked in what county the lands lay. In Co. Entr. 180 b. tit. Dower, where the demand is of dower in London, to a plea of ne unques accouple, the replication is, That the demandant at the parish of St. Hilary in the county of Glamorgan in the diocese of Llandaff, was accoupled in lawful matrimony, &c. "Therefore because the issue must be tried by the bishop of the said place, it is commanded Francis, Bishop of Llandaff, the diocesan of the said place, &c." In Robinson's Entr. 240, the demand is of lands in Suffolk, the plea ne unques accouple, and the replication, that the demandant at Wested in the said county, in the diocese of Norwich, was accoupled; "Therefore John, Bishop of Norwich, the diocesan of the said place is commanded:" there the lands and the marriage were in the same diocese, but the replication is particular in specifying the parish and diocese. In Bro. Ab. tit. Trials, pl. 114, "in an appeal by a feme of the death of her baron, if the Defendant pleads ne unques accouple in lawful matrimony, this shall be tried where the espousals are alleged, by the certificate of the bishop of the place where the espousals are alleged." To the same point also is Fitz. Abr. 220, Trial, pl. 85.

It appears therefore, that the trial ought to be by the certificate of the bishop of the diocese in which the espousals were celebrated: but where it is impossible, as in the present case, that there should be such a certificate, there the marriage may be tried by the country. There are many instances where certain issues ought regularly to be tried by the certificate of a bishop, yet under particular circumstances those issues may be tried by the country. Thus general bastardy is to be tried by the certificate of the bishop; but there are cases, where, if alleged, it shall be tried per pais; as in formedon, bastardy was alleged in one who was mesne in the conveyance by which the demandant claimed; and because he was dead and not a party to the writ, it was tried per pais, and not by the certificate of the bishop. Bro. Abr. Trial, pl. 10. So where the bastardy of one who is dead comes in issue, it shall be tried per pais, and not by certificate, id. pl. 26. The reason of which is thus given 2 Roll. Abr. 584, Trial, pl. 17. "If bastardy be alleged in a stranger to the writ, it shall be tried by the country, and not by certificate, because if it should be tried by the ordinary, it would be peremptory to the stranger perpetually, if it were certified [151] that he were a bastard," and pl. 19. If bastardy be alleged in one who is dead, it shall be tried by the country, and not by the ordinary, because the judgment cannot be final. So in the case of infancy, a matter of spiritual cognizance, as bastardy, alleged in the infant, shall be tried per pais, 2 Roll. Abr. 586, pl. 34. So if the issue on ne unques accouple is to be tried between strangers, it shall be tried by the country, id. 585, pl. 17. In quare impedit, the ability or non-ability of the clerk shall be tried by the ordinary: but if the ordinary refuses a clerk for non-ability, and gives notice to the patron, who does not present another within six months, whereupon the bishop collates, and the patron brings quare impedit, and insists that his clerk was able, if the clerk be living, the question whether able or not, shall be tried by the metropolitan by examination, but per pais, if the clerk be dead. Bro. Abr. Qua. Imp. pl. 102. 2 Roll. Abr. 583, Trial, pl. 1 and 2. So profession is regularly to be tried by the certificate of the ordinary; but if the profession of a third person comes in question, or of one who is dead, it shall be tried by the country. Hardres, 63. And so it shall be of monks and other exempts, and if the ordinary returns that he is exempt from his jurisdiction, then it shall be tried by the country. 2 Roll. Abr. 587, pl. 38. So it is where the persons to certify are interested: thus customs of the city of London shall be certified by the mayor and aldermen by the mouth of their recorder;

but when the city is itself concerned, such custom shall be tried by the country. Hob. 86. 2 Roll. Abr. 579, pl. 2.

With respect to the want of a venue, which is assigned as a cause of demurrer, it is to be observed that fictions of law are invented for the furtherance of justice, and shall never be contradicted so as to defeat that end, though for every other purpose they may be contradicted. The fiction of a venue with a videlicet, is barely for a mode of trial; to every other purpose therefore it shall be contradicted, but not for the purpose of saying, the cause shall not be tried. *Mostyn v. Fabrigas*, Cowp. 177. So here it shall not be insisted on for the purpose of preventing a trial.

"In an action on a policy of assurance, the plaintiff declared, that the Defendant undertook that such a ship should sail from Melcombe Regis in Dorsetshire to Abbeville in France, safely, without violence, &c. and alleged that the said ship in sailing towards Abbeville, that is to say in the river of Somme in the realm of France, was arrested by the French king, [152] whereupon the parties came to issue, whether the ship was so arrested or not: and this issue was tried at Nisi Prius before Wray, Ch. J., in London, and found for Plaintiff; and it was moved in arrest of judgment, that this issue, arising merely from a place which is out of the realm, could not be tried: and if it could be tried, it was said it should be tried by a jury from Melcombe: but it was answered and resolved, that this issue should be tried where the action was brought. 6 Co. 47 b. 4 Inst. 142."

So too in Pasch. 28 Eliz. "In the King's Bench the case was, a charter party by deed indented was made at Thetford in Norfolk, between Evangelist Constantine of the one part, and Hugh Gynne of the other part, by the which Constantine did covenant with Gynne, that a certain ship should sail with merchandizes of Gynne to Muttrel in Spain, and there should remain by certain days, upon the breach of which covenant, Gynne brought an action of debt for 500l. upon a clause in the charter, and alleged the breach of the covenant, for that the ship did not remain at Muttrel in Spain by so many days, as were limited by the covenant: whereupon issue was taken, and tried before Sir Christopher Wray, Ch. J. of England, and found for the Plaintiff; and in arrest of judgment it was shewn, that this issue did arise out of a place totally and merely in a foreign kingdom, out of the realm, from whence no jury of twelve men could come, and the trial was insufficient.

"But it was adjudged by Sir Christopher Wray, Sir Thomas Gawdy, and the whole Court of B. R., after great deliberation, that the Plaintiff should recover his 500l., besides his damages and costs, for that the charter party whereon the action is brought, was made at Thetford within the realm, and the trial being in the same place where the action was brought, was sufficient. 4 Inst. 141, 142. Co. Litt. 261 b." So too when part of the act, especially the original, is done in England, and part out of the realm, that part which is to be performed out of the realm, if issue be taken thereupon, shall be tried here by twelve men, and those twelve men shall come out of the place where the writ is brought. Co. Litt. 261 b. In Bro. Abr. tit. Trials, pl. 93, it is holden, that in divers cases, jurors shall take cognizance of an act done in another country, as of shipping merchandize to Venice, or of freighting a foreign ship to Bourdeaux against the statute, and of an alien born beyond sea; those things shall be tried in England, and a foreign county shall try damages in another county: and the jurors of one county shall find the making of a grant of a rent-charge in [153] one county, out of lands in another county, and a lease and release made in a foreign county shall be tried in the county where the land lies, and a retainer of services beyond sea shall be tried in England. 7 H. 7, 8.

So it is said that if an act be to be done all beyond sea, it cannot be tried in England: but where part is to be done in England, that part beyond sea, it may be tried in England. Bro. Abr. Trials, pl. 154. So where an agreement is at land, and a performance at sea, it shall be tried where the agreement is made; and saying in *partibus transmarinis infra parochiam*, is idle. 12 Mod. 34, *Can v. Cary*.

LORD CHIEF JUSTICE EYRE. This is a proceeding in dower, and to the declaration there is a plea that the demandant was never accoupled to Thomas Ilberton, deceased, in lawful matrimony. To this plea there is a replication, which states that the demandant, on the 6th of September, in the year of our Lord 1774, was accoupled to Thomas Ilberton deceased, in lawful matrimony at Edinburgh, in that part of Great Britain called Scotland, and the replication concludes to the country. To this replication there is a special demurrer. The demurrer states for cause, that the supposed

marriage in the replication mentioned, declaring it to have been celebrated in that part of Great Britain called Scotland, is not a marriage whereby, or by reason whereof, the demandant can by law claim or intitle herself to have any dower of the tenements above mentioned. There is also another cause of demurrer alleged, That the Plaintiff has not laid any place by way of venue, where the supposed marriage was had. There is a third cause, That the replication is ill concluded, by being concluded to the country, and by having by that conclusion attempted to put in issue, and draw to a trial by a jury of the country, a matter that is not by law triable by a jury of the country, but which is of ecclesiastical cognizance, and which ought to be tried by the certificate of the bishop, to whom the right of certifying, whether the Plaintiff and Thomas Ilderton were or were not accoupled in lawful matrimony, belongs: and also for that it does not appear to the Court, by the said replication, to what bishop, or other spiritual judge or person, any writ can or ought to be directed or sent, to inquire and certify, whether the Plaintiff was accoupled to Thomas Ilderton deceased, in lawful matrimony or not; and there is a joinder in demurrer.

[154] Upon the argument, the first cause of demurrer having been abandoned, the residue of these causes resolves itself into two questions, which have been very ably argued at the Bar; and the Court always feel themselves obliged to the Bar, when they will have the goodness to examine questions of this sort, with that diligence which they have used upon the present occasion. The first of these questions is, Whether the Plaintiff ought in this case to have concluded to the country? The second question is, Whether the replication is either informal, or substantially defective, for want of a venue? In support of the demurrer, and upon the first question it has been argued, that the matter of this replication is exclusively of ecclesiastical cognizance; and a passage from Glanville, book 7, chap. 13 and 14, has been cited in support of these propositions, that in intendment of law, a jury is not competent to decide upon this matter; that there was in this case no necessity for excluding the ecclesiastical jurisdiction; that in cases of bastardy, which it was said are not distinguishable from this case, a writ always goes to the bishop of the diocese where the lands lie, without regard to the place where the espousals were had, or where the birth was; and that the analogy directs how the writ should be directed, where there happens to be no bishop having jurisdiction in the place, where the demandant states herself to have been accoupled in lawful matrimony, and consequently, that in this case the demandant should have prayed a writ to the bishop where the lands lay, and ought not to have concluded to the country.

The passage in Glanville is as follows: "*Hæres autem legitimus, nullus bastardus, nec aliquis qui ex legitimo matrimonio non est procreatus, esse potest. Verum si quis versus aliquem, hæreditatem aliquam tanquam hæres petat, et alius ei objiciat, quod hæres inde esse non potest, eo quod ex legitimo matrimonio non sit natus, tunc quidem placitum illud in curiâ Domini Regis remanebit, et mandabitur archiepiscopo vel episcopo loci, quod de matrimonio ipso cognoscat; et quod inde judicaverit, id domino Regi vel ejus justiciariis, scire faciat, et per hoc breve.*"

Then follows the form of the writ "*Rex archiepiscopo salutem, veniens coram me W. in curiâ meâ, petiit versus R. fratrem suum, quartam partem feodi unius militis in illâ villâ sicut jus suum, et in quo idem R. jus non habet, ut W. dicit, [155] eo quod ipse bastardus sit, natus ante matrimonium matris ipsorum. Et quoniam ad curiam meam non spectat agnoscere de bastardiâ, eos ad vos mitto, mandans ut in curiâ Christianitatis, inde faciatis, quod ad vos spectat, et cum loquela illa debitum coram vobis finem sortita fuerit, mihi literis vestris significetis quid inde coram vobis actum fuerit, &c.*"

Now it must be acknowledged, that the language of these passages very distinctly marks the ground and principle upon which the temporal courts have sent their writs to the bishop, namely, that the cognizance of lawful matrimony belongs to the Court Christian, and not to the temporal courts. "*Placitum illud in curiâ Domini Regis remanebit, et mandabitur archiepiscopo vel episcopo loci, quod de matrimonio ipso cognoscat, et quod inde judicaverit, id scire faciat*" are strong words, and the language of the writ, quoniam ad curiam meam non spectat agnoscere de bastardiâ, eos ad vos mitto, mandans ut in curiâ Christianitatis inde faciatis quod ad vos spectat; et cum loquela illa debitum coram vobis finem sortita fuerit, mihi literis vestris significetis, quid inde coram vobis actum fuerit," is still stronger to mark the sense of the time in which Glanville wrote, that questions of matrimony and bastardy were exclusively of

ecclesiastical cognizance, and that a jury was at that time thought to be not competent to decide upon these questions; or at least if they do not go so far, as a jury not being thought competent to the decision of these questions, they shew that the Court itself was not competent to such examination and decision.

It was agreed by my Brother Adair, that the matrimony of which the Court Christian has at this day exclusive cognizance, is lawful matrimony, as opposed to marriage in fact, and that it was essential that the marriage should be lawful in two cases only, in the case of dower and in the case of appeal: but it is very obvious that Glanville, in the passage which I have read, draws no such line; he supposes that in the case of bastardy, "*mandabitur episcopo, &c. quod de matrimonio ipse cognoscat.*" Glanville wrote in the time of Henry the Second, at which time the distinction between general and special bastardy had not been introduced. The struggle for legitimating the issue born before matrimony, which is recorded in the statute of Merton (2 Inst. 96), 20 Henry 3, c. 9, seems first to have suggested the plea of special bastardy, and it is observable, and is material, that the Temporal Courts, from that time, withdrew the cognizance of [156] special bastardy from the Court Christian. In succeeding times, other considerations induced the Temporal Courts to withdraw from the cognizance of the Court Christian the questions of matrimony and of bastardy, in a variety of cases. In bastardy, the trial by the certificate of the bishop takes place at this day, only in the case of a general allegation of bastardy, and that only so long as the party is living, and not only living, but a party to the suit, and not only a party to the suit, but adult; in matrimony, as is agreed by my Brother Adair, in the two cases only of dower and appeal. It is not therefore to Glanville that we must resort for the present state of the law respecting the trial by certificate of the bishop; and when we advert to the ordinary course of proceeding, in every one of those cases which have been withdrawn from the cognizance of the Court Christian, it will be impossible to maintain that, in intendment of law, a jury is not competent to try questions of matrimony or bastardy. The true proposition is, that the common law is general and fundamental, that the particular trials by the Court Christian are to be considered as privileges, and as such in their nature particular, that every thing which is not within the privilege belongs to the common law. Respecting things which have been considered in early times as proper to be tried by the certificate of the bishop, if for good reason they ought not to be so tried, or if from particular circumstances they cannot be so tried, the common law, out of its own inexhaustible fountain of justice, must derive another mode of trial, and that mode is the trial by the country. It was upon these principles that the case of special bastardy, and every one of the other cases which I have alluded to, have been sent by the Temporal Courts to be tried by the country, instead of being tried by the certificate of the bishop; and they will be found applicable to every case in which the law of England hath admitted of any special mode of trial; for instance, the trial by inspection, by the escheator, by the certificate of the marshal of the king's host, by the certificate of the recorder of London, nay, even at the trial by the record, and in short, every other kind of trial that can be stated.

But it has been argued in support of the demurrer, that in this case there is no necessity for departing from the antient and usual course of trial, of an issue joined on the marriage in dower; that this marriage alleged to have taken place in Edinburgh, in that part of the united kingdom called Scotland, may [157] be tried by the certificate of the bishop of that diocese in which the county where the writ is brought happens to lie. This is not supported by the authority of any case adjudged in point, but it is argued upon the analogy which the present case bears to adjudged cases, and particularly to the case of general bastardy, where the writ to the bishop is said, and I believe truly said, to be always sent to that bishop in whose diocese the lands lie, or, more properly, where the demandant's writ is brought. But there will be found no analogy between those cases and the present. I have observed that the writ to the bishop goes only where there is a plea of general bastardy; the replication to that plea, though it may specially allege the espousals of the parents, or the birth in another diocese, amounts to nothing more than an averment that the demandant was mulier, and not bastard; and in some of the year books, abridged by Brooke, in his title "*Bastardy*," the special allegation of espousals and birth is disallowed by the Court, and the demandant is driven to add "*et sic mulier, et non bastardus*;" and in one of the cases in particular, the whole special allegation is left out of the record,

and nothing entered, but that the demandant was mulier, et non bastardus (pl. 20), and so the writ went of course to the bishop of the diocese where the lands lay, and in that case could by no possibility go to any other bishop.

Upon whatever ground it proceeded in bastardy, the writ always went to the bishop of the diocese where the lands lay. Now in the case of dower, if a general replication to a plea of *ne unques accouple in loyal matrimonie* is admissible, there, by analogy to the case of bastardy, it might be argued that the writ should go to the bishop of that diocese where the lands lay, upon a foundation common to both cases, that the birth in wedlock in bastardy, or the lawful marriage in dower, should be intended to have taken place in the county where the lands lay. But as in most of the cases of dower, and probably in all, the replication is special, of espousals in a particular church, in a particular county and diocese, and as the writ to the bishop has usually gone to the bishop of the diocese where the espousals have been alleged to have been celebrated, and as I have been able to find no case, in which the espousals having been alleged to have been celebrated in another county, and in another diocese, the writ has yet gone to the bishop of the diocese where the lands lay, there seems to be no manner of analogy between the case of bastardy and dower. To whatever [158] bishop the writ in either case is directed, it is sent to him as ordinary, as having either in fact or in the intendment of law, cognizance of the question. The ordinary acts as a judge, in a cause regularly instituted before him: one of the reasons for not sending a writ to the bishop, where a party who is attempted to be bastardized is dead, or a stranger to the suit, is, that the suit in the Court Christian cannot be decided between the parties; it is a false reason to say that it does not go in that case because it is peremptory; it is peremptory because it is the judgment of a Court of competent jurisdiction, in a suit between the parties. If under any circumstances, the writ goes to a bishop within whose diocese the espousals were in fact not celebrated, it is pretty clear that he might decline certifying. In one of the cases that were cited, it was said expressly, that he might return by way of answer to the writ, that the place of the espousals alleged to be within his diocese was not within his diocese, which return could not be admitted if the writ might go to any bishop, in respect of the matter being in its nature of ecclesiastical cognizance. All the analogies of law contradict that notion. In the theory of our law, a jury of one county could not try a matter of fact arising in another county. If we are to resort to analogy, let us consider how the law stands respecting the certificate of the bishop. In the case of profession, the writ went to the bishop of that diocese in which the religious house was situate, upon the presumption that he was the ordinary, and could examine; but if the religious house happened to be exempted, as was frequently the case, this was a sufficient return to the writ, and the trial by certificate could not be had. If a question arises in quare impedit, the writ goes to the bishop of the diocese to certify, but if the bishop claims any thing more than as ordinary, so that he may be a disturber, the writ cannot go to him, for he is interested: in that case it does not go to any other bishop, but it goes to his metropolitan. Why? Because he is superior ordinary. Suppose the case then to arise in the diocese of the Archbishop of Canterbury, who has no superior ordinary, and he was a disturber, and consequently the writ could not go to him, all the analogies of law exclude the idea of the writ being sent to any inferior ordinary; in that case, therefore, it is evident that in a matter confessedly arising, not only within the kingdom, but even within the diocese where the writ is brought, and where the lands lay, there could be no writ to the [159] bishop. If in all cases in which a writ goes to the bishop, the writ is sent to that bishop who has, or is at least presumed to have, jurisdiction of the subject matter; if it is sent to him as ordinary, and in no other character, and if where it cannot be sent to the ordinary, even within the kingdom, it cannot be sent to a bishop at all, upon what principle, or upon what analogy of law, can a marriage distinctly stated to have been celebrated out of any diocese, out of any actual or presumed jurisdiction of any ordinary, nay out of the kingdom, be sent to any bishop to be by him inquired into and certified? If the trial cannot be by certificate, we lay it down as a proposition fundamental and incontrovertible, that the trial is to be by the country: and for a reason that is unanswerable, that there may not be a failure of justice. This is not a point to be debated, but they who have the curiosity to enquire what has been done in cases of a similar exigency, may find in Sir Thomas Hardres's Reports, 65, several instances collected by him in an argument delivered by him, of cases, in their own nature

triable by the bishop's certificate, sent to be tried by the country, upon the particular circumstances of those cases. One of them is taken from the Year Book 2 Richard 33 & 4, and it was trespass for taking of goods: the Defendant pleaded a will by which he was constituted executor, and so entitled himself to the goods in question, which had been the testator's. The Plaintiff said, that after the will was made, whereby the Defendant was appointed to be executor, the testator made another will, wherein he appointed the Plaintiff to be his executor; the Defendant pleaded that the Pope, by his bull, had delegated such a one to examine this matter, who had by sentence annulled the will by which the Plaintiff claimed. It was resolved, that because this matter was not triable by the certificate of any bishop of England, to whom the Court might write, that therefore some matter must be put in issue triable *per patriam, ne deficiat justitia*.

The second question which arises upon this demurrer, is, whether in point of form or in substance, it was necessary that the Plaintiff should have alleged that the espousals were celebrated in some place, within some county in England, in order to a trial by the country, supposing that such is to be the trial in this case? I must conclude that this inserting of a place has been anxiously avoided, considering the circumstances in which this replication has been framed: I suppose from an apprehension, in my judgment unfounded, that the alleging a place within a county, for the purpose of trying here a matter arising in a foreign country, might have assisted the argument in favour of a trial by certificate. The leaving the replication open to this objection, undoubtedly gives great advantage to the Defendant, because, if he can maintain that it is the established form of replication, in similar cases, to allege a place within a county in England, the want of it will support his demurrer, it being specially assigned for cause, though in truth it be but a mere form, and not at all essential to the real justice of the case: and if it should in the result be found that there is no such established form of replication, the Defendant has still this advantage, that he will be at liberty to insist that the replication is in this respect substantially defective, and that in this respect, therefore, the demurrer will hold. The question of mere form must be decided by the books of entries; but no one entry has been produced, in a case exactly similar, and very few, if any, in cases analogous, that is, where any matter arising in a foreign country is replied. Forms of declarations stating matters arising in a foreign country, or even pleas, are no precedents. Replications stand upon their own ground in this respect; they have reference to the declaration, they maintain the declaration, and they cannot be entirely separated from the declaration, in the way in which a plea in bar may. They may therefore have the assistance of the declaration, as far as concerns the allegation of a place within a county of England, for the mere purpose of trial. The cases cited on the part of the Defendant, for another purpose, proving or tending to prove that special espousals or birth in another county should be tried where the writ is brought, and many other cases which are to be found in the books, some of which were also cited, of matter respecting the persons, when pleaded in abatement, being tried where the writ is brought, sufficiently establish that the replication may borrow a place, for the mere purpose of trial, from the declaration, of which I make no other use at present, than to shew that forms of declarations, and of pleas in bar, are no precedents for forms of replications, and I conclude, that this objection to the replication, considered as an objection of form only, and to be supported only, because it is especially assigned for cause of demurrer, is not so maintained as to oblige us upon fair ground of form to say, that this replication is ill. Considered as an objection in substance, I am ready to agree that it [161] is by no means a trivial objection; our books are full of cases upon the subject of venues, and the doctrine is very nice and curious. It was anciently the opinion of lawyers, that a jury of one county could not try any matter arising within another county, and a foreign county was almost as formidable a thing in point of jurisdiction to try, as a foreign country. The place therefore in which every alleged fact was done, was to be shewn upon the pleadings, that it might be known to what county the jury process should go; and if the facts arose in two counties, or in *confinio comitatum*, that the process might go to both counties. The old law too being, that the jury were to come *de vicineto*, there was another necessity created for very great particularity and niceness in laying venues. But when, in process of time, masculine sense had so far controlled the former doctrine of venues, that in respect of all matters transitory in their nature the Defendants were obliged to

lay the venues of transactions they alleged in their pleas in the place and county in which the Plaintiff had laid his declaration, and since the statute 4 Ann. (c. 16, s. 6) has directed that the jury should come *de corpore comitatûs*, the law of venues will be found to be very substantially altered, and to lie in a very narrow compass; and the distinction between laying no venue at all in a plea, and being obliged to lay the same venue as is to be found in the declaration, will not be a very substantial one. The principle now is, that the place laid in the declaration draws to it the trial of every thing that is transitory, and it should seem that neither forms of pleading, nor ancient rules of pleading established upon a different principle, ought now to prevail (*b*). I have said that there was a time when a foreign county was almost as formidable a difficulty, with respect to mere trial, as a foreign country; and in respect of matters arising in the one or in the other, as far as respects the trial merely, there is no difference between them. All matters arising in a foreign country must be considered, for the purpose of trial, as transitory; there can be no reason for preferring the trying them in one county rather than in another. When the old doctrine prevailed, if a matter arose in Ireland the judges thought themselves obliged to take the jury *de vicineto* of the borders of the English county nearest to Ireland; but since that doctrine has been justly exploded, if a Defendant were to plead a matter arising in a foreign country, he would be obliged to lay the same venue as was laid in the declaration, which brings us [162] again to the distinction between being obliged to repeat the venue, which is in the declaration, and laying no venue at all, which appears to me, I confess, to be a distinction without a difference. It may be asked, shall we then assume jurisdiction to try matters arising in a foreign country, without even the colour which the fiction of the parish of St Mary le Bow in the ward of Cheap has so long supplied? Certainly not: of matters arising in a foreign country, pure and unmixed with matters arising in this country, we have no proper original jurisdiction; but of such matters as are merely transitory, and follow the person, we acquire a jurisdiction by the help of that fiction to which I have alluded, and we cannot proceed without it: but if matters arising in a foreign country mix themselves with transactions arising here, or if they become incidents in an action, the cause of which arises here, we have jurisdiction, and according to the case in 12 Mod. the fiction need not be resorted to at all, and if resorted to, the effect will be not to give jurisdiction; and if a place had been before named, for that part of the transaction which arose here, it would have no effect even as to the trial. In the very infancy of commerce, and in the strictest times, as I collect from a passage in Brooke, Trial, pl. 93, the cognizance of matters arising here, was understood to draw to it the cognizance of all matters arising in a foreign country, which were mixed and connected with it, and in these days we should hardly hesitate to affirm that doctrine.

The result is, That there are no precedents to bind the case in point of form, and if there were, the law has been so altered, that they ought not to bind. In point of substance, the question on this marriage in Scotland arising incidentally in a suit in dower, of which we have original jurisdiction, is for the purpose of this cause within our jurisdiction, without the assistance of a fiction; and the venue for the mere purpose of trial, being necessarily the venue laid in the declaration, the inserting it in the replication would have been nugatory, and the want of it can do no harm. We are therefore of opinion that the Demandant is entitled to judgment in her favor.

Judgment for the Demandant.

[163] FRENCH AND HOBSON *against* CAMPBELL. Wednesday, June 19th, 1793.

Bills of exchange were drawn by A. in England on B. in the East Indies, payable 60 days after sight, and a bond was entered into, conditioned to be void if the bills should be duly paid in India, or come back to England duly protested for non-payment and the amount of them paid by the obligor within a certain time after they should be so returned protested for non-payment. The bills were sent to India, but before they arrived, B. the drawee had left the country, and his agent there refused to accept them. They were then protested in India for non-acceptance, sent back to England so protested, and being presented to the drawee here for

(b) [Vide *Neale v. De Garay*, 7 T. R. 247, accord.]

payment, were protested for non-payment. This was holden to be a substantial performance of the condition of the bond (a).

This was an action of debt on three bonds; the first, dated July 17, 1776, for 12,104l., the second, September 23, in the same year, for 6104l., and the third, on the same 23d of September, for 6060l. each of which was stated in a separate count.

Plea, *Non sunt facta*. 2. Oyer of the bond in the first count, by which it appeared that the Defendant was jointly and severally bound with Sir James Cockburn, Bart. Henry Douglas, Esq. and Lauchlan Macleane, Esq. Oyer also of the condition, which was as follows:

"Whereas the above-bounden Sir James Cockburn hath delivered to the above-named Andrew French and Daniel Hobson, for value received, a certain set of bills of exchange four in the set, bearing even date herewith, drawn by the said Sir James Cockburn on Lieutenant Colonel Cockburn in Bombay, in the East Indies, for twelve thousand one hundred and four and one third star pagodas, payable at sixty days after sight, to the order of the said Henry Douglas and Sir James Cockburn, and by them indorsed, as also by the said Lauchlan Macleane and Alexander Campbell, a true copy of one of which said set of bills of exchange is hereunder written; Now the condition of the above-written obligation is such, that if the said set of bills of exchange or any of them shall be duly paid at Bombay aforesaid, according to the tenor and true meaning thereof, or if the said set of bills of exchange or any of them shall be returned, and come back to England, duly protested for want of payment, (no one of them having been acquitted as aforesaid,) and the said Sir James Cockburn, Henry Douglas, Lauchlan Macleane and Alexander Campbell, any or either of them, their, any or either of their heirs executors or administrators, shall and do well and truly pay or cause to be paid unto the said Andrew French and Daniel Hobson, their executors, administrators or assigns, within thirty days next after any of the said set of bills of exchange returned with protest duly made for want of payment thereof, (no one of them having been acquitted as aforesaid) shall be produced, or legal notice thereof given to the said Sir James Cockburn, Henry Douglas, Lauchlan Macleane, and Alexander Campbell, or either of them, their, any or either of their heirs, executors or administrators, the full amount of [164] such bills of exchange, as shall be so returned, at and after the rate of ten shillings sterling per pagoda, then the above-written obligation to be void, else to be and remain in full force and virtue." Oyer also of the said copy of one of the said set of bills of exchange, written under the said condition of the said writing obligatory, in the said first count of the said declaration mentioned, which was in the following words: "London, the seventeenth July 1776, for star pagodas 12104½, at sixty days after sight, pay this second of exchange (first not paid) to the order of Messrs. Douglas and Cockburn, at the house of Messrs. Mowbray and Renton, in Madras, twelve thousand one hundred and four and one third star pagodas, value here received, which place to account. To Lieutenant Colonel Cockburn in Bombay." Signed Ja. Cockburn, indorsed in blank Douglas and Cockburn, L. Macleane, Alexander Campbell. "Which said writing obligatory in the said first count of the said declaration mentioned, and the condition thereof, and the said copy of one of the said set of bills of exchange under the said condition written, being read and heard, the said Alexander by leave of the Court, &c. &c. because he says that the said set of bills of exchange in the said condition mentioned, were not, nor were any or either of them returned, nor did the same or any or either of them come back to England duly protested for want of payment thereof, and this he is ready to verify, wherefore he prays judgment, &c. And for further plea in this behalf, as to the said sum of money in the said first count of the said declaration

(a) [A writ of error was brought to reverse the judgment, in this case, on the second and third counts, on which this Court had given judgment for the Plaintiff, which judgment was reversed by the Court of King's Bench. It was held by the latter Court, that the bills might have been protested in India for non-payment, and that not having been so protested, the bonds were not forfeited. With regard to the first count, the Court held that they could not examine it, there being a separate and independent judgment given upon it, on which no error had been assigned, 6 T. R. 200.]

mentioned, the said Alexander by like leave, &c. &c. because protesting that the said set of bills of exchange in the said condition mentioned, were not, nor were or was any or either of them returned, nor did the same, or any or either of them, come back to England duly protested for want of payment thereof, for plea in this behalf, the said Alexander saith, that no one of the said set of bills of exchange, returned with protest duly made for want of payment thereof, was nor were any of them produced, or legal notice thereof given to the said Sir James Cockburn, Henry Douglas, Lauchlan Maclean, and Alexander, or either of them, and this he is ready to verify, wherefore he prays judgment, &c." The fourth plea, after oyer of the bond in the second count, craved oyer also of the condition of that bond, which was as follows: "Whereas the above-bounded Lauchlan Maclean hath delivered to the above-named Andrew French and Daniel Hobson, for value received, a certain set of bills of exchange, four in the set, bearing even date herewith, drawn by the said Lauchlan [165] Maclean on John Macpherson, Esq.; at Fort St. George, Madras, in the East Indies, for star pagodas six thousand one hundred and four and one third, payable at sixty days after sight, to the order of the said Sir James Cockburn, and by him indorsed, as also by the said Douglas and Cockburn, and Alexander Campbell, a true copy of one of which said set of bills of exchange is hereunder written. Now the condition of the above written obligation is such, that if the said set of bills of exchange, or any of them, shall be duly paid at Fort Saint George aforesaid, according to the tenor and true meaning thereof, or if the said set of bills of exchange, or any of them, shall be returned and come back to England, duly protested for want of payment, (no one of them having been acquitted as aforesaid,) and the said Lauchlan Maclean, Sir James Cockburn, Henry Douglas, and Alexander Campbell, any or either of them, their any or either of their heirs, executors or administrators, shall and do well and truly pay, or cause to be paid, unto the said Andrew French and Daniel Hobson, their executors, administrators or assigns, within thirty days next after any of the said set of bills of exchange returned with protest duly made for the want of payment thereof, (no one of them having been acquitted as aforesaid,) shall be produced, or legal notice thereof given to the said Lauchlan Maclean, Sir Thomas Cockburn, Henry Douglas, and Alexander Campbell, or either of them, their, any or either of their heirs, executors or administrators, the full amount of such bills of exchange, as shall be so returned, at and after the rate of ten shillings sterling per pagoda, then the above-written obligation to be void, else to be and remain in full force and virtue." Oyer also of the said copy of one of the said set of bills of exchange, written under the condition of the said writing obligatory in the said second count of the said declaration mentioned, which was as follows: "London, the 23d September 1776, for star pagodas 6104½, at sixty days sight, pay this first of exchange to the order of Sir James Cockburn, six thousand one hundred and four, and one third value of the same, which place to account." Signed L. Maclean; To John Macpherson at Fort St. George, Madras. Indorsed in blank, J. Cockburn, Douglas and Cockburn, Alexander Campbell; "which said writing obligatory in the said second count of the said declaration mentioned, and the condition thereof, and the said copy of one of the said sets of bills of exchange under the said last mentioned condition written, being read and heard, he the said Alexander by like leave, [166] &c. &c. because he says, that the said set of bills of exchange in the said last mentioned condition mentioned, were not nor were any or either of them returned, nor did the same nor any or either of them come back to England duly protested for want of payment thereof, and this he is ready to verify, wherefore he prays judgment if the said Andrew and Daniel ought to have or maintain their aforesaid action thereof in this respect against him, &c."

The fifth plea was the same as the third, *mutatis mutandis*.

The sixth and seventh pleas, which related to the bond in the third count, were nearly the same as the fourth and fifth, the only difference between them arising from the sums and dates of a third set of bills of exchange, as a security for which that bond was given.

Replication to the second plea, "That the said set of bills of exchange in the said condition mentioned, after the making of the said writing obligatory in that plea mentioned, were sent over to Bombay aforesaid, to David Scott, Esq., as the agent of the said Andrew and Daniel, in order to be there presented to the said Lieutenant Colonel Cockburn, on whom the same were drawn, according to the custom of merchants, and that the said set of bills of exchange, afterwards, to wit, on the 22d

day of August, in the year of our Lord 1777, arrived at Bombay aforesaid, and were then and there delivered to the said David Scott, Esquire, as the agent of the said Andrew and Daniel as aforesaid; and the said Andrew and Daniel further say, that at the time of the arrival of the said set of bills of exchange at Bombay aforesaid, the said Lieutenant Colonel Cockburn was not there, but had left that place, and resided elsewhere, whereupon the said Lieutenant Colonel Cockburn not being at Bombay aforesaid, on the same day and year last aforesaid, at the request of the said David Scott, one James Todd, a notary public at Bombay aforesaid, by lawful authority duly admitted and sworn, did go to Robert Taylor, the attorney of the said Lieutenant Colonel Cockburn, at Bombay aforesaid, lawfully authorized to act for him the said Lieutenant Colonel Cockburn in that behalf, and did demand acceptance of one of the said bills, whereunto the said Robert Taylor answered, that the said Lieutenant Colonel Cockburn, who then resided at Tanna, had determined not to accept the said bills, as he had no advice from the said Sir James of the nature of the exchange, nor the reason of the said draft, and the said Robert Taylor refused to accept the said bills, for and on the behalf of the said Lieutenant Colonel Cockburn, where[167]-upon the said notary duly protested the said bill for want of acceptance thereof, according to the usage and custom of merchants, and the said Andrew and Daniel aver, that the said Colonel Cockburn was not at Bombay aforesaid, at any time after the arrival of the said set of bills of exchange there as aforesaid, and before one of the said bills was returned to England as hereafter mentioned, and that the said Lieutenant Colonel Cockburn did not give or leave with any person or persons whatsoever, any order or orders for the acceptance or payment of the said bills, or any one of them, nor was or were there any person or persons at or in Bombay or Madras, who would either accept or pay the said bills or any one of them, nor were or was the said bills or any of them accepted or paid, wherefore the said bills so protested as aforesaid, afterwards, to wit, on the 21st day of May, in the year of our Lord 1778, were returned and came back to England so duly protested, no one of the said bills having been acquitted; and this the said Andrew and Daniel are ready to verify, &c."

The replication to the third plea was the same, with the addition of the following averment, "And the said Andrew and Daniel further say, that one of the said set of bills of exchange, so returned to England with protest duly made, in manner and form as above is mentioned, was after such return, to wit, on the 26th day of May, in the year of our Lord 1778, at London aforesaid, in the parish and ward aforesaid, produced, together with the said protest, to the said Alexander, &c." (the Defendant).

The replication to the fourth plea was also the same, except that it stated, that the set of bills, in that plea mentioned, were sent to Peter Martin, at Madras, as the agent of the Plaintiff, in order to be there presented to John Macpherson; that John Macpherson had returned to England, when the set of bills mentioned in that plea arrived at Madras, and averred, "That the said last mentioned set of bills were, after such return to England, to wit, on, &c. at &c. shewn and presented to the said John Macpherson for payment thereof; and the said John Macpherson was then and there required to pay the same; but that the said John Macpherson, at the said time when the said last mentioned bills were so shewn and presented to him as aforesaid, or at any other time, did not pay the said sum of money mentioned in the said bills, or any part thereof, but then and there wholly refused so to do; whereupon the said Andrew and Daniel, afterwards, to wit, [168] on the said day, &c. at &c. duly caused the said last mentioned bills to be protested for the said non-payment thereof, according to the usage and custom of merchants, no one of the said bills having been acquitted; whereof the said Alexander then and there had notice."

The replication to the fifth plea, stated that the said set of bills after such return and protest for non-payment, was produced, together with the said protests, to the said Alexander.

The replication to the sixth and seventh pleas were similar to the two last above stated.

To the two first replications there was a general demurrer.

To the third there was a rejoinder, "that after the arrival of the said set of bills of exchange at Fort St. George, Madras aforesaid, to wit on the second day of July A.D. 1777, at Fort St. George, Madras aforesaid, to wit, at London aforesaid, in the parish and ward aforesaid, the said Peter Martin in that plea mentioned, caused one of the said set of bills in that plea mentioned, to be presented and shewn to one James

Henry Casamajor, and one Charles Oakley, then and there being the attornies and agents of the said John Macpherson, for their acceptance thereof, but that the said James Henry Casamajor and Charles Oakley, so being the attornies and agents of the said John Macpherson, then and there refused, and each of them did refuse to accept the same, whereupon the said Peter Martin, afterwards, to wit, on the said 2d day of July, A.D. 1777, caused the said bills to be protested for want of acceptance thereof, which is the same protesting of the said bills for want of acceptance thereof, as is mentioned in the said plea of the said Andrew and Daniel, by them above pleaded by way of reply, &c."

The rejoinders to the fourth, fifth, sixth and seventh replications stated in like manner that the several sets of bills were respectively presented to Casamajor and Oakley for acceptance, which was by them refused, &c.

To these rejoinders there were general demurrers.

This case was argued in Hilary Term last, by Bond, Serjt., for the Defendant, and Lawrence, Serjt., for the Plaintiffs, and a second time in Easter Term by Rooke, Serjt., for the Defendant, and Le Blanc, Serjt., for the Plaintiffs. On the part of the Defendant the arguments were as follow.

The question for the decision of the Court in this case is, whether the matter alleged in the replications to the two special pleas pleaded to the first count in the declaration, to which replications the Defendant has demurred, is such an answer to the pleas as [169] will intitle the plaintiffs to recover; for though there are demurrers to the rejoinders, yet on those demurrers the same question arises with respect to the bonds stated in the second and third counts, as appears on the former demurrers. That question in substance is, whether, when there is a bond conditioned for the payment of money within thirty days after bills are returned from the East Indies protested for non-payment, or notice given of their being so returned, such bond is forfeited by a refusal to pay, on the bills being returned protested for non-acceptance? It seems impossible to answer this question in the affirmative, unless it can be shewn that a protest for non-payment, and a protest for non-acceptance, are one and the same thing. If there be a clear difference between the two instruments, recognized and adopted by courts of law, then it will follow, that the obligee, in order to recover on the bond, must produce a protest for non-payment, and that he cannot satisfy the terms of the obligation, by a protest for non-acceptance. Now it cannot be denied that there is such a difference. A bill protested for non-acceptance may yet be paid at the time when it becomes due. If an indorser of a foreign bill is called upon to pay it, in consequence of its not being accepted, it is the received practice among merchants, that the indorser shall not sue the drawer without producing a protest for non-payment (a), which cannot be made before the time when the bill becomes due. But the most material distinction is, that a protest for non-acceptance may be made immediately on the acceptance being refused, but a protest for non-payment, not before the day of payment arrives; and it is on this distinction that the present case chiefly depends, the bills being drawn at sixty days sight. For if it be possible to put a protest for non-acceptance, and a protest for non-payment on the same footing, and to make the former equivalent to the latter, there is an end of those provisions which the parties concerned in Indian remittances anxiously make, in order to induce the holder of the bills to wait till the time of payment in case they are not accepted. In the course of these Indian transactions, it frequently happens that the holder sends the bills by one ship, and the drawer his advices by another: now as the drawer is aware that the bills may possibly arrive in India before the advices, and that the drawee will probably not accept them without ad-[170]-vice, it is usual for the drawer to offer a considerable advantage to the holder, as an inducement for him to keep the bills in India till the time of payment, which is commonly sixty days after sight, instead of sending them back protested for non-acceptance: a collateral security is therefore given, to pay so much per pagoda, if the bills are returned protested for non-payment. Now if the Court were to say, that the terms of the bonds were complied with, by the bills being returned protested for non-acceptance (b), they would destroy all the advantage, which

(a) This was stated to be the practice among merchants, but quære?

(b) In this part of the argument, a case of *Starely v. Crawford* was cited, tried before Mr. J. Buller at Guildhall, at the Sittings after Trinity Term 1784, on a bond similar to the present, where there were three pleas; two of usury, and the third,

it was the intent of the parties to give the drawers of the bills, and the obligors of the bonds, namely, a delay of sixty days, during which time the advices that such bills were drawn might arrive in India, or effects might be sent. That this was the intent of the parties is manifest beyond a doubt, and there cannot be a safer rule in the construction of a contract, than the intent of the parties contracting. It is also a rule of law, that where there is an obligation with a condition, the condition shall be construed most in favour of the obligor, though a single bond shall be taken strictly against him. Co. Litt. 206. 1 Saund. 66. And it was said by Mr. Justice Buller in *Straton v. Rastall*, 2 Term Rep. B. R. 370, "that against a surety, the contract cannot be carried beyond the strict letter of it," and in the present case the Defendant Campbell joined in the bonds as a surety.

On the part of the Plaintiffs the arguments took the following course:—

In this case there are two questions: the first, What was the intention of the parties according to the true construction of the contract; the second, Whether, supposing the terms of it not to have been literally complied with, there has not been a substantial performance of the conditions? With respect to the first question, the facts admitted by the pleadings are these: the Plaintiffs were desirous to remit money to India, and in order to make the remittance, they applied to the Defendant and the other obligors, to give them bills of exchange in England, payable in India, for which they paid a valuable consideration; [171] and there was an agreement between the parties, that in case the bills were not paid in India, the obligors would pay the obligees after a certain rate per pagoda, within thirty days after the bills should be returned protested for non payment. Now this being the nature of the contract, the parties are to be presumed to have entered into it with a knowledge of the general law relating to bills of exchange, which form the basis of it. That law is, that the drawer of a bill of exchange, by the act of drawing it, undertakes, among other things, that the person on whom it is drawn, shall be found at the place where he is described as being, for the purpose of the bill being presented to him, and that he shall accept it when presented. If the bill be not accepted, the holder may immediately sue the drawer, without waiting for the expiration of the time, when it becomes due. *Bright v. Purrier*, Bull. N. P. 269. *Milford v. Mayor*, Dougl. 54 (8vo edit.). This being the general law on the subject, if in this particular instance any thing more is to be done by the Plaintiffs, than is usually required from the holder of a bill of exchange, it ought to have been stated expressly and unequivocally in the conditions of the bonds, otherwise the Court will not intend that it was the intention of the parties that the holders of the bills in question should do any thing out of the usual course of proceeding. If it had been their intention that the holders should keep the bills sixty days in India, such intention ought to have been clearly expressed. The parties are to be considered as using language in its proper signification; when, therefore, they speak of bills being returned duly protested, they must be understood to mean, that the bills should be returned with such protest as the law requires in such cases, which is obviously a protest for non-acceptance. And this will evidently appear on the face of the condition itself, by a fair and easy transposition of the words "for want of payment;" for let those words precede in the sentence the words "duly protested," which they may do without any violence to the construction, and the condition will be "if the bills should be returned for want of payment, duly protested," &c.

But secondly, the conditions, if not literally, have at least been substantially performed. It is confessed by the pleadings, that when the first set of bills arrived in India, Colonel Cockburn, on whom they were drawn, was not at Bombay, and his attorney, on being applied to, refused to accept them. The contract [172] therefore, which had been entered into with the drawer, failed in the first instance; the drawee was not found at the place where he was described to be by the bills; and his attorney refused to accept; under these circumstances, the only protest that could be made was made, which was a protest for non-acceptance. With respect to the two other sets of bills, which were drawn upon Macpherson at Madras, the place also where he was to be found was described in the bills; but when the bills came to Madras, he had left

that "the bill was not returned duly protested for non-payment," and issues joined on those pleas: and the Plaintiff was nonsuited for want of a protest for non-payment. But as that case seemed to turn merely on the form of the issue, and therefore not to be applicable, it is omitted in the statement of the argument.

India, and was returned to Europe, and according to the additional fact disclosed in the rejoinder, and admitted by the demurrer, it appears that the holders applied to Messrs. Oakley and Casamajor, who were the attorneys of Macpherson for other purposes, to know whether they would accept the bills, which they positively refused. What do the holders do upon this? They protest the bills for non-acceptance, and send them back to England, the only place where the person on whom they were drawn was to be found; at that place they are presented to him for payment, having been previously protested for non-acceptance at Madras, and he refuses to pay them. So that with respect to the two latter sets of bills, the person on whom they were drawn, not being to be found at the place where he was described to be, and where the drawer, by the terms of his contract, had engaged he should be, and nobody being there who had authority to accept or pay them for him, they are sent after him to the place where he is, and he, on their being presented to him for payment, refuses to pay them; upon which there is a protest for non-payment, and due notice given to the parties, to whom notice was to be given by the conditions of the bonds. Every thing therefore which the holders of the bills could do, has been done, and if the terms of the contract have not been strictly followed, they have been performed *cy-pres*. From the very nature, indeed, of the transaction, it was impossible there should be a protest for non-payment in India. The bills are drawn payable sixty days after sight. Now a protest for non-payment cannot be made till the time of payment arrives: in the present case the time of payment could not happen till after sixty days had elapsed from the sight of the bills by the drawee: but as they were never seen in India by the person on whom they were drawn, the sixty days could never begin to run, and consequently the time of payment could never arrive (a)¹: it was [173] impossible therefore to comply with that part of the condition which required a protest for non-payment in India. But a bond, with an impossible condition, becomes a single obligation, and the obligee is entitled to recover on it. So if the condition becomes impossible by the act of the obligor. Now here both Colonel Cockburn and Mr. Macpherson were the correspondents of the obligors, and the conditions of the bonds were rendered impossible by their being respectively absent from the places where the bills described them to be: it is, therefore, quasi the act of the obligors themselves which renders the conditions impossible. In Brooke, Abr. tit. Condition, pl. 127, four cases are mentioned of conditions becoming impossible, namely, where the impossibility arises from the act of God, of a stranger, of the obligor, and the obligee. The first and last are sufficient to prevent a forfeiture, *actus Dei nemini facit injuriam*, and the obligee cannot take advantage of his own wrong. But in the second case the forfeiture is not prevented, for the obligor has undertaken that he can rule and govern the stranger, and in the third his own act shall not excuse it. Here too the obligors undertook that the strangers, Colonel Cockburn and Mr. Macpherson, should be at the place where they were described to be, and accept the bills.

If then the conditions of these bonds could not be strictly and literally performed, it was sufficient that the performance should be as near as possible to the terms of them. In Lit. sec. 352, it is said "If a feoffment be made upon condition that the feoffee shall give the land to the feoffor and to the wife of the feoffor, to have and to hold to them and to the heirs of their two bodies engendered, and for default of such issue, the remainder to the right heirs of the wife; in this case, if the husband dieth, living the wife, before any estate in tail made unto them, &c. then ought the feoffee to make an estate to the wife, as near the condition, and also as near to the intent of the condition, as he may make it: that is to say, to let the land to the wife for term of life, without impeachment of waste, the remainder after her decease to the heirs of the body of her husband on her begotten (a)²: and for default of such issue, the remainder to the right heirs of the husband." And Lord Coke commenting on this passage 219 b, says, "A. infeoffs B. upon condition that B. shall make [174] an estate in frank-marriage to C. with one such as is the daughter of the feoffor: in this case, he cannot make an estate in frank-marriage, because the estate must move from the feoffee, and the daughter is not of his blood; but yet he must make an estate to

(a)¹ But *quære* of this?

(a)² See 2 Blac. 731, the observation of Wilmot, Ch. J., on this passage, and the note (3) Harg. and Butl. Co. Lit. 219 a.

them for their lives, for this is as near the condition as he can. And so it is, if the condition be to make to A. (who is a mere layman) an estate in frank-almoigne, yet he must make an estate to him for his life, for the reason here yielded by Littleton." The same doctrine is laid down in *Eaton v. Butter*, Sir W. Jones, 180, Paln. 552, which was debt by Richard Eaton and his wife, who was administratrix of William Butter, against Margaret Butter executrix of John Butter, upon an obligation made by the testator; the condition of which was, that if he should happen to die without issue of his body lawfully begotten, that then, if the said John Butter by his last will, or otherwise, in writing, should, in his life time, lawfully assure or convey to the said William Butter, his heirs and assigns, certain lands, &c. &c. the obligation to be void, &c. The plea was, that William Butter died in the life-time of the obligor, to which there was a demurrer; and after much argument the Court held that the Plaintiff was intitled to recover. The principal question was, whether the obligor was not bound to convey the estate to the heir of William Butter; and though all the Court held, that where a condition, possible at the beginning, becomes absolutely impossible by the act of God, the party is discharged, yet Whitlock and Jones held, that where a condition could not be literally performed, by the act of God, it should be performed as near the intention of the parties as possible; and in the report in Palmer, 554, it is stated that three of the judges, in the absence of Dodderidge, held that the case of an obligation did not differ in reason from that of a feoffment upon condition, put by Littleton; for one was an obligation in rem, the other in personam.

Upon the whole therefore it is submitted, that the Plaintiffs are entitled to recover.
Cur. advis. vult.

LORD CHIEF JUSTICE EYRE. This is an action of debt, brought by the Plaintiff upon three different bonds, in all of which the Defendant was bound, but bound upon different considerations. Upon oyer of the condition of the bond in the first count mentioned in the declaration, the substance of it is, that Sir [175] James Cockburn had delivered to the Plaintiffs French and Hobson, for value received, a set of bills of exchange, bearing even date with the bond, drawn by Sir James Cockburn on Lieutenant Colonel Cockburn in Bombay, for 12104½ star pagodas, payable sixty days after sight, to the order of Douglas and Company, and by them indorsed, and also indorsed by Lauchlan Macleane and Alexander Campbell, which bills are set forth in the condition, but nothing turns upon the form of them. Then the conditions of the bond are, that if these bills of exchange, or any of them, shall be duly paid at Bombay, according to their tenor, or if any of them shall be returned and come back to England, duly protested for want of payment, and Sir James Cockburn, Henry Douglas, Lauchlan Macleane and Alexander Campbell, or any of them, shall pay to French and Hobson within thirty days after any of these bills, so returned with protest duly made for want of payment, shall be produced to them, or legal notice given to them, the full amount of such bills of exchange, after the rate of ten shillings sterling per pagoda, then the obligation was to be void, or otherwise to remain in full force. After having thus stated the conditions upon oyer, the Defendant pleads, that the set of bills of exchange in the condition mentioned, were not, nor were any or either of them returned, nor did the same or either of them come back to England duly protested for want of payment.

He pleads also another plea, the substance of which is, that these bills of exchange with protests upon them for non-payment, were never produced, or legal notice given of them to Sir James Cockburn, Henry Douglas, Lauchlan Macleane, and Alexander Campbell, or either of them. With respect to the bond in the second count of the declaration, the condition of that bond, as stated upon oyer, is, (after reciting that Lauchlan Macleane had delivered to French and Hobson for value received, another set of bills of exchange, drawn by Macleane on John Macpherson, Esqr. at Fort St. George, Madras, in the East Indies, for 6104½ pagodas, payable at sixty days after sight, to the order of Sir James Cockburn, and by him indorsed, also indorsed by Douglas and Company,) in substance the same as the condition annexed to the former bond, and the pleas are the same. With respect to the third bond, upon oyer, the condition of that bond recites another set of bills of exchange for another sum, drawn by Lauchlan Macleane on John Macpherson having been delivered to those parties, and is also in substance the [176] same with the condition of the former bond; and the pleas are also in substance the same.

The replication to the first plea, which applies to the first of these bonds, is, that

the set of bills mentioned in the condition, were sent over to Bombay to Daniel Scott, Esq. as the agent of the Plaintiff, in order to be there presented to Lieutenant Colonel Cockburn; that this set of bills of exchange arrived in Bombay, upon the 22d of August in the year 1777, and were there delivered to Mr. Scott as the Plaintiff's agent; that at the time of the arrival of these bills, Colonel Cockburn was not in Bombay, but had left that place, and resided elsewhere; that at the request of the agent Scott, James Todd a notary public at Bombay, went to Robert Taylor, the attorney of Colonel Cockburn, and demanded of him acceptance of one of these bills, to which he answered, that Lieutenant Colonel Cockburn, who then resided at Tanna, had determined not to accept those bills, as he had had no advice from Sir James Cockburn of the nature of the exchange, nor the reason of the draft. By the way, I would observe here, that this manner of stating evidence in pleadings is extremely irregular and defective pleading, and should be avoided.

It goes on to state, that this notary public then protested the bills for want of acceptance, according to the usage and custom of merchants; it also states that Colonel Cockburn was not at Bombay at any time after the arrival of these bills of exchange, and before they were returned to England; that Colonel Cockburn left no orders with any person whatsoever, for the acceptance or payment, or any persons who would accept or pay the bills, nor were they accepted or paid, and therefore the bills so protested were returned and came back to England, no one of them having been acquitted. This therefore is the replication to that plea, which states that the bills of exchange were never returned to England protested for non-payment. As to the plea that states, that the parties had never produced or shewn to them the bills returned protested for non-payment, they reply the same matter in substance as in the former replication, with the addition that the bills that had been returned thus protested for non-acceptance, had been produced and shewn to the parties, according, as they insist, to the terms of the condition.

With respect to the plea to the second count of the declaration, they reply, that the bills mentioned in the condition, [177] were sent over to Madras to Peter Martin the agent of the Plaintiffs, to be presented to Mr. Macpherson, on whom the same were drawn; that they arrived at Fort St. George on the 2d of July 1777, that they were delivered to Peter Martin as the Plaintiffs' agent, that at the time of their arrival Mr. Macpherson was not at Fort St. George, but had left that place, and was returned to England, and thereupon Mr. Macpherson not being at Fort St. George, Peter Martin caused the bills to be protested for want of acceptance: And the replication goes on to aver, that Mr. Macpherson was not at Fort St. George, at any time after the arrival of this set of bills, and before they were returned to England; and that he did not leave any order or orders for the acceptance or payment of the bills, or any of them; that there was no person at Fort St. George who would accept or pay them: that the bills so protested for non-acceptance, on the 2d of May 1778, came back to England, so duly protested, no one of them having been paid. It then goes on to state, and in this respect it differs essentially from the former replication, that these bills, after they were returned to England, upon the 18th of January 1779, were presented to Mr. Macpherson for payment, and that Mr. Macpherson was then required to pay them, but that Mr. Macpherson did not pay them, or any part of them, but refused so to do; and thereupon, on the 18th of January 1779, the Plaintiff caused these bills to be protested for non-payment, of which the Defendants had notice. They insist therefore, that though these bills were not sent back from India, protested for non-payment, yet having been sent back protested for non-acceptance, and then having been here in England shewn to Macpherson, and payment demanded, which payment was refused, and having been here protested for non-payment, this satisfies the condition, and intitles the Plaintiffs to call for the payment of the money, according to the terms of the condition. They repeat the substance of this replication, in order to meet the case which is pleaded, with respect to their not having notice of the bills having been returned for non-payment.

They then go on to the third count of the declaration; and the replication is, in substance, the same upon the third count, as it is upon the second. There is a demurrer on the part of the Defendant to the first replication, and a frivolous rejoinder to the second and third; and in the end, that rejoinder produces another demurrer, and so the whole question comes before the Court, upon a demurrer joined between

those parties upon different parts of the pleadings, and the points that arise [178] upon this demurrer result to these few and simple questions, viz. Whether the Plaintiffs have shewn that they have performed the conditions, on their part to be performed, so as to intitle them to call for a performance of the conditions on the part of the Defendant, or in failure of that performance, to demand payment; and the case does not lie very wide, but rather in a narrow compass. We agree with those who object, that the Plaintiffs have not in this instance performed their part of the conditions, that these conditions are to be understood according to the true intent of the parties. We agree farther, that if it appears that the condition of a bond is impossible to be performed, the bond becomes a single bond, because the obligation is created, and the party is to obtain a defeasance of that obligation as he may; if he cannot obtain that defeasance, in consequence of the terms of it being originally impossible, the consequence is, that he has entered into a bond, and he has nothing to say against the penalty of it, therefore he must pay it (a)¹. We also agree, that if there be a default in the Defendant, by occasion of which default it is impossible that something, which according to the terms of the condition, is in the order of things precedent, and to be performed on the part of the plaintiff, should be performed, in that case, as it cannot be performed, the performance of it is dispensed with. On the other hand, every possible condition, upon which money is to become payable, must be performed, or must be dispensed with upon sufficient ground, before the money is demandable in an action; and in the action in which it is demanded, it must appear that the condition has been performed, if not literally, at least substantially, or that by reason of some default in the opposite party, the performance of the condition has been prevented, which dispenses with that performance. And to come nearer to the present case, if there is a condition annexed to a writing obligatory, for the benefit of the obligor, and the obligee is by the terms of it to do the first act, or to concur with the obligor in doing the first act, he must do, or concur in doing that first act, before he can demand the penalty. If a stranger is to do the first act, the obligor is to procure that stranger to do it, it being for his benefit; but if the obligee himself is to do it, the obligee cannot demand the penalty till he has done it; it is, with regard to him, in the nature of a condition precedent.

If this wanted authority, there is a case in 2 Saund. 106, *Hollipp, executor of Dowse, v. Otway*, which is a strong authority for a proposition, which in my opinion wants no authority, [179] because it stands upon plain principles. That was a case in error from the Court of Common Pleas. It was an action of debt on a bill obligatory made by the testator to Otway for 68l. which he covenanted to pay, as soon as several bills of costs of the testator, expended in the prosecution of suits in law or equity, for Robert and Margery Riggs, should be duly audited, debated and settled by two attornies, to be indifferently chosen between them, to examine and state the accounts of the bills; one third of which was to be paid by the plaintiff to Otway. The Plaintiff protesting that he was always ready on his part to do every thing that was on his part to be performed, and protesting that there was nothing due on any bill of costs, in the prosecution of any suits, averred, that the testator in his life-time, or the Defendant since, had never shewn nor produced any bills of costs expended in the prosecution of the suits aforesaid, to be audited, debated and settled; he therefore concluded that he was well entitled to maintain his action. The judgment was by default. It went into the Court of King's Bench by error, upon another point; that point which we have lately had under consideration here (a)², with respect to the power of the Court themselves to assess the damages, with the assent of the Plaintiff. That point was decided against the Plaintiff in error, but in the course of the argument, another objection was taken by Saunders, a man who very well understood what he was doing; he objected, that the Plaintiff had not sufficiently intitled himself to his action, for the 68l. was not to be paid till the bills of costs were settled by the two attornies; that the averment was nothing to the purpose, for the testator was not bound to produce any bills to any body, but the two attornies: That the Plaintiff ought to have averred, that two attornies were chosen, and that the testator did not produce the bills of costs to them to be settled; or he ought to have averred, that he had appointed one attorney, and had required the testator to appoint another, to

(a)¹ [Vide 1 Saund. 66, and notes.]

(a)² Vide ante, vol. i. pp. 252, 528, 541.

examine and settle the bills, which the testator had refused to do, by which it might have appeared that the Plaintiff was in no fault, and that there was a default in the testator: That the money was payable upon the settling of the bill by the two attornies. This did not appear to have been done, nor that there was any default in the testator, by occasion of which it was not done; and of this opinion was the whole Court. However they meant to give judgment nisi, meaning to consider the question; but Jones, who was counsel with the Defendant in error, thinking [180] that he could not maintain the judgment, in order to expedite the cause, that another action might be brought, desired that judgment might be pronounced, reversing the judgment by default in the Court of Common Pleas. The grounds upon which that reversal proceeded are clearly stated; they are very rational, and appear to me to have a direct application to the present case, to establish the grounds upon which our decision now ought to proceed. With regard to the language of the conditions stated in the pleadings, there is no ambiguity in it, nor any doubt as to the intent of the parties. The words are plain, that the money is to be payable here, in the event of the bills being sent back protested for non-payment. A protest for non-payment is perfectly intelligible, and known; and it is undoubtedly a different thing from a protest for non-acceptance; that difference was so clearly demonstrated in the course of the argument, that it is not necessary for me now to point it out. With regard to any supposed difficulty having arisen, which prevented the returning the bills protested for non-payment, it is impossible to make out that there was any difficulty created by any body: and therefore the question, by whom the difficulty was created, does not arise; in truth there was no difficulty at all; it was in the power of the parties, whether the persons upon whom the bills were drawn were resident or not resident, to protest them for non-payment, as much in their power as it was to protest them for non-acceptance: certainly, if it were material, there was no fault in the Defendant, which prevented in any manner the Plaintiffs from protesting these bills for non-payment.

The question therefore is reduced to a single point: Have the Plaintiffs shewn that they have substantially performed the conditions on their part to be performed, before the right to call for the performance of the conditions, on the part of the obligor, or the penalty is to attach? With regard to the bills drawn on Colonel Cockburn, which are the bills mentioned in the condition of the bond in the first count in the declaration, there seems to be no colour to argue that they have performed that condition; they have totally failed. The condition called upon them to return these bills protested for non-payment; to this hour they have not been protested for non-payment, they therefore never could be returned, there never could be notice of their having been returned protested for non-payment, not having been so returned; according to the plain import of the condition, as well as upon the authority of the case which I have cited, they have failed in performing that preliminary act upon which the condition to be performed by the Defendant was to arise, and consequently they cannot be [181] permitted to maintain their action upon that count. With respect to the bonds in the other counts of the declaration, whether the condition on the part of the Plaintiffs has been sufficiently performed, so as to enable them to call upon the Defendants to pay the money stipulated to be paid, or in failure to pay the penalty of the bond, depends upon this, whether we can construe a protest for non-payment, made here after the bills are returned for non-acceptance, to be equivalent to a protest for non-payment there, and the bills returned from thence, with that protest upon them. I at first hesitated with regard to that, because it occurred to me, that it might be very possible, that if the bills had been kept till they were due in India, they might have been paid there, that it was a very different thing, whether the payment was to be exacted there, or here, because the bills might have been drawn upon a person, who was only an agent, who, while he remained in India, might have effects in his hands, which effects might be liable to the payment of these bills, and which he might be willing to apply to the payment of them, and that when he came home he might leave those effects in the hands of other persons; that he might come home without effects of the drawer in his hands, and be unable to pay here what he might have been willing and able to have paid there, by himself or his agents. But, upon consideration, I think that this would be assuming too much; these facts do not appear upon the record, and I think we can hardly take it for granted that the case was so, so as to establish a substantial difference between the presenting for payment, and the protest for non-payment there, and the presenting

for payment and protest for non-payment here. If we were to refine, we might refine to another conclusion, namely, that this whole business is neither more nor less than downright usury. But it is not enough that it has an usurious aspect; the parties have taken other ground, and the facts are stated upon the record with a view to the ground which they have taken. I agree that upon the whole of the case, it seems reasonable to construe the protest here, after personal application to the party, and a demand founded upon that protest here, to be a substantial performance of the conditions, by which upon the bills being returned with a protest for non payment, these parties are bound to pay the money expressed in the conditions, and that not having paid the money, they are consequently liable upon these bonds.

[182] The result of the whole is, that we are of opinion, that with respect to the bond in the first count, the Plaintiffs have not made good their title to demand that money, and that the judgment as to that count ought to be for the Defendant: That with respect to the two other bonds, it appears to us, that the conditions are, though not literally, yet substantially performed; consequently, with respect to the counts upon these two bonds, the judgment will be in favour of the Plaintiffs. The manner of entering these judgments, will depend upon the particular manner in which the demurrers are joined; to which the parties will take care to attend (a)¹.

RICHARDSON AND ANOTHER *against* THE MAYOR AND COMMONALTY OF ORFORD.
Wednesday, June 19th, 1793.

[In the Exchequer Chamber in Error.]

See 4 Term Rep. B. R. 437.

To an action of trespass for fishing in the Plaintiffs' fishery, the Defendant pleaded that the locus in quo was an arm of the sea, in which every subject of the realm had the liberty and privilege of free fishing (a)². The Plaintiff replied a prescription for the sole and several right of fishing, and traversed that every subject had the liberty and privilege of free fishing in the locus in quo. This was a bad traverse. The Defendant therefore might well pass it by in the rejoinder, and traverse the prescriptive right of the Plaintiff, stated in the replication.

This was an action of trespass, in which the declaration contained five counts: 1. For fishing in the several fishery of the Plaintiffs in a certain haven called Orford haven, and the fish, to wit, 10,000 bushels of oysters of the said Plaintiffs there being found and caught, seizing, taking and carrying away, and converting, &c. 2. For fishing in the free fishery of the Plaintiffs in a certain haven called Orford haven, &c. &c. 3. For fishing in a certain other several fishery of the Plaintiffs in a certain river called Orford river, &c. &c. 4. For fishing in a certain other free fishery of the Plaintiffs in a certain river called Orford river, &c. &c. 5. For taking the fish of the Plaintiffs.

Plea, Not guilty. 2. That the places and fish in the several counts mentioned were the same, and that the said place in which, &c. "in the said declaration mentioned, now is, and at the said several times when, &c. was, and from time whereof the memory of man is not to the contrary, hath been an arm of the sea, in which every subject of this realm at the said several times when, &c. in the said declaration mentioned, had and ought to have had, and yet hath and still ought to have, the liberty and privilege of free fishing; wherefore the [183] said John and William (the Defendants), being subjects of this realm, at the said several times when, &c. in the said declaration mentioned, fished, &c. &c." The third plea was the same in all respects as the second, except that it alleged the locus in quo to be a public navigable river, in which the tide and water of the sea flowed and reflowed, in which every subject of the realm had a right to fish, &c.

The first replication, as to so much of the second plea as related to the fishing in the haven in the first count, and the taking, &c. and in the river in the third count

(a)¹ See this cause in an earlier stage, ante, vol. i. p. 245.

(a)² [Vide *Ward v. Creswell*, Willes, 265.]

of the declaration mentioned, and the taking, &c. &c. (i.e. as to the fishing in the Plaintiffs' several fishery) was, "That the town of Orford, in the county of Suffolk aforesaid, now is, and from time whereof the memory of man is not to the contrary, hath been an ancient town, and that the inhabitants of the said town now are, and from time whereof the memory of man is not to the contrary, have been a body corporate and politic, in deed, fact and name, and have at various times for and during the time aforesaid, until the 7th day of July, in the 21st year of the reign of the Lady Elizabeth, late Queen of England, been called and known by various names of incorporation, to wit, by the name of the honest men of Orford, and also by the name of the burgesses of the town of Orford, and since, after the said last-mentioned day, by the name of the mayor and commonalty of the borough of Orford, to wit, at Orford aforesaid, in the county aforesaid: and the said mayor and commonalty further say, that the said body politic and corporate, from time whereof the memory of man is not to the contrary, until and at the said several times when, &c. in the said first and last count mentioned, have had and enjoyed, and have used and been accustomed to have and enjoy, and of right ought to have had and enjoyed, and still of right ought to have and enjoy, the sole and several right, liberty and privilege of dredging and fishing for, and catching and taking oysters in the said place in which, &c. to wit, at Orford aforesaid, in the county aforesaid, without this, that in the said arm of the sea, in which, &c. every subject of this realm, at the said several times when, &c. had, and ought to have had the liberty and privilege of free fishing, in manner and form as the said John and William have in their said last mentioned plea above alleged; and this the said mayor and commonalty are ready to verify," &c.

[184] The second replication to the residue of the second plea, which related to the fishing in the haven in the second count, and the taking, &c. and the fishing in the fourth count, and the taking, &c. &c. (i.e. as to the fishing in the Plaintiffs' free fishery) stated the prescription to be, "That the Plaintiffs have had and enjoyed, and have used and been accustomed to have and enjoy, and of right ought to have had and enjoyed, and still of right ought to have and enjoy, the free liberty and privilege of dredging and fishing for, and catching and taking oysters in the said places in which, &c. every year at all seasonable times of the year, at their free will and pleasure, to wit, at Orford aforesaid, in the county aforesaid," and concluded with a traverse precisely the same as the last.

The third and fourth replications, which related to the third plea, contained the same matter of inducement as the first and second, and each concluded with a similar traverse, of the right of every subject of the realm to fish in the said river, &c. Then followed some new assignments, not material to be stated.

In the first rejoinder "the said John and William as to so much of the said plea of the said mayor and commonalty by them by way of reply pleaded to the said plea of the said John and William by them secondly above pleaded in bar, as relates to the fishing in the said haven called Oxford haven, in the said first count of the said declaration mentioned, and the fish then and there found and being, catching, seizing, taking and carrying away, and converting and disposing thereof to their own use, and to fishing in the said river called Orford river, otherwise the river Ore, in the said third count of the said declaration mentioned, and the fish then and there found and being, catching, seizing, taking and carrying away, and converting and disposing thereof to their own use, and to seizing and taking the said fish in the said last count of the said declaration mentioned, and carrying away the same, and converting and disposing thereof to their own use, say, that the said mayor and commonalty by reason of any thing in that plea alleged, ought not to have or maintain their said action against the said John and William, because protesting that the said town of Orford is not, nor from time whereof the memory of man is not to the contrary, hath been an ancient town: protesting also that the inhabitants of the same town are not, nor from time whereof the memory of man is not to the contrary have been a body corporate and politic in deed fact and name, in manner and form as the said mayor and commonalty have in their said replication in that behalf [185] alleged, they the said John and William as before say, that the said place in which, &c. in the said declaration mentioned, now is, and at the said several times when, &c. was, and from time whereof the memory of man is not to the contrary hath been an arm of the sea, in which every subject of this realm, at the said several times when, &c. in the said declaration mentioned, had and ought to have had, and yet hath, and still ought to

have, the liberty and privilege of free fishing, without this that the said body politic and corporate, from time whereof the memory of man is not to the contrary, until and at the said several times when, &c. in the said first, third and last counts mentioned, have had and enjoyed, and have been used and accustomed to have and enjoy, and of right ought to have had and enjoyed, and still of right ought to have and enjoy, the sole and several right, liberty and privilege of dredging and fishing for, and catching and taking oysters, in the said place in which, &c. in manner and form as the said mayor and commonalty have in their said replication to such part of the said 2d plea of the said John and William above alleged, and this the said John and William are ready to verify, &c."

The other rejoinders were similar, *mutatis mutandis*.

Special demurrer, "For that the said mayor and commonalty have in and by their said plea, so by them above pleaded by way of reply as aforesaid, traversed a material and issuable point of the said plea of the said John and William so by them above pleaded in bar, and by that traverse tendered to the said John and William a material issue; but the said John and William have not, in and by their said plea, so by them thereunto pleaded by way of rejoinder, taken issue upon that traverse, or joined in issue with them the said mayor and commonalty thereupon, but have passed by and taken no notice thereof, and have traversed another part of the said plea of the said mayor and commonalty, so by them above pleaded by way of reply, and have thereby attempted to put in issue another matter, and a matter alleged by the said mayor and commonalty by way of inducement only to the said traverse, so made and taken by the said mayor and commonalty, and have thereby attempted to introduce great uncertainty, confusion and unnecessary length of pleading," &c.

The assignment of errors was, "There is error also in this, that judgments were given for the said mayor and commonalty against the said John and William upon the several demurrers in the record and proceedings aforesaid, whereas judgments [186] ought to have been given on those demurrers for the said John and William against the said mayor and commonalty, inasmuch as the places in which, &c. being admitted upon the said record and proceedings to be arms of the sea, or a public navigable river, in which the tide and water of the sea flowed and reflowed, the several traverses in the record and proceedings aforesaid, tendered by the said mayor and commonalty, are traverses of mere inferences of law, and therefore are immaterial traverses; and inasmuch as the traverses in the record and proceedings tendered by the said John and William are traverses of the several prescriptions of the said mayor and commonalty, whereon alone the title of the said mayor and commonalty to the fisheries in question, and consequently to maintain this action depends, and therefore are the only material traverses to be taken and tendered."

This case was twice argued: the first time in Easter Term by Wood, for the Plaintiffs in error, and Chambre for the Defendants; the second, in the present term by Bower for the Plaintiffs, and Le Blanc, Serjt., for the Defendants. After which,

LORD CHIEF JUSTICE EYRE said shortly in the name of the Court, that they had sent this case to a second argument, rather from an unwillingness to adopt, without great deliberation, a decision contrary to that of the Court from whence the record came, than from any difficulty they saw in the question. For from the moment it appeared, that upon the pleadings the Plaintiffs might have recovered a verdict in an action of trespass, without having either possession or right, it seemed very difficult to support the judgment. That the first traverse was of the right of all the king's subjects to fish in the arm of the sea, stated by the Defendants; now this was clearly a bad and immaterial traverse, for it was not only a traverse of an inference of law, but it was so taken, that if at the trial it had been proved that it was the separate right of others, and not of the Plaintiffs, the issue must have been found for the Plaintiffs, not only without their being obliged to prove either possession or right, but where in fact they had neither possession nor right. That an immaterial traverse might be passed over, and the matter of the inducement traversed; which had been properly done in this case by the Defendants.

Judgment reversed.

[187] IN THE HOUSE OF LORDS.

[In Error.]

GIBSON AND JOHNSON *against* HUNTER. 1793.

[S. C. 6 Bro. P. C. 235. See *Sewell v. Burdick*, 1884, 10 App. Cas. 99; *Vagliano v. Bank of England*, 1889-91, 23 Q. B. D. 258; [1891] A. C. 107. See other proceedings, 2 H. Bl. 289; 6 Bro. P. C. 225.]

On a demurrer to circumstantial evidence, the party offering the evidence is not obliged to join in demurrer, unless the party demurring will distinctly admit upon the record every fact and every conclusion, which the evidence offered conduces to prove (a).

This was an action brought by Hunter, the Defendant in error, as indorsee, against Gibson and Johnson, as acceptors of an instrument purporting to be a bill of exchange.

The cause came on to be tried before Lord Kenyon, and a special jury, at Guildhall, at the Sittings after Michaelmas Term 1791, when the Plaintiffs in error demurred to the evidence, and the record was as follows:—

Thomas Gibson, late of London, merchant, and Joseph Johnson, late of the same place, merchant, were attached to answer Robert Hunter, in a plea of trespass on the case, and whereupon the said Robert Hunter, by Edwin Dawes, his attorney, complains, for that whereas one Nathaniel Hingston, on the 11th day of March, in the year of our Lord 1788, to wit, at Falmouth, to wit, at London aforesaid, in the parish of St. Mary-le-Bow, in the ward of Cheap, according to the usage and custom of merchants, made his certain bill of exchange in writing, with his own hand and name thereunto subscribed, bearing date the same day and year aforesaid, and directed the said bill of exchange to the said Thomas Gibson and Joseph Johnson, by the names and description of Messrs. Gibson and Johnson, bankers, London, and thereby required the said Thomas Gibson and Joseph Johnson, two months after date to pay to Mr. William Fletcher or order, 521l. 7s. value received, with or without advice, he the said Nathaniel Hingston then and there well knowing that no such person as William Fletcher, in the said bill of exchange mentioned, existed; upon which said bill of exchange, afterwards, to wit, on the same day and year aforesaid, at London aforesaid, at the parish and ward aforesaid, a certain indorsement or writing was made, purporting to be the indorsement of William Fletcher named in the said bill, and to be subscribed with his name, and which said indorsement purported to require the said sum of money in the said bill of exchange contained, to be paid to certain persons using trade and commerce as copartners in the copartnership name and firm of Livesey, Hargreave and Company, or their order, which said bill of ex-[188]change, afterwards, to wit, on the same day and year aforesaid, at London aforesaid, in the parish and ward aforesaid, was shewn and presented to the said Thomas Gibson and Joseph Johnson for their acceptance thereof, and the said Thomas Gibson and Joseph Johnson then and there, according to the custom of merchants, accepted the same, they the said Thomas Gibson and Joseph Johnson then and there well knowing that no such person as William Fletcher, as in the said bill named, existed, and that the name of William Fletcher, so indorsed on the said bill of exchange, was not the hand-writing of any person of that name; and the said bill of exchange being so indorsed as aforesaid, they the said persons using trade and commerce in the name and firm of Livesey, Hargreave and Company as aforesaid, afterwards, to wit, on the same day and year aforesaid, at London aforesaid, at the parish and ward aforesaid, by a certain indorsement in writing made upon the said bill of exchange, and subscribed with the hand and name of one Absalom Goodrich, by procuration of the said Livesey, Hargreave and Company, according to the usage and custom of merchants, appointed the said sum of money in the said bill of exchange contained, to be paid to the said Robert Hunter, and then and there delivered the said bill of exchange so indorsed as aforesaid, as well with the name of the said William Fletcher as with the name of

(a) [See vol. i. p. 313, and the note there, and 6 Br. Parl. Ca. 235, 255, Tomlin's ed. See also *Bulkeley v. Butter*, 2 B. & C. 446.]

the said Absalom Goodrich, to the said Robert Hunter, by reason whereof, and by force of the usage and custom of merchants, the said Thomas Gibson and Joseph Johnson became liable to pay to the said Robert Hunter the said sum of money in the said bill of exchange contained, according to the tenor and effect of the said bill of exchange, and of their acceptance thereof as aforesaid; and being so liable, they the said Thomas Gibson and Joseph Johnson, in consideration thereof, afterwards, to wit, on the same day and year aforesaid, at London aforesaid, at the parish and ward aforesaid, undertook, and to the said Robert Hunter then and there faithfully promised to pay him the said sum of money in the said bill of exchange contained, according to the tenor and effect of the said bill of exchange and their acceptance thereof as aforesaid.

And whereas also, the said Nathaniel Hingston on the said 11th day of March, in the year of our Lord 1788, at Falmouth, to wit, at London aforesaid, at the parish and ward aforesaid, according to the usage and custom of merchants, made his certain other bill of exchange in writing with his proper hand and name thereunto subscribed, bearing date the same day and year aforesaid, [189] and then and there directed the said last mentioned bill of exchange to the said Thomas Gibson and Joseph Johnson, by the name and description of Messrs. Gibson and Johnson, bankers, London, and thereby requested them the said Thomas Gibson and Joseph Johnson two months after date to pay to Mr. William Fletcher or order, 521l. 7s. value received, with or without advice, and then and there delivered the said last mentioned bill of exchange to the said William Fletcher, which said bill of exchange afterwards, to wit, on the same day and year aforesaid, at London aforesaid, in the parish and ward aforesaid, was presented and shewn to the said Thomas Gibson and Joseph Johnson for their acceptance thereof; and the said Thomas Gibson and Joseph Johnson then and there, according to the custom of merchants, accepted the same; and the said William Fletcher afterwards, to wit, on the same day and year aforesaid, at London aforesaid, at the parish and ward aforesaid, according to the usage and custom of merchants, indorsed the said last mentioned bill of exchange, and by that indorsement appointed the said sum of money in the said last mentioned bill of exchange, contained, to be paid to the said persons using trade and commerce in the name and firm of Livesey, Hargreave and company as aforesaid, or their order, and then and there delivered the said last mentioned bill of exchange so indorsed as aforesaid, to the said Livesey, Hargreave and Company; and the said last mentioned bill of exchange being so indorsed as aforesaid, they the said persons using trade and commerce in the name and firm of Livesey, Hargreave and Company, afterwards, to wit, on the same day and year aforesaid, at London aforesaid, at the parish and ward aforesaid, by a certain indorsement in writing made upon the said last mentioned bill of exchange, and subscribed with the hand and name of the said Absalom Goodrich, by procuration of the said Livesey, Hargreave and Company, according to the usage and custom of merchants, appointed the said sum of money in the said last mentioned bill of exchange contained, to be paid to the said Robert Hunter, and then and there delivered the same bill of exchange so indorsed as aforesaid to the said Robert Hunter, by reason whereof, and by force of the usage and custom of merchants, the said Thomas Gibson and Joseph Johnson became liable to pay to the said Robert Hunter the said sum of money in the said last mentioned bill of exchange contained, according to the tenor and effect of the said last mentioned bill and their acceptance thereof as aforesaid, and being so liable, they the [190] said Thomas Gibson and Joseph Johnson, in consideration thereof, afterwards, to wit, on the same day and year aforesaid, at London aforesaid, in the parish and ward aforesaid, undertook, and to the said Robert Hunter then and there faithfully promised to pay to him the said sum of money in the said last mentioned bill of exchange contained, according to the tenor and effect of the same bill and their acceptance thereof as aforesaid.

And whereas also, the said Nathaniel Hingston on the said 11th day of March, in the said year of our Lord, 1788, at Falmouth, to wit, at London aforesaid, in the parish and ward aforesaid, according to the usage and custom of merchants, made his certain other bill of exchange in writing, the hand and name of him the said Nathaniel Hingston being thereunto subscribed, bearing date the same day and year aforesaid, and then and there directed the said last mentioned bill of exchange to the said Thomas Gibson and Joseph Johnson, by the names and description of Messrs. Gibson and Johnson, bankers, London, and thereby required them the said Thomas Gibson

and Joseph Johnson two months after date to pay to the bearer of the said last mentioned bill 521l. 7s. value received, with or without advice, which said last mentioned bill of exchange afterwards, to wit, on the same day and year aforesaid, at London aforesaid, in the parish and ward aforesaid, was presented and shewn to the said Thomas Gibson and Joseph Johnson for their acceptance thereof, who thereupon then and there duly accepted the same, according to the usage and custom of merchants aforesaid: and the said Robert Hunter in fact says, that afterwards, and before any payment of the said last mentioned bill of exchange, to wit, on the same day and year aforesaid, at London aforesaid, at the parish and ward aforesaid, he the said Robert Hunter became and was the bearer and owner of the said last mentioned bill of exchange, of which said last mentioned premises the said Thomas Gibson and Joseph Johnson then and there had notice, by reason whereof, and according to the usage and custom of merchants, the said Thomas Gibson and Joseph Johnson became liable to pay to the said Robert Hunter the said sum of money in the said last mentioned bill of exchange specified, according to the tenor and effect of the same bill; and being so liable, they the said Thomas Gibson and Joseph Johnson in consideration thereof, afterwards, to wit, on the same day and year aforesaid, at London aforesaid, at the parish and ward aforesaid, undertook, and to the said Robert Hunter then and there faithfully promised to pay to him [191] the said sum of money in the said last mentioned bill of exchange specified, according to the tenor and effect of the same last mentioned bill of exchange.

And whereas also, the said Nathaniel Hingston afterwards, to wit, on the same day and year aforesaid, at Falmouth, to wit, at London aforesaid, at the parish and ward aforesaid, according to the usage and custom of merchants, made his certain other bill of exchange in writing, the hand and name of him the said Nathaniel Hingston being thereunto subscribed, bearing date the same day and year aforesaid, and then and there directed the said last mentioned bill of exchange to the said Thomas Gibson and Joseph Johnson, by the names and description of Messrs. Gibson and Johnson, bankers, London, and thereby required the said Thomas Gibson and Joseph Johnson, two months after date, to pay to Mr. William Fletcher, or order, 521l. 7s. value received, with or without advice, which said last mentioned bill of exchange afterwards, to wit, on the same day and year aforesaid, at London aforesaid, in the parish and ward aforesaid, was presented and shewn to the said Thomas Gibson and Joseph Johnson for their acceptance thereof, who then and there duly accepted the same, according to the usage and custom of merchants. And the said Robert Hunter avers, that when the said last mentioned bill of exchange was so made as aforesaid, or at any time afterwards, there was not any such person as William Fletcher, the supposed payee named in the said last mentioned bill of exchange, but that the same name was merely fictitious, to wit, at London aforesaid, at the parish and ward aforesaid, by reason whereof and according to the usage and custom of merchants aforesaid, the said sum of money mentioned in the said last mentioned bill of exchange, became and was payable to the bearer thereof, according to the effect and meaning of the said last mentioned bill; and the said Robert Hunter also avers, that he the said Robert Hunter afterwards, to wit, on the same day and year aforesaid, at London aforesaid, at the parish and ward aforesaid, in due form of law became and was the bearer and proprietor of the said last mentioned bill of exchange, by reason whereof, and according to the usage and custom of merchants, they, the said Thomas Gibson and Joseph Johnson, there and then became and were liable to pay to the said Robert Hunter the said sum of money, in the last mentioned bill of exchange specified, according to the tenor and effect thereof; and being so liable, they, the said Thomas Gibson and Joseph Johnson, in consideration thereof, afterwards, to wit, on the same day and year aforesaid, at [192] London aforesaid, at the parish and ward aforesaid, undertook and to the said Robert Hunter then and there faithfully promised to pay him the said sum of money in the said last mentioned bill of exchange specified, according to the tenor and effect of the same bill.

And whereas also, the said persons using trade and commerce in the name and firm of Livesey, Hargreave and Company, on the said 11th day of March, in the said year of our Lord, 1788, at Falmouth, to wit, at London aforesaid, at the parish and ward aforesaid, according to the usage and custom of merchants, made their certain other bill of exchange in writing, with the hand and name of the said Absalom Goodrich, by procuration of the said Livesey, Hargreave and Company, thereunto subscribed, bearing date the same day and year aforesaid, and then and there directed the said

last mentioned bill of exchange to the said Thomas Gibson and Joseph Johnson, by the names and description of Messrs. Gibson and Johnson, bankers, London, and thereby requested them, the said Thomas Gibson and Joseph Johnson, two months after date to pay to the said Robert Hunter, or order, 521l. 7s. value received, with or without advice, which said bill of exchange afterwards, to wit, on the same day and year aforesaid, at London aforesaid, at the parish and ward aforesaid, was shewn and presented to the said Thomas Gibson and Joseph Johnson for their acceptance thereof, and the said Thomas Gibson and Joseph Johnson then and there, according to the usage and custom of merchants, accepted the same, and the said persons, using trade and commerce in the name and firm of Livesey, Hargreave and Company, afterwards, to wit, on the same day and year aforesaid, at London aforesaid, at the parish and ward aforesaid, delivered the said last mentioned bill of exchange to the said Robert Hunter, by reason whereof, and by force of the usage and custom of merchants, the said Thomas Gibson and Joseph Johnson then and there became liable to pay to the said Robert Hunter the said sum of money in the said last mentioned bill of exchange contained, according to the tenor and effect of the said last mentioned bill of exchange; and being so liable, they, the said Thomas Gibson and Joseph Johnson, in consideration thereof, afterwards, to wit, on the same day and year aforesaid, at London aforesaid, at the parish and ward aforesaid, undertook, and to the said Robert Hunter then and there faithfully promised to pay him the said sum of money, in the said last mentioned bill of exchange contained, according to the tenor and effect of the said last mentioned bill of exchange.

[193] And whereas also, before and at the time of making the promise and undertaking of the said Thomas Gibson and Joseph Johnson, next hereinafter mentioned, to wit, on the said 11th day of March, in the said year of our Lord 1788, at London aforesaid, at the parish and ward aforesaid, the said Nathaniel Hingston was indebted to the said Robert Hunter in a large sum of money, to wit, in the sum of 521l. 7s. of lawful money of Great Britain, for money by the said Nathaniel Hingston before that time had and received, to and for the use of the said Robert Hunter, and for money before that time paid, laid out, and expended by the said Robert Hunter, to and for the use of the said Nathaniel Hingston, at his special instance and request; and the said last mentioned sum of money, at the time of making the promise and undertaking next hereinafter mentioned, being wholly due and owing, and unpaid from the said Nathaniel Hingston to the said Robert Hunter, the said Thomas Gibson and Joseph Johnson afterwards, to wit, on the same day and year last mentioned, at London aforesaid, at the parish and ward aforesaid, in consideration of the last mentioned premises, and also in consideration that the said Robert Hunter, at the special instance and request of the said Thomas Gibson and Joseph Johnson, would forbear and give day of payment of the said last mentioned sum of money until the 14th day of May, in the said year of our Lord 1788, and would not sue or prosecute the said Nathaniel Hingston for the recovery of the said last mentioned sum of money, at any time before default should be made by the said Thomas Gibson and Joseph Johnson in payment of the said last mentioned sum of money, according to their promise and undertaking, next hereinafter mentioned, undertook, and to the said Robert Hunter then and there faithfully promised to pay him the said last mentioned sum of 521l. 7s. on the 14th day of May, in the said year of our Lord 1788: and the said Robert Hunter in fact says, that he the said Robert Hunter, confiding in the said last mentioned promise and undertaking of the said Thomas Gibson and Joseph Johnson, did forbear and give day of payment of the said last mentioned sum of money, until the said 14th day of May, in the year of our Lord 1788 aforesaid, and did not sue or prosecute the said Nathaniel Hingston for the recovery of the said last mentioned sum of money, or any part thereof, at any time before the said Thomas Gibson and Joseph Johnson had made default in paying the said last mentioned sum of money, according to their said last mentioned promise and undertaking; neither hath the said Robert Hunter, at any time [194] since the making of the said last mentioned promise and undertaking of the said Thomas Gibson and Joseph Johnson, sued or prosecuted the said Nathaniel Hingston for the recovery of the same sum of money, or any part thereof, but hath wholly forborne so to do, and the said last mentioned sum of money remains wholly due and unpaid to the said Robert Hunter, whereof the said Thomas Gibson and Joseph Johnson afterwards, to wit, on the 15th day of May, in the year last aforesaid, at London aforesaid, at the parish and ward aforesaid, had notice.

And whereas also, before and at the time of making the promise and undertaking of the said Thomas Gibson and Joseph Johnson next hereinafter mentioned, to wit, on the said 11th day of March, in the said year of our Lord, 1788, at London aforesaid, at the parish and ward aforesaid, the said Nathaniel Hingston was indebted to the said Robert Hunter in another large sum of money, to wit, in the sum of other 521l. 7s. of like lawful money, for money by the said Nathaniel Hingston before that time had and received, to and for the use of the said Robert Hunter, and for money before that time paid, laid out, and expended by the said Robert Hunter, to and for the use of the said Nathaniel Hingston, at his like instance and request; and the said last mentioned sum of money, at the time of making the promise and undertaking next hereinafter mentioned, being wholly due, and owing, and unpaid, from the said Nathaniel Hingston to the said Robert Hunter, the said Thomas Gibson and Joseph Johnson afterwards, to wit, on the same day and year last aforesaid, at London aforesaid, in the parish and ward aforesaid, in consideration of the last mentioned premises, and also in consideration of the said Robert Hunter, at the special instance and request of the said Thomas Gibson and Joseph Johnson, would forbear and give day of payment of the said last mentioned sum of money, until the 14th day of May, in the year of our Lord 1788, and would not sue or prosecute the said Nathaniel Hingston for the recovery of the said last mentioned sum of money, at any time before default should be made by the said Thomas Gibson and Joseph Johnson in paying the said last mentioned sum of money, according to their promise and undertaking next hereinafter mentioned, undertook, and to the said Robert Hunter then and there faithfully promised to pay him the said last mentioned sum of money, on the said 14th day of May, in the said year of our Lord 1788, if the said last mentioned sum of money [195] should then remain unpaid to the said Robert Hunter: and the said Robert Hunter in fact says, that he the said Robert Hunter, confiding in the said last mentioned promise and undertaking of the said Thomas Gibson and Joseph Johnson, did forbear and give day of payment of the said last mentioned sum of money, until the said 14th day of May, in the year of our Lord 1788 aforesaid, and did not sue or prosecute the said Nathaniel Hingston for the recovery of the said last mentioned sum of money, or any part thereof, at any time before the said Thomas Gibson and Joseph Johnson had made default in paying the same sum of money, according to their said last mentioned promise and undertaking: neither hath the said Robert Hunter, at any time since the making of the said last mentioned promise and undertaking of the said Thomas Gibson and Joseph Johnson, sued or prosecuted the said Nathaniel Hingston for the recovery of the same sum of money, or any part thereof, but hath wholly forborne so to do; and the said last mentioned sum of money, on and after the said 14th day of May, in the year of our Lord 1788, remained, and was, and still remains, and is wholly due and unpaid to the said Robert Hunter, of all which premises the said Thomas Gibson and Joseph Johnson, afterwards, to wit, on the 15th day of May, in the year of our Lord 1788, at London aforesaid, at the parish and ward aforesaid, had notice.

And whereas also, before and at the time of making the promise and undertaking of the said Thomas Gibson and Joseph Johnson next hereinafter mentioned, to wit, on the said 11th day of March, in the said year of our Lord 1788, at London aforesaid, at the parish and ward aforesaid, the said persons using trade and commerce in the name and firm of Livesey, Hargreave and Company were indebted to the said Robert Hunter in another large sum of money, to wit, in the sum of other 521l. 7s. of like lawful money, for so much money by the said persons using trade and commerce in the name and firm of Livesey, Hargreave and Company, before that time had and received to and for the use of the said Robert Hunter, and the said last mentioned sum of money, at the time of making the promise and undertaking next hereinafter mentioned, being wholly due and unpaid from the said persons so using trade and commerce in the name and firm of Livesey, Hargreave and Company as aforesaid, to the said Robert Hunter, the said Thomas Gibson and Joseph Johnson afterwards, to wit, on the same day and year last mentioned, at London aforesaid, at the parish and ward aforesaid, in consideration of the last mentioned premises, and also in [196] consideration that the said Robert Hunter, at the special instance and request of the said Thomas Gibson and Joseph Johnson, would forbear and give day of payment of the said last mentioned sum of money until the 14th day of May, in the said year of our Lord 1788, and would not sue or prosecute the said persons so using trade and commerce in the

name and firm of Livesey, Hargreave and Company as aforesaid, for the recovery of the last mentioned sum of money, at any time before default should be made by the said Thomas Gibson and Joseph Johnson, in payment of the said sum of money, according to their promise and undertaking next hereinafter mentioned, undertook, and to the said Robert Hunter then and there faithfully promised to pay him the said last mentioned sum of 521l. 7s. on the said 14th day of May, in the said year of our Lord 1788; and the said Robert Hunter, in fact says, that he the said Robert Hunter, confiding in the said last mentioned promise and undertaking of the said Thomas Gibson and Joseph Johnson, did forbear and give day of payment of the said last mentioned sum of money until the said 14th day of May, in the year of our Lord 1788 aforesaid, and did not sue or prosecute the said persons so using trade and commerce in the name and firm of Livesey, Hargreave and Company as aforesaid, for the recovery of the last mentioned sum of money, or any part thereof, at any time before the said Thomas Gibson and Joseph Johnson had made default in payment of the said last mentioned sum of money, according to their said last mentioned promise and undertaking, neither bath the said Robert Hunter at any time since the making of the said last mentioned promise and undertaking of the said Thomas Gibson and Joseph Johnson, sued or prosecuted the said persons so using trade and commerce in the name and firm of Livesey, Hargreave and Company as aforesaid, or any of them, for the recovery of the said last mentioned sum of money, or any part thereof, whereof the said Thomas Gibson and Joseph Johnson afterwards, to wit, on the 15th day of May, in the year last aforesaid, at London aforesaid, in the parish and ward aforesaid had notice.

And whereas also, before and at the time of making the promise and undertaking of the said Thomas Gibson and Joseph Johnson next hereinafter mentioned, to wit, on the said 11th day of March, in the said year of our Lord 1788, at London aforesaid, in the parish and ward aforesaid, the said persons so using trade and commerce in the name and firm of Livesey, [197] Hargreave and Company as aforesaid, were indebted to the said Robert Hunter in another large sum of money, to wit, in the sum of other 521l. 7s. of like lawful money, for so much money by the said persons so using trade and commerce in the name and firm of Livesey, Hargreave and Company as aforesaid, before that time had and received, to and for the use of the said Robert Hunter, and the said last mentioned sum of money, at the time of making the promise and undertaking next hereinafter mentioned, being wholly due and owing, and unpaid for the said persons so using trade and commerce in the name and firm of Livesey, Hargreave and Company as aforesaid, to the said Robert Hunter, the said Thomas Gibson and Joseph Johnson, afterwards, to wit, on the same day and year last aforesaid, at London aforesaid, in the parish and ward aforesaid, in consideration of the last mentioned premises, and also in consideration that the said Robert Hunter, at the special instance and request of the said Thomas Gibson and Joseph Johnson, would forbear and give day of payment of the said last mentioned sum of money until the 14th day of May, in the said year of our Lord 1788, and would not sue or prosecute the said persons using trade and commerce in the name and firm of Livesey, Hargreave and Company as aforesaid, for the recovery of the said last mentioned sum of money, at any time before default should be made by the said Thomas Gibson and Joseph Johnson in payment of the said sum of money, according to their promise and undertaking next hereinafter mentioned, undertook, and to the said Robert Hunter then and there faithfully promised to pay to him the said last mentioned sum of money on the said 11th day of May, in the said year of our Lord 1788, if the said last mentioned sum of money should then remain unpaid to the said Robert Hunter; and the said Robert Hunter in fact says, that he the said Robert Hunter, confiding in the said last mentioned promise and undertaking of the said Thomas Gibson and Joseph Johnson, did forbear and give day of payment of the said last mentioned sum of money until the said 14th day of May, in the year of our Lord 1788 aforesaid, and did not sue or prosecute the said persons so using trade and commerce in the name and firm of Livesey, Hargreave and Company as aforesaid, for the recovery of the said last mentioned sum of money, or any part thereof, at any time before the said Thomas Gibson and Joseph Johnson had [198] made default in payment of the said sum of money, according to their said last mentioned promise and undertaking, neither bath the said Robert Hunter at any time since the making of the said last mentioned promise and undertaking of the said Thomas Gibson and Joseph Johnson, sued or prosecuted

the said persons so using trade and commerce in the name and firm of Livesey, Hargreave and Company as aforesaid, for the recovery of the same sum of money or any part thereof, but hath wholly forborne so to do; and the said last mentioned sum of money, on and after the said 14th day of May, in the year of our Lord 1788, remained, and was and still remains and is wholly unpaid to the said Robert Hunter, of all which premises the said Thomas Gibson and Joseph Johnson afterwards, to wit, on the 15th day of May, in the said year of our Lord 1788, at London aforesaid, at the parish and ward aforesaid, had notice.

There were also the four common money counts, viz. the 10th for money had and received, 11th for money paid, 12th for money lent and advanced, and the 13th on an account stated. Plea the general issue.

"And the jurors of the jury, whereof mention is within made, being called, likewise come, and being chosen, tried and sworn, to say the truth of the premises within contained, the said Robert Hunter produced to the jury aforesaid, a certain instrument in writing, in the words and figures following (that is to say):

"£521 7s.

"Falmouth, 11th March, 1788.

"Two months after date, pay to Mr. Will. Fletcher, or order, five hundred twenty-one pounds seven shillings, value received, with or without advice.

"NATHL. HINGSTON.

"No. 2068.

"To Messrs. Gibson & Johnson, Bankers, London.

"G. & J.

"And whereupon are the following indorsements, 'William Fletcher,' 'by pron. of Livesey, Hargreave and Co.' 'A Goodrich.' And the said Robert Hunter, to prove and maintain the issue within joined on his part, shews in evidence to the jury aforesaid, by Robert Booth a witness duly sworn in that behalf, that he, the said Robert Booth, was a clerk to certain persons [199] using trade and commerce as copartners, in the copartnership name and firm of Livesey, Hargreave and Company, and that one Nathaniel Hingston was, at the time of the drawing of the said instrument, a shopkeeper, and carried on the business of a shopkeeper, at Falmouth, in the county of Cornwall: that the name of Nathaniel Hingston subscribed to the said instrument, was the hand-writing of the said Nathaniel Hingston, and that he drew the same as agent to the said Livesey, Hargreave and Company; that Livesey, Hargreave and Company used to send down to the said Nathaniel Hingston blank bills of exchange for him to sign as the drawer thereof: that many such blank bills were sent down together: that when they were returned to the said Livesey, Hargreave and Company, they filled up the blanks with the sum to be paid, and the name of the person to whom the same was to be payable: that when the bills were so drawn and filled up, they were carried indiscriminately with other bills, to the house of Thomas Gibson and Joseph Johnson, the Defendants, for their acceptance: that Livesey, Hargreave and Company, gave Gibson and Johnson advice of the bills so drawn by the said Nathaniel Hingston: that such bills, indiscriminately with the said other bills, used to be carried two or three times a day from the house of Livesey, Hargreave and Company, to the house of Gibson and Johnson for acceptance, and were often carried wet: that the acceptance of the bill produced was the acceptance of the Defendants Thomas Gibson and Joseph Johnson: that the said Robert Booth, upon those occasions, used to see the Defendant Johnson: that Livesey, Hargreave and Company, were generally indebted to the Defendants, Gibson and Johnson, upon the balance of accounts, for cash advanced by the said Gibson and Johnson to the said Livesey, Hargreave and Company: that the Defendants, Gibson and Johnson, were covered for these acceptances by bills of exchange given as a security for the same, but that the said bills so given as a security have not been paid: that no such person as William Fletcher, in the said instrument and indorsement named, existed; and that the name William Fletcher, so indorsed on the said instrument, was not the hand-writing of any person of the name of William Fletcher. And the said Robert Hunter further shews in evidence to the jury aforesaid, by one Stephen Barber, a witness duly sworn in that behalf, that he negotiated the instrument now produced, with the Plaintiff Robert Hunter; that he carried it from Live-[200]-sey, Hargreave and Company, to get it discounted for them; and that he told the said Robert Hunter from whom he came; that the said Robert Hunter gave him the value for the said

instrument in money, and he took it back to be indorsed by Livesey, Hargreave and Company; and that it was indorsed by Absalom Goodrich, by procuration of Livesey, Hargreave and Company; that the said instrument had been accepted by Gibson and Johnson before it was carried to be discounted. And the said Thomas Gibson and Joseph Johnson say, that the aforesaid matters, to the jurors aforesaid, in form aforesaid shewn in evidence by the said Robert Hunter, are not sufficient in law to maintain the said issue within joined on the part of the said Robert Hunter, and that they, the said Thomas Gibson and Joseph Johnson, to the matters aforesaid, in form aforesaid shewn in evidence, have no necessity, nor are they obliged by the law of the land to answer: and this they are ready to verify: wherefore, for want of sufficient matter in that behalf, shewn in evidence to the jury aforesaid, the said Thomas Gibson and Joseph Johnson pray judgment, and that the jury aforesaid may be discharged from giving any verdict in the said issue, and that the said Robert Hunter may be precluded from having his said action against the said Thomas Gibson and Joseph Johnson.

"And the said Robert Hunter, for that he hath shewn sufficient matter in maintenance of the said issue in evidence to the said jurors, which matter the said Thomas Gibson and Joseph Johnson do not deny, nor in any manner answer thereto, prays judgment and his damages, by reason of the premises to be adjudged to him.

"Whereupon it is told to the jurors aforesaid, that they shall inquire what damages the said Robert Hunter has sustained, as well by reason of the matter shewn in evidence as aforesaid, as for his costs and charges, by him about his suit in this behalf expended, in case it shall happen that judgment shall be given upon the evidence aforesaid, for the said Robert Hunter, and the jurors aforesaid upon their oaths aforesaid thereupon say, that if it shall happen that judgment shall be given for the said Robert Hunter upon the evidence aforesaid, then they assess the damages of the said Robert Hunter, by him sustained by reason of the matter shewn in evidence as aforesaid, besides his costs and charges by him about his suit in this behalf expended, to 521l. 7s. and for those costs and charges to 40s. And thereupon the said jurors, by the assent [201] of the said parties, are discharged from giving any further verdict upon the premises. And thereupon all and singular the premises being seen by the said court of our said lord the king, before the king himself, now here fully understood and considered, it seems to the said court here, that the aforesaid matter to the jury aforesaid, in form aforesaid, shewn in evidence by the said Robert Hunter, is sufficient in law to maintain the said issue above joined, on the part and behalf of the said Robert Hunter. Therefore it is considered by the said court of our lord the king, before the king himself here, that the said Robert Hunter doth recover his aforesaid damages by the jury aforesaid, in form aforesaid, assessed: and also 199l. 3s. for his costs and charges, by the said Court of our said lord the king now here adjudged of increase to the said Robert Hunter by his assent, which said damages in the whole amount to 722l. 10s. and that the said Thomas Gibson and Joseph Johnson be in mercy," &c.

In Hilary Term 1792, this demurrer to evidence was set down for argument before the Court of King's Bench, but it being the understanding of both parties that a writ of error was to be brought, the Court gave judgment for the Defendant in error, without argument.

Upon this judgment a writ of error was brought, returnable in parliament; and the Plaintiffs in error having assigned general errors; and the Defendant in error having pleaded that there was no error in the record and proceedings, the Plaintiffs in error hoped that the said judgment would be reversed, for the following, among other Reasons:—

First. There is no count in the declaration at all supported by the evidence.

As to the first count, there is nothing to warrant any inference or presumption that the acceptors of the bill of exchange knew the payee to be a fictitious person, at the time of their acceptance of the bill; or that they ever meant to accept a bill payable to such payee, or to any other description of person than the real payee, his indorsee, in the fair and usual course of negotiation. The allegations in the first count of the declaration are wholly destitute of proof, and it would be necessary [202]-sary, in order to support them, to presume the acceptors to be parties to a fraud without evidence, and contrary to the established rule, that every thing is to be presumed to have been fairly done, until proof is given to the contrary.

The second count is expressly negatived by the evidence.

The third count is negatived by the mere inspection of the instrument produced, which purports to be a bill payable to Fletcher or order; and although it has been determined that a bill purporting, on the face of it, to be payable to order, may, in particular circumstances, be considered as a bill payable to bearer; the case (a) in which that decision was made, was where an indorsement had been made by the drawers, subsequent to the indorsement in the name of the fictitious payee, and where the acceptor was privy to the fact of the payee being fictitious at the time of the acceptance of the bill; neither of which circumstances occur in this case, but the direct contrary appears.

The fourth count depends upon the same reasoning as the third, and only differs from it by drawing a supposed inference of law, which will not follow, if the arguments used in support of the third count shall be thought insufficient.

The fifth count is negatived by the evidence, in the same manner as the third, by the mere inspection of the instrument produced, which purports to be a bill payable to Fletcher or order, and indorsed by him to Livesey, Hargreave and Company, and by them to the Defendant in error; and not a bill drawn by Livesey, Hargreave and Company, payable to the said Robert Hunter, as is supposed by the said fifth count.

The sixth, seventh and eighth counts are wholly negatived by the evidence, from which it appears, that so far from the Plaintiffs in error having engaged themselves as a collateral security to pay an antecedent debt, due from the drawers of the bill to the Defendant in error, they had actually accepted the bill, and made themselves liable (so far as any obligation to pay the bill was imposed by law upon them), previous to the bill's being discounted by the Defendant in error, and were themselves, if they are bound at all, the principal debtors, to whom [203] resort must, in the first instance, be made for payment, before the Defendant in error had acquired any interest at all in the debt, or become party to the transaction. If, as is humbly submitted by the Plaintiffs in error, they were not liable, under the circumstances, as principal debtors, they could not be liable, as collateral securities, for a debt which became due from the drawer to the Defendant in error, subsequent to the acceptance.

The ninth, tenth, eleventh and twelfth counts are wholly unsupported by proof, inasmuch as it appears that so far from the Plaintiffs in error being indebted to the drawers of the bill (in whose place the Defendant in error is supposed to stand, and through whom he derives his claim), the Plaintiffs in error were actually in advance to the drawers, and had no security for their monies so lent, but bills, which have not been paid.

Lastly. On the supposition (which is wholly denied) that the Plaintiffs in error were privy to the payee being fictitious, and the indorsement being made in the name of a person they knew not to exist, and that they put the bill into the hands of the drawers that they might negotiate it, concealing the circumstance of the payee being fictitious, their conduct would amount to a direct uttering of a forgery, with intent to defraud the person to whom such bill was passed in circulation, and the remedy by civil action would be merged in the felony. If it is to be taken that the Defendant in error was acquainted with the whole transaction, and made himself a party in it, with full knowledge of all the circumstances, it is submitted that he cannot intitle himself to maintain an action through the medium of an instrument, which, at the time he received it, he knew to be a forgery.

The Defendant in error hoped that the judgment would be affirmed, for the following among other Reasons:—

First. The Plaintiffs in error having demurred to the evidence produced in support of the action, and thereby prevented the jury from finding any facts, have virtually admitted every fact, which upon the evidence the jury might have found in favour of the Defendant in error, in case the trial had proceeded and a verdict had been given; and on the other hand, no intendments, but such as are absolutely necessary, can be made in favour of the Plaintiffs in error. The evidence shews the Defendant in error to be the bonâ fide holder of the bill, for a [204] valuable consideration, and the jury might upon the evidence have found that the Plaintiffs in error accepted the bill, knowing that the name of the payee was fictitious; these facts therefore may be assumed in considering the question of law, but no act of forgery can be presumed, so

as to raise the question, whether the policy of the law will suffer an action to be founded upon a transaction accompanied with forgery.

Second. The Defendant in error being a fair holder of the bill in question, and having advanced his money upon the faith of the acceptance, and the Plaintiffs in error as acceptors sustaining no disadvantage from the drawer's using the name of a fictitious payee, the justice of the case as between the parties requires, that the acceptors should not be permitted to avoid the effect of their acceptance, and the rather, as they may be intended to have known the circumstances relating to the bill and its indorsement.

Third. The case of *Gibson and Johnson v. Minet and Fector*, lately determined in the House of Lords (ante, vol. i. p. 569), is a decision of the highest authority to prove that the bill in question may have effect against the acceptors as a bill payable to bearer, and there does not appear to be any material distinction between that case and the present.

Fourth. An indorsement has the effect of creating a new bill, and the indorser becomes a security to the subsequent proprietors of the bill, in like manner as the original drawer; the Defendant in error, therefore, to whom this bill has been indorsed by Livesey, Hargreave and Company, may maintain his action against the acceptors as being the real payee of the bill, and duly so construed according to the custom of merchants.

Fifth. If the instrument could not take effect in any way as a bill of exchange, then the money which was paid for it, was advanced without consideration, and the persons who received it become indebted to the Defendant in error for the amount. The Plaintiffs in error, by the terms of their acceptance, promised to pay this debt, and the promise being founded upon a valuable consideration proved by writing, so as to comply with the requisitions of the Statute of Frauds, may entitle the Defendant in error to recover upon the counts in the declaration which apply to that view of the case.

[205] The case having been fully argued at the bar of the House, the following questions were proposed to the Judges.

I. Whether upon the state of the evidence given for the Plaintiff in this case, it was competent to the Defendants to insist upon the Jury being discharged from giving a verdict by demurring to the evidence, and obliging the Plaintiff to join in demurrer?

II. Whether on this record, any judgment can be given?

III. In case no judgment can be given, what ought to be the award?

To which questions, LORD CHIEF JUSTICE EYRE thus delivered the unanimous answer of the Judges.

The questions referred by your Lordships to the Judges, arise upon a proceeding, which is called a demurrer to evidence, and which though not familiar in practice, is a proceeding well known to the law. It is a proceeding, by which the Judges, whose province it is to answer to all questions of law, are called upon to declare what the law is upon the facts shewn in evidence, analogous to the demurrer upon facts alleged in pleading. My Lords, in the nature of the thing, the question of law to arise out of the fact cannot arise till the fact is ascertained. It is the province of a jury to ascertain the fact, under the direction and assistance of the judge; the process is simple and distinct, though in our books there is a good deal of confusion with respect to a demurrer upon evidence, and a bill of exceptions, the distinct lines of which have not always been kept so much apart as they ought to have been.

My Lords, in the first stage of that process, under which facts are ascertained, the Judge decides, whether the evidence offered conduces to the proof of the fact which is to be ascertained: and there is an appeal from his judgment by a bill of exceptions. The admissibility of the evidence being established, the question how far it conduces to the proof of the fact which is to be ascertained, is not for the Judge to decide, but for the Jury exclusively; with which Judges interfere in no case, but where they have in some sort substituted themselves in the place of the Jury in attaint, upon motions for new trials. When the Jury have ascertained the fact, if a question arises [206] whether the fact thus ascertained maintains the issue joined between the parties, or, in other words, whether the law arising upon the fact (the question of law involved in the issue depending upon the true state of the fact) is in favour of one or other of the parties, that question is for the Judge to decide. Ordinarily he declares to the Jury what the law is upon the fact which they find, and then they compound their

verdict of the law and fact thus ascertained. But if the party wishes to withdraw from the Jury the application of the law to the fact, and all consideration of what the law is upon the fact, he then demurs in law upon the evidence, and the precise operation of that demurrer is, to take from the Jury and to refer to the Judge the application of the law to the fact. In the nature of things therefore, and reasoning by analogy to other demurrers, and having regard to the distinct functions of Judges and of Juries, and attending to the state of the proceeding in which the demurrer takes place, the fact is to be first ascertained.

My Lords, with this short introduction, I proceed to the first question proposed to the Judges, which is, "Whether upon the state of the evidence given for the Plaintiff in this case, it was competent to the Defendants, to insist upon the Jury being discharged from giving a verdict, by demurring to the evidence, and obliging the Plaintiff to join in demurrer?" Your Lordships' question is confined to this particular case; but it will be necessary for me to proceed by steps. All our books agree, that if a matter of record, or other matter in writing, be offered in evidence in maintenance of an issue joined between the parties, the adverse party may insist upon the Jury being discharged from giving a verdict, by demurring to the evidence, and obliging the party offering the evidence to join in demurrer. He cannot refuse to join in demurrer, he must join, or waive the evidence. Our books also agree, that if parol evidence be offered, and the adverse party demurs, he who offers the evidence may join in demurrer if he will. We are therefore thus far advanced, that the demurrer to evidence is not necessarily confined to written evidence. The language of our books is very indistinct upon the question, whether the party offering parol evidence should be obliged to join in demurrer. Why is he obliged to join in demurrer, when the evidence which he has offered is in writing? The reason is given in Croke's report of *Baker's case* (a)¹, because, [207] says the book, "there cannot be any variance of matter in writing." Parol evidence is sometimes certain, and no more admitting of any variance than a matter in writing, but it is also often loose and indeterminate, often circumstantial. The reason for obliging the party offering evidence in writing to join in demurrer, applies to the first sort of parol evidence, but it does not apply to parol evidence which is loose and indeterminate, which may be urged with more or less effect to a Jury, and least of all will it apply to evidence of circumstances, which evidence is meant to operate beyond the proof of the existence of those circumstances, and to conduce to the proof of the existence of other facts. And yet if there can be no demurrer in such cases, there will be no consistency in the doctrine of demurrers to evidence, by which the application of the law to the fact on an issue is meant to be withdrawn from a Jury, and transferred to the Judges. If the party who demurs, will admit the evidence of the fact, the evidence of which fact is loose and indeterminate, or in the case of circumstantial evidence, if he will admit the existence of the fact, which the circumstances offered in evidence conduce to prove, there will then be no more variance in this parol evidence, than in a matter in writing, and the reasons for compelling the party who offers the evidence to join in demurrer, will then apply, and the doctrine of demurrers to evidence will be uniform and consistent. That this is the regular course of proceeding, in respect to parol evidence of the nature that I have been describing, I think may be collected from the known case upon this subject, *Baker's case*. There is also another case, *Wright v. Pindar*, as it stands reported in Aleyn's Reports (a)² which carries the doctrine further, and home to every case of evidence circumstantial in its nature, affording ground for a conclusion of fact from fact; and the two cases taken together, I think, prove satisfactorily, that the course is that which I have already supposed, and which would remove all the difficulties that are in the way of obliging the party to join in demurrer upon parol evidence. *Baker's case*, after stating that the party must join in demurrer, or waive his evidence, where a matter in writing is shewn in evidence, goes on thus: "If the Plaintiff produces witnesses to prove any matter in fact upon which a question in law arises, if the defendant admits their testimony [208] to be true, there also the defendant may demur in law upon it, but then he ought to admit the evidence given by the Plaintiff to be true." These cases have very carefully marked the precise ground upon which a party may demur to evidence;

(a)¹ Cro. Eliz. 753, *Middleton v. Baker*, 5 Co. 104, S. C.

(a)² Al. 13, S. C. Style, 22, loosely reported by the name of *Whyte v. Pindar*.

and prove that if a party may demur, the other party must join in demurrer. According to Aley's report of the case of *Wright v. Pyndar*, which case underwent very serious consideration, it was resolved, "that he that demurs upon the evidence, ought to confess the whole matter of fact to be true, and not refer that to the judgment of the court; and if the matter of fact be uncertainly alleged, or that it be doubtful whether it be true or no, because offered to be proved by presumptions or probabilities, and the other party demurs thereupon, he that alleges this matter, cannot join in demurrer with him, but ought to pray the judgment of the court, that he may not be admitted to his demurrer, unless he will confess the matter of fact to be true." It seems to follow as a necessary conclusion, that if he will confess the matter of fact to be true, there he is to be admitted to his demurrer, and that if he is admitted, the other party must join in demurrer. My Lords, it is said in some of our books, that upon a demurrer entered upon *parol* evidence, the party offering the evidence may choose whether he will join in demurrer or not. But after having stated the two authorities which I have mentioned, I think those passages in the books must be understood with the qualification mentioned in both those authorities, "unless the adverse party will confess the evidence to be true." The matter of fact being confessed, the case is ripe for judgment in matter of law upon the evidence, and may then be properly withdrawn from the jury; and being entered on record will remain for the decision of the Judges. And this operation of entering the matter upon record, and indeed the whole operation of conducting a demurrer to evidence, ought to be under the direction and control of the Judge at *Nisi Prius*, or of the Court, if the trial be at the bar of one of the king's courts. I take the whole proceeding upon a demurrer to evidence, to be under the control of the Judge before whom the trial is had. In the case of *Worsley v. Filisker* which is reported in 2 Rolle's Reports, 117, Mr. Justice Dodderidge, who was one of the ablest men upon the Bench, said, "the court might deny and hinder a party from demurring by over-ruling the matter in demurrer, if it seemed to them to be clear in law;" and the court did in point of fact, in that case, over-rule the demurrer, and leave the case to the Jury. The demurrer in that case was certainly [209] frivolous; but if it had been over-ruled improperly, it might, I presume, have been the subject of a bill of exceptions. If the court may over-rule, it may also regulate the entry of the proceedings upon the record, and the admissions which are to be made previous to the allowing of the demurrer. And, my Lords, after this explanation of the doctrine of demurrers to evidence, I have very confident expectations that a demurrer like the present will never hereafter find its way into this House.

My Lords, The answer to the first question that the Judges have agreed upon, and which I have endeavoured to lay a foundation for, in what I have now offered to the House, is, "That upon the state of the evidence given for the Plaintiff in this case, it was not competent to the Defendants to insist upon the jury being discharged from giving a verdict, by demurring to the evidence, and obliging the Plaintiff to join in demurrer, without distinctly admitting upon the record, every fact, and every conclusion, which the evidence given for the Plaintiff conduced to prove."

Your Lordships' second question is, Whether on this record any judgment can be given? To which we answer, that we conceive no judgment can be given. The examination of the witnesses in this case, has been conducted so loosely, or this demurrer has been so negligently framed, that there is no manner of certainty in the state of facts upon which any judgment can be founded. I will not detain your Lordships with particular observations upon the state of the facts, as they are contained in this demurrer, because all the observations I could have made, were made to your Lordships from within your House at the time these questions were put, and, I believe, felt by every body that heard them.

To the third question, In case no judgment can be given, what ought to be awarded? We answer, that there ought to be an award of a *venire facias de novo*: the issue joined between these parties, in effect has not been tried, and the case of *Wright v. Pyndar* is expressly in point, that another *venire facias* should issue (a).

Accordingly a *venire de novo* was awarded ([see post, p. 288]).

(a) The last case respecting demurrers to evidence, which has fallen within my observation, is that of *Cocksedge v. Fanshaw*, Dougl. 119, 8vo.; and it was there holden by the Court of King's Bench, as appears from the report, "that on a demurrer to

[211] LICKBARROW AND OTHERS *against* MASON AND OTHERS.

In this Term, the House of Lords directed that a venire facias de novo should be awarded in this case. See 2 Term Rep. B. R. 63, ante, vol. i. 357. [5 T. R. 367, 687.]

End of Trinity Term.

In the Long Vacation, died Sir John Wilson, Knt., one of the Justices of this Court,

And in the following Term, Giles Rooke, Esq., King's Serjeant, was appointed to succeed him, and was knighted.

evidence, every fact which the jury could infer in favour of the party offering it, from the [210] evidence demurred to, was to be considered as admitted." It is also stated in a note subjoined to that case, that on a writ of error, the Court of Exchequer Chamber were all of opinion with the Court of King's Bench, except the Lord Chief Justice (then Mr. Baron) Eyre, but that afterwards in the House of Lords, his Lordship concurred with the other judges, in answering the following question proposed to them, in the affirmative, viz. "Whether the evidence and facts admitted, upon which that demurrer had been joined, were sufficient in law to maintain the issue for the Defendant in error?"

Now there is reason to believe that the ground upon which his Lordship agreed to the affirmative of that question was, that upon the record there was a distinct allegation of the existence of a custom in the city of London, that freemen factors should have to their own use, the farthing duty on the corn consigned to them; to which allegation, as well as to the facts offered in evidence, the demurrer was applied. This allegation therefore being admitted by the demurrer, the point to be considered was, whether such a custom were a good one: and it was upon that ground that the case seems to have been decided in the House of Lords.

Upon examining that record, I find it to be in the following words:

"The said Thomas Cocksedg by James Wallace, Esquire, one of his majesty's counsel learned in the law, of the counsel of the said Thomas Cocksedg, in maintenance of the issue within joined, before the chief justice, aforesaid, insisted and said, that the city of London is, and from time whereof the memory of man is not to the contrary hath been, an ancient city, and that the citizens of the said city now are and from time whereof the memory of man is not to the contrary, have been a body corporate and politic, by the name of the mayor, commonalty and citizens of the city of London, and that the said mayor, commonalty and citizens of the city of London, from time whereof the memory of man is not to the contrary, have from time to time admitted, and have used and been accustomed, and had a right to admit such and so many persons to be freemen of the said city, as they have thought fit, upon payment to the said mayor, commonalty and citizens, of such sum and sums of money, for such respective admissions to the freedom of the said city, as the said mayor, commonalty and citizens have thought fit; and that from time whereof the memory of man is not to the contrary, there of right ought to be paid by all persons not being free of the said city, or otherwise legally exempt therefrom, importing corn into the said city of London, or to the liberties thereof eastwise, eastward of London Bridge (except from the Cinque Ports or the county of Kent), a toll or duty of one farthing for every quarter of corn so imported, and that the said toll or duty of one farthing a quarter, for and upon all corn so imported as aforesaid (except corn consigned to a cornfactor being a freeman of the said city, to be there sold), hath during all the time aforesaid, been paid to the said mayor, commonalty and citizens, for the use of the said body corporate, but that the said duty of one farthing a quarter, for and upon all corn so imported as aforesaid, consigned to a cornfactor, being a freeman of the said city, to be there sold, hath during all the said time, whereof the memory of man is not to the contrary, been paid, and of right ought to be paid, to or for the use of, and received by such factor, being a freeman of the said city, to whom such corn hath been consigned as aforesaid, for his own use, &c."

Then follow some admissions as to facts, of "Thomas Faushaw by John Glynn, Esq. Serjeant at law of the counsel of the said Thomas," &c. &c.

After which the record goes on, whereupon in order to maintain the said issue

[213] CASES ARGUED AND DETERMINED IN THE COURTS OF COMMON PLEAS, AND EXCHEQUER CHAMBER, IN MICHAELMAS TERM, IN THE THIRTY-FOURTH YEAR OF THE REIGN OF GEORGE III.

JAMES *against* SEMMENS, Widow. Wednesday, Nov. 13th, 1793.

[Discussed, *Allen v. Callow*, 1796, 3 Ves. 294; *Osborne v. Leeds*, 1800, 5 Ves. 380.]

Where two legacies of the same sum are bequeathed to the same person by different instruments, viz. one in a will, and the other in a codicil, the legatee is intitled to both, unless there be some circumstance to shew that the intent of the testator was, that he should take but one (a).

Replevin for taking the goods and chattels of the Plaintiff, at the parish of St. Erth in the county of Cornwall, in a certain close there called the Mowhay, being part of a certain tenement called Trevon.

"Avowry, because, she says, that before the said time when, &c., to wit, on the 29th day of April, in the year of our Lord 1790, one Pascoe Semmens, now deceased, the husband of the said Katharine (the Defendant) was possessed of the said tenement called Trevon, whereof the said close in which, &c. is part and parcel, for the residue of a certain term of years then to come and unexpired, and being so possessed thereof, the said Pascoe, in his life-time, afterwards, to wit, on the same day and year last aforesaid, in the parish aforesaid, in the county aforesaid, made his last will and testament in writing, and then and there duly signed, sealed and published the same, and thereby gave and bequeathed to her the said Katharine an annuity of 10l. a year during her natural life, and to be issuing and payable out of the said tenements free

within joined, Benjamin Green is produced as a witness on the part of the said Thomas Cocksedge, and being sworn and examined on his oath, gives in evidence, and says that, &c. &c." And afterwards the name of each witness, and the facts deposed by him are distinctly stated.

The demurrer is, "And the said Thomas Fanshaw (the Defendant) by John Glynn, Esq. Serjeant at law, and Recorder of the said city of London, of the counsel of the said Defendant saith, that the evidence and allegations aforesaid, above alleged on the behalf of the said Thomas Cocksedge, the Plaintiff, are not sufficient in law to maintain the said issue, &c."

That record seems to have been carefully framed, and is agreeable to the ancient mode adopted in demurrers to evidence, in which it was usual to enter both the allegations of counsel in favour of the party offering the evidence, and the evidence itself on the record, and to demur as well to the allegations as the evidence. This [211] appears in Rastal's Entries, tit. Demurrer, but more particularly from the record in *Scholastica's case*, Plowd. 403, which is, "Whereupon William Bendloe, Serjeant at law, of counsel with the aforesaid Robert and Scholastica, in maintenance of the assize aforesaid, said, That, &c. &c."

And the demurrer is, "That the aforesaid William Lark and John Hunt, in their proper persons, say, that the evidences and allegations aforesaid, on behalf of the said Robert and Scholastica above alleged, are not sufficient in law to maintain the assize aforesaid," &c.

In this view of the case of *Cocksedge v. Fanshaw*, the ultimate decision of it does not appear to be contradicted by the present determination. It may also be observed, that the language of that case is, that every fact which the jury could infer from the evidence in favour of the party offering it, is to be considered as admitted: now in the present instance, as the opinion of the judges was, that the evidence stated on the record was so extremely loose, that no certainty could be inferred from it, upon which any judgment could be founded, it seems not too much to say, that from such evidence the jury could not reasonably have inferred facts sufficient to warrant a verdict in favour of the Defendant in error.

(a) [Vide *Cootte v. Boyd*, 2 Br. C. C. 521. *Currey v. Pile*, 2 Br. C. C. 225. *Hodges v. Peacock*, 3 Ves. 735. *Holford v. Wool*, 4 Ves. 79. *Osborn v. Duke of Leeds*, 5 Ves. 369. *Benyon v. Benyon*, 17 Ves. 34. *Attorney-General v. Harley*, 4 Madd. 267. *Hurst v. Beech*, 5 Madd. 351.]

and clear of all out-goings whatsoever, and to be paid to her the said Katharine by the said Pascoe's executors, every year in the 25th day of March, as long as she the said Katharine should live, the first payment thereof to be made on [214] the 25th day of March which should next happen after the death of the said Pascoe, and to be paid home to the 25th day of March preceding the death of the said Katharine; and the said Pascoe gave the said Katharine a power of entry and distress upon the said tenement called Trevon, if the said Katharine should not be regularly paid in the manner in which the said Pascoe had before directed; and the said Katharine further saith, that afterwards, in the life of the said Pascoe, to wit, on the 24th day of May, in the said year of our Lord 1790, in the parish aforesaid, in the county aforesaid, the said Pascoe made a certain codicil in writing to the said will, and then and there duly signed, sealed and published the same codicil, and thereby declared his further will to be, and the said Pascoe did thereby give and bequeath to the said Katharine, during her natural life, in case she should be living at the time of the decease of the said Pascoe, the yearly sum of 10l. of lawful money of Great Britain, free and clear of all out-goings whatsoever, to be issuing and payable out of the said tenement called Trevon, by quarterly payment thereof, to begin and be made at the first quarter-day of payment which should happen next after the decease of the said Pascoe; and the said Pascoe did thereby charge the said tenement of Trevon with the payment thereof, with power to distrain in case of non-payment. And the said Pascoe afterwards, and before the 24th day of June, in the year of our Lord 1790, to wit, on the 24th day of May, in the year last aforesaid, in the parish aforesaid, in the county aforesaid, died possessed of the said tenement, for the residue of the said term, which said term then and there was not, and still is not, determined or expired, without altering his said will and codicil, and thereupon, and by reason of the aforesaid will and codicil, the said Katharine became intitled to the said several annuities so payable as aforesaid. And the said Katharine further saith, that afterwards, and before the said time when, &c., to wit, on the 29th day of September, in the year of our Lord 1792, the sum of fifteen pounds of the said last mentioned annuity, so given and bequeathed by the said codicil to the said Katharine, for six quarterly payments of the same annuity, before that time elapsed was due and owing and in arrear to the said Katharine. And because the said sum of fifteen pounds of the said last mentioned annuity, on the day and year last aforesaid, and also at the said time when, &c. was due, unpaid and in arrear to the said Katharine as aforesaid, the said Katharine well avows the taking of the said goods and chattels in the said place in which, &c., and justly, &c., as a distress for the said arrears of the said [215] last mentioned annuity, so due and unpaid to the said Katharine as aforesaid; and this the said Katharine is ready to verify, wherefore she prays judgment, and a return of the said goods and chattels, together with her damages, costs and charges in this behalf, according to the form of the statute in such case made and provided, to be adjudged to her.

And the said Joel (the Plaintiff) as to the avowry of the said Katharine by her above pleaded, saith, that she, by reason of any thing therein contained, ought not to avow the taking of the said goods and chattels of him the said Joel, in the said place in which, &c., to be just, &c.; because, he says, that the aforesaid last will and testament of the said Pascoe Semmens deceased, is in the words following: that is to say, "In the name of God, Amen, this is the last will and testament of me Pascoe Semmens, of the parish of Ludgvan in the county of Cornwall, Yeoman, First and principally, I commend my soul into the hands of Almighty God my Creator, and my body to be decently interred in the plainest manner possible, at the discretion of my executors hereinafter named; item I give and bequeath to my wife Katharine Semmens, her executors, administrators and assigns, all that messuage and tenement with the appurtenances, in the parish of Madden, called Malfel, now in the occupation of Thomas Glasson, and which was given to her by her aunt Ursula Friggens, to hold to her and her assigns from my death, during the remainder of the lease or leases thereof, under and subject to such rents, payment, suits and services, as are due and payable thereout, to the lord or lords of the fee. And also I give to my said wife Katharine Semmens whatsoever household goods and furniture were given to her, and come to her, by her said aunt Ursula Friggens; and also I give to her the liberty of continuing in my dwelling-house for a year and a day after my decease, without being liable to pay any rent, or to be molested by my executors hereinafter named, during the said day and twelve months after my death. Item. I give and bequeath unto my said wife

Katharine Semmens an annuity of 10l. a year, during her natural life, and to be issuing and payable out of my leasehold estate of Trevon in the parish of St. Erth, free and clear of all out-goings whatsoever, and to be paid and payable to her by my executors every year on the 25th of March as long as she lives; the first payment thereof to be made on the 25th day of March, which shall next happen after my [216] death, and be paid home to the 25th day of March preceding her death; and I give her a power of entry and distress upon the said premises called Trevon, if she is not paid regularly in the manner I have above directed. Item, I give and bequeath unto my eldest brother William Semmens, all my wearing apparel, both linen and woollen, and 20l. in money, to be paid him by my executors hereinafter named, six months after my decease, if my brother William shall be alive at that time. Item, I give and bequeath unto my brother Edmond Semmens one guinea, to be paid him by my executors six months after my decease; and to my brother Edmund's three daughters a guinea each, to be paid them in the same manner, and at the same time of their father's legacy. Item, I give unto my brother Simon one shilling; I give and bequeath unto my sister Elizabeth Semmens, for and during the term of her natural life, one annuity or yearly sum of 5l. to be issuing and payable out of my said estate called Trevon, to be paid quarterly during her life; the first payment to be made on the first quarterly days of Christmas, Lady-day, Midsummer or Michaelmas, which shall first happen after my death. Item, I give to my sister Jane Mathews one shilling. Item, I give and bequeath to Mary Thomas, formerly Mary Eddy, my wife's niece, fifteen guineas, to be paid by my executors hereinafter named, six months after my decease. Item, I give my watch to my great nephew Peter Semmens, son of my nephew John Semmens. Lastly, all the rest, residue and remainder of my estate and effects, of what nature or kind soever, and wheresoever situate lying and being, I give and bequeath the same unto my two nephews John Semmens, son of my brother Peter Semmens, and Edward Semmens, son of my brother Simon Semmens; and I do hereby nominate and appoint them my residuary legatees, and joint executors of this my last will; in witness whereof, I have to this my last will and testament, written on one sheet of paper, put and subscribed my hand and seal this 29th day of April 1790." And the said Joel further saith, that the aforesaid codicil of the said Pascoe is in the words following: that is to say, "I Pascoe Semmens, of the parish of Ludgvan in the county of Cornwall, blacksmith, being sick and weak in body, but of a sound and disposing mind, memory and understanding, do make and ordain this to be a codicil to my last will and testament, and which I do hereby order and direct shall be taken as a part and parcel thereof, and be annexed thereto, after my decease: first, my further will is, and I do hereby give and [216] bequeath unto my dearly beloved wife Katharine, during her natural life, in case she shall be living at the time of my decease, the yearly sum of ten pounds, of lawful money of Great Britain, free and clear of all out-goings whatsoever, to be issuing and payable out of my estate called Trevon, situate, lying and being in the parish of St. Erth in the said county of Cornwall, by quarterly payments; the first payment thereof to begin and be made, at the first quarter day of payment, which shall happen next after my decease; and I do hereby charge the said estate of Trevon with the payment thereof, with power to distrain in case of non-payment. Also I do hereby give and bequeath unto my said wife Katharine the estate in Manfel now in the possession of Thomas Glasson, and heretofore given her by the last will and testament of her aunt Ursula Friggens, for and during all the estate, term, time and interest, which shall be to come and unexpired therein, from and after my decease. Also I give and bequeath to my said wife Katharine all that messuage, dwelling-house, gardens, orchards, fields and premises, situate, lying and being in the village of Crowlas in the said parish of Ludgvan, wherein I do now dwell, occupy and enjoy, and now in my possession, to hold to my said wife, to be peaceably and quietly enjoyed by her for and during her natural life only, without molestation of my executors, in my will named; and my further will is, and I do hereby direct, that my said wife Katharine shall have, hold and enjoy all my household goods and furniture, as they shall stand in my dwelling-house at the time of my decease, and my horse and cow, and all other things which shall then be on the said premises (the wheat and cider only excepted), which I do hereby give to her for and during her natural life, and from and after her decease, that then the same shall be delivered up to my executors, in good order and condition. And I do hereby further order and direct, that as soon as conveniently may be after my decease, my said wife, jointly with my

executors in my said will named, shall take or cause to be taken an inventory of all my household furniture, china and other goods, chattels and effects, which shall then be in my said dwelling-house only, and that each party shall sign and deliver a copy of the same to each other. In witness whereof, I the said Pascoe Semmens the testator, have hereunto set my hand and seal, and published and declared this paper writing [217] as and for a codicil to my last will and testament, and which I do hereby order and direct shall be taken as part and parcel thereof and be annexed thereto after my decease, this 24th day of May, in the year of our Lord 1790." And the said Joel further saith, that the said Pascoe Semmens did intend by his said will and codicil, to give to the said Katharine one annuity of ten pounds a-year only, and not two several annuities, and that the said Katharine by reason of the said will and codicil, did not become entitled to two several annuities, but became intitled to one annuity only of ten pounds, payable as in the said codicil is mentioned; and that at the said time when, &c. no part of the said annuity of ten pounds, given and bequeathed by the said will and codicil, to the said Katharine, was due, owing, unpaid, or in arrear to the said Katharine, and this he is ready to verify, wherefore he prays judgment and a return of the said goods and chattels, and his damages, costs and charges on occasion of the said taking and unjust detaining of the same, to be adjudged to him, &c.

To this plea there was a general demurrer.

In support of the demurrer, Runnington, Serjt., argued in the following manner.

The question is, whether the testator, Pascoe Semmens, intended by his will and codicil to bequeath two several annuities to his wife, the Defendant, or whether the codicil be a mere repetition confirmatory of the will; in which case, only one annuity would pass. Now as the will and codicil are distinct instruments, the legacy given by the last must be taken to be accumulative, and the Defendant is intitled to receive two annuities of 10l. each. By the will, the testator gives to his wife, describing her simply as his wife, the estate called Malfel, such household goods and furniture as were given her by her aunt, the liberty of continuing in his dwelling-house, for a year and a day after his decease, without paying any rent, and also an annuity of 10l. a year, payable annually on the 25th of March. In the codicil, he uses terms of strong affection, and gives her, in addition to his former bequest, his dwelling-house and all his furniture, some few things excepted, for her life, and also an annuity of 10l. a year payable quarterly, whereas the other annuity was payable yearly. It is plain therefore, that his intention was, that his wife should derive greater benefit from the codicil, than she would have done from the will alone, and where such an intention can be collected, the law will favour an accumulative construction. The rule as laid down by Lord Thur-[218]low in *Ridges v. Morrison*, 1 Brown, Chanc. Rep. 389, is, that "where a testator gives a legacy by a codicil as well as by a will, whether it be more, less, or equal, to the same person who is legatee in the will, speaking simpliciter, it is an accumulation." And "where the same quantity has been given, and the same cause, or no additional reason assigned for a repetition of the gift, the Court has inferred the testator's intention to be the same, and rejected the accumulation; but where the same quantity is given with any additional cause assigned for it, or any implication to shew that the testator meant that the same thing *prima facie* should accumulate, the Court has decided in favour of the accumulation." Which doctrine is founded on the case of *Hooley v. Hatton*, coram Lord Chancellor Bathurst, and the elaborate opinion of Mr. Justice Aston (a). And in Swinburne's Treatise, 526, it is said, "where a certain quantity is twice bequeathed, it is twice due, if in two distinct writings, as in a will and in a codicil."

Lawrence, Serjt., *contra*. The codicil contains merely a repetition of the same annuity that is given in the will. The testator shews no intention to give two annuities to his wife, but in the codicil he only varies the mode of payment of that which he had before left in his will, by directing that it should be paid quarterly, instead of yearly: and he orders that the codicil should be "taken as a part and parcel of his will:" the whole therefore is to be considered as making but one instrument.

In Swinburne, 526, after the passage cited on the other side, it is added, "but if in one writing, it does not make the legacy double," and in the same book 530, it is said "if the testator do bequeath to one man a hundred pounds, and afterwards in the

(a) Cited at length in a note to *Ridges v. Morrison*.

same testament bequeath to the same man a hundred pounds; the second disposition is understood to be but a repetition of the former, and all but one legacy; wherefore the legatary in this case can recover but one hundred pounds, unless he make proof that it was the testator's meaning that he should have two hundred pounds. Or unless where two equal sums be left to one person, the one quantity were left in one writing, and another quantity in another writing, suppose one hundred pounds in the testament, and another hundred pounds in the codicil; for here the legatary may recover two hundred pounds, as two several legacies, except the executor prove the testator's meaning to be contrary." The rule therefore which Swinburne lays down, is subject to the intention of [219] the testator. Here there is no intention whatever to be collected from the instrument, that the testator meant to give two annuities to his wife; "there is no additional cause assigned," according to the doctrine of Lord Thurlow in *Ridges v. Morrison*. In that case there was a circumstance which marked the legatee Nicholas Layton, as a peculiar object of favour, namely, the mentioning him as the child whom the testator had put out an apprentice; from which the Court inferred an intention that he should have an additional legacy. But in *Coote v. Coote*, 2 Brown, Rep. Chan. 521, Lord Thurlow determined, that where a second codicil was only a repetition of a former one, the legacies were not doubled, and his Lordship said "that when the same legacy is given in a will and a codicil, the Court generally takes it as one legacy," which is agreeable to the judgment of Lord Hardwicke, in *The Duke of St. Albans v. Beauchamp*, 2 Atk. 636. But besides the apparent intention of the testator arising on the face of the whole will and codicil taken together; it is expressly stated on the record, and admitted by the demurrer, that "the said Pascoe Semmens did intend by his said will and codicil, to give to the said Katharine one annuity of ten pounds a-year only."

The Court held, that the rule as laid down in Swinburne was the true one, viz. that where two legacies of the same sum were given to the same person, one in a will and the other in a codicil, without any circumstances from which the intention of the testator could be collected, (the proof of which would be thrown upon the executor,) there the legatee would be entitled to both; but that in the present case, it seems clearly to appear from the whole of the will and codicil taken together, that the meaning of the testator was, that his wife should take but one annuity. In the codicil the same annuity was repeated, which was before mentioned in the will: it was charged on the same lands, and the only difference was, that the payment was directed to be made quarterly in the codicil, and yearly in the will. That the decision of the Court was founded solely on what appeared to be the intention of the testator, on the face of the will and codicil together, without adverting to the argument, that the intention of the testator was admitted by the demurrer, which, if it had been necessary, seemed to them to deserve consideration.

Judgment for the Plaintiff.

[220] BROOKS *against* MORAVIA. Friday, Nov. 15th, 1793.

The Court of requests for the city of London has no jurisdiction in a suit, unless both the plaintiff and defendant be resident within the city (a).

On the motion of Le Blanc, Serjt., a rule was granted to shew cause why a suggestion should not be entered on the record, that this action was brought for a debt under 40s. and that at the time of the commencement of the suit, the Defendant was a tradesman, keeping a shop, and carrying on business within the City of London, and liable to be warned or summoned to the Court of Requests for the City, under the statutes 3 Jac. 1, c. 15, and 14 Geo. 2, c. 10.

Adair, Serjt., shewed cause, contending that the case was not within those statutes, because it appeared from the affidavit on which the rule was obtained, that the Plaintiff was not a tradesman or inhabitant within the City of London, but resident and carrying on business in the county of Essex; and that the Court of Requests for the City had not

(a) [Vide *Jonas v. Greening*, 5 T. R. 529. *Webb v. Brown*, Id. 535, accord. See also *Dillamore v. Capon*, 1 Bingh. 388, ante 29, note. 1 Chitty's Rep. 636 (n).]

jurisdiction, except where the Plaintiff as well as the Defendant was resident within the City.

The Court on looking into the statutes, were very clearly of that opinion, and Discharged the rule.

FLEETWOOD against FINCH. Friday, Nov. 15th, 1793.

By the statute 19 G. 3, c. 74, the clerk of assize on each circuit, is intitled to receive a certain fee for every person convicted of a transportable offence, (except petty larceny) and sentenced to transportation, hard labour, or confinement in the house of correction, and for persons capitally convicted who afterwards have received the king's pardon, on condition of being transported or imprisoned. On the Norfolk Circuit, that fee is one guinea.

This was an action for money had and received, in which a verdict was found for the Plaintiff, subject to the opinion of the Court on the following case.

"The Plaintiff before and in the year 1779, was clerk of assize for the Norfolk circuit, and from thence hitherto hath so continued. The Defendant during all that time, hath been and still is treasurer for the county of Norfolk. The present action is brought to recover the sum of 171l. 3s. being the amount of fees which the Plaintiff claims to have become due to him, as such clerk of assize, from 1779 to 1791, at the assizes for the county of Norfolk, for persons convicted of transportable offences, and sentenced to transportation, hard labour, or confinement in the house of correction, and for persons capitally convicted, who afterwards have received the king's pardon, on condition of being [221] transported or imprisoned: (and on account of such persons being sent or delivered in execution of their respective sentences, orders had been drawn up by the said clerk of assize,) being after the rate of one guinea for every such person. That the clerks of assize on the different circuits in England, have been accustomed to receive some certain fee, for every person so convicted and sentenced, and in London and Middlesex for those whose sentences have been afterwards carried into execution; and the usual fee which has been paid in the county of Norfolk, has been one guinea each. That the Defendant as treasurer of the said county, has in his hands more than sufficient to pay the Plaintiff's demand, and which he has the orders of the justices at the quarter sessions to pay, and consents to pay to the Plaintiff, if the Plaintiff is intitled to the same."

"And the question for the opinion of the Court is, whether the Plaintiff is intitled to recover the sum of 171l. 3s. or any or what part thereof?"

Le Blanc, Serjt., for the Plaintiff. The question in this case is, whether the Plaintiff, as clerk of assize for the Norfolk circuit, be intitled to a fee for each person convicted at the assizes for that county, of an offence for which he was liable to be transported, and has received sentence of imprisonment in lieu of transportation, (except in cases of petty larceny) and also for each person, who, having been capitally convicted, has received the king's pardon, on condition of transportation or imprisonment? Now the right to this fee is established by usage, and confirmed by act of parliament: for it is stated, that the clerks of assize on the different circuits in England, have been accustomed to receive a certain fee, and the statute 19 Geo. 3, c. 74, provides (sect. 30) "That the clerk of assize or other clerk of the court, shall have the same fee, gratuity or satisfaction, as hath usually been paid, and would have been due to them respectively, if such offender had been sentenced to transportation, except in the case of petty larceny, wherein they shall have only such fees as have usually and of right been paid upon conviction for the said offence; and such fees, gratuities, and satisfaction, &c. shall be paid by the treasurer of the county, &c. to such clerk of assize."

Bond, Serjt., contrâ. It is a principle of law, that the right of any officer to fees, must be founded either on ancient usage or act of parliament. Now in the present instance, there could [222] be no ancient usage, the punishment of transportation having commenced no earlier than the reign of Geo. 1 and the statute 19 Geo. 3, c. 74, does not give a new fee, but only directs, that the clerk of assize shall have the same fee as hath usually been paid, and would have been due, if the offender had been sentenced to transportation. It remains therefore to be considered, whether any and what fee is given, by prior acts of parliament. The first statute that ordered convicts to be transported to the American Plantations, was 4 Geo. 1, c. 11, which mentions

nothing respecting fees to be given to officers. This statute is confirmed by 6 Geo. 1, c. 23, which empowers the Court before whom the offenders are convicted, to appoint two justices to contract for the transportation of them, and orders that all charges incurred in making the contracts and conveying the felons shall be borne by the county, and paid by the treasurer, by order of the Justices at the Quarter Sessions, but is silent as to fees to be paid to the clerk of the assize (*b*): so also are 16 Geo. 2, c. 15. 20 Geo. 2, c. 46, and 8 Geo. 3, c. 15. On another ground likewise, the claim of the Plaintiff is void: the office of clerk of assize concerns the administration of justice, and no person having such an office can legally take a fee for the execution of it, except from the king. Co. Lit. 368 b. 2 Inst. 209. Stat. of Westm. 1, c. 26, which, according to Lord Coke, was made in affirmance of a fundamental maxim of the common law. 2 Inst. 210.

Le Blanc in reply. Admitting the principles laid down on the other side, they are not applicable to this case. The statute 19 Geo. 3, c. 74, contains a legislative acknowledgment that some fee had been usually paid to the clerk of assize, and a direction that such fee should be continued. Thus also the 16 Geo. 3, c. 43 (sect. 17), which passed for the employment of convicts on board the hulks, expressly provides that the clerk of assize shall be paid by the treasurer of the county, "the like satisfaction as hath been usually paid for the order of transportation of any offender."

LORD CHIEF JUSTICE EYRE. I agree with my Brother Bond, that no officer can claim a fee, except by ancient usage or act of parliament; but the fee in question is claimed under the 19 Geo. 3, c. 74. The 16 Geo. 3, c. 43, enacts, that the clerk of assize shall give a certificate in the cases mentioned in the act, [223] and have the like satisfaction as hath been usually paid for the order of transportation. The 19 Geo. 3, c. 74, by varying the phrase, and adding the words, "would have been due," has let in all the argument used to shew that nothing was due, and the only difficulty that could arise in the case. But we must understand the expressions according to the subject-matter of the different acts. Now the subject-matter being of modern introduction no ancient usage can apply to it. We must therefore take the Legislature to have meant that the clerk of assize should have the same fee as had been usually paid since the fourth year of George I. for we come nearer the truth by referring the usage mentioned in the act to what then existed, than to what never existed. And it is highly reasonable that a public officer should have some fee or recompense; but the construction contended for would leave him without any.

GOULD, J. The statute 16 Geo. 3, c. 43, s. 16, directs that the clerk of assize shall not take more than 2s. 6d. as a fee for certifying a transcript, containing the effect of every indictment and conviction of offenders, who should escape from their place of confinement or hard labour, in order to their trial, and immediately afterwards, in the next section provides, that such clerk of assize should have the like satisfaction as had been usually paid for the order of transportation of any offender. That is therefore a direct recognition that some fee had been accustomed to be paid. It is difficult to say when this fee commenced; but though transportation was not established by legislative authority before the 4 Geo. 1, yet long before that time (probably from the original planting of colonies in the West Indies), transportation was frequent, as appears from the introduction to Kelynge's Reports (*a*). And it is indeed reasonable and proper that a public officer should have a compensation for his labour; and the statutes of Geo. 3 contain a parliamentary recognition of a right to such compensation.

HEATH, J., of the same opinion. Though the statute 4 Geo 1 first established the transportation of offenders by authority of Parliament, yet it is well known that it was usual, long before, for the Crown to grant pardons on condition of transportation, which came in lieu of abjuring the realm. An ancient fee may attach on a modern act of parliament, such, for instance, as a fee on an oath taken before a justice of the peace, or a judge at [224] chambers; so if a new act were to direct an officer to grant a certificate, an accustomed fee taken on granting certificates would attach.

ROOKE, J., of the same opinion. From the 4 Geo. 1 to the 16 Geo. 3 there is a

(*b*) Except in cases of returning from transportation before the expiration of the term, s. 7.

(*a*) Tit. Directions for Justices of the Peace, p. 4. The same also appears from the preamble to the statute 4 Geo. 1, c. 11.

period of near sixty years, during which transportation was continually used as a punishment, and it is not to be supposed that the officer ever acted gratis. When therefore in the 19 Geo. 3, the legislature speak of a fee as having been usually paid, they must be intended to mean such as had been paid during that time.

Judgment for the Plaintiff.

BROOK *against* WILLET. Friday, Nov. 22d, 1793.

A prescription for common of pasture for a certain number of sheep on A. every year at all times of the year, is well laid, though the evidence which proves the right of common, proves also that the tenant of a certain farm has a right to have the sheep folded at night on his farm, after they have fed on the common during the day (a).

Replevin for taking twenty sheep of the Plaintiff at the parish of Mildenhall in the county of Suffolk, in a certain place there called Undley Common, and twenty other sheep at the parish of Lakenheath in the said county in a certain other place called Undley Common, &c. &c.

Non cepit, and avowry.

And the said Anthony, by William Fuller his attorney, comes and defends the wrong and injury, when, &c. And as to the said cattle in the declaration of the said Thomas first particularly mentioned, and therein alleged to have been seized and taken by the said Anthony in the parish of Mildenhall aforesaid, says, that he the said Anthony did not take the same, in manner and form as the said Thomas hath above thereof complained against him, and of this he puts himself upon the country, &c. And as to the residue of the said cattle in the said declaration lastly mentioned, he the said Anthony well avows the taking of those cattle in the said place in which, &c. and justly, &c. because he says that the said place in which, &c. is, and at the said time when, &c. was, and from time whereof the memory of man is not to the contrary hath been, a certain large waste or common, containing in itself divers, to wit, 400 acres of land, situate, lying and being within the said parish of Lakenheath, in the said county of Suffolk; and that before and at the said time when, &c., he the said Anthony and Mary his wife, in right of the said Mary, were and still are seised [225] in their demesne as of fee, of and in a certain messuage with the appurtenances, situate and being in the said parish of Lakenheath and county aforesaid, and that he the said Anthony and all those whose estate he hath, and at the said time when, &c. had, of and in the messuage with the appurtenances, from time whereof the memory of man is not to the contrary, have had and used, and been accustomed to have and use, for himself and themselves, his and their tenants and farmers, occupiers of the said messuage with the appurtenances, common of pasture for all of his and their commonable cattle (except sheep), levant and couchant in and upon the said messuage with the appurtenances, in the said place in which, &c. every year at all times of the year, as to the said messuage with the appurtenances belonging and appertaining. And because the said last mentioned cattle, at the said time when, &c. were wrongfully and injuriously in the said place in which, &c. depasturing the grass there then growing, and doing damage there, by reason whereof the said Anthony could not have and enjoy his said common of pasture, in so ample and beneficial a manner as he then and there ought to have had and enjoyed the same, he the said Anthony well avows the taking of the said last mentioned cattle in the said place in which, &c. and justly, &c. as a distress for the damage there then done and doing, and this he the said Anthony is ready to verify, wherefore he prays judgment and a return of the said last mentioned cattle, together with his damages, costs and charges, according to the form of the statute in such case made and provided, to be adjudged to him, &c.

Plea in bar,

And the said Thomas, as to the plea of the said Anthony by him first above pleaded in bar, and whereof he puts himself upon the country, doth so likewise. And as to the said avowry of the said Anthony above made, as to the residue of the said

(a) [It is not a variance to prove a larger prescription than that put in issue, *Rogers v. Allen*, 1 Campb. N. P. C. 309, and the note there. See also *Rex v. Marquis of Buckingham*, 4 Campb. N. P. C. 189, and 1 Saund. 269, (new notes) 5th edit.]

cattle in the said declaration lastly mentioned, the said Thomas says, that by reason of any thing in that avowry alleged, the said Anthony ought not to avow the taking of the said cattle in the said place in which, &c. to be just, because he says, that one Sir Thomas Charles Bunbury, long before the said time when, &c. to wit, on the 29th day of September in the year of our Lord 1780, was and yet is seised in his demesne as of fee, of and in a certain messuage, and divers, to wit, 500 acres of land with the appurtenances, situate and being in the parish of Mildenhall in the said county of Suffolk; and that he the [226] said Sir Thomas Charles Bunbury, and all those whose estate he had, and bath, of and in the said messuage and land with the appurtenances, from time whereof the memory of man is not to the contrary, have had and used, and been accustomed to have and use, and of right ought to have had and used, and still of right ought to have and use, for himself and themselves, his and their farmers, tenants, occupiers of the said messuage and land, with the appurtenances, common of pasture in the said place called Undley Common, in which, &c. for twenty sheep levant and couchant in and upon his said messuage and land with the appurtenances, every year and at all times of the year, at his and their free will and pleasure, as belonging and appertaining to the said messuage and land with the appurtenances. And the said Thomas further says, that the said Sir Thomas Charles Bunbury, whilst he was so seised thereof, and before the said time when, &c. to wit, on the day and year last aforesaid, at the parish of Mildenhall aforesaid, in the said county of Suffolk, did demise the said messuage and lands with the appurtenances to the said Thomas, to hold the same to the said Thomas, from the 10th day of October in the year of our Lord 1780, for and during and unto the full end and term of 12 years, from thence next ensuing; by virtue of which said demise, the said Thomas afterwards, and before the said time when, &c. to wit, on the 11th day of October, in the year last aforesaid, entered into the said messuage and land with the appurtenances, and became and was, and from thence continually until, and at the said time when, &c. remained so possessed thereof, under the said demise as tenant thereof to the said Sir Thomas Charles Bunbury; and being so possessed of the said messuage and land with the appurtenances, he the said Thomas, afterwards and before the said time when, &c. to wit, on the 29th day of April, in the year of our Lord 1790 aforesaid, put his said cattle in the said declaration lastly mentioned, then being twenty of his own sheep, levant and couchant upon his said messuage and land with the appurtenances, so by the said Sir Thomas Charles Bunbury demised to the said Thomas as aforesaid, into the said place in which, &c. to depasture the grass then there growing, and to use his common of pasture there, as it was lawful for him to do, for the cause aforesaid: and the said cattle at the said time when, &c. were in the said place called Undley Common, in which, &c. depasturing upon the grass then there growing, and using the said common of pasture of the said Thomas there, until the said Anthony, of his [227] own wrong, at the said time when, &c. took the said cattle of him the said Thomas in the said declaration lastly mentioned, in the said place called Undley Common, in which, &c. and unjustly detained the same against sureties and pledges, until, &c. in manner and form as the said Thomas hath above thereof complained against him, and this he the said Thomas is ready to verify, &c. And for further plea in bar to the said avowry so by the said Anthony lastly above made, as to the residue of the said cattle in the said declaration lastly mentioned, he the said Thomas, by leave of the court, &c. saith, that by reason of any thing in that avowry alleged, the said Anthony ought not to avow the taking of the said cattle in the said place in which, &c. to be just, because he says that the said place called Undley Common, in which, &c. now is, and at the said time when, &c. was, and from time immemorial hath been, a certain open common, lying and being in two several parishes, (that is to say) a part thereof is, and during all that time was, situate, lying and being in the parish of Lakenheath aforesaid, in the said county of Suffolk, and another part thereof is, and during all that time was situate, lying and being in the parish of Mildenhall, in the said county of Suffolk; and the said Thomas further saith, that one Sir Thomas Charles Bunbury, long before the said time when, &c. to wit, on the 29th day of September, in the year of our Lord 1780, was, and yet is, seised in his demesne as of fee, of and in a certain other messuage, and divers, to wit, 500 other acres of land, with the appurtenances, situate and being in the said parish of Mildenhall, in the said county of Suffolk; and that he the said Sir Thomas Charles Bunbury, and all those whose estate he had and bath, of and in the said last mentioned messuage and lands, with

the appurtenances, from time whereof the memory of man is not to the contrary, have had and used, and have been accustomed to have and use, and of right ought to have had and used, and still of right ought to have and use, for himself and themselves, and his and their farmers and tenants, occupiers of the said last mentioned messuage and land, with the appurtenances, common of pasture in and upon that part of the said place called Undley Common, in which, &c. which is situate, lying and being in the parish of Mildenhall, in the said county of Suffolk as aforesaid, for twenty sheep levant and couchant in and upon the said last mentioned messuage and land, with the appurtenances, every year, at all times of the year, at his and their free will and pleasure, as belonging and appertaining to the said last mentioned messuage and land with the ap-[228]-purtenances: and the said Thomas further saith, that such part of the said place called Undley Common, in which, &c. as is within the said parish of Mildenhall as aforesaid, now lies, and at the said time when, &c. did lie, and from time whereof the memory of man is not to the contrary, hath lain contiguous and next adjoining to that part of the said place called Undley Common, in which, &c. which lies within the said parish of Lakenheath as aforesaid, and without any hedge or fence whatsoever dividing or separating the one part thereof from the other part thereof, and that from time whereof the memory of man is not to the contrary, the cattle of each and every respective person, for the time being, having right of common of pasture in that part of the said place called Undley Common, in which, &c. which lies within the said parish of Lakenheath as aforesaid, and from time to time put into that part of the said place called Undley Common, in which, &c. which lies within the said parish of Lakenheath as aforesaid, to feed and depasture on the grass there then growing, have wandered, strayed and escaped, and have been used and accustomed to wander, stray and escape, from and out of that part of the said place called Undley Common, in which, &c. which lies within the said parish of Lakenheath as aforesaid, unto and into that part of the said place called Undley Common, in which, &c. which lies in the said parish of Mildenhall as aforesaid, and to intercommon and interpasture there with the cattle from time to time feeding on and in that part of the said place called Undley Common, in which, &c. which lies in the said parish of Mildenhall as aforesaid, at their free will and pleasure by cause of vicinage, and in like manner the cattle of each and every respective person, for the time being, having right of common in that part of the said place called Undley Common, in which, &c. which lies within the said parish of Mildenhall as aforesaid, and from time to time put into that part of the said place called Undley Common, in which, &c. which lies within the said parish of Mildenhall as aforesaid, to feed and depasture on the grass there then growing, have wandered, strayed and escaped, and have been during all the time aforesaid, used and accustomed to wander, stray and escape, from and out of that part of the said place called Undley Common, in which, &c. which lies within the said parish of Mildenhall as aforesaid, unto and into that part of the said place called Undley Common, in which, &c. which lies in the said parish of Lakenheath as aforesaid, and to intercommon and inter-[229]-pasture there with the cattle from time to time feeding on and in that part of the said place called Undley Common, in which, &c. which lies in the said parish of Lakenheath as aforesaid, at their free will and pleasure, by cause of vicinage, to wit, at the respective parishes of Lakenheath and Mildenhall aforesaid, in the said county of Suffolk. And the said Thomas further saith, that the said Sir Thomas Charles Bunbury being so seised of and in the said last mentioned messuage and land, with the appurtenances, as last aforesaid, he the said Sir Thomas Charles Bunbury, whilst he was so seised, and before the said time when, &c. to wit, on the day and year last aforesaid, at the parish of Mildenhall aforesaid, in the said county of Suffolk, demised the said last mentioned messuage and land, with the appurtenances, to the said Thomas, to hold the same to the said Thomas, from the 10th day of October in the said year of our Lord 1780, for, during and unto the full end and term of twelve years, from thence next ensuing, by virtue of which said last mentioned demise, the said Thomas afterwards, and before the said time when, &c., to wit, on the 11th day of the said October, in the year last aforesaid, entered into the said last mentioned messuage and land, with the appurtenances, and became, and was, and from thence continually until, and at the said time when, &c. remained so possessed thereof, under and by virtue of the said last mentioned demise, as tenant thereof to the said Sir Thomas Charles Bunbury; and being so possessed of the said last mentioned messuage and land, with the appurtenances, as last aforesaid, he the

said Thomas afterwards, and before the said time when, &c., to wit, on the 29th day of April, in the year of our Lord 1790 aforesaid, put the said cattle in the said declaration lastly mentioned, being twenty of his own commonable sheep, levant and couchant on the said last mentioned messuage and land, with the appurtenances, so demised to him by the said Sir Thomas Charles Bunbury as last aforesaid, into and upon that part of the said place called Undley Common, in which, &c. which lies within the said parish of Mildenhall as aforesaid, to feed and depasture on the grass there then growing, and to use his the said Thomas's common of pasture there, and left the said cattle there for the purpose aforesaid, as it was lawful for him to do for the cause aforesaid; which said cattle being so put and left there for the purpose last aforesaid, afterwards and before the said time when, &c., to wit, on the day and year last aforesaid, of their own accord, and for want of [230] fences as last aforesaid, wandered, strayed and escaped, from and out of that part of the said place called Undley Common, in which, &c. which is within the said parish of Mildenhall aforesaid, unto and into that part of the said place called Undley Common, in which, &c. which lies in the said parish of Lakenheath as aforesaid, for cause of vicinage, there not being then and there any hedge or fence to separate or divide that part of the said place called Undley Common, in which, &c. which lies in the said parish of Mildenhall as last aforesaid, from that part of the said place called Undley Common, in which, &c. which lies in the said parish of Lakenheath as last aforesaid; and on that occasion the said cattle were staid, remained and continued in that part of the said place called Undley Common, in which, &c. which lies in the said parish of Lakenheath as last aforesaid, feeding and depasturing on the grass there then growing, and intercommoning and interpasturing there with the cattle of the several persons then having right of common of pasture in that part of the said place called Undley Common, in which, &c. which lies in the said parish of Lakenheath as last aforesaid, for cause of vicinage, from thence until the said Anthony at the same time when, &c. of his own wrong took the cattle of the said Thomas in the said declaration last mentioned, in the said place in which, &c. and unjustly detained the same against sureties and pledges, until, &c. in manner and form as the said Thomas hath above thereof complained against him the said Anthony, and this he the said Thomas is ready to verify, wherefore, &c.

And the said Anthony, as to the said plea by the said Thomas first above pleaded in bar to the said avowry, by him the said Anthony above made, as to the said cattle in the said declaration lastly mentioned, says, that by reason of any thing in that plea alleged, he the said Anthony ought not to be barred from avowing the taking of the said cattle in the said declaration lastly mentioned, in the said place in which, &c. to be just, because, as before he says, that the said cattle in the said declaration lastly mentioned, at the said time when, &c. were wrongfully and injuriously in the said place in which, &c. depasturing the grass there then growing, and doing damage there in manner and form as the said Anthony hath above in his said avowry alleged, "Without this that the said Sir Thomas Charles Bunbury, and all those whose estate he had and hath, of and in the said messuage and lands, with the appurtenances, from time whereof the memory of man is not to the contrary, have had and used, and been accustomed to have and use, and of [231] right ought to have had and used, and still of right ought to have and use, for himself and themselves, his and their farmers and tenants, occupiers of the said messuage and lands with the appurtenances, common of pasture in the said place called Undley Common, in which, &c. for twenty sheep, levant and couchant in and upon the said messuage and land with the appurtenances, every year, at all times of the year, at his and their free will and pleasure, as belonging and appertaining to the said messuage and lands, with the appurtenances, in manner and form as the said Thomas hath in that plea alleged," and this he the said Anthony is ready to verify, wherefore he prays judgment, and a return of the said cattle in the said declaration lastly mentioned, together with his damages, costs and charges, in this behalf, according to the form of the statute in such case made and provided, to be adjudged to him, &c. And the said Anthony, as to the said plea by the said Thomas lastly above pleaded in bar to the said avowry, by him the said Anthony above made, as to the said cattle in the said declaration lastly mentioned, says, that by reason of any thing in that plea alleged, he the said Anthony ought not to be barred from avowing the taking of the said cattle in the said declaration lastly mentioned, in the said place in which, &c. to be just, because he says, that the said Thomas of his own wrong, before the said time when, &c., to wit, on the same day and year in the said declaration

mentioned, put the said cattle in the said declaration lastly mentioned, in and upon the said part of Undley Common aforesaid, in which, &c. lying and being within the said parish of Lakenheath; and that the said cattle in the said declaration lastly mentioned, at the said time when, &c. were wrongfully and injuriously in the said place in which, &c. depasturing the grass there then growing, and doing damage there, in manner and form as the said Anthony hath above in his said avowry alleged, "Without this, that the said Thomas before the said time when, &c. put the said cattle in the said declaration lastly mentioned, into and upon that part of the said place called Undley Common, in which, &c. which lies within the parish of Mildenhall, to feed and depasture on the grass there then growing, and to use his the said Thomas's common of pasture there, and that the said cattle of their own accord, and for want of fences, wandered, strayed and escaped, from and out of that part of the said place called Undley Common, in which, &c. which lies within the [232] said parish of Mildenhall, unto and into that part of the said place called Undley Common, in which, &c. which lies in the said parish of Lakenheath as aforesaid, for cause of vicinage, in manner and form as the said Thomas hath by his said last plea in bar alleged," and this he the said Anthony is ready to verify, wherefore he prays judgment, and a return of the said cattle in the said declaration lastly mentioned, together with his damages, costs and charges, according to the form of the statute in such case made and provided, to be adjudged to him, &c.

And the said Thomas, as to the said plea of the said Anthony by him above pleaded, by way of reply to the plea by the said Thomas first above pleaded in bar to the said avowry, by him the said Anthony above made, as to the said cattle in the said declaration lastly mentioned, says, as before, that the said Sir Thomas Charles Bunbury, and all those whose estate he had and hath, of and in the said messuage and lands, with the appurtenances, from time whereof the memory of man is not to the contrary, have had and used, and been accustomed to have and use, and of right ought to have had and used, and still of right ought to have and use, for himself and themselves, his and their farmers and tenants, occupiers of the said messuage and lands with the appurtenances, common of pasture in the said place called Undley Common in which, &c. for twenty sheep, levant and couchant in and upon the said messuage and land with the appurtenances, every year, at all times of the year, at his and their free will and pleasure, as belonging and appertaining to the said messuage and land with the appurtenances, in manner and form as the said Thomas hath above in his said plea alleged, and of this he puts himself upon the country. And the said Anthony doth so likewise, &c. And the said Thomas, as to the said plea of the said Anthony by him above pleaded, by way of reply to the plea by the said Thomas lastly above pleaded in bar to the said avowry by him the said Anthony above made, as to the said cattle in the said declaration lastly mentioned, says, that the said Thomas, before the said time when, &c. put the said cattle, in the said declaration lastly mentioned, into and upon that part of the said place called Undley Common in which, &c. which lies within the parish of Mildenhall, to feed and depasture on the grass there then growing, and to use his the said Thomas's common of pasture there, and that the said cattle of their own accord, and for want of fences, wandered, strayed and escaped [233] from and out of that part of the said place called Undley Common, in which, &c. which is within the said parish of Mildenhall, unto and into that part of the said place called Undley Common, in which, &c. which lies in the said parish of Lakenheath as aforesaid, for cause of vicinage, in manner and form as the said Thomas hath above in his said last plea in bar alleged, and of this he puts himself upon the country, and the said Anthony doth the like, &c.

This cause was tried at the last Summer assizes at Bury, before the Lord Chief Justice of this court, when a verdict was found for the Plaintiff, on the traverses of the right of common; the evidence being, that he had a right to common of pasture at all times of the year on Undley Common, but that the tenant of Undley-hall Farm had a right to have the sheep folded on the lands of that farm, when they fed on Undley Common. It was also proved, by an old occupier of the farm, that he had received a compensation from a person who had turned sheep on the common, for not folding them on the farm. And now

Adair, Serjt., obtained a rule to shew cause why the verdict should not be set aside, on the ground that the prescription was not proved as laid, being qualified with the right of the occupier of Undley hall Farm to have the sheep folded on his lands.

Against which Le Blanc, Serjt., shewed cause.

The right of the occupier of the farm was collateral to and distinct from the right of common, and not inconsistent with the prescription on the record. It was not part of an entire prescription, and therefore was not material to be stated. The folding the sheep was a condition subsequent, and not precedent, to the exercise of the right: and a subsequent condition need not be stated. Thus in *Kenchin v. Knight*, 1 Wils. 253, 1 Black. 49, the Defendant, to an action of trespass, pleaded a custom for the tenants and occupiers of certain ancient messuages to have a right of common in the locus in quo, and under that custom justified the putting in his swine, &c.; the Plaintiff in his replication confessed the custom as pleaded to be true as far as it went, but added, that it went farther, viz. that the swine should be rung to prevent their rooting up the ground. To this replication there was a demurrer, and it was objected that it was bad, because it did not traverse the custom in the plea, and two contrary customs could not be pleaded; but the Court held the replication good, for it admitted the custom set forth in the plea, and then added another circumstance quite [234] consistent with it, namely, that the swine should be rung, which was rather a qualification of the custom pleaded, than a different one. And in *Griffith v. Williams*, Say. Rep. 56, it is laid down, that where two customs are stated, for the breach of which there are mutual remedies, it is not necessary for the party traversing the one to take any notice of the other.

Adair, Serjt., for the rule. The question is, whether the evidence supports the prescription as laid! Now the prescription is stated in a large unqualified manner, but the evidence shews that the right is narrowed, by the condition of folding the sheep on Undley-hall Farm. The allegation therefore is not supported by proof. The cases cited on the other side turned entirely on the forms of pleading, and in none of them was there any question how far the allegations correspond with the evidence. Those cases therefore are not applicable to the present.

The Court at first seemed to doubt whether the prescription, stating the right of common for the sheep at all times of the year, at the free will and pleasure of the Plaintiff, did not give him a right to continue the sheep on the common all night; and, if so, it was repugnant to the evidence, which proved that they were to be folded at night on Undley-hall Farm. But upon consideration, they held that the words "all times" were to be understood according to the subject-matter, and the general course of feeding sheep, which seldom, if ever, remained during the night on the commons on which they were turned out to pasture, but were driven to a fold. The words therefore, "all times" must be taken to mean all usual times. That there were two prescriptions, and that the folding the sheep on Undley-hall Farm, was not part of an entire prescription for common of pasture on Undley Common, but a condition or rather a consideration, subsequent to the enjoyment of the right, and therefore not necessary to be stated; which it would have been, had it been precedent.

And Rooke, J., mentioned *Gray's case*, 5 Co. 78 b. where, in "replevin between Gray and Fletcher, in bar of the avowry for damage feasant, the Plaintiff entitled himself to have common of pasture in the place where, &c. to his copyhold, which custom was traversed. And it was found, that he ought to have the same common, but that every copyholder had used to pay time out of mind, pro eâtem communiâ, unam gallinam et quinque ova, annuatim, and it was adjudged, that on this verdict the Plaintiff should have judgment; for the Plaintiff need not shew more than makes for him, and that is of his part" (a).

Rule discharged.

[235] CALLAN against TYE. Friday, Nov. 22d, 1793.

The Court will set aside an attachment against the sheriff issued on account of bail above not being put in, on payment of costs and perfecting bail, where the Plaintiff has not been delayed.

Bail above not being put in in due time, an attachment was regularly obtained against the sheriff. But now Bond, Serjt., moved to set aside the attachment, on an affidavit that the Plaintiff had lost no time.

The Court made the rule absolute, on putting in and justifying bail and payment of costs; and they said, that if the Plaintiff had taken an assignment of the bail-bond, instead of resorting to the sheriff, as the proceedings would have been staid by perfecting bail and paying the costs, it was reasonable that the same indulgence should be allowed to the sheriff, and that the practice should be uniform (a)¹.

Rule absolute.

WAUGH against CARVER, CARVER AND GIESLER. Saturday, Nov. 23d, 1793.

[Adopted, *Bond v. Pittard*, 1838, 3 Mee. & W. 361; *Brett v. Beckwith*, 1856, 26 L. J. Ch. 133. Discussed, *In re Stanton Iron Company*, 1855-60, 21 Beav. 169; (sub nom. *Cox v. Hickman*) 8 H. L. C. 303. Questioned, *Bullen v. Sharp*, 1865, L. R. 1 C. P. 112. Explained, *Hohne v. Hammond*, 1872, L. R. 7 Ex. 226. Disapproved, *Mollwo v. Court of Wards*, 1872, L. R. 4 P. C. 433. Referred to, *Ex parte Mills*, 1873, L. R. 8 Ch. 572. Commented on, *Pooley v. Drirer*, 1876, 5 Ch. D. 477. Qualified, *In re Howard*, 1877, 6 Ch. D. 315. Questioned, *Badeley v. Consolidated Bank*, 1888, 38 Ch. D. 247. Referred to, *Adam v. Newbigging*, 1888, 13 App. Cas. 316. Discussed, *In re Fort*, [1897] 2 Q. B. 498.]

A. and B. ship agents at different ports, enter into an agreement to share, in certain proportions, the profits of their respective commissions, and the discount on tradesmen's bills employed by them in repairing the ships consigned to them, &c. By this agreement they become liable as partners to all persons with whom either contracts as such agent, though the agreement provides that neither shall be answerable for the acts or losses of the other, but each for his own (a)².

This action of assumpsit for goods sold and delivered, work and labour done, &c. was tried at Guildhall before the Lord Chief Justice, when a verdict was found for the Plaintiff, subject to the opinion of the Court on a case which stated,

(a)¹ The same practice has been also adopted in *B. R. Hill v. Bolt*, 4 Term Rep. B. R. 352. And the rule in both courts seems to be, that if the Plaintiff has not been delayed in going to trial, the attachment shall be set aside; but if he has been so delayed, then the attachment shall remain in the office as a security in case he should obtain a verdict. [Vide Tidd's Prac. 317, 8th Edit.]

(a)² [The distinction taken in this case as to agreements constituting a partnership with regard to third persons, and yet not operating so as to render the parties themselves partners as between themselves, has been recognized in many subsequent decisions. See *Hesketh v. Blanchard*, 4 East, 144. *Bolton v. Puller*, 1 Bos. & Pul. 546, and the cases cited below.

In the principal case, there are two modes stated by which a person may render himself liable as a partner with regard to third persons. 1. "If he will lend his name as a partner, he becomes, as against all the rest of the world, a partner, not upon the ground of the real transaction between them, but upon principles of general policy to prevent the frauds to which creditors would be liable if they were to suppose that they had lent their money upon the apparent credit of three or four persons, when in fact they lent it only to two of them." 2. "He who takes a moiety of all the profits indefinitely, shall by operation of law be made liable to the losses, if losses arise, upon the principle that by taking part of the profits he takes from the creditors a part of that fund which is the proper security to them for the payment of their debts." Since the decision of *Waugh v. Carver*, which must now be regarded as the leading case on this subject, a number of cases illustrative of these principles have occurred, the substance of which is stated below.

1. Lending the name makes a partner, for though in point of fact parties are not partners in trade, yet if one so represents himself, and by that means gets credit for goods for the other, both are liable. Per Lord Kenyon, *De Berkem v. Smith*, 1 Esp. N. P. C. 29. So if the name of a clerk is introduced into a firm, he is liable as a partner, though he has no share of the profits. *Guidon v. Robson*, 2 Campb. N. P. C. 302 (but see *Teel v. Elworthy*, 14 East, 210). But if a person holds himself out as a partner of another in one transaction only, he will not thereby render himself liable as a partner in other transactions. *De Berkem v. Smith*, 1 Esp. N. P. C. 29. Nor will

That on the 24th February 1790, the Defendants duly executed articles of agreement as follows: "Articles of agreement indented, made, concluded and agreed upon, this twenty-fourth day of February in the year of our Lord one thousand seven hundred and ninety, between Erasmus Carver and William Carver of Gosport in the county of Southampton merchants of the one part, and Archibald Giesler of Plymouth in the county of Devon merchant of the other part. Whereas the said Archibald Giesler, some time since received appointments from several of the principal ship owners, merchants, and insurers in Holland, and other places, to act as their agent in

a person be chargeable as a partner merely by his name appearing in a firm, unless it appears that it was used with his consent. *Newcome v. Coles*, 2 Campb. N. P. C. 617; and see, as to withdrawing the name, *Goode v. Harrison*, 5 B. & A. 17. So, where A. suffers his name to appear in a firm, but has no participation in the profits and losses, he is not a partner as to persons who have notice of that fact. *Alderson v. Pope*, 1 Campb. N. P. C. 404 (n.), and see *Heard v. Bigg*, Manning's Index, 220. Sed vide infra.

2. A participation in profits will render the person participating a partner, and it is immaterial whether he receives the profits for his own benefit or as a trustee for others, *Wightman v. Townroe*, 1 M. & S. 412, and whether he takes a smaller or larger share of the profits; for whatever may be the private stipulations between the partners themselves, as to the mode in which the profits are to be shared or the losses borne, yet, as to the rest of the world, each of the partners is liable for the whole amount of the debts of the concern. *Rex v. Dodel*, 9 East, 527. It is also immaterial whether or not the party dealing with the concern knew, at the time of such dealing, that the party he charges as a partner participated in the profits. *Ex parte Geller*, 1 Rose, 297.

In order to render a person liable as partner by participating in the profits, it must appear that he was to receive a portion of the profits, as such; therefore, a remuneration made to a traveller or other clerk or agent, by a portion of the sums received by or for his master or principal, in lieu of a fixed salary, which is only a mode of payment adopted to increase or secure exertion, will not constitute a partnership. *Cheap v. Cramond*, 4 B. & A. 670. So an agreement between A. and B., the owner of a lighter, that A. in consideration of working the lighter should receive half the gross earnings, Lord Ellenborough held, that this was only a mode of paying the Defendant wages for his labour, and was different from a participation of profits and loss. *Dry v. Boswell*, 1 Campb. N. P. C. 329. So the agreements entered into by the crews of ships employed in the whale fishery, that they shall receive a certain proportion of the produce of the cargo in lieu of wages, do not render the crew partners with the owners of the cargo. *Wilkinson v. Frasier*, 4 Esp. N. P. C. 182. *Mair v. Glennie*, 4 M. & S. 244. See also *Rex v. Hartley*, R. & R. Crown Cases, 139. *Evans v. Bennett*, 1 Campb. N. P. C. 300. So where a person receives from a trader an agreed sum in respect of goods sold by his recommendation, such receipt is not a receipt of a portion of the profits so as to create a partnership. *Cheap v. Cramond*, 4 B. & A. 670. Sed vide *Young v. Artell*, cited in the principal case, and see *Benjamin v. Porteous*, post, 590; but if a broker agrees that in lieu of brokerage, he shall have a share of the profits arising out of the sales, such agreement will make him a partner as to third persons. *Smith v. Watson*, 2 B. & C. 409. If, however, the party is only to be paid by a salary or sum of money in proportion to the profits, and only relies on the profits as a fund for payment, he is not a partner, for he is not to receive a portion of the profits as such, vide infra, 241, *Grace v. Smith*, there cited; see also *Ex parte Hamper*, 17 Ves. 404. *Ex parte Rowlandson*, 19 Ves. 461. Although the grant of an annuity of a certain sum to a retiring partner will not render him liable as a partner, vide infra, 245, yet if the annuity is subject to abatement or increase, as the profits of the business may fluctuate, he will still continue liable to the creditors of the concern. *Re Colbeck*, Buck, 48.

There may be a partnership in the profits, and yet not in the goods themselves from which the profits arise. Thus an agreement between A. a merchant, and B. a broker, that the latter should purchase goods for the former, and in lieu of brokerage should receive for his trouble a certain proportion of the profits arising from the sale, and should bear a proportion of the losses, does not vest in B. any share in the property so purchased, or in the proceeds of it, though it may render him liable, as a partner, to third persons. *Smith v. Watson*, 2 B. & C. 401.]

the several counties of [236] Hampshire, Devonshire, Dorsetshire and Cornwall; and whereas the said Erasmus Carver and William Carver have, for a great number of years, been established at Gosport aforesaid, in the agency line, under the firm of Erasmus Carver and Son, and hold sundry appointments as consuls and agents for the Danish and other foreign nations, and also have very extensive connexions in Holland, and other parts of Europe; and whereas it is deemed for their mutual interest, and the advantage of their friends, that the said Archibald Giesler should remove from Plymouth and establish himself at Cowes in the Isle of Wight; and the said Erasmus Carver and William Carver and the said Archibald Giesler have agreed, that each should allow to the other certain portions of each other's commissions and profits, in manner hereafter more particularly mentioned and expressed; Now therefore this agreement witnesseth, and the said Archibald Giesler doth hereby for himself, his executors and administrators, covenant, promise and agree to and with the said Erasmus Carver and William Carver, their executors and assigns in manner following (that is to say), that the said Archibald Giesler shall and will, when required so to do by the said Erasmus Carver and William Carver, remove from Plymouth, and establish himself at Cowes aforesaid, for the purpose of carrying on a house there in the agency line, on his account; but in consequence of the assistance and recommendations which the said Erasmus Carver and William Carver have agreed to render in support of the said house at Cowes, the said Archibald Giesler doth covenant, promise and agree to and with the said Erasmus Carver and William Carver, that the said Archibald Giesler, his executors, administrators and assigns, shall and will well and truly pay or allow, or cause to be paid or allowed to the said Erasmus Carver and William Carver, their executors, administrators or assigns, one full moiety or half part of the commission agency, to be received on all such ships or vessels as may arrive or put into the port of Cowes, or remain in the road to the westward thereof, within the Needles, of which the said Archibald Giesler may procure the address, and likewise one full moiety or half part of the discount on the bills of the several tradesmen employed in the repairs of such ships or vessels; and as there have been for a considerable time past, very general complaints made abroad of the malpractices and impositions that have [237] prevailed at Cowes aforesaid, and it being a principal object of the said Erasmus Carver and William Carver to counteract and prevent such, the said Archibald Giesler doth further covenant, promise and agree to and with the said Erasmus Carver and William Carver, that he the said Archibald Giesler shall and will use his utmost diligence and endeavours, to prevent ships or vessels arriving at the East end of the Isle of Wight from being carried past the port of Portsmouth to that of Cowes, and also to induce the mariners or commanders of such ships or vessels, as may come in at the West end of the island through the Needles, whenever it is practicable and advisable, to proceed to Portsmouth, and there put themselves under the direction of the said Erasmus Carver and William Carver, and that he will consult and advise with the said Erasmus Carver and William Carver on and respecting the affairs of such ships or vessels as may put into and remain at the port of Cowes under the care of the said Archibald Giesler, and pursue such measures as may appear to the said Erasmus Carver and William Carver for the interest of the concerned. And whereas one of the causes of complaint before mentioned, is the very heavy charge made at Cowes for the use of warehouses for depositing the cargoes of ships or vessels, the said Archibald Giesler doth also covenant, promise and agree, to and with the said Erasmus Carver and William Carver, that they the said Erasmus Carver and William Carver shall be at full liberty to engage warehouses at Cowes aforesaid, on such terms and in such manner as they may think proper, in which the said Archibald Giesler shall not upon any grounds or pretence whatsoever, either directly or indirectly, interfere. And the said Erasmus Carver and William Carver, for the considerations herein before mentioned, do hereby covenant, promise and agree, to and with the said Archibald Giesler, his executors and administrators, that they the said Erasmus Carver and William Carver, shall and will well and truly pay or allow, or cause to be paid or allowed to the said Archibald Giesler, his executors, administrators or assigns, three fifth parts or shares of the commission or agency to be received by the said Erasmus Carver and William, on account of all such ships or vessels, the commanders whereof may, in consequence of the endeavours, interference or influence of the said Archibald Giesler, proceed from Cowes to Portsmouth, and there put them-

selves under the direction of the said Erasmus Carver and William Carver, in manner hereinbefore mentioned, and likewise one and one half per cent. on the amount of [238] the bills of the several tradesmen employed in the repairs of such ships or vessels, together with one fourth part of such sum or sums as may be charged or brought into account for warehouse rent, on the cargoes of such ships or vessels respectively; and also one sixth part of such sum or sums as may be charged or brought into account for warehouse rent on the cargoes of such ships or vessels as may be landed at Cowes aforesaid: and also that they the said Erasmus Carver and William Carver, their executors, administrators and assigns, shall and will well and truly pay or allow, or cause to be paid or allowed unto the said Archibald Giesler, his executors, administrators or assigns, one fourth part or share of the commission or agency to be received by the said Erasmus Carver and William Carver, on account of all such ships or vessels that may arrive or put into the port of Portsmouth or remain in the limits thereof, under the care and direction of the said Erasmus Carver and William Carver; and likewise one half per cent. on the amount of the bills of the several tradesmen employed in the repairs of such ships or vessels; and in order to prevent any misunderstanding or disputes, with respect to the commission and discount to be paid and divided between the said Erasmus Carver and William Carver and the said Archibald Giesler, and for the better ascertaining thereof, it is hereby mutually covenanted, declared and agreed upon between the said Erasmus Carver and William Carver and the said Archibald Giesler, that one fifth part of the commission or agency on each ship shall and may be first retained by the party under whose care such ship or vessel shall be, as a full compensation for clerks, boat-hire, and all other incidental charges and expences in regard of such ships or vessels respectively; after which deduction, the then remaining balance of such commissions or agency shall be divided between the said Erasmus Carver and William Carver and the said Archibald Giesler in the proportion hereinbefore mentioned; and that such commission or agency shall be ascertained by one party's producing to the other true and authentic copies of the general accounts of each ship or vessel under their respective care and direction, signed by the several masters of such ships or vessels respectively, and notarially authenticated. And it is hereby further covenanted, declared and agreed upon, by and between the said Erasmus Carver and William Carver and the said Archibald Giesler, that this present contract and agreement shall commence and take effect from the date hereof, and shall continue in full force and virtue for the term of seven years, [239] during the whole of which said term, the said parties or either of them, shall not, upon any grounds or pretence whatsoever, directly or indirectly, enter into, or form any connexion, contract or agreement, with any other house or houses, or with any other person or persons whomsoever, concerning the commission or agency of ships or vessels, that may during the said term put into or arrive at either of the before mentioned ports of Portsmouth, or Cowes, nor shall the said Archibald Giesler, at the expiration of the said term of seven years, directly or indirectly establish himself at Gosport or Portsmouth, nor on any grounds or pretences whatsoever enter into or form any connexion, contract, or agreement, with any house or houses, person or persons whomsoever at Gosport or Portsmouth aforesaid. And also that they the said Erasmus Carver and William Carver and the said Archibald Giesler shall and will meet at Gosport on or about the first day of September yearly, for the purpose of examining and settling their accounts, concerning the said commission business, and that such party from whom the balance shall then appear to be due, shall and will well and truly pay or secure the same unto the other party, his executors, administrators or assigns, on or before the 29th day of the said month of September yearly. And it is hereby likewise covenanted, declared and agreed, by and between the said Erasmus Carver and William Carver and the said Archibald Giesler, that each party shall separately run the risque of, and sustain all such loss and losses as may happen on the advance of monies, in respect of any ships or vessel under the immediate care of either of the said parties respectively; it being the true intent and meaning of these presents, and of the parties hereunto, that neither of them the said Erasmus Carver and William Carver and Archibald Giesler shall at any time or times during the continuance of this agreement, be in anywise injured, prejudiced or affected by any loss or losses that may happen to the other of them, or that either of them shall in any degree be answerable or accountable for the acts, deeds, or receipts of the other of them, but that each of them the said Erasmus

Carver and William Carver and Archibald Giesler shall in his own person, and with his own goods and effects, respectively be answerable and accountable for his own losses, acts, deeds, and receipts. Provided always nevertheless, and it is hereby declared and agreed to be the true intent and meaning of these presents, and the parties hereunto, that in case the houses of either of them the said Erasmus Carver and William Carver and Archibald Giesler, [240] shall dissolve or cease to exist, from any circumstances whatsoever, before the expiration of the said term of seven years, that then this present agreement and every clause, sentence and thing herein contained, shall from thence cease, determine and be absolutely void, to all intents and purposes whatsoever; but without prejudice, nevertheless, to the settlement of any accounts that may then remain open and unliquidated, between the said Erasmus Carver and William Carver and the said Archibald Giesler, which shall be settled and adjusted, within the space of six months next after the dissolution of the houses of either of them the said Erasmus Carver and William Carver and Archibald Giesler; and also that at the expiration of the said term of seven years, it shall be at the option of the said Erasmus Carver and William Carver to renew this agreement for the further term of seven years, under and subject to the several clauses, covenants, and agreements hereinbefore particularly mentioned and set forth, which the said Archibald Giesler doth hereby engage to do. And it is hereby further covenanted, declared and agreed, by and between the said Erasmus Carver and William Carver and Archibald Giesler, that these presents do not, nor shall be construed to mean to extend to such ships or vessels that may come to the address of either of the said parties respectively, for the purpose of loading or delivering any goods, wares or merchandize, it being the true intent and meaning of these presents, and the parties hereunto, that the foregoing articles shall not, nor shall be construed to bear reference to their particular, or separate mercantile concerns or connexions; and that in case any disputes or misunderstandings shall hereafter arise between them, respecting the true intent and meaning of any of the articles or covenants hereinbefore contained, that then such disputes or misunderstandings shall be submitted to the arbitration of two indifferent persons, one to be chosen by the said Erasmus Carver and William Carver, and the other by the said Archibald Giesler; and in case such two persons cannot agree about the same, then they are hereby empowered to name some third person as an umpire; and it is hereby declared and agreed, that the award and determination of the said referees and umpire, or any two of them, concerning the object in dispute, shall be made and settled six calendar months next after such differences shall have arisen between the said [241] parties, and shall be absolutely final, conclusive and binding. And lastly for the true performance of all and every the covenants, articles and agreements hereinbefore contained, they the said Erasmus Carver and William Carver and Archibald Giesler do hereby bind themselves, their heirs, executors and administrators, each to the other, in the penalty of five thousand pounds of lawful money of Great Britain, firmly by these presents."

In pursuance of these articles, Giesler removed from Plymouth, and settled at Cowes, where he carried on the business of a ship agent in his own name, and contracted for the goods, &c., which were the subject of the action.

And the question was, whether the Defendants were partners on the true construction of the articles?

This was argued in Trinity Term last by Clayton, Serjt., for the Plaintiff, and Rooke, Serjt., for the Defendants, and a second time, in the present term, by Le Blanc, Serjt., for the Plaintiff, and Lawrence, Serjt., for the Defendants. The substance of the arguments for the Plaintiff was as follows:

The question in this case is, whether the articles of agreement entered into by the Defendants constituted a partnership between them? That such was the effect of these articles, will appear by considering the general rules of law respecting partners, and the particular circumstances of the case. The law is, that wherever there is a participation of profits a partnership is created; though there is a difference between a participation of profits and a certain annual payment. Thus in *Grace v. Smith*, 2 Black. 998, a retiring partner lent the other who continued in business, a certain sum of money at 5l. per cent., and was to have an annuity of 300l. a year for seven years, the whole of which was secured by the bond of the partner who remained in trade. This was holden not to make the lender a partner; but Chief Justice De Grey there said, "The question is, what constitutes a secret partner? Every man who has

a share of the profits of a trade, ought also to bear his share of the loss; and if any one takes part of the profits, he takes a part of that fund on which the creditor of the trader relies for his payment. I think the true criterion is, to inquire whether Smith agreed to share the profits of the trade with Robinson, or whether he only relied on those profits as a fund for payment." And Blackstone, J., also said, "The true criterion, when money is advanced to a trader, is, to consider whether the profit or premium is certain and defined, or casual and indefinite, and depending on the accidents of trade: in the former case it is a loan, in the latter a partner-[242]-ship." In *Bloram v. Pell* cited in *Grace v. Smith*, a sum secured with interest on bond, and also an agreement for an annuity of 200l. a year for six years, if Brooke so long lived, as in lieu of the profits of the trade, with liberty to inspect the books, was holden by Lord Mansfield to constitute a partnership. In *Hoar v. Daws*, Dougl. 371, 8vo. a number of persons unknown to each other, and without any communication together, employed the same broker to purchase tea at a sale of the East India Company. The broker bought a lot, to be divided among them according to their respective orders, and pledged the warrants with the Plaintiff for more money than they turned out to be worth; on the broker becoming a bankrupt, the Plaintiff sued two of the purchasers, considering them all as secret partners, and liable for the whole. But the Court held, there was no partnership, and Lord Mansfield said, "There is no undertaking by one to advance money for another, nor any agreement to share with one another in the profit or loss." In *Coope v. Eyre*, ante, vol. i. p. 37, one of the Defendants had bought a quantity of oil of the Plaintiffs, and the other Defendants had agreed, before the purchase, each to take certain shares of the quantity bought; but when bought, each was to do with his own share as he pleased: they were holden not to be partners, for there was no share of profit or loss. In *Young v. Axtell and another (a)*, which was an action to recover 600l. and upwards, for coals sold and delivered by the Plaintiff, a coal merchant, an agreement between the Defendants was given in evidence, stating that the Defendant, Mrs. Axtell, had lately carried on the coal trade, and that the other Defendant did the same; that Mrs. Axtell was to bring what customers she could into the business, and that the other was to pay her an annuity, and also 2s. for every chaldron that should be sold to those persons who had been her customers, or were of her recommending. The Plaintiff also proved, that bills were made out for goods sold to her customers, in their joint names; and the question was whether Mrs. Axtell was liable for the debt? Lord Mansfield said, "he should have rather thought on the agreement only, that Mrs. Axtell would be liable, not on account of the annuity, but the other payment, as that would be increased in proportion as she increased the business. However, as she suffered her name to be used in the business, and held herself out as a partner, she was certainly liable, though the Plaintiff did not, at the time of [243] dealing, know that she was a partner, or that her name was used." And the jury accordingly found a verdict for the Plaintiff.

It appearing therefore, from these authorities, that a participation of profits is sufficient to constitute a partnership, it remains to be seen whether the agreement in question did not establish such a participation of the profits of the agency business between the Defendants, as to make them liable as partners. In the first place, it is stated in the recital, that the Carvers and Giesler had agreed to allow each other certain proportions of each other's commissions and profits. It is then agreed, that Giesler should, when required by the Carvers, remove from Plymouth to Cowes, and there establish a house: and in consequence of the Carvers' recommendation and assistance to support the house, Giesler is to allow them a moiety of the commission on ships putting into the port of Cowes, or remaining in the road to the westward, addressed to him, and a moiety of the discount on the tradesmen's bills, employed on such ships: he also covenants to advise with the Carvers, and pursue such measures as may appear to them to be for the interest of the concerned. On the other hand, the Carvers agree to pay Giesler three fifths of the agency of all vessels which shall come from Cowes to Portsmouth, and put themselves under the direction of the Carvers, by the recommendation of Giesler, one half per cent. on tradesmen's bills, and certain proportions of warehouse rent and agency. Each party is likewise to produce true copies of the accounts of the ships to the other, and neither is to form any other connexion in the agency business

(a) At Guildhall Sittings after Hil. 24 Geo. 3, cor. Lord Mansfield; cited by Mr. Serjt. Le Blanc from a MS. note.

during the period agreed upon; and they are to meet once a year at Gosport to settle their mutual accounts, and pay over the balance. Now it was not possible to express in clearer terms, an agreement to participate in the profits of the business of ship agents, and to establish a joint concern between the two houses. It may be objected that there is a proviso that neither of the parties shall be answerable for the losses of the other; but this would certainly be not binding on the creditors. *Lord Craven v. Widdows*, 2 Chan. Cas. 139. *Heath v. Percival*, 1 Pre. Wms. 682. *Rich v. Coe*, Cowp. 636. An agreement to share profits alone cannot prevent the legal consequence of also sharing losses for the benefit of creditors. Perhaps it may be difficult to find an exact definition of a partnership, but it has been always holden, that where there is a share of profits, there shall also be share of losses, for who-[244]-ever takes a part of the capital, or of the profits upon it, takes a part of that fund to which the public have given credit, and to which they look for payment. If there be no original capital, the profits of the trade are themselves a capital, to which the creditor is to have recourse. Thus, if in the year 1791 the profits were 100l., and in the year 1792 there was a loss of 10l. of course the profits of the preceding year would be the stock to which the creditor would resort for the payment of the debts which constituted part of the loss of the succeeding year. Indeed it is by no means necessary that to constitute a partnership, the parties should advance money by way of capital; many joint-trades are carried on without any such advance: there is therefore no ground to object, in the present instance, that neither party brought any money into a common stock, in order to carry on their business.

On behalf of the Defendants, the arguments were as follow:—The question is, whether this agreement creates such a partnership as to make all liable to the debts of each? A partnership may be defined to be, “the relation of persons agreeing to join stock or labour, and to divide the profits.” Thus Puffendorf described it, “*Contractus societatis est, quo duo pluresve inter se pecuniam, res, aut operas conferunt, eo fine, ut quod inde redditus lucri inter singulos pro ratâ dividatur*,” lib. 5, cap. 8. Partners, therefore, can only be liable on the ground of their being joint-contractors, or as partaking of a joint stock. In many cases in which questions of this sort have arisen, and the persons have been holden to be partners, goods had been sold, and a common fund established, to which the creditor might look for payment; and there it was highly reasonable to hold, that if many persons purchase goods on their joint account, though in the name of one only, and are to share the profits of a re-sale, they shall be considered as joint-contractors, and therefore liable as partners. So if a joint stock or capital, or joint labour be employed, each party is interested in the thing on which it is employed, and in the profits resulting from it. But in the present case there is no joint contract for the purchasing goods, nor any joint stock or labour, but the parties are to share in certain proportions the profits of their separate stock and separate labour; there was no house of trade or merchandize established, but two distinct houses, for the purpose of carrying on the business of ship agency, on two distinct accounts. The profits are not a capital unless carried on as capital, and [245] not divided. Ship agents are not traders, but their employment is merely to manage the concerns of such ships in port as are addressed to them. Suppose two fishermen were to agree to share the profits of the fish that each might catch, one would not be liable for mending the nets of the other. So if two watermen agree to divide their fares, neither would be answerable for repairing the other's boat. Nor would any artificers, who entered into similar agreements to share the produce of their separate labour, be obliged to pay for each other's tools or materials. And this is not an agreement as to the agency of all ships with which the parties were concerned, for such as came to the particular address of one were to be the sole profit of that one. It was indeed clearly the intent of the parties to the agreement, and is so expressed, that neither should be answerable for the losses, acts or deeds of the other, and that the agreement should not extend to their separate mercantile concerns. It must therefore be a strong and invariable rule of law that can make the parties to the agreement responsible for each other against their express intent. But all cases of partnership which have been hitherto decided, have proceeded on one or other of the following grounds:—1. Either there has been an avowed authority given to one party to contract for the rest. 2. Or there has been a joint capital or stock. 3. Or, in cases of dormant partners, there has been an appearance of fraud in holding out false colours to the world. Now the present case is not within either of those principles;

because there was no authority given to either party to contract for the others; nor was there any joint capital or stock; nor were the public deceived by any false credit; no fraud is stated or attempted to be proved, nor can the Court collect from the articles that any was intended: it was merely a purchase of Giesler's profits, by giving him a share of those of the Carvers, to prevent a competition between them.

LORD CHIEF JUSTICE EYRE. This case has been extremely well argued, and the discussion of it has enabled me to make up my mind, and removed the only difficulty I felt, which was, whether by construing this to be a partnership, we should not determine, that if there was an annuity granted out of a banking house, to the widow, for instance, of a deceased partner, it would make her liable to the debts of the house, and involve her in a bankruptcy. But I think this case will not lead to that consequence.

[246] The definition of a partnership cited from Puffendorf is good as between the parties themselves, but not with respect to the world at large. If the question were between A. and B. whether they were partners or not, it would be very well to inquire whether they had contributed, and in what proportions, stock or labour, and on what agreement they were to divide the profits of that contribution. But in all these cases a very different question arises in which that definition is of little service. The question is generally, not between the parties, as to what shares they shall divide, but respecting creditors claiming a satisfaction out of the funds of a particular house, who shall be deemed liable in regard to these funds? Now a case may be stated, in which it is the clear sense of the parties to the contract that they shall not be partners; that A. is to contribute neither labour nor money, and, to go still farther, not to receive any profits. But if he will lend his name as a partner, he becomes, as against all the rest of the world, a partner, not upon the ground of the real transaction between them, but upon principles of general policy, to prevent the frauds to which creditors would be liable, if they were to suppose that they lent their money upon the apparent credit of three or four persons, when in fact they lent it only to two of them, to whom, without the others, they would have lent nothing. The argument gone into, however proper for the discussion of the question, is irrelevant to a great part of the case. Whether these persons were to interfere more or less with their advice and directions, and many small parts of the agreement, I lay entirely out of the case; because it is plain upon the construction of the agreement, if it be construed only between the Carvers and Giesler, that they were not nor ever meant to be partners. They meant each house to carry on trade without risk of each other, and to be at their own loss. Though there was a certain degree of control at one house, it was without an idea that either was to be involved in the consequences of the failure of the other, and without understanding themselves responsible for any circumstances that might happen to the loss of either. That was the agreement between themselves. But the question is, whether they have not, by parts of their agreement, constituted themselves partners in respect to other persons? The case therefore is reduced to the single point, whether the Carvers did not intitle themselves, and did not mean to take a moiety of the profits of Giesler's house, generally and indefinitely as they [247] should arise, at certain times agreed upon for the settlement of their accounts. That they have so done is clear upon the face of the agreement: and upon the authority of *Grace v. Smith* (2 Black. 998), he who takes a moiety of all the profits indefinitely, shall, by operation of law, be made liable to losses, if losses arise, upon the principle that by taking a part of the profits, he takes from the creditors a part of that fund which is the proper security to them for the payment of their debts. That was the foundation of the decision in *Grace v. Smith*, and I think it stands upon the fair ground of reason. I cannot agree, that this was a mere agency, in the sense contended for on the part of the Defendants, for there was a risk of profit and loss: a ship agent employs tradesmen to furnish necessaries for the ship, he contracts with them, and is liable to them, he also makes out their bills in such a way as to determine the charge of commission to the ship owners. With respect to the commission indeed, he may be considered as a mere agent, but as to the agency itself, he is as much a trader as any other man, and there is as much risk of profit and loss to the person with whom he contracts, in the transactions with him, as with any other trader. It is true he will gain nothing but his discount, but that is a profit in the trade, and there may be losses to him as well as to the owners. If therefore the principle be true, that he who takes the general profits of a partnership must of necessity be made liable to the

losses, in order that he may stand in a just situation with regard to the creditors of the house, then this is a case clear of all difficulty. For though, with respect to each other, these persons were not to be considered as partners, yet they have made themselves such with regard to their transactions with the rest of the world. I am therefore of opinion that there ought to be judgment for the Plaintiff.

GOULD, J. I am of the same opinion.

HEATH, J. I am of the same opinion.

ROOKE, J., having argued the case at the bar, declined giving any opinion.

Judgment for the Plaintiff.

[248] EMERSON, One, &c. *against* LASHLEY. Saturday, Nov. 23d, 1793.

[Applied, *Dent v. Basham*, 1854, 9 Ex. 471. Referred to, *Marbella Iron Ore Company v. Allen*, 1878, 47 L. J. C. P. 605. Applied, *Furber v. Taylor*, [1900] 2 Q. B. 721.]

No action will lie in this court, to recover costs ordered to be paid by a rule of an inferior court in the course of a suit there, notwithstanding the Defendant should not be liable to an attachment of the inferior court, by being resident out of its jurisdiction. But such an action having been brought, the Court ordered the costs awarded to the Plaintiff in the inferior court, to be deducted by the prothonotary from those allowed to the Defendant in the action (a).

This was an action of assumpsit, and the declaration stated, "that before and at the time of making the promise and undertaking of the Defendant thereafter next mentioned, a certain action and attachment thereunto made had been and was depending in the court of our lord the King, holden before the Mayor and Aldermen of the city of London, in the chamber of the Guildhall of the same city, according to the custom of the said city from time immemorial there used and approved of, (that is to say) a certain action and attachment wherein the said Defendant was Plaintiff, and one Benjamin Bostock was Defendant, and Thomas Daniel the elder, and Thomas Daniel the younger, were garuisees, and in which said action and attachment the said Plaintiff before the making of such promise and undertaking, had been retained and employed as the attorney of and for the said Defendant in the said court, to wit, at London, &c.; that while the said action was so depending in the said court, and before the making of the promise and undertaking of the said Defendant thereafter next mentioned, to wit, on the 19th day of February, in the 30th year of our said lord the king, a certain rule or order was made by the said court of our said lord the king before the mayor and aldermen aforesaid, in the chamber of the Guildhall aforesaid, whereby it was ordered, that the said Emerson, the Plaintiff's attorney in the said action and attachment, should at the next sitting of the Court shew cause why he the said Emerson had refused to proceed in the said action and attachment for the said now Defendant, and to answer the matter contained in a certain affidavit of the said Defendant, and one William Norfolk Johnson, as by the said rule or order (reference being thereunto had) will more fully appear: and such proceedings were thereupon had, that afterwards and before the making of said promise and undertaking of said Defendant thereafter next mentioned, to wit, on the 14th day of May in the thirtieth year aforesaid, at London, &c. a certain other rule or order was made by said Court of our said lord the king, before the mayor and aldermen aforesaid, in the chamber of the Guildhall aforesaid, upon reading the said first mentioned rule, and upon hearing counsel for said Plaintiff and said Defendant respectively, and reading the affidavits of said Defendant and William Norfolk Johnson, and the affidavits of said Plaintiff and of John Smith and Samuel Hawkins, whereby [249] it was ordered,

(a) [It seems that an action will not lie on a rule of Court for payment of money, either in the same or in any other Court; and that, therefore, where there is no judgment for the costs, an attachment is the only mode of recovering them. See *Smith v. Whalley*, 2 Bos. & Pul. 484. *Fry v. Malcolm*, 4 Taunt. 705. *Carpenter v. Thornton*, 3 B. & A. 57.]

that the said first mentioned rule should be discharged with costs (*a*)¹, to be taxed by the proper officer as by said rule or order so made as last aforesaid (reference being thereunto had) will more fully appear; and the said Emerson averred, that afterwards, to wit, on the 7th day of June, in the 30th year aforesaid, at London, &c. the costs of and attending the said last mentioned rule or order were taxed and allowed by one Thomas Whittle, the proper officer in that behalf, at a large sum of money, to wit, the sum of 9l. 14s. 5d. of lawful money of Great Britain; of all which said several premises, the said Defendant afterwards, to wit, on same day and year last aforesaid, at London, &c. had notice; and by means thereof, and according to the form and effect of said last mentioned rule or order, the said Defendant then and there became liable to pay to the Plaintiff the said sum of 9l. 14s. 5d. when the said Defendant should be thereunto afterwards requested; and being so liable, the said Defendant in consideration thereof, afterwards, to wit, on same day and year last aforesaid, at London, &c. promised to pay, &c." There were also the common counts.

The Defendant at first demurred generally to the first count, and pleaded the general issue to the others; but the demurrer was afterwards withdrawn, and non assumpsit pleaded to the whole declaration. The cause therefore went to trial, and a verdict was found for the Plaintiff on the first count, subject to the opinion of the Court on the question whether the action could be maintained?

N.B. It appeared at the trial, that the Defendant at the time of entering the action and attachment in the Mayor's Court, and also at the time when the present action was brought, was resident out of the jurisdiction of that court.

Runnington, Serjt., on the part of the Plaintiff. There was sufficient ground in this case on which an assumpsit might be raised, for wherever there is a legal or equitable obligation to pay money, the law will imply a promise, according to the doctrine of Lord Mansfield in *Hawkes v. Saunders*, Cowp. 290, and *Rann v. Green*, Cowp. 476: and thus in *Walker v. Witter*, Dougl. 1, a foreign judgment was holden to be a sufficient consideration to raise an assumpsit. In the present case, the Defendant was under a legal obligation to pay the costs, which he was ordered to pay by a court of competent jurisdiction, and the Court will therefore imply an assumpsit in him. Those [250] costs were not imposed on him by way of penalty, but to indemnify Emerson for the expence of defending himself against a rule which had been granted against him without foundation. Though indeed in former times costs were considered as a penalty, yet they are now taken to be a debt, and go to the executor or administrator, 1 Term Rep. B. R. 103, *The King v. Chamberlayne*; and being a debt, they may be proved under a commission of bankrupt against the Defendant, 2 Term, B. R. 261, *Gulliver v. Drinkwater*, though judgment be not signed till after the commission has issued, 2 Black. 1317, *Ayllett v. Harford*. It may possibly be said, that the proper remedy was an attachment in the Mayor's Court; but supposing this to be true, it must be on the ground of a legal obligation on the Defendant to pay, and if so, the law will create a duty. If there be two remedies, the party may elect which he will choose to pursue. But in fact, in the present case, there could be no remedy by attachment, the Defendant living out of the jurisdiction of the inferior court. If therefore an action will not lie for the costs, the Plaintiff is without any redress.

Clayton, Serjt., contra. No instance has been shewn of an action being brought for costs awarded by an interlocutory order in an inferior court: and if such an action has never yet been brought, it affords a strong presumption that it will not lie (*a*)². According to this principle, Littleton, sect. 108, speaking of an action against the guardian in chivalry upon the statute of Merton, for the disparagement of the heir by marriage, says, "It seemeth to some, that no action can be brought upon this statute, insomuch as it was never seen or heard, that any action was brought upon the statute

(*a*)¹ The words of the latter rule were, "It is ordered that the said rule (i.e. the first rule) be discharged with costs, to be taxed by the proper officer of this court."

(*a*)² Here the learned Serjeant mentioned a case of *Payne v. Lacon*, as having been decided in the Court of Exchequer in the year 1780, which was an action of the same kind with the present, to recover costs awarded on a rule in that Court, and which that Court held, could not be supported. But as it was cited from memory, and all the circumstances of it not precisely known, I have taken the liberty to omit it in the statement of the argument.

of Merton for this disparagement against the guardian for the matter aforesaid ; and if any action might have been brought for this matter, it shall be intended that at some time it would have been put in ure" (b). Although it be true, that in many cases the law will imply a contract where there is a debt or duty, yet there is [251] neither in this case, the costs or an interlocutory rule being merely in the nature of a penalty. Those costs are entirely of a distinct kind from costs in the cause, which are given by the statute of Gloucester, and combined with the debt in the final judgment. Whether the Defendant be within the jurisdiction of the Mayor's Court or not, if the superior courts have no power to create a debt, by ordering the payment of costs on an interlocutory proceeding, which they clearly have not, neither can the inferior courts have that power. But if it were to be allowed, that the superior courts of Westminster-hall should execute the orders of the inferior, the authority of the latter would be co-extensive with that of the former. Besides, if this action were to be maintained, the order of the inferior court must be taken to be conclusive, for the superior court would not go into evidence to learn whether the inferior did right in making such order, and then the consequence would be, that the superior Court would enforce that order whether right or wrong.

LORD CHIEF JUSTICE EYRE. If there were nothing else in this case but the mere circumstance of its being an action brought for the first time, the Court would think again and again, before they would give it any encouragement. In general, there is another remedy, (however that remedy may fail in an inferior court, whose jurisdiction is local,) and the consequence of our determining that an action would lie for such costs as these, would be, that instead of applications to the Court for their superior interference, numberless actions would be brought, of which we have enough already. And upon general principles of law, it seems pretty clear that no action can lie for such costs. In actions brought in superior courts, the costs become a duty only by being united with the debt in the judgment : there is that sort of credit given to the judgments of a court of competent jurisdiction, that they create debts and duties, upon which actions of debt are founded. General policy and convenience require, that faith should be given to those judgments, and that duties should arise ; but as to the conduct, and all the steps belonging to the conduct of the interlocutory proceedings, they are fit to be regulated by the authority of the court where they arise, but by no means fit to be the foundation of general duties creating moral obligations. It is the power of the Court that enforces these kind of orders, and the power of the Court will always be regulated by the discretion [252] of the Court, in causes which come before them. I was very much struck with an observation of my Brother Clayton, that if we suffer an action to be brought for costs thus ordered to be paid in an inferior court, we must take that order to be final : we give credit indeed to judgments of inferior courts, because there is a regular course, if those judgments are improper, by which they may be corrected ; but the case is very different with respect to these interlocutory orders, from which there is no appeal or writ of error. It would be impossible to take one of these interlocutory proceedings as final, and if we were to inquire whether the inferior court had done right, what a new field would be open for investigation ! If a superior court were to take into consideration a cause with which they had nothing to do, and to give judgment whether the inferior court had done right in making an interlocutory order, it would be impossible for any such court to go on with its ordinary business. The case that comes the nearest to the support of this action, is that of *The King v. Chamberlayne* (1 Term Rep. B. R. 103), where the Court of King's Bench decided, that the costs upon a recognizance to prosecute were in the nature of a debt, which an administrator might claim. But the expressions in that case must be understood according to the subject-matter ; properly speaking, those costs were not a debt to any one, for if they were a debt, there was no occasion for a recognizance to enforce

(b) In the great case of *Ashby v. White*, 2 Ld. Raym. 944, this passage in Littleton is cited by Powys, Justice, in his fourth reason, as affording an argument to shew that the action in that case would not lie, because such a one had never been brought before. But that opinion is controverted, and the passage commented upon by Holt, Ch. J., p. 957. See also, Hargr. and Butl. Co. Litt. 81 b. n. (2). [*Chapman v. Pickersgill*, 2 Wils. 146. *Lecaux v. Eden*, Doug. 602. *Russell v. Men of Devon*, 2 T. R. 673. *Pusley v. Freeman*, 3 T. R. 63. *Berkley v. Presgrave*, 1 East, 225. *Duke of Newcastle v. Clark*, 8 Taunt. 621. *Carpenter v. Thornton*, 3 B. & A. 57.]

the payment of them; the Court indeed held, that the original right devolved from the original party to the administrator, but if it were not a debt to the original party, it was not a debt to his representative: the recognizance indeed was merely a security, without which, the costs could not have been recovered at all. That case, therefore, rather makes against the argument to which it is applied. Upon the whole, therefore, though there will be a particular inconvenience arising in this case, from the circumstance of the Defendant being out of the jurisdiction of the inferior court, it is better to oblige the other party to wait, till he can be brought within that jurisdiction, than to produce the mischievous consequences, which would ensue from our determining that this action could be maintained.

GOULD, J. I agree with my Lord, according to the rule of law laid down by Littleton and Lord Coke, that it is better to submit to a particular inconvenience, than introduce a general mischief. It is apparent, what an ill use might be made, of [253] our establishing a precedent of this kind. Did any man ever hear of an action in a superior court to recover costs, where there had been an interlocutory reference to a Prothonotary or Master? It has been always holden, that an attachment was the proper remedy on the allocatur.

HEATH, J. I am of the same opinion. The question arises upon an action for costs, given by an interlocutory order, which are not costs given by the statute of Gloucester. It is a motion in an inferior court, by a party against his own attorney; the court, acting upon a power it has over its own ministers, declares the complaint groundless, and inflicts a penalty. As therefore these costs are a penalty, and not given by the statute of Gloucester, I am of opinion that the action will not lie.

ROOKE J. I am of the same opinion. I think it would be very dangerous to encourage actions of this sort.

Judgment for the Defendant.

On a subsequent day, a rule was granted to shew cause why the costs awarded to the Plaintiff in the Mayor's Court, should not be deducted from the costs to be allowed to the Defendant in the present action, and why the Prothonotary should not make his allocatur after the deduction.

Against which Clayton shewed cause, by urging that in cases where costs had been set off against each other, they were considered as debts, for which there were mutual remedies by action.

Runnigton, Serjt., for the rule contended, that the Court might, in their discretion, order the deduction to be made, and cited *Thrustout v. Crafter*, 2 Black. 826, and *Schoole v. Noble*, ante, vol. i. 23; he observed also the peculiar hardship the Plaintiff would be under, if the application were refused, as he had no remedy to recover the costs given him by the rule in the inferior court.

The Court, without hesitation, said it was highly reasonable to allow the deduction, and therefore made the

Rule absolute.

[254] NICHOLSON against CHAPMAN. Monday, Nov. 25th, 1793.

[Distinguished, *Hingston v. Wendt*, 1876, 1 Q. B. D. 373. Adopted, *Aitchison v. Lohre*, 1879, 4 App. Cas. 760. See *Gas Float Whilton* (No. 2), [1896] P. 52; [1897] A. C. 337. Referred to, *Gwilliam v. Twist*, [1895] 2 Q. B. 87.]

A quantity of timber, placed in a dock on the bank of a navigable river, being accidentally loosened, is carried by the tide to a considerable distance, and left at low water upon a towing path. A. finding it in that situation, voluntarily conveys it to a place of safety, beyond the reach of the tide, at high water. A. has no lien on the timber for the trouble or expence to which he may have put himself in the carriage of it, but is liable to an action of trover, unless he deliver it up to the owner on demand, though nothing be tendered him by the owner by way of compensation (a). But in such a case, in all probability, A. might maintain an action against the owner for a compensation.

This was an action of trover, brought under the following circumstance. A considerable quantity of timber, the property of the Plaintiff, was placed in a dock on the

(a) [Vide *Lempriere v. Pasley*, 2 T. R. 485.]

banks of the Thames, but the ropes with which it was fastened accidentally getting loose, it floated, and was carried by the tide as far as Putney, and there left at low water, upon a towing path within the manor of Wimbledon. Being found in this situation, the bailiff of the manor, one Fairchild, employed the Defendant Chapman, to remove the timber with his waggon from the towing-path, which it obstructed, to a place of safety at a little distance. This Chapman accordingly did, and when the Plaintiff sent to demand the timber to be restored to him, refused to deliver it up, unless 6l. 10s. 4d. were paid, which he claimed partly by way of salvage, as a customary right due to the lord of the manor, and partly as a recompense to himself for the trouble of drawing the timber from the water side to the place where it then lay; but this demand the Plaintiff refused to comply with, and did not tender any other sum. The bailiff acted under the following order, made at a court leet of the lord of the manor, in May 1792, "Complaint having been made to this court of the great detriment arising to the tenants, &c. within this manor, from timber having been left by the tide upon the towing-path within the same; it is ordered, that Francis Fairchild, the bailiff of this manor, do, under the authority of this court, remove the same to a proper place of safety, until the lord or his steward shall give proper directions, for the benefit of the particular owner or proprietor thereof." But no such customary right as was set up in the lord, was established at the trial; the Lord Chief Justice therefore directed the jury to ascertain what they thought a proper compensation for the carriage of the timber by the Defendant, as above stated. They answered that two guineas were a reasonable sum for that purpose, upon which it was agreed that a verdict should be found for the Plaintiff for the value of the timber, subject to the opinion of the Court on the question, whether there ought not to have been a tender of two guineas, before action brought: if the Court should be of that opinion, the verdict to be entered for the Defendant, he undertaking to deliver up the timber on payment of two [255] guineas; but if they should be of a contrary opinion, then the verdict to be entered for the value.

This question was now argued by Adair and Runninton, Serjts., on the part of the Plaintiff, as follows.

The first question is, whether the refusal to deliver the timber, on the part of the Defendant, was not tortious, and evidence of a conversion? It is sufficient to make the refusal tortious, that he was unable to support the demand which he made, as a condition of the delivery. That demand was for 6l. 10s. 4d., which included the sum supposed to be due by custom to the lord of the manor, as well as a recompence to the Defendant for conveying the timber to the place where it lay: but such customary right was not supported at the trial. Now upon a general demand, a refusal to deliver goods without annexing a condition to the delivery, with which the owner is not bound to comply, is a tortious refusal, and amounts to evidence of a conversion. It being then ascertained that the condition imposed by Chapman was unreasonable, the remaining question will be, whether the demand of the Plaintiff, unaccompanied with any tender, were a legal demand? Now the Plaintiff was not bound to tender any thing, unless the Defendant could have maintained a demand against him. But it is clear that Chapman took the goods merely by the direction of the bailiff of the manor, and not with any view or motive to preserve them for the true owner, or to act in any manner for his benefit: Chapman therefore had no right of action against the Plaintiff. If he could have maintained any action, he must have declared as having done what he did, at the special instance and request of the Plaintiff; but such an implication would have been negatived by evidence, shewing that the timber was taken for the payment of a duty to the lord of the manor. And as it was not taken with a view to preserve it for the owner, no arguments from the general doctrine of salvage can be applicable to this case. If therefore the Defendant was not intitled to make a demand on the Plaintiff, he could have no lien on the timber, so as to justify him in refusing to deliver it.

Bond and Clayton, Serjts., thus argued on the other side. The demand of the Plaintiff, unless accompanied with a tender of proper satisfaction for the trouble and labour which the Defendant had exerted in saving his property, was not such a demand as that a refusal to comply with it will make the Defendant guilty of a conversion. The Defendant was entitled to [256] such satisfaction on grounds of public policy, for the timber having been left by the falling of the tide on the bank of the river, might at high water have floated again, and been carried farther off; the

removing it therefore from the place where it lay, was clearly a benefit and convenience to the owner. This case bears a resemblance to that of salvage, but is much stronger: for salvage generally arises from the dangers of the seas, against which no human prudence can guard; but here the timber probably got loose from the moorings, from the careless manner in which it was fastened. In the case of salvage, by the authority of the common law, the person who saves the property of another is not guilty of a conversion by refusing to deliver it up till there has been tendered to him a reasonable compensation. 1 Ld. Raym. 393, *Hartford v. Jones*, Salk. 654, pl. 2. And though the Defendant in this instance might have made too large a demand, yet the demanding a sum larger than that which the jury have found to be reasonable could not be a forfeiture of the original right. By the common law, every person who employs labour or skill on the goods of another without a special contract, is entitled to retain them till a proper recompence is made. Thus likewise the owner of an estray must tender to the lord the expences which have been incurred in the finding, keeping and proclaiming it, before he is intitled to a return (a)¹; and it is laid down, 1 Roll. Abr. 879, pl. 5, that if the lord require more for amends than is reasonable, still if the owner does not tender sufficient amends for the feeding, the detainer of the estray (b) is lawful. Supposing the position to be true as laid down by the other side, that Chapman had no right of action for his trouble and labour, it is clearly in favour of his right to detain the timber, since it is a principle of law and justice, that if a meritorious party can have no recompence but by the detention of the thing, he shall have a lien to a reasonable extent. If the case of *Binstead v. Buck*, 2 Black. 1117, be thought to be against the Defendant's right to a lien, it is to be observed, [257] that it was not necessary for the preservation of the Plaintiff's dog in that case, that the Defendant should keep it as he did; but here, unless Chapman had drawn the timber to a place out of the reach of the tide at high water, it might have been entirely lost.

Cur. advis. vult.

On this day, after consideration, the opinion of the Court was thus delivered by LORD CHIEF JUSTICE EYRE. The only difficulty that remained with any of us, after we had heard this case argued, was upon the question whether this transaction could be assimilated to salvage? The taking care of goods left by the tide upon the banks of a navigable river, communicating with the sea, may in a vulgar sense be said to be salvage; but it has none of the qualities of salvage, in respect of which the laws of all civilized nations, the laws of Oleron, and our own laws in particular, have provided that a recompence is due for the saving, and that our law has also provided that this recompence should be a lien upon the goods which have been saved (a)². Goods carried by sea are necessarily and unavoidably exposed to the perils which storms, tempests and accidents (far beyond the reach of human foresight to prevent) are hourly creating, and against which, it too often happens that the greatest diligence and the most strenuous exertions of the mariner cannot protect them. When goods are thus in imminent danger of being lost, it is most frequently at the hazard of the lives of those who save them, that they are saved. Principles of public policy dictate to civilized and commercial countries, not only the propriety, but even the absolute necessity of establishing a liberal recompence for the encouragement of those who engage in so dangerous a service.

Such are the grounds upon which salvage stands; they are recognized by Lord Chief Justice Holt in the case which has been cited from Lord Raymond and Salkeld (1 Ld. Raym. 393. Salk. 654, pl. 2). But see how very unlike this salvage is to the case now under consideration. In a navigable river within the flux and reflux of the tide, but at a great distance from the sea, pieces of timber lie moored together in convenient places; carelessness, a slight accident, perhaps a mischievous boy, casts off the mooring rope, and the timber floats from the place where it was deposited, till the tide falls and leaves it again somewhere upon the banks of the river. Such an event

(a)¹ The instance here put of an estray does not seem to be parallel with the case in question, since an estray becomes the absolute property of the lord after the proclamations, and a year and a day passed without a claim being made; and this, even though the owner be under a legal incapacity to claim, as an infant, feme-covert, executrix, prisoner, or beyond sea. 5 Co. 107 b. and 108 b., *Sir Henry Constable's case*.

(b) See Bro. Abr. tit. Estray and Waif. pl. 1. 44 Ed. 3, 14.

(a)² [Vide *Sutton v. Buck*, 2 Taunt. 302.]

as this, gives the owner [258] the trouble of employing a man, sometimes for an hour, and sometimes for a day, in looking after it till he finds it, and brings it back again to the place from whence it floated. If it happens to do any damage, the owner must pay for that damage; it will be imputable to him as carelessness, that his timber in floating from its moorings is found damage-feasant, if that should happen to be the case. But this is not a case of damage-feasance; the timber is found lying upon the banks of the river, and is taken into the possession, and under the care of the Defendant, without any extraordinary exertions, without the least personal risk, and in truth, with very little trouble. It is therefore a case of mere finding, and taking care of the thing found (I am willing to agree) for the owner. This is a good office, and meritorious, at least in the moral sense of the word, and certainly intitles the party to some reasonable recompence from the bounty, if not from the justice of the owner; and of which, if it were refused, a court of justice would go as far as it could go, towards enforcing the payment (*a*). So it would if a horse had strayed, and was not taken as an estray by the lord under his manorial rights, but was taken up by some good-natured man and taken care of by him, till at some trouble, and perhaps at some expence, he had found out the owner (*b*). So it would be in every other case of finding that can be stated (the claim to the recompence differing in degree, but not in principle); which therefore reduces the merits of this case to this short question, whether every man who finds the property of another, which happens to have been lost or mislaid, and voluntarily puts himself to some trouble and expence to preserve the thing, and to find out the owner, has a lien upon it for the casual, fluctuating and uncertain amount of the recompence which he may reasonably deserve? It is enough to say, that there is no instance of such a lien having been claimed and allowed; the case of the pointer-dog (2 Black. 1117), was a case in which it was claimed and disallowed, and it was thought too clear a case to bear an argument. Principles of public policy and commercial necessity support the lien in the case of salvage. Not only public policy and commercial necessity do not require that it should be established in this case, but very great inconvenience may be apprehended from it, if [259] it were to be established. The owners of this kind of property, and the owners of craft upon the river which lie in many places moored together in large numbers, would not only have common accidents from the carelessness of their servants to guard against, but also the wilful attempts of ill-designing people to turn their floats and vessels adrift, in order that they might be paid for finding them. I mentioned in the course of the cause another great inconvenience, namely, the situation in which an owner seeking to recover his property in an action of trover will be placed, if he is at his peril to make a tender of a sufficient recompence, before he brings his action: such an owner must always pay too much, because he has no means of knowing exactly how much he ought to pay, and because he must tender enough. I know there are cases in which the owner of property must submit to this inconvenience; but the number of them ought not to be increased: perhaps it is better for the public that these voluntary acts of benevolence from one man to another, which are charities and moral duties, but not legal duties, should depend altogether for their reward upon the moral duty of gratitude. But at any rate, it is fitting that he who claims the reward in such case should take upon himself the burthen of proving the nature of the service which he has performed, and the quantum of the recompence which he demands, instead of throwing it upon the owner to estimate it for him, at the hazard of being nonsuited in an action of trover.

Judgment for the Plaintiff.

(*a*) It seems probable that in such a case, if any action could be maintained, it would be an action of assumpsit for work and labour, in which the Court would imply a special instance and request, as well as a promise. On a quantum meruit, the reasonable extent of the recompence would come properly before a jury.

(*b*) [It is however laid down, that a mere voluntary courtesy will not support an assumpsit. *Lampleigh v. Braithwaite*, Hob. 105; and see the Reporters' note, 3 Bos. & Pul. 251. 1 Saund. 264 (*n*) 5th Edit. ante, vol. i. p. 93. According to the civil law the party is entitled to recover, see Wood's Institute, 256, and see Bull. N. P. 45. Whether the finder of goods is bound to take them into his possession, or if taken into his possession to keep them safely, see *Isaak v. Clark*, 2 Bulstr. 312. *Mulgrave v. Ogden*, Cro. Eliz. 219.]

BOLTON *against* THE BISHOP OF CARLISLE, THE EARL OF LONSDALE AND SMITH, Clerk. Monday, Nov. 25th, 1793.

Where in setting forth a conveyance it was stated that a release was cancelled by the seal of the releasor being taken off and destroyed, and that part of the deed was destroyed or lost, with a profert of the residue, it was holden to be good pleading (a). The omitting to state the consideration of a bargain and sale, cannot be taken advantage of on a general demurrer.

In this *Quare Impedit*, brought to recover the presentation to the vicarage of Askham in the county of Westmorland, the declaration after deducing a title in fee, through a variety of conveyances to one Joseph Fielden, proceeded thus: "And the said Joseph Fielden being so seised of the said advowson with the appurtenances, afterwards, to wit, on the 20th day of June, in the year of our Lord 1791, at the parish aforesaid, by a certain other indenture of bargain and sale, therein mentioned to be [260] made between the said Joseph Fielden, one Robinson Shuttleworth, and one Elizabeth Tatham spinster of the one part, and the said Plaintiff of the other part, (one part of which said last mentioned indenture, sealed with the seal of the said Joseph Fielden the said Plaintiff brings here into court, the date whereof the same day and year last aforesaid), the said Joseph Fielden for the consideration therein mentioned, did bargain and sell unto the said Plaintiff (among other things) the said advowson with the appurtenances, to hold the same unto the said Plaintiff, from the day next before the day of the date of the same indenture, for one whole year then next following, as by the said last mentioned indenture, relation being thereunto had, more fully appears. By virtue of which said last mentioned bargain and sale, and by force of the statute for transferring uses into possession, the said Plaintiff became and was possessed of the said advowson with the appurtenances for the term of one year; and the said Plaintiff being thereof so possessed, afterwards, to wit, on the 21st day of June, in the year last aforesaid, at the parish aforesaid, by a certain other indenture then and there sealed with the seal of the said Joseph Fielden, and bearing date the day and year last aforesaid, and therein mentioned to be made between the said Joseph Fielden of the first part, the said Robinson Shuttleworth of the second part, the said Elizabeth Tatham spinster of the third part, John Hankinson of the fourth part, and the said Plaintiff of the fifth part, (which said last mentioned indenture, so sealed with the seal of the said Joseph Fielden as aforesaid, afterwards, to wit, on the first day of July in the year last aforesaid at the parish aforesaid, was cancelled by the said seal of the said Joseph Fielden thereto being then and there taken off from the same, and destroyed or lost, and the residue thereof the said Plaintiff now brings here into court,) the said Joseph Fielden for the considerations therein mentioned, did release unto the said Plaintiff and his assigns (among other things) the said advowson with the appurtenances, to hold to the said Plaintiff, his heirs and assigns for ever, to the use of the said Plaintiff, his heirs and assigns for ever," &c. &c. The avoidance was then stated, by the death of John Cantley, the last incumbent, &c.

The Bishop pleaded the usual plea of disclaimer, and the other Defendants demurred specially to the declaration, "For that it is not stated or alleged, nor does it appear in or by the [261] said declaration, for what reason or on what account the said supposed indenture of release therein lately mentioned was cancelled, or that the same was re-executed before the said vicarage became void by the death of the said John Cantley, or that the same hath at any time hitherto been re-executed," &c.

In support of the demurrer, Cockell, Serjt., argued as follows: Besides the cause of demurrer assigned, the declaration is bad, because it sets forth a bargain and sale, without stating the consideration of it; for it is a rule of law, that in pleading a conveyance deriving its effect from the Statute of Uses, a consideration must appear, and in a bargain and sale that consideration must be shewn to be money, according to 1 Leon. 170. *Smith v. Lane*, Moore, 569. *Fisher v. Smith*; and though in *Barker v. Keate*, 1 Mod. 262. 2 Mod. 249, a pepper-corn was holden to be a sufficient considera-

(a) [A deed may be pleaded as lost by time and accident, without profert. *Read v. Brookman*, 3 T. R. 151. See also as to the profert of lost deeds, *Smith v. Woodward*, 4 East, 585. *Hewly v. Stephenson*, 10 East, 55. *Hawley v. Peacock*, 2 Campb. N. P. C. 557. *Paine v. Bustin*, 1 Stark. N. P. C. 74.]

tion, yet there it was necessary to set it forth. A use cannot be raised on a general consideration, *Mildmay's Case*, 1 Co. 176 a; but the bargainee may aver, that money or other valuable consideration was paid or given. *Ibid.* 2 Inst. 672. And this is a substantial objection, which would not be cured by a verdict. Sir Thomas Raymond, 200, *Gulliams v. Munnington*; and therefore it is a ground for a general demurrer. It is true, indeed, that in *Stream v. Seyer*, 1 Ld. Raym. 111. *Sargent v. Read*, 2 Stra. 1228. 1 Wils. 91, this defect was holden to be cured by a verdict, yet in those cases it is said, it would have been fatal on demurrer (a).

[HEATH, J. This ought to have been assigned as a cause of special demurrer, for it would have been cured by a verdict. A title defectively set forth is good after verdict, but not a defective title (b): here it is defectively set forth.]

With respect to the cause of demurrer assigned, the Plaintiff ought to have stated how it happened that the deed of release was cancelled by the seal being taken off, in order to excuse the omission of a profert; as the record stands, it appears from his own shewing, that the deed under which he claims, does not exist. If the seal be once severed from the deed, the deed is void, Bro. Abr. tit. Faits, pl. 27. 5 Co. 22 b. *Matthewson's case*, 11 Co. 28 b. *Pigot's case*; and in 3 Bulst. 79, it is said by Coke, Chief Justice, and assented to by Dodderidge, that if a deed be lost, the right is lost.

[262] [HEATH, J. A profert is not necessary of a conveyance deriving its effect from the Statute of Uses (c). *Dyer*, 277. *Cro. Jac.* 217. 3 Term Rep. B. R. 151. *Read v. Brookman*.]

Lawrence, Serjt., for the Plaintiff. The argument used on the other side, that a pecuniary consideration must be stated in pleading a bargain and sale, is not supported by the cases cited. In *Smith v. Lane*, as it is reported in Leonard, the Court doubted, and there was a difference in opinion, and judgment was staid; but it appears from *Lord Buckhurst's case*, Moore, 504, that it was finally adjudged in the same case of *Smith v. Lane*, that "if land be bargained and sold by deed indented and inrolled, without an express consideration of money, the bargainee in pleading shall not be compelled to aver payment of money, because it is apparently implied." But

Supposing the objection to have any foundation, the stat. 4 Anne, c. 16, s. 1, directs "that where any demurrer shall be joined, the judges shall proceed and give judgment according as the very right of the cause and matter in law shall appear unto them, without regarding any imperfection, omission or defect in any writ, return, plaint, declaration or other pleading, process or course of proceeding whatever, except those only which the party demurring shall specially and particularly set down and express, together with his demurrer, as causes of the same, notwithstanding that such imperfection, omission or defect might have heretofore been taken to be matter of substance, and not aided by the statute made in the 27th year of Queen Elizabeth, &c." And it goes on to provide, that "no advantage or exception shall be taken for default of alleging the bringing into court any bond, bill, indenture or other deed whatsoever, mentioned in the declaration or other pleadings, &c.; but the Court shall give judgment according to the very right of the cause as aforesaid, without regarding any such imperfections, omissions and defects, or any other matter of like nature, except the same shall be specially and particularly set down and shewn for cause of demurrer."

With respect to the other objection, viz. that the deed had lost its effect by the seal being taken off, the question is, whether the right once vested in the Plaintiff, were divested by the release being so cancelled? That the right was not divested, appears from Palm. 403. Latch, 226. 2 Lev. 113, and in Gilbert's Law of Evidence it is said, "where a thing lies in livery, a deed formerly sealed may be given in evidence relating to [263] it, though the seal be afterwards torn off; for the interest passed by the act of livery that invests the party with the possession, and the possession that was once transferred by the deed doth not return back again though the deed was

(a) But this obviously means a special demurrer, though it is not so expressed in the cases cited.

(b) [Vide 1 Saund. 228 b. (n). 2 Saund. 137 a. (n) 5th edit.]

(c) [See the cases collected in 1 Saund. 9 a. (n). See also *Banfill v. Leigh*, 8 T. R. 573. *Onslow v. Smith*, 2 Bos. & Pul. 387. The reason is because the deeds are supposed to belong to the feoffees, &c. to uses, and that therefore the cestui que use has not the power of bringing them into court. But this doctrine has been questioned by conveyancers, see 4 Cruise Dig. 128, 3d edit.]

cancelled, &c. and so if the conveyance was made by lease and release, and the uses were once executed by the statute, they do not return back by cancelling the deed," 109, 110. It is indeed admitted on the pleadings that the estate vested, for the Defendant has not denied the release, which he ought to have done, and taken issue on it. But whether the lease be valid or not, the bargain and sale was for a year, and within the year the church became vacant.

LORD CH. J. EYRE. I have no doubt on either point made in the argument; the first insisted upon is a matter of form, and ought to have been assigned as a cause of special demurrer, but cannot be taken advantage of on a general demurrer. As to the second, I hold clearly that the cancelling a deed will not divest property which has once vested by transmutation of possession (a); and I would go farther, and say that the law is the same with respect to things which lie in grant. In pleading a grant, the allegation is that the party at such a time "did grant"; but if by accident the deed be lost, there are authorities enough to shew that other proof may be admitted: the question in that case is whether the party did grant; to prove this the best evidence must be produced, which is the deed; but if that be destroyed, other evidence may be received to shew that the thing was once granted: for God forbid that a man should lose his estate by losing his title-deeds. When I sat in the Court of Exchequer, questions frequently arose on real compositions, in which it was contended that, according to the old opinions, the original deed must be shewn; but though the old books say that a real composition must be by deed, I always held that the production of the deed was not necessary, and that the party might shew that it originally commenced by deed, if the deed were lost.

GOULD, J. I am of the same opinion with my Lord Chief Justice. A title defectively set forth is a ground of special demurrer; and as to the cancelling the deed, a man's title to his estate is not destroyed by the destruction of his deeds: the case where the seal was ate off by rats, must be in the recollection of every one. It was properly said by my Brother Lawrence, that the Defendant should have pleaded, that the party did not [264] release, upon which an issue might have been taken, and then if the deed had been cancelled by consent of both parties, that perhaps might have been given in evidence, though I much doubt whether even that would have helped him. But in the present case there is a circumstance which plainly shews that the deed was not cancelled by Bolton or the person under whom he claims, with a view to prevent the operation of it, for it is averred that the Plaintiff brings the remaining part of the deed into court.

HEATH, J. I have already given my opinion, in the course of the argument, on the first point. With respect to the second, as this is a conveyance deriving its effects from the Statute of Uses, all that is averred about the deed being destroyed, is mere surplusage; but if it were necessary, surely no one will say, that if deed should happen to be stolen, therefore that the owner shall lose his estate.

ROOKE, J. As to the first point, I am of the same opinion. With regard to the second, I think the Defendant ought to have pleaded, and then an issue might have been taken. The case cited from 3 Bulst. 79, as it is there reported, is scarcely intelligible, and is very differently stated 1 Roll. Rep. 188 (there called *Moore v. Waldron*), where it is as follows. "The deed of a stranger was pleaded, and the Defendant pleaded that the seal was severed from the deed, and so non est factum. Jermin moved the Court to compel the Defendant to alter the issue, on an affidavit that it was melted with fire by accident, and cited *Dr. Leufield's case*. And by Coke and Haughton, this is no cause to compel the Defendant to alter the issue: and here this stranger to the deed cannot plead this special non est factum, but ought to plead that nothing passed by the deed." But I agree that a right once vested, is not divested by merely cancelling the deed.

Judgment for the Plaintiff.

(a) [Vide accord. *Roe d. Berkeley v. Archbishop of York*, 6 East, 90. *Perrott v. Perrott*, 14 East, 431. *Doe d. Lewis v. Bingham*, 4 B. & A. 677. *Moss v. Mills*, 6 East, 148.]

[265] THE EARL OF BUTE *against* GRINDALL AND ANOTHER.
Wednesday, Nov. 27th, 1793.

In the Exchequer Chamber, in Error.

See 1 Term Rep. B. R. 338.

The ranger of a royal park is rateable to the poor, in respect of inclosed and cultivated lands in the park, if he is in the enjoyment of the immediate profits of those lands ; for as to such profits he is considered as an occupier of the lands (*a*).

LORD CHIEF JUSTICE EYRE. The question in this case is, whether the Earl of Bute was liable to be rated to the relief of the poor of the parish of Putney, in respect of certain lands, in the rate or assessment in the first count of the declaration mentioned. These lands were 199 acres and twelve perches of inclosed lands, being meadow and arable, parcel of Richmond Park, and 39 acres 1 rood and 32 perches of land, also parcel of the park, but open to park pasture, and not inclosed. There was a feigned issue to try this question, and another question respecting the herbage and pannage of the park, but this last question being disposed of, I need not state it more particularly. On the trial of the cause, a special verdict was found, stating a grant to Lord Bute, by the King's letters patent, of the office of ranger and keeper, and of the custody of Richmond Park, and of the preservation of the houses, lodges, edifices, walks, deer, wild beasts and game in the park, to be exercised by him or his deputy, during the king's pleasure. The herbage and pannage of the park, over and above the keeping the game, browse wood, decayed timber, timber for repairs, and for inclosing and beautifying, the liberty of planting trees against the wall, and all other wages, fees, profits, rights, perquisites, commodities, advantages and emoluments, to the said office belonging or appertaining, or of right taken or usually enjoyed with the office, are also granted by the said letters patent, in as large, ample and beneficial a manner, as the Princess Amelia, or any former ranger had enjoyed them, without account to his majesty. There are then huddled into this special verdict, without farther introduction, several circumstances of fact, shewing in what manner the lands, which are the subject of the assessment, had been, both before and during Lord Bute's rangership, cultivated, partly at the expence of the king, and partly at the expence of the ranger, and how the profits of them had been taken, partly by the king, and partly by the ranger, followed up by a [266] finding, that the profits arising from these lands to the ranger, were worth 100*l.* a year. The special verdict has not found directly, one way or the other, who was the occupier of these lands, nor that the profits which are found to have arisen to the ranger, were profits appertaining to his office of ranger, or even that the custody or possession of these lands did belong to his office of ranger, or that they ever had belonged to it.

Upon this loose and inaccurate statement in the special verdict, the question is reserved, Whether Lord Bute was liable to be rated and assessed to the poor, in respect to these lands? If Lord Bute had been found to be the occupier of the lands, there would have been no room for a question respecting his liability to this assessment ; on the other hand, if he was not the occupier, whatever might be his connexion with the occupier short of joint occupation, if for instance, he was only a servant to the occupier, it seems that according to the current of the authorities, and the case of *Milward v. Cuffin* in particular, (2 Black. Rep. 1330,) he was not liable to be assessed in respect of these lands. The not finding this fact of occupation directly and plainly one way or the other, created a difficulty in my mind, and I believe with some of the other judges. This occasioned the cause to stand over, and as we were not till very lately pressed to give judgment in it, I had concluded, especially after the death of Lord Bute, that the cause was at an end.

But being now called upon, we who heard the argument, being a Quorum of the Court of Error, have thought it right to give judgment, without putting the parties to the expence and delay of another argument before a full Court, and we are at length come to this conclusion, that though this special verdict is extremely loose and

(a) [Vide *Rex v. Brown*, 8 East, 528 ; *Rex v. Bishop of Rochester*, 12 East, 353 ; *Rex v. Bradford*, 4 M. & S. 317 ; *Rex v. Trent Navigation*, 4 B. & C. 57.]

inaccurate an occupation of these lands sufficient to support this assessment may be collected from it. The finding upon which we rely, is that the profits arising to the ranger from the whole of the said inclosed lands are worth 100l. a-year. If these profits arose to the ranger from these lands, during the rangership of Lord Bute, they arose to Lord Bute, and if they arose to him *ex ratione* as ranger, we must understand them to be the profits of land appertaining to his office of ranger. Having them by a title, and *virtute officii*, they arise to him immediately, and we think it may be stated as a general proposition, that the immediate profits of land (some mines excepted) are a proper subject of assessment, or, to speak more correctly, that the person who is in the possession [267] of the immediate profits of land may be taxed to the relief of the poor, in respect of those immediate profits: that *quoad* these immediate profits of the land, he is an occupier of the land, within the meaning of those authorities which have decided that the occupier only can be assessed to the relief of the poor. The case of *Rowls v. Gell*, Cowp. 451, is in its principle an authority for this doctrine. There the lessee under the crown of lead mines, was holden to be rateable to the poor, for the profits arising from lot and cope, lot being the 13th dish or measure of lead-ore got and made merchantable by the adventurers, and cope being 6d. for every nine dishes of lead-ore raised by those adventurers. Lord Mansfield in giving judgment observed, that in general the farmer or occupier of the land, and not the landlord, was liable to the poor-rate: that the landlord was never assessed for his rent, because that would be a double assessment, as his lessee had paid before, but that if there were profits to the landlord which were a proportion of the profits of the land, for which the tenant had not been assessed, there was no reason to exempt these proportionable revenues from this tax; and it was holden that he was liable to be rated for this property. In that case, strictly speaking, the lessee of the lead-mine was landlord, and not occupier, but he was considered as occupier *quoad* those profits, for the purpose of an assessment to the relief of the poor. He was in the possession of profits arising immediately from the land, he was an occupier of the profits of the land, and as such, rateable: so was the Earl of Bute in the case which now stands for judgment before us. We are therefore of opinion that this judgment ought to be affirmed.

Judgment affirmed.

THE EARL OF LONSDALE *against* LITTLEDALE. Wednesday, Nov. 27th, 1793.

In the Exchequer Chamber, in Error.

[2 Anstr. 356, S. C. Vide post, 299, S. C. in Dom. Proc.]

[Referred to, *Dalton v. Angus*, 1881, 6 App. Cas. 748; *Jordeson v. Sutton, Southcoates and Drypool Gas Company*, [1899] 2 Ch. 248.]

Qu. Whether a peer of parliament may be sued in the Court of King's Bench, by bill? (a).

The Defendant in error, filed a bill in the Court of King's Bench, against the Plaintiff, and recovered a verdict, the cause of action being the following.

"Be it remembered, that in Easter Term last past, before our lord the king at Westminster, came Henry Littledale by Anthony Adamson his attorney, and brought in the court of our said lord [268] the king then there, his bill against the Right Honourable James Earl of Lonsdale having privilege of parliament, of a plea of trespass on the case, and there are pledges for the prosecution, to wit, John Doe and Richard Roe; which said bill follows in these words, to wit, Cumberland to wit, Henry Littledale complains of the Right Honourable James Earl of Lonsdale, having privilege of parliament, in a plea of trespass on the case, &c., for that whereas the said Henry, on

(a) [Vide 3 Bos. & Pull. 9 b. 12 a. Tidd's Pr. 115, 8th Ed. Where a peer was sued jointly with others by bill of Middlesex, the Court of K. B. set aside the proceedings as against the peer, *Briscoe v. Earl of Egremont and Others*, 3 M. & S. 88.

But where an Irish peer was sued by bill, the Court of Common Pleas refused to set aside the proceedings on motion, but left him to plead his privilege in abatement, *Davis v. Lord Rendlesham*, 7 Taunt. 679; 1 B. Moore, 410, S. C.]

the first day of January in the year of our Lord 1789, and long before, was and from thenceforth continually hitherto hath been, and still is seised in his demesne as of fee, of and in a certain messuage or dwelling-house, with a coach-house, stable, out-houses, buildings, yards, and gardens, to the said messuage or dwelling-house belonging, with the appurtenances, situate and being at the parish of Saint Bees in the said county of Cumberland; and whereas also the said Earl during all the time aforesaid, was lawfully possessed of all the mines and seams of coal lying under the said messuage and premises of the said Henry, and also of a certain other coal-mine, situate and being under certain other lands in the parish of Saint Bees aforesaid: and whereas also before and at the time of committing the grievance next hereinafter mentioned, there was a certain large mine of coal, extending as well under the aforesaid premises of the said Henry, as under other houses, lands and tenements, at the parish aforesaid, contiguous and near thereto, which same mine had before that time been dug and worked, and then, and for a long time before, had large quantities of water confined therein, which could not be emptied or discharged therefrom, in the manner hereafter mentioned, without greatly endangering the earth, soil and ground over the same, and the houses, buildings and premises thereon erected and being; yet the said Earl, contriving and wrongfully intending to injure and damnify the said Henry, and to disturb him in the peaceable and quiet possession, occupation and enjoyment of the said messuage and premises, and to damage and destroy the same, whilst the said Henry was so seised of his said messuage and premises as aforesaid, and whilst the said Earl was so possessed of his said mines and seams of coal, and the said other coal-mine as aforesaid, to wit, on the second day of January in the year of our Lord 1789, and on divers other days and times, between that day and the day of exhibiting the bill of the said Henry against the said Earl, in this behalf at the parish of [269] Saint Bees aforesaid, cut, dug, worked and made, and caused to be cut, dug, worked and made, certain drifts from and out of his last mentioned coal-mine, and in so doing, so negligently, incautiously and improvidently conducted, managed and carried out the same, that the said Earl for want of due care and caution of himself or his agents, and servants, in that behalf, on the 31st day of January in the year of our Lord 1791, at the parish aforesaid, negligently, incautiously and improvidently, pierced, dug and broke into the aforesaid mine, which had been dug and worked, and had water confined therein as aforesaid, whereby the water, which was then and there confined therein as aforesaid, was suddenly and hastily let out, emptied and discharged therefrom, and with great force, violence and rapidity rushed and was carried along and through the same mine, and from and out of the same, through and along the said drifts; and the support of the said messuages and premises of the said Henry, and of the earth, soil and ground, upon which his said messuage, stables, out-houses and buildings were erected, standing and being as aforesaid, over and above the same mine so having water confined therein as aforesaid, was thereby then and there greatly damaged, weakened, removed and destroyed: by reason whereof, part, to wit, ten square yards of the earth and soil of the said Henry, of the said garden, hath sunk and fallen to a great depth, to wit, to the depth of one hundred fathoms, into the said mine so dug and worked under the same as aforesaid, and other the earth and soil of the said Henry of his garden and yards and also the earth and soil upon which his said messuage, coach-house, stables, out-houses and buildings were erected and built, have greatly shrunk, cracked, rent and given away, and his said messuage, coach-house, stables, out-houses and buildings, have been and are very much cracked, rent, shaken, weakened and damaged, and in great danger of falling, and rendered unfit and dangerous for the use or habitation, and the walls, to wit, forty perches of the walls of the said garden, and forty perches of the walls of the said yards of the said Henry, have fallen down, and are destroyed, and the residue of the walls of the said garden and yards, are greatly shaken, rent, weakened and damaged, and in great danger of falling, and all the said messuage and premises of the said Henry are thereby greatly diminished in value, and become of very little use or value to him the said Henry, by reason of which said several premises, [270] the said Henry was forced and obliged to remove himself and his family, and also his goods, furniture and effects, and hath accordingly removed himself and his family, and his goods, furniture and effects, from and out of his said messuage or dwelling-house, and other his premises, for their safety and preservation, and hath been obliged to lay out and expend, and hath actually laid out and expended, a large sum of money, to wit, the sum of 100l. in the removal of

his said goods, furniture and effects as aforesaid, and in procuring other places for the abode of himself and his family, and the reception of his said goods, furniture and effects, and in and about the preserving of his said messuage and premises, and preventing the same from falling or receiving further damage; and the said goods, furniture and effects, in and by reason of such removal, were part thereof, being of great value, to wit, of the value of 100*l.* purloined and lost, and the residue thereof of great value, to wit, of the value of 1000*l.* very much damaged, broken, spoiled and destroyed, to wit, at the parish of Saint Bees aforesaid "(a).

There were also several other counts, somewhat varying in their statement of the mode of working the mines, and of the injury received. A writ of error being brought, after the usual errors, the assignment was, "that the said Earl being a peer of this realm ought to have been sued by original writ, and not by bill." And now, on behalf of the Plaintiff in error, Williams in support of that assignment made two questions; the first, whether a peer or lord of parliament could be sued in the Court of King's Bench by bill prior to the passing the statute 12 & 13 W. 3, c. 3? The second, whether that statute had made any alteration in this respect? 1. Before that statute a peer could only be sued by original. By the antient common law, that court had no jurisdiction of civil suits except in cases of trespass *vi et armis*; and in such the party might be arrested. 3 Co. 12 a. But in the course of time it was holden that when the Defendant was once in custody of the Marshal, he might be sued for any other cause of action by bill. Thus Lord Coke says, "This court hath power to hold plea by bill, for debt, detinue, covenant, promise, and all other personal actions, ejectione firmæ, and the like, against any that is in *custodiâ mareschalli*, or any officer, minister or clerk of the court: and the reason hereof is, that if they should be sued in any other court, they should have the privilege of this [271] court: and lest there should be a failure of justice (which is so much abhorred in law) they shall be impleaded here by bill, though these actions be Common Pleas, and are not restrained by the said act of Magna Charta; 4 Inst. 71," and again, "it is observable, that putting in bail at one man's suit he was in *custodiâ mareschalli* to answer all others which would sue him by bill, and this continueth to this day. If any person be in *custodiâ mareschalli* &c., be it by commitment, or by *latitat*, bill of Middlesex or other process of law, it is sufficient to give the court jurisdiction, 4 Inst. 72." In 3 Black. Comm. 42, it is thus laid down, "on the plea side, or civil branch, it has an original jurisdiction and cognisance of all actions of trespass, or other injury alledged to be committed *vi et armis* of actions for forgery of deeds, maintenance, conspiracy, deceit, and actions on the case which alledge any falsity or fraud; all of which savour of a criminal nature, although the action is brought for a civil remedy, and make the Defendant liable in strictness to pay a fine to the King, as well as damages to the injured party. The same doctrine is also now extended to all actions on the case whatsoever. But no action of debt or detinue or other mere civil action, can by the Common Law be prosecuted by any subject in this court, by original writ out of Chancery; though an action of debt given by statute, may be brought in the King's Bench as well as in the Common Pleas. And yet this Court might always have held plea of any civil action, (other than actions real), provided the Defendant was an officer of the court, or in the custody of the Marshal or prison-keeper of this court, for a breach of the peace, or any other offence. And in process of time, it began by fiction, to hold plea of all personal actions whatsoever, and has continued to do so for ages; it being surmised that the Defendant is arrested for a supposed trespass, which he never has in reality committed; and being thus in the custody of the Marshal of this court, the Plaintiff is at liberty to proceed against him for any other personal injury: which surmise, of being in the Marshal's custody, the Defendant is not at liberty to dispute."

The proceeding by bill was indeed originally designed only for injuries committed with force to the person or property of another. The party to whose person or property any injury accompanied with force had been committed, had liberty to apply to the Court of King's Bench for redress, and, in order that process might be awarded to bring the offender into court, [272] the Plaintiff drew out his complaint, and entered it at length on the records of the Court, in which a trespass was alleged, in order to give the Court jurisdiction. Trye, 98. When this was done, the clerk of the court was warranted to issue the bill, the only process awarded in the first instance. This bill was

(a) [See the observations of Eyre, C.J., in *Bush v. Steinman*, 1 Bos. & Pull. 407.]

directed to the sheriff of that county where the Court happened to sit, commanding him to take and safely keep the Defendant, so that he might have the body before the King at a certain day, to answer to the Plaintiff in a plea of trespass. If Non est inventus was returned, and the Defendant was in another county, the Plaintiff might sue a testatum bill or latitat, and when the Defendant was taken and brought into court, he was either delivered to the actual custody of the Marshal or admitted to bail.

It is clear, therefore, that at common law, the Court of King's Bench could hold plea by bill in no instance, except where the Defendant was in the actual or supposed custody of the Marshal (a). But as a Peer or Lord of Parliament could not be legally arrested in a civil suit, he could not in reality be in the custody of the Marshal; and as he could not be so really, the fiction could not extend to him. That he could not be arrested, is plain from many authorities. Thus, in *The Countess of Rutland's case*, 6 Co. 52, it was resolved, that the person of a Baron, who is a Peer of Parliament, shall not be arrested in debt or trespass. In *The Earl of Shrewsbury's case*, 9 Co. 49 a. it is said, "The law gives them (meaning Earls) high and great privileges; and therefore their bodies shall not be arrested for debt, trespass, &c. because the law intends that they assist the king with their counsel for the commonwealth, and keep the realm in safety by their prowess and valour." In *Mackalley's case*, 9 Co. 68 a. it is holden, that "if a Capias be awarded against a Baron or other Peer of the realm, it is erroneous, because their bodies are by law privileged from arrest." So in *Foster v. Jackson*, Hob. 61, it is laid down in trespass vi et armis, at "the common law, against a Baron, a Capias lieth not, nor after, by equity of the common law upon the statute (25 Ed. 3, st. 5, c. 17), because the estate of a Baron is [273] intended sufficient." In 1 Vent. 298, a bill of Middlesex "was issued by an attorney against the Countess of Huntingdon, which was discharged by Supersedeas, without pleading, because it appeared by the record that she was a Peeress, and the attorney was committed for suing out the process." And in a note, Lilly's Entries, 21, it is said, "a Peer cannot be sued in the King's Bench by bill, by reason he is therein alleged to be in the custody of the Marshal."

2. It remains then to be seen, whether by the statute 12 & 13 W. 3, c. 3, Peers are made liable to the process by bill, from which they are exempted by the common law. In the first section, a power is given to sue all persons alike having privilege of Parliament immediately after the dissolution or prorogation, or after an adjournment for a longer time than fourteen days. But in the second section, there is a distinction established in the mode of suing Peers, and members of the House of Commons. In that clause, it is enacted, that "if any person or persons having cause of action or complaint against any Peer of this realm, or Lord of Parliament, such person or persons after any dissolution, prorogation, or adjournment, as aforesaid, or before any session of parliament, or meeting of both houses as aforesaid, shall and may have such process out of his Majesty's courts of King's Bench, Common Pleas, and Exchequer, against such Peer or Lord of Parliament, as he or they might have had against him out of the time of privilege." Now the only process which the Plaintiff could have had against a Peer, out of the time of privilege, was an original, (it having been before shewn that he could not have a bill,) for in the time of privilege he could have had no process at all, and it was to remedy the mischief which arose from the debtors being protected by the privilege of parliament, in the intervals when parliament was not sitting, that the statute was made. But with respect to the House of Commons, in the same clause it is enacted, "that if any person or persons have cause of action against any of the said knights, citizens, or burgesses, or any other person intitled to privilege of parliament, after any dissolution, prorogation, or adjournment as aforesaid, or before any sessions of parliament, or meeting of both Houses as aforesaid, such person or persons shall and may prosecute such Knight, Citizen or Burgess, or other person intitled to such privilege of parliament in his Majesty's Courts of King's

(a) It seems from Bro. Abr. tit. Bill, pl. 6, that, anciently, if a person who was neither in the custody of the Marshal nor an officer of the court, were sued in the King's Bench by bill, he might give the Court jurisdiction in the suit by pleading voluntarily, though he was not bound to plead. The passage is as follows, "Nota, per Cheney, home n'avera bill in Banco Regis vers. auter, nisi defendens soit prisoner al court tempore, &c. vel officer, ut videtur; quare s'il ne soit prisoner il n'est tenu de responder a un bill, mes il poit responder gratis s'il voit, et c'est bon."

Bench, Common Pleas and Exchequer, by summons and distress infinite, or by original bill [274] and summons, attachment, and distress infinite," &c. The statute, therefore, directs, that Peers shall be sued by the same process to which they were liable out of the time of privilege, but members of the House of Commons, either by summons and distress infinite, or by original bill, summons, attachment, and distress infinite. And it is remarkable, that when this act went to the House of Lords for their concurrence, they expunged a part of the clause in question which gave the same process of original bill and summons against them, as against the members of the House of Commons, and sent the act amended back to the House of Commons, where it passed with the amendment. Journals of the House of Commons, vol. 13, p. 567, which plainly shews, that the intent of the Legislature was not to give any new process against Peers, by making them subject to the original bill, as well as the members of the House of Commons. And though after Knights, Citizens, and Burgesses, the statute mentions other persons intitled to such privilege, yet those words cannot be construed to include Peers, it being a rule of construction not to go back from the inferior to the superior; thus the statute 13 Eliz. c. 10, which mentions only deans and chapters and other inferior ecclesiastical persons, is holden not to extend to bishops (a)¹. If, indeed, the cases of *Say v. Lord Byron*, Sayer, 63, and *Gosling v. Lord Weymouth*, Cowp. 844, be cited on the other side, it is hoped that the Court will not be bound by them, as the present writ of error is brought to obtain a review of these cases, and it is a maxim of law, non potest adduci exceptio ejusdem rei, cujus petitur dissolutio.

Holroyd, who was going to argue on the other side, was stopped by the Court, and the

Judgment was affirmed (b).

This case is now depending in the House of Lords. [Vide post, 299.]

[275] EX PARTE WORSLEY. Thursday, Nov. 28th, 1793.

The affidavit of the acknowledgment of a warrant of attorney to suffer a recovery taken before an ordinary magistrate in a foreign country, must be attested by a notary-public. But the Court will dispense with such attestation, in the case of an affidavit taken before a great judicial officer in Ireland (a)².

Lawrence, Serjt., moved to pass a recovery at the bar, the affidavit of the acknowledgment of the warrant of attorney having been taken at Gibraltar, before a magistrate of that place, but not attested by a notary-public; and in support of his motion, he mentioned that last term, in the case of the affidavits of an acknowledgment taken before Lord Carleton, the Lord Chief Justice of the Common Pleas in Ireland, the Court dispensed with the attestation of a notary, on an affidavit that the signature was in his Lordship's hand-writing. But

The Court said, that though by the courtesy which subsisted between the two countries, they would take judicial notice that so great an officer as the Chief Justice

(a)¹ It was not necessary that the 13 Eliz. c. 10, should extend to bishops, who were already restrained from granting leases for more than 21 years, or three lives, by 1 Eliz. c. 19, s. 5.

(b) As other errors were assigned, besides that which was made the [275] subject of argument, there was enough on the record to intitle the Court of Exchequer Chamber to give judgment; but that court could not mean to decide the question that was argued, the Statute 27 Eliz. c. 8, s. 2, having expressly excepted "errors to be assigned or found, for or concerning the jurisdiction of the said Court of King's Bench."

(a)² [See *Dalmer v. Barnard*, 7 T. R. 252, that it is the constant practice for the judges here to receive affidavits sworn before the judges of Scotland and Ireland. Where the warrant of attorney is acknowledged in a place very distant from the residence of any notary-public, or British magistrate, an affidavit of the acknowledgment made before a British consul, or agent there, will suffice, *Domville v. Collier*, 3 Taunt. 275. Vide R. M. 39 Geo. 3, 1 Bos. & Pul. 362. *French v. Belew*, 1 M. & S. 303.]

of a superior court in Ireland was competent to administer an oath, and therefore would be satisfied with a verification of his hand-writing, yet there was a great difference with respect to an ordinary magistrate, and that in such cases, the rule requiring the attestation of a notary-public, ought to be strictly observed. On hearing this, Lawrence took nothing by his motion.

End of Michaelmas Term.

[276] CASES ARGUED AND DETERMINED IN THE COURTS OF COMMON PLEAS, AND EXCHEQUER CHAMBER, IN HILARY TERM, IN THE THIRTY-FOURTH YEAR OF THE REIGN OF GEORGE III.

ROLFE *against* STEELE. Friday, Jan. 24th, 1794.

An attachment against the Sheriff is irregular, if the rule to bring in the body issues before the time for putting in bail has expired (*a*)¹. But if the Sheriff neglect to apply to the Court in due time, to set aside the attachment, the irregularity is waived. Where a writ is returnable the first return of a term, in a country cause, the Defendant has eight days after the 4to die post, to put in bail.

A testatum capias issued into Surrey returnable the first return of last Michaelmas Term, viz. Nov. 3. On the 6th of Nov. the Sheriff was ruled to return the writ. On the 12th he returned cepi corpus: on the 13th he was ruled to bring in the body. On the 21st an attachment issued. On the 23d of January, the first day of Hilary Term, a motion was made on the part of the Sheriff, to set aside the attachment as irregular, because the rule to bring in the body had issued a day before the time was out for the Defendant to put in his bail; for the writ being returnable the first return of Michaelmas Term, and it being a country cause, the Defendant had eight days after the first day of full term, i.e. after the 4to die post, to put in bail (*b*), and the Sheriff being only liable in default of the Defendant, he ought not to be ruled to bring in the body till the time for putting in bail was expired.

The Court were of opinion that the attachment was irregular, the rule to bring in the body having issued too soon. But as a week had elapsed in Michaelmas Term after the attachment issued, without any application to set it aside, and during that time the Sheriff and the Plaintiff had frequent communications together, it was holden that the irregularity was waived; and therefore the

Rule was discharged.

Le Blanc, Serjt., for the Sheriff; Cockell, Serjt., for the Plaintiff.

[277] BOOTH AND OTHERS, Executors, *against* HOLT. Tuesday, Jan. 28th, 1794.

Executors are not liable to costs, on a judgment as in case of a nonsuit, under the statute 14 Geo. 2, c. 17 (*a*)².

The Defendant had obtained a rule for judgment as in case of a nonsuit, under the stat. 14 Geo. 2, c. 17, the Plaintiffs not having proceeded to trial in due time after issue joined; which rule was made absolute, and judgment as in case of a nonsuit entered. And now a rule was granted to shew cause why it should not be referred to the prothonotary to tax the Defendant his costs; against which Le Blanc, Serjt., shewed cause, insisting that as this was an action brought by executors for a debt due to the testator, they were not liable to costs on a judgment as in case of a nonsuit on the statute, any more than they would have been if they had been nonsuited at the trial. The directions of the statute are, "that all judgments given by virtue of that act shall be of the like force and effect as judgments upon nonsuit, and of no other force or effect:" and that the Defendant or Defendants shall, upon such judgment, be awarded his, her or their costs in any action or suit where he, she or

(*a*)¹ [Acc. *Rex v. Sheriff of Middlesex*, 8 East, 525. Tidd's Pr. 311, 8th edit.]

(*b*) Consequently he might have put them in on the 14th of November.

(*a*)² [Vide *Higgs v. Warry*, 6 T. R. 654. *Shaw v. Mansfield*, 7 Price, 709. Tidd's Pr. 830, 8th edit.]

they would upon nonsuit be intitled to the same, and in no other action or suit whatever." And this point has been already decided. *Barnes*, 130 (last edit. [Willes, 316, S. C.]). *Howard v. Radburn*, 4 Burr. 1928. *Bennet v. Coker*, Bull. N. P. 332.

Cockell, Serjt., contra, in support of the rule. The Plaintiffs were guilty of laches, and where there is laches in executors they are liable to costs. Thus on a non-pros they are so liable. 3 Burr. 1584, *Hawes v. Saunders*. So also on a discontinuance. 3 Burr. 1451, *Harris v. Jones*. And the principle is the same in one case of laches as in another.

But the Court held clearly, that the Plaintiffs were not liable to costs, the words of the statute being so strict as to preclude all argument from principle.

Rule discharged.

[278] DE LA COUR *against* READ. Tuesday, Jan. 28th, 1794.

The Defendant, having been holden to bail, but afterwards discharged on a common appearance, on account of the Plaintiff declaring against him on a different cause of action from that mentioned in the writ and affidavit, may be again holden to bail in an action on the judgment (a).

This was an action of debt upon a judgment by default (b)¹ in which the Defendant was holden to bail, though he had brought a writ of error. He had been likewise holden to bail in the original action, on an affidavit that he was indebted to the Plaintiff as acceptor of three bills of exchange; but the Plaintiff declared against him in covenant. Upon which, on application to the Court, he was discharged on entering a common appearance, on the ground that the Plaintiff had declared on a different cause of action from that mentioned in the writ and affidavit. The Defendant now applied, by Le Blanc, Serjt., to be discharged on entering a common appearance, upon the ground that having been arrested and holden to bail in the original action, he ought not to be holden to bail in an action on the judgment. *Sayer*, 43. *Newton v. Sneymer*, 160. *Bower v. Bewett*, 2 Stra. 1039. *Hall v. Howes*, 2 Wils. 93. *Crutchfield v. Seyward*.

Lawrence, Serjt., shewed cause. The Defendant having been discharged, on a common appearance in the original action, the Plaintiff has no bail; and this being a judgment by confession there are no bail in error, which distinguishes this case from that in 2 Wils. 93, where there was a verdict, and therefore might have been bail in error. And

The Court, in the absence of the Lord Chief Justice, held that the Plaintiff having lost his bail in the original action, though by declaring in a different form of action, was in the same situation as if he had not holden the Defendant to bail at all, and therefore might hold him to bail in an action on the judgment.

Rule discharged (c).

[279] CHAPMAN AND OTHERS, Assignees of Kennet a Bankrupt, *against* GARDNER. Tuesday, Jan. 28th, 1794.

A bankrupt who has obtained his certificate is not a competent witness to prove the debt of the petitioning creditor, or any other fact necessary to support the commission (b)².

Assumpsit on several promissory notes given by the Defendant to the bankrupt. Plea, Non assumpsit. At the trial at Guildhall, the Plaintiffs, to make out their title

(a) [In general a Defendant cannot be arrested in an action on a judgment if he was arrested in the original action. *Crutchfield v. Seward*, *Barnes*, 116. 1 Chitty's Rep. 274 (n). See also *Imley v. Ellefsen*, 3 East, 309. Tidd's Pr. 174, 175.]

(b)¹ The default was in not producing the record, on a plea of a judgment recovered, and a replication of Nul tiel record.

(c) But see *Barnes*, 376. *Wright v. Kerswill*, Stra. 792. *Chambers v. Robinson*, Cowp. 72. *Blandford v. Foot*.

(b)² [See *Wyatt v. Wilkinson*, 5 Esp. N. P. C. 187, that a bankrupt cannot be asked

as assignees, called the bankrupt, who had obtained his certificate, as a witness to prove the debt of the petitioning creditor: but it was objected by the counsel for the Defendant, that he was not a competent witness to prove his own petitioning creditor's debt, or any other fact necessary to support the commission, on which his certificate and discharge from his prior debts depended. This objection the Lord Chief Justice over-ruled, and admitted the evidence, and a verdict was found for the Plaintiff. A new trial being moved for by Le Blanc, Serjt., on the ground that the evidence was not admissible, the rule was afterwards made absolute without argument, the Court being clearly of opinion, in which the Lord Chief Justice concurred, that the bankrupt could not be admitted to prove any of the facts necessary to support the commission.

Rule absolute (a).

questions with a view to establish a prior act of bankruptcy. If the Defendant calls the bankrupt as a witness, it has been held that he waives all objections to his competency, and the bankrupt may be cross-examined as to the requisites of bankruptcy. *Fletcher v. Woodmas*, Selw. N. P. 253 (n), 4th edit.; but this case has been over-ruled. See *Binns v. Tetley*, 1 M.C. & Y. 397, where all the authorities are considered.]

(a) *Cross v. Fox*, at Guildhall, Michaelmas, 5 Geo. 2, before Lord Raymond, Chief Justice.

In an action brought by the assignees of a bankrupt, the Plaintiff, in order to prove the petitioning creditor's debt, produced the bankrupt himself, to whom Mr. Fazakerly objected, and the Chief Justice agreed, that as the bankrupt himself could not be a witness to prove his own act of bankruptcy, so he could not be a witness for this purpose; because the establishing and fixing the debt of the petitioning creditor, goes to support the commission itself, and it is for the benefit of the bankrupt that the commission should be in force; and the Plaintiffs were nonsuited.

Flower and Others v. Herbert, before Sir Dudley Ryder, Chief Justice, at Guildhall, December 17th, 1754.

Two issues were directed by the Court of Chancery, to try first, whether at and before the issuing the commission of bankrupt against the Defendant and William Eyton, the Defendant was a bankrupt, within the true intent and meaning of the statutes concerning bankrupts, or either of them: and secondly, whether at the time of issuing the commission, the Defendant and Eyton were indebted to Henkell the petitioning creditor in 100l.? Eyton having obtained his certificate, the Defendant's counsel objected to his competency as a witness, because he was interested to support his certificate, which would be void if the commission improperly issued, and the commission would have issued improperly if Herbert was not a bankrupt as well as Eyton.

LORD CH. J. RYDER. This is a question I do not remember ever to have been made before: I think Eyton is not admissible as a witness, either to shew that he and Herbert were joint debtors to the petitioning creditor, or that they were partners, or that Herbert was a bankrupt; for either of these facts tend to support the commission, which must unavoidably be superseded, if these facts were otherwise: and if this be not a good commission, as it will not be unless it be good against both, then the certificate will become void, and Eyton, in consequence, be liable again to his debts from which this certificate would discharge him; for the certificate is as a release, which the releasee can never be allowed as a witness to affirm. It is a settled rule, and so agreed on all sides, that a bankrupt after his certificate is obtained, may be a witness to any thing relating to the bankruptcy, except only to the act of bankruptcy; but then he is not admitted directly to support the commission, but to prove other matters (a).

(a) [See the observations of Mr. Phillippus upon this and the above case, *Treatise on Evidence*, 335, 6th edit. where he remarks, that if they are to be followed, they must be considered as anomalous exceptions to the general rule which is uniformly adopted on the subject of interested witnesses. See also 3 Starkie, N. P. C. 59 (n).]

[280] JORDAINE AND OTHERS *against* SHARPE. Tuesday, Jan. 28th, 1794.

Where the Plaintiff does not countermand notice of trial, but withdraws the record, after the cause is called on, the Court will make it a condition of discharging a rule for judgment as in case of a nonsuit, (on a peremptory undertaking to try,) that he shall pay the Defendant the costs incurred by the omitting to try, though the practice of the Court is not to grant a rule for costs for not going on to trial, and also a rule for judgment as in case of a nonsuit, at the same time (a)¹.

A rule was granted to shew cause why there should not be judgment as in case of a nonsuit, the Plaintiff not having proceeded to trial in due time after issue joined. The affidavit on which the motion was grounded, stated also that the Plaintiff had given notice of trial, and had not countermanded it, but had entered the cause for trial, and withdrew the record after it was called on, by which the defendant had been put to the expence of witnesses, briefs, &c. Sufficient cause being shewn, the Court discharged the rule, on a peremptory undertaking of the Plaintiff to try the cause at the sittings after this term, and on payment of the Defendant's costs, on account of the cause not being tried. This latter part of the rule was opposed on the part of Plaintiff, and it was insisted that by the practice of this Court, the Plaintiff could not have a rule for costs for not going on to trial, and a rule for judgment as in case of a nonsuit at the same time. But on consulting the Prothonotary, who said he had often taxed costs in similar circumstances, the rule was discharged as above mentioned (a)².

Adair, Serjt., for the Plaintiff; Le Blanc, Serjt., for the Defendant.

THE DUCHESS OF CUMBERLAND, Executrix of the Duke of Cumberland *against* PRAED, Administrator of Blackwell. Wednesday, Jan. 29th, 1794.

In the Exchequer Chamber in Error.

See 4 Term Rep. B. R. 585.

To an action of debt on a bond given to secure an annuity, the Defendant pleaded that no such memorial was enrolled as is required by the statute; the replication stated that a memorial was enrolled, containing the particulars which the statute directs; the rejoinder alleged, that the memorial in the replication mentioned, did not truly set forth the consideration on which the annuity was granted. This was clearly a departure from the plea (a)³.

This was an action of debt on a joint and several bond, given by the Duke of Cumberland and the Honourable Temple Simon Luttrell, to secure an annuity of 800l. a-year, to Blackwell.

[281] Plea, after oyer, by which it appeared that Samuel Blackwell had agreed with the Duke of Cumberland and T. S. Luttrell for the purchase of an annuity of 800l. a-year, during the life of the said T. S. Luttrell, for the price of 4800l. and which sum of 4800l. had been accordingly paid by the said Samuel Blackwell to the said Duke and T. S. Luttrell; 1. Non est factum. 2. Plenè administravit. 3. "That no such memorial of the said bond or writing obligatory, as is required to be inrolled in the High Court of Chancery, by a certain act of parliament made and passed in the seventeenth year of the reign of our sovereign Lord George the now king, intituled 'An act for registering the grants of life-annuities, and for the better protection of infants against such grants,' hath been inrolled in the High Court of Chancery, before the commencement of the suit of the said Humphry Mackworth Praed against her the said Anne, on the said bond or writing obligatory, as in and by the said act

(a)¹ [But in K. B. a rule for costs for not proceeding to trial may be obtained after a rule for judgment, as in case of a nonsuit, has been discharged, *Thomas v. Williams*, 4 B. & C. 260.]

(a)² This seems to account for the Court not allowing both rules, for the rule for judgment as in case of a nonsuit is sufficient to answer both purposes, if the affidavit be properly drawn.

(a)³ [Vide *Dudlow v. Watchoor*, 16 East, 41; 2 Saund. 84 b. (n) 5th edit.]

of parliament is directed and required; and this she the said Anne is ready to verify," &c.

Replication to the third plea.

That before the commencement of the suit of the said Humphry Mackworth against her the said Anne Duchess Dowager of Cumberland, on the said bond or writing obligatory, to wit, on the twenty-third day of May in the year of our Lord one thousand seven hundred and ninety-one, a memorial of the said bond or writing obligatory was inrolled in the High Court of Chancery, at Westminster aforesaid, and that such memorial did contain the day of the month and the year, when the said bond or writing obligatory bore date, and the names of all the said parties and witnesses, and did set forth the annual sum to be paid, and the name of the person for whose life the annuity was granted, and the consideration of granting the same, according to the form of the statute in such case made and provided, as by the inrollment of the said memorial remaining of record in the said High Court of Chancery, at Westminster aforesaid, more fully appears, and this be the said Humphry Mackworth is ready to verify by the said record, when and where, and in what manner the Court here shall order and direct, and therefore, &c.

Rejoinder.

"That true it is, that the said memorial of the said bond or writing obligatory, in the said replication of the said Humphry Mackworth mentioned, was inrolled on the day and year in the [282] said replication mentioned in the High Court of Chancery, but the said Anne Duchess Dowager of Cumberland further saith that the said memorial does not truly set forth the consideration for which the said annuity in the said bond or writing obligatory mentioned was granted, but on the contrary thereof doth set forth a false and untrue consideration for granting the same, in this, that the said memorial sets forth, that the said annuity was granted in consideration of four thousand and eight hundred pounds paid to the said Temple Luttrell and the said Henry Duke of Cumberland, when in truth and in fact the said Robert Blackwell in the said writing obligatory and memorial mentioned, did not, at the time of the supposed execution of the above-mentioned supposed writing obligatory, or at any time before or afterwards, pay to the said Duke in his lifetime, the said four thousand eight hundred pounds in the said bond and memorial mentioned, or any part thereof, nor did he the said Duke at the time of the said supposed execution of the said bond, ever receive or take the said sum of money in the above-mentioned memorial specified to be the consideration for the said supposed writing obligatory, or any part thereof, or any other sum or sums of money, or any other consideration whatsoever, and this the said Anne Duchess Dowager of Cumberland is ready to verify," &c.

Special demurrer.

For that the said Anne Duchess Dowager of Cumberland hath in and by her plea above pleaded in bar alleged, that no memorial of the said writing obligatory in the said declaration mentioned, hath been inrolled, and yet in the said plea above pleaded by way of rejoinder, the said Anne Duchess Dowager of Cumberland hath admitted that there is a memorial inrolled, and hath alleged that the facts contained in the said memorial are untruly set forth, which is a departure from the said plea in bar: and also for that the said plea so pleaded by way of rejoinder, introduces matter to be tried by the country, after the said Humphry Mackworth had pleaded a plea by way of reply, with a verification to be tried by the record; and also for that the said plea so pleaded by way of rejoinder, alleges matters wholly immaterial and not traversable by the said Humphry Mackworth, and denies the existence of a fact not alleged in the said plea so pleaded by way of replication; and also for that the said plea so pleaded by way of rejoinder, is no answer to the allegations set forth in the plea of the said Humphry Mackworth above pleaded by way of reply; and also for that the said rejoinder is in other respects contradictory, inconsistent, uncertain, insufficient, and informal, &c.

[283] Judgment having been given by the Court of King's Bench, in favour of the Plaintiff, a writ of error was brought, and the common errors assigned. And now Gibbs, on the part of the Plaintiff in error, contended first, that the rejoinder was not a departure from the plea; and secondly, that the rejoinder did, in substance, negative the allegation in the replication, and was therefore inconsistent with it.

1. The plea states, that no such memorial of the bond, as is required by the statute, was inrolled in the Court of Chancery, which is saying in other words, that there was

no memorial inrolled containing the day of the month, and the year when the bond bears date, the names of the parties, &c. and the consideration of granting the annuity, according to the requisites of the statute. The replication is, that a memorial complying with those requisites, and stating the consideration of granting the annuity, was inrolled. The rejoinder alleges, that the consideration stated in the memorial was not the true one, which supports, instead of departing from the allegation in the plea, namely that there was no memorial inrolled containing the consideration of granting the annuity. 2. The replication states, that the memorial contained the consideration of granting the annuity; the rejoinder alleges that the memorial sets forth, that the annuity was granted in consideration of a sum of money jointly to Temple Luttrell and the Duke of Cumberland, but that in truth no part of the money was paid to the Duke at the time of executing the bond: now this is in effect a denial of what is stated in the replication, viz. that the memorial contained the consideration of granting the annuity.

Shepherd, *contrà*, was stopped by the Court.

LORD CHIEF JUSTICE EYRE. The objection taken goes properly to the deed, and not to the memorial. By the third section of the statute it is enacted, "that in every deed, instrument or other assurance, whereby any annuity shall be granted, the consideration really and *bonâ fide*, (which shall be in money only,) and also the name or names of the person or persons by whom, and on whose behalf the said consideration or any part thereof shall be advanced, shall be fully and truly set forth and described in words at length;" and by the first, "that every memorial shall contain the day of the month and the year when the deed, bond, instrument or other assurance bears date, and the names of all the parties, and for whom any of them are trustees, and of all the witnesses; and shall set forth [284] the annual sum or sums to be paid, and the name of the person or persons for whose life or lives the annuity is granted, and the consideration or considerations of granting the same." Now the use of the memorial being to notify to the world that such a deed exists, when it has done that, generally speaking, it has done its office, perhaps with the single exception of a secret trust, under the words "for whom any of them are trustees." The true construction of the act therefore seems to be, that the deed shall fully and truly express the consideration, &c., and that the memorial shall truly set forth what is contained in the deed (a)¹. And this will be clear, if the third section be transposed and read in the place of the first. Then the question is, whether the matter stated in the rejoinder be not a departure from the plea? That it is a departure is clear beyond a doubt, upon every principle of pleading. The plea in effect states that there was no memorial; the replication alleges a memorial containing the requisites which the law requires; and then the rejoinder introduces a fact which goes to vitiate the deed, but not the memorial. As the first point therefore is so plainly in favour of the Defendant in error, it is unnecessary to discuss the second, on which we give no opinion.

Judgment affirmed.

SHEPHERD, ONE, &c. *against* MACKRETH. Wednesday, Feb. 5th, 1794.

In the Exchequer Chamber, in Error.

The Court of Exchequer Chamber is bound to allow double costs to the Defendant in error, on the affirmance of a judgment of the King's Bench: but it is entirely a matter in their discretion, whether or not interest shall be allowed on such affirmance (a)².

This action being brought to recover the amount of the Plaintiff's bill as an

(a)¹ But see *The Duke of Bolton v. Williams*, 4 Brown's Cas. Chan. 297. [Vide ante, p. 12, n. (1).]

(a)² [It seems that in the exercise of its discretion, the Court of Exchequer Chamber will only allow interest in cases where interest is recoverable below, unless it is distinctly proved that the writ of error was brought for delay, Tidd's Pr. 1241. As to the particular cases in which interest has been allowed, vide *ibid.*; it appears to have been improperly allowed in the principal case, *Walker v. Bayley*, 2 Bos. & Pul. 219. It is allowed on non pros., as well as on affirmance, *Sykes v. Harrison*, 1 Bos. & Pul. 29.]

attorney, for business done on behalf of the Defendant, a verdict was obtained and judgment entered in the Court of King's Bench, which, on a writ of error being brought (apparently for delay), was affirmed without argument. And now a rule was granted to shew cause on the motion of Gibbs, why interest should not be allowed on the affirmance of the judgment, against which, Williams shewed cause; and after consideration, the opinion of the Court was thus delivered by

LORD CHIEF JUSTICE EYRE. It has been doubted, whether this Court had power to give interest in the shape of damages on the affirmance of a judgment, or whether the double costs given by statute, were not in lieu of such damages. But it was declared by [285] Lord Loughborough (*a*), when his Lordship presided here, that it was entirely in the discretion of the Court to give damages for delay of execution, besides double costs; and there seems no difficulty in the question, if the several statutes upon the subject be attended to, which will be found all perfectly consistent with each other, and to have extended the benefit of 3 Hen. 7, c. 10, as to damages to many cases, and as to double costs, to all: so that it will appear that the double costs are not given in lieu of damages, but as a collateral and farther remedy for the same mischief. The statute 3 Hen. 7, c. 10, provides, that "if any Defendant or tenant, or any other that shall be bound by the judgment, sue before execution had, any writ of error or to reverse any such judgment, in delay of execution, then if the said judgment be affirmed good in the said writ of error, and not erroneous, or if the said writ of error be discontinued, or the person that sues it be nonsuited in the same, the person against whom the writ of error is sued shall recover his costs and damages for his delay and wrongful vexation in the same, by discretion of the justice before whom the said writ of error is sued." This statute not having been put in execution, the 19 Hen. 7, c. 20, directs that it shall be in future. The 3 Jac. 1, c. 8, enacts, that "no execution shall be stayed or delayed upon any writ of error, or supersedeas thereupon, for the reversing of any judgment given or to be given in any action or bill of debt upon any single bond, or upon any obligation with condition for the payment of money only, or upon any action or bill of debt for rent, or upon any contract, unless such person or persons, in whose name or names such writ of error shall be brought with two sufficient securities, such as the Court wherein such judgment shall be given shall allow of, shall first before such stay made or supersedeas to be awarded, be bound unto the party for whom any such judgment is or shall be given, by recognizance to be acknowledged in the same court, in double the sum adjudged to be recovered by the former judgment, to prosecute the said writ of error with effect, and also to satisfy and pay, if the judgment be affirmed, all and singular the debts, damages, and costs adjudged upon the former judgment, and all costs and damages to be also awarded, for the delaying of execution." This statute prescribes a term upon which there may [286] be a delay of execution, which is, the giving bail to answer the original judgment, and costs and damages to be awarded for delay of execution, evidently referring to the statute 3 Hen. 7, c. 10. The 13 Car. 2, st. 2, c. 2, s. 8 & 9, reciting the 3 Jac. 1, c. 8, and that other cases were within the same mischief, provides "that no execution shall be staid by any writ or writs of error, or supersedeas thereon, after any verdict and judgment thereupon obtained in any action of debt on the statute of Ed. 6, for not setting forth of tithes, nor in any action upon the case upon any promise for payment of money, actions of trover, covenant, detinue and trespass, unless such recognizance as is directed by the statute 3 Jac. 1, be first acknowledged:" and by sect. 10, it is enacted, "that if the judgment be affirmed, the person bringing the writ of error shall pay to the Defendant in error double costs, to be assessed by the Court where such writ of error shall be depending, for the delaying of execution." It must be acknowledged that there is a little ambiguity in this section; but without debating whether this should not be read "where such writ of error for the delay of execution shall be depending," this is manifestly a substantial independent provision of double costs, absolute and not at discretion, not only in the specified cases in 3 Jac. 1, and in the former clause, but in all cases whatsoever after verdict, popular and other penal actions excepted, which are so by the next section. The general provision of these

(a) Several motions had been made at different times for the allowance of interest which were ordered to stand over, that inquiry might be made as to the practice in error.

statutes of Jac. 1 and Car. 2, is extended by 16 & 17 Car. 2, c. 8, to all personal actions whatsoever after verdict: and in the case of a writ of error on a judgment after verdict in dower or ejectione firmæ, the Plaintiff in error is to be bound with condition, if judgment be affirmed, or the writ discontinued, or the party non-suit, to pay such costs, damages, and sum or sums of money as shall be awarded. Here a new term is introduced, "sum or sums of money" which is explained in the next section of the statute, which directs, "that the Court wherein such execution ought to be granted, upon such affirmance, discontinuance, or nonsuit, shall issue a writ to inquire as well of the mesne profits, as of the damages by waste committed after the first judgment in dower or ejectione firmæ; and upon the return thereof judgment shall be given, and execution awarded for such mesne profits and damages, and also for costs of suit." Here the legislature meaning to provide a satisfaction for a particular damage by waste, the words sum or sums of money are [287] introduced; and as neither this special damage, nor the general damage as applied to the two cases of dower and ejectione firmæ were matters of computation, which the Court could make at its discretion, a writ of inquiry is given. In this statute there are the same excepted cases, with the addition of writs of error brought by executors and administrators. These provisions are further extended by stat. 8 & 9 W. 3, c. 27, s. 3, to the case of the Marshal of the King's Bench and Warden of the Fleet, bringing a writ of error to reverse judgments in actions for an escape, who are to put in special bail, in default whereof no execution is to be stayed, nor any sequestration of the profits of their offices delayed. These statutes are perfectly consistent with each other, being all in *pari materia*, and are nothing but a gradual extension of the statute 3 Hen. 7, c. 10. To prevent writs of error being brought for delay, double costs are absolutely given in all cases, and under particular circumstances damages also at the discretion of the Court. That rule lets in applications to the court, in all cases, which it is entirely in their discretion to refuse or comply with, and if complied with, to fix the quantity of the recompence.

Afterwards the following rule was drawn up.

Upon reading the rule made on Wednesday the 13th day of November last past, in this cause, and upon hearing counsel for both parties, It is Ordered, that it shall be referred to the Clerk of the Errors, to calculate and ascertain the amount of the interest upon the final judgment obtained in this cause in his Majesty's Court of King's Bench, after the rate of four pounds per cent. per annum (*a*)¹, from the time of such final judgment being entered up, until the affirmance of the said judgment in this court, and that such interest may be added to the damages for which such final judgment was entered up.

By the Court.

A similar rule was also made on the affirmance of the judgment in the case of *The Earl of Lonsdale v. Littledale*, ante, 274 (*a*)². See the cases cited in the notes, Dougl. 750, 8vo edit. on this subject.

End of Hilary Term.

During the Vacation after this Term, died Sir Henry Gould, Knight, one of the Justices of this Court; and Soulden Lawrence, Esquire, Serjeant at Law, was appointed to succeed him, and was knighted.

(*a*)¹ [In *Sykes v. Harrison*, 1 Bos. & Pul. 30, it was said, that five per cent. would be allowed in future; but quære, whether the Court would allow five per cent. at present? See *Tidd's Pr.* 1242, 8th Ed.]

(*a*)² [Vide 2 Bos. & Pul. N. R. 360 (*n*), where it is said, that with respect to this case it was observed by a gentleman who had been counsel in the cause, that the damages there had been taken by consent, subject to reduction by arbitration; and therefore the Court had considered the amount ascertained by admission: see also 2 Campb. N. P. C. 428.]

[288] CASES ARGUED AND DETERMINED IN THE COURT OF COMMON PLEAS AND EXCHEQUER CHAMBER, IN EASTER TERM, IN THE THIRTY-FOURTH YEAR OF THE REIGN OF GEORGE III.

IN THE HOUSE OF LORDS.

GIBSON *against* HUNTER, IN ERROR. 1794.

[S. C. 6 Bro. P. C. 255. See *Sewell v. Burdick*, 1884, 10 App. Cas. 99; *Vagliano v. Bank of England*, 1889-91, 23 Q. B. D. 258; [1891] A. C. 107. See other proceedings, 2 H. Bl. 187; 6 Bro. P. C. 235.]

A. draws a bill of exchange on B. payable to a fictitious payee or order, and indorsed in the name of such payee, which B. accepts. In an action by an innocent indorsee for a valuable consideration against B. on the bill, in order to draw an inference, either that B. at the time of his acceptance knew the name of the payee to be fictitious, or that B. had given an authority to A. to draw the bill in question by having given a general authority to A. to draw bills on B. payable to fictitious persons, evidence is admissible of irregular and suspicious transactions and circumstances relating to other bills drawn by A. on B. payable to fictitious payees and accepted by B., though none of those transactions or circumstances have any apparent relation to the bill in question, and though none of them prove that B. accepted any of those other bills with a knowledge that the payees mentioned in them were fictitious (a).

A venire de novo having been awarded in this cause, (ante, 187,) it came on to be tried a second time before Lord Kenyon at Guildhall, at the Sittings after Trinity term 1793, when the Plaintiffs in error tendered a bill of exceptions to his Lordship's directions to the jury, the record of which proceeded thus. "And the jurors aforesaid, impannelled to try the said issue being also come, were then and there in due [289] manner chosen and sworn to try the same issue, and upon the trial of the said issue so had, the said Plaintiff in maintenance of the said issue so joined as aforesaid on his part, produced to the jury aforesaid a certain paper-writing, purporting to be a bill of exchange, in the words and figures following; that is to say:

"£521 7s.

"Falmouth, 11th March, 1788.

"Two months after date, pay to Mr. William Fletcher, or order, five hundred twenty-one pounds seven shillings, value received, with or without advice.

"To Messrs. Gibson and Johnson,
Bankers, London.

"NATHANIEL HINGSTON.

"No. 2068. G. & J.

"And upon which paper-writing were the following indorsements, that is to say, 'William Fletcher,' 'By procuration of Livesey, Hargreave and Company. A. Goodrich.' And the said Plaintiff thereupon proved, and gave in evidence to the said jury, that the said name of the said Nathaniel Hingston, purporting to be subscribed to the said paper-writing so produced to the said jury as aforesaid, was of the proper handwriting of the said Nathaniel Hingston, and that the said Nathaniel Hingston so subscribed the same paper-writing as the drawer of the same, and as the agent of the said Livesey, Hargreave and Co. in the said declaration mentioned, and was accustomed to draw bills of exchange for them, in his own name as their agent, and that the said Nathaniel Hingston resided at Falmouth, in the county of Cornwall, and that no such person as William Fletcher the supposed payee, in the said paper-writing mentioned, ever existed; and that the name of William Fletcher contained in the same paper-writing was merely fictitious, and that the said paper-writing so subscribed by the said Nathaniel Hingston, and before the same was indorsed with the name of 'A. Goodrich, by procuration of Livesey, Hargreave and Co.,' and also before the letters

(a) [So on an indictment for uttering a forged note knowing the same to be forged, evidence that the prisoner has passed other forged notes is admissible. *Rex v. Wylie*, 1 Bos. & Pul. N. R. 92. *Rex v. Bull*, 1 Campb. N. P. C. 324. *Russ. & Ry. C. C. 132. S. C. Hough's case*, *Russ. & Ry. 120.*]

and figures No. 2068, and the letters G. and J. were subscribed thereto, was sent by the said Livesey, Hargreave and Co. being the same persons mentioned and described in the said indorsement, by the name or firm of Livesey, Hargreave and Co. to the said Defendants for their acceptance, who accordingly accepted the same, by subscribing thereto the said letters and figures [290] No. 2068, and also the said letters G. and J. as the initials of their respective surnames. That the indorsement of the name of William Fletcher upon the said paper-writing produced in evidence, was made by a clerk of the said Livesey, Hargreave and Co. whose name was not William Fletcher. And that the said bill was afterwards indorsed with the words, 'by procuration of Livesey, Hargreave and Co. A. Goodrich,' by the said A. Goodrich, a clerk of the said Livesey, Hargreave and Co., for and by procuration of the said Livesey, Hargreave and Co., and paid and delivered by them to the said Plaintiff for a valuable consideration, then paid to them by the said Plaintiff, and that the said Plaintiff did not know that the payee named in the said paper-writing was fictitious. And the said Plaintiff in further maintenance of the said issue so joined as aforesaid, on his part, and to shew that the said Defendants at the time of their said acceptance of the said paper-writing, either knew that the said name of William Fletcher contained in the same paper-writing and indorsed thereon as aforesaid was a fictitious name, or that the said Defendants had given authority to the said Livesey, Hargreave and Co., to draw the said paper-writing so produced to the jury upon them, the said Defendants, by and in the name of the said Nathaniel Hingston, their said agent, expressed therein to be made payable to the order of a person who did not in fact exist, and whose name was a fictitious name, by having given a general authority to the said Livesey, Hargreave and Co. to draw bills of exchange upon them the said Defendants, by and in the name of the said Nathaniel Hingston, their said agent, expressed therein to be made payable to the order of persons who did not in fact exist, and whose names were fictitious names, did further prove and give in evidence to the said jury, that the said Livesey, Hargreave and Co. used to send down to the said Nathaniel Hingston, at Falmouth, printed forms of bills of exchange upon paper duly stamped for that purpose, with blanks therein for the dates, the times of payment, the names of the payees, and the sums to be made payable therein, to be signed by him the said Nathaniel Hingston, who used to return the same signed by him the said Nathaniel Hingston accordingly, to the said Livesey, Hargreave and Co., who then filled up the bills so returned according to their convenience, with the dates, the times they were made payable, the payee's names, the greater part of which were fictitious, and the residue real, and the sums for which they were to become [291] payable; and that this was done as the exigencies of the house of Livesey, Hargreave and Co. required. That when the bills were thus filled up, they were taken to the Defendants for acceptance, some of the said bills when so taken for acceptance being unindorsed, and others of such bills at the time they were so taken for acceptance, having the names of the supposed payees in such bills indorsed upon the same in various hand-writings. That this happened in a great variety of instances, and to the amount of 20,000l. That the said bill or paper-writing produced in evidence, although dated at Falmouth, was not in fact filled up with the date, the time of payment, the name of the payee, or the sum of money therein mentioned, at Falmouth, but in London. That bills so drawn by the said Nathaniel Hingston, and dated from the same place, were frequently carried at several different times on the same day, by the said Livesey, Hargreave and Co. to the Defendants for acceptance, and accepted by them accordingly. That it requires three days to transmit a bill from Falmouth to London by the post. That a letter sent from Falmouth on the first day of any month, would not by the post reach London until the fourth. That in several instances, such bills drawn by the said Nathaniel Hingston, as from Falmouth, have been presented by the said Livesey, Hargreave and Co. on the second day after the date of them, to the Defendants for acceptance, and that they have accepted them without objection. That in many instances, bills so drawn by the said Nathaniel Hingston were presented by the said Livesey, Hargreave and Co. to the Defendants for acceptance on the days on which, by the course of the post, the same bills would have arrived, if sent on the respective days of their respective dates, but before the hours of the post's arrival on those days, and that they were accepted by the Defendants without objection. That in some instances such bills so drawn by the said Nathaniel Hingston, were carried by the said Livesey, Hargreave and Co. to the said defendants for acceptance after the arrival

of the post from Falmouth, and other bills of the like kind were carried by them to the said Defendants for acceptance, at different times afterwards on the same day. That in many instances, bills so drawn by the said Nathaniel Hingston upon the said defendants were carried by the said Livesey, Hargreave and Co. to the said defendants for acceptance, upon the day on which they were [292] filled up by the said Livesey, Hargreave and Co. the instant they were filled up, and whilst the ink with which they were so filled up has been wet. That the house of the said Livesey, Hargreave and Co., where the said bills were so filled up, was not three minutes' walk from the Defendants' house. That this was the general course of dealing between the said house of Livesey, Hargreave and Co. and the Defendants. That the ink has been apparently so wet at many times when the bills were so delivered for acceptance at the house of the said Defendants, that the person who so delivered the same bills was careful in carrying them, that they might not smear from the ink's being so wet as aforesaid. That at the time of the carrying such bills in this manner, it was very apparent that the signature of Nathaniel Hingston was dry, and an old writing, and that what had been written in to fill up the bills was fresh and wet. That the witnesses, by whose testimony the said Plaintiff gave the said evidence of the said several instances of the manner of presenting and accepting the said bills, had no particular memory to distinguish the bill or paper-writing produced in evidence, as aforesaid, from the rest of the bills presented to, and accepted by the said Defendants, as aforesaid: that the date of the said bill or paper produced in evidence, the name of the payee, and the sum therein expressed to be made payable, were filled up by a clerk in the said house of the said Livesey, Hargreave and Company in London, and that was the general course before described with respect to the other bills that were carried by the said Livesey, Hargreave and Co. to the said Defendants wet for acceptance. That the Defendants paid bills under these circumstances to a large amount, and for a considerable length of time. And thereupon the counsel of the said Defendants did then and there object to the evidence so further given by the said Plaintiff in further maintenance of the said issue so joined, as aforesaid, on his part, and to prove that the said defendants, at the time of their said acceptance of the said paper-writing, either knew that the said name of William Fletcher, contained in the said paper-writing, and indorsed thereon, as aforesaid, was a fictitious name, or that the said Defendants had given authority to the said persons using trade and commerce in the name or firm of Livesey, Hargreave and Company to draw the said bill or paper-writing, so produced to the jury, upon them the said Defendants, by and in the name of the said Nathaniel Hingston their said agent, expressed therein to be made payable to the order of a person who did not in fact exist, and whose [293] name was a fictitious name, by having given a general authority to the said Livesey, Hargreave and Company to draw bills upon them, the said Defendants, by and in the name of the said Nathaniel Hingston, their said agent expressed therein, to be made payable to the order of persons who did not in fact exist, and whose names were fictitious names; and did then and there insist, that the same evidence ought not to be received, or left to the consideration of the said jury in that behalf; and prayed the said Chief Justice, that he would declare to the jury aforesaid, that the same evidence was not proper evidence to be received, or to be taken into their consideration as evidence in maintenance of the said issue on the part of the said Plaintiff, or upon which they could find that the said Defendants at the time of their said acceptance of the said paper-writing, either knew that the said name of William Fletcher contained in the said paper-writing, and indorsed thereon as aforesaid, was a fictitious name, or that the said Defendants had given authority to the said Livesey, Hargreave and Company to draw the said bill or paper-writing, so produced to the said jury, upon them, the said Defendants, by and in the name of the said Nathaniel Hingston their said agent, expressed therein to be made payable to the order of a person, who in fact did not exist, and whose name was a fictitious name, by having given a general authority to the said Livesey, Hargreave and Company to draw bills of exchange upon them, the said Defendants, by and in the name of the said Nathaniel Hingston their said agent, expressed therein to be made payable to the order of persons who did not in fact exist, and whose names were fictitious names: yet the said Chief Justice did then and there declare and deliver his opinion to the jury aforesaid, that the said evidence, so objected to by the counsel of the said Defendants as aforesaid, was proper evidence to be received in maintenance of the said issue, on the part of the said Plaintiff, as to the third count of the said

declaration, and to be left to their consideration as evidence in maintenance of the said issue on that count, to prove that the said Defendants, at the time of the said acceptance of the said paper-writing, either knew that the said name of William Fletcher, contained in the said paper-writing, and indorsed thereon as aforesaid, was a fictitious name, or that the said Defendants had given authority to the said Livesey, Hargreave and Co. to draw the said bill or paper-writing, so produced to the said jury, upon them, the said De-[294]-fendants, by and in the name of the said Nathaniel Hingston, their said agent, expressed therein to be made payable to the order of a person who in fact did not exist, and whose name was a fictitious name, by having given a general authority to the said Livesey, Hargreave and Co. to draw bills of exchange upon them the said Defendants, by and in the name of the said Nathaniel Hingston, their said agent, expressed therein to be made payable to the order of persons who did not in fact exist, and whose names were fictitious names; and that if the said jury should believe upon that evidence, that the said Defendants had such knowledge, or had given such authority to the said Livesey, Hargreave and Company, they might upon the whole evidence find their verdict for the said Plaintiff upon the said issue so joined as aforesaid, as to the said third count of the said declaration, but not upon any of the other counts contained in the said declaration (a): and thereupon, with that direction, left the same to the said jury; and the jury aforesaid then and there gave their verdict for the said Plaintiff, as to the said third count of the said declaration, with 521l 7s. damages and 40s. costs; and for the said Defendants as to all the other counts in the said declaration mentioned. Whereupon the said counsel for the said Defendants did then and there except to the aforesaid opinion of the said Chief Justice, and insisted that the evidence so given as aforesaid, for the purpose aforesaid, and which had been so objected to as aforesaid, was inadmissible to maintain the said issue on the part of the said Plaintiff, and to prove that the said Defendants, at the time of their said acceptance of the said paper-writing, knew that the said name of William Fletcher contained in the said paper-writing, and indorsed thereon as aforesaid, was a fictitious name, or that they had given authority to the said Livesey, Hargreave and Company to draw the said bill or paper-writing, so produced to the said jury, upon them, the said Defendants, by and in the name of the said Nathaniel Hingston, their said agent, expressed therein to be made payable to the order of a person who in fact did not exist, and whose name was a fictitious name, by having given a general authority to the said Livesey, Hargreave and Company to draw bills upon them, the said Defendants, by and in the name of the said Nathaniel Hingston their said agent, expressed therein to be made payable to the order of persons who did not in fact exist, and whose names were fictitious names; and inasmuch as the said [295] several matters so produced and given in evidence on the part of the said Plaintiff, and by the counsel of the said Defendants objected to and insisted on as not admissible in evidence on the trial of the issue aforesaid, do not appear by the record of the verdict aforesaid, the said counsel for the aforesaid Defendants did then and there propose their aforesaid exception to the opinion of the said Chief Justice, and requested the Chief Justice to put his seal to this bill of exceptions, containing the said several matters so produced and given in evidence on the part of the said Plaintiff as aforesaid, according to the form of the statute in such case made and provided; and thereupon the said Chief Justice, at the request of the counsel for the above named Defendants, did put his seal to this bill of exceptions, pursuant to the aforesaid statutes, in such case made and provided, on the 21st day of June aforesaid, in the 33rd year of the reign of his said present Majesty."

In Michaelmas Term, 1793, the Court of King's Bench gave judgment for the Defendant in error, upon which judgment the Plaintiffs brought a writ of error in parliament, and having assigned the common errors, hoped that the judgment of the Court of King's Bench would be reversed, for the following (among other) Reasons:—

I. Because the evidence excepted to has no relation to the particular bill now in question, and does not purport or affect to apply itself to such bill, and it is impossible that the facts of any one particular transaction can legally be inferred from circumstances applying wholly to others.

II. Because it follows as a consequence from the first reason, that even if it had been proved that the Plaintiffs in error had accepted other bills, knowing that the

(a) [Stating the Bill as payable to bearer.]

supposed payees in them were fictitious, it could not legally be inferred from thence, that they had actual knowledge of the supposed payee being fictitious in the bill in question.

[296] III. Because, if the evidence excepted to was not legally admissible, and to be left to the jury as evidence, from which they might properly infer actual knowledge in the Plaintiffs in error of the bill in question being made payable to a fictitious payee, it cannot be admissible to prove general authority to have been given by the Plaintiffs in error to Livesey, Hargreave and Co. to draw bills upon them payable to fictitious payees, inasmuch as a general authority to do certain acts, where an actual authority is not proved, can only be inferred by shewing an acquiescence of the person supposed to have given such authority, in other acts of a similar nature, done with his privity or consent; and if the evidence excepted to did not prove any one act of a similar description with that in question to have been done with the privity and by the consent of the Plaintiffs in error, no given number of instances of the same kind can be proper evidence upon which to presume a general authority to have been given by them to do such acts. Any number of instances, each of which, taken singly, proves nothing, can never prove any thing when taken collectively; and if the evidence excepted to would not be admissible to prove that the Plaintiffs in error had accepted any single bill with knowledge that the payee therein was fictitious, the permitting it to be offered to the jury as evidence, from which they might infer the fact of the Plaintiffs in error having given general authority to Livesey, Hargreave and Co. to draw bills upon them, payable to fictitious payees, would be attended with this absurdity, that the fact of such general authority would be inferred from the assumption of a number of antecedent facts, when the evidence was not admissible to prove the existence of any single antecedent fact, from a number of which the fact of general authority was to be inferred.

Reasons for the Defendant in Error.

It is presumed that the Plaintiffs in error mean to argue, that the evidence given at the trial, to prove their knowledge that the payee named in the bill in question was a non-existing [297] person, or that the house of Livesey, Hargreave and Company, with their privity, or under their authority, drew bills upon them payable to fictitious payees, ought not to have been received, as neither directly proving the facts to which such evidence was applied, nor raising any probability or presumption of the existence of such facts, or at most a probability or presumption so light and uncertain, as not to be entitled to any attention in a court of law.

The Defendant in error humbly submits, that it is competent to a jury to find matters of fact, without direct or positive testimony of those facts, and upon circumstantial evidence only, although the inference or conclusion to be drawn from the circumstances proved, be not absolutely certain or necessary.

That is sufficient if the circumstantial evidence be such as may afford a fair and reasonable presumption of the facts to be tried, and if the evidence has that tendency it ought to be received, and left to the consideration of the jury, to whom alone it belongs to determine upon the precise force and effect of the circumstances proved, and whether they are sufficiently satisfactory and convincing to warrant them in finding the fact in issue.

The Defendant in error humbly contends, that the privity or authority attempted to be proved, has, if necessary to support the verdict, been found upon circumstances affording a degree of probability of the fact, sufficiently strong to entitle the Defendant in error to prove those circumstances, and submit them to the consideration of the jury, as a ground of presumption.

The whole of the bill-transaction in evidence, appears as between Livesey, Hargreave and Company, and the Plaintiffs in error, to have been a joint concern of those two houses, merely for the purpose of raising money. Though the extent of the negotiation was so large, there is no evidence to shew that it arose out of any real mercantile transaction between them, but the contrary is to be inferred from the whole of the evidence given. [298] The irregularities and improprieties in the manner of making the bills, are such as would, for preserving the credit of the drawers, have been carefully concealed by them from the persons required to accept such bills, unless those persons had been privy to the whole plan of the negotiation,

and the mode of conducting it; but the evidence which is objected to proves the most open and undisguised exposure of all those circumstances to the view and knowledge of the Plaintiffs in error.

These are all circumstances hardly reconcileable with any other supposition than that of an entire privity betwixt Livesey, Hargreave and Company, and the Plaintiffs in error; and it would be greatly injurious to the fair purchasers of bills of exchange, and a great encouragement to fraud, if such circumstances could not be proved against the acceptor, and that the acceptor might always resist the performance of his engagements when there should be a defect of positive or demonstrative evidence of a fact, of which none but the drawer and acceptor, the parties interested, might have a full knowledge.

After argument, the following question was proposed to the Judges, viz.

“Whether the circumstances mentioned in the bill of exceptions be sufficiently relative to the propositions therein also mentioned, viz. that the Defendants in the action knew the name Fletcher was fictitious, or that the Defendants had given authority to Livesey and Co. to draw bills upon them the said Defendants payable to fictitious payees, so that they ought to have been received, and left to the jury as evidence thereof?”

On this question there was a division among the judges, who delivered their respective opinions seriatim; but the majority of them, together with the Lord Chancellor and Lord Kenyon, having declared that they thought the evidence ought to have been received and left to the jury, the

Judgment was affirmed (a).

[299] IN THE HOUSE OF LORDS.

THE EARL OF LONSDALE *against* LITTLEDALE IN ERROR.

See this case ante, 267 [with note]. [5 Br. P. C. 519, S. C.]

A Peer of Parliament having pleaded in chief to a bill filed against him in the Court of King's Bench cannot afterwards assign for error, that he ought to have been sued by original writ and not by bill. *Quære*. Whether the Court of King's Bench has jurisdiction to proceed against a Peer of Parliament by bill?

The Plaintiff in error having assigned the same error as in the Court of Exchequer Chamber, hoped the judgment would be reversed for the following among other Reasons:—

1st. Because the jurisdiction assumed by the Court of King's Bench, of proceeding against a Peer by original bill, is not warranted either by the common or statute law of this realm.

By the common law that court has power to hold plea by bill against two descriptions of persons only, viz. against the attornies, officers, ministers, or clerks of the Court, who are supposed to be present in court (and the course always has been to exhibit original bills against them, as being present in court in their proper persons), and against persons in custody of the marshal of the Marshalsea of the Court, and in such bills it is necessary to allege that the Defendant is in the custody of the marshal of the Marshalsea of that court: this last mentioned branch of its jurisdiction in process of time, has been extended to all persons against whom the process of *capias* could issue, by the following fiction, viz. the Court having an original jurisdiction in trespasses *vi et armis*, issues a writ called a bill of Middlesex or *latitat*, commanding the sheriff to take the body of a Defendant, as for a supposed trespass *vi et armis*, which the Defendant never has in reality committed, and the Defendant being taken and brought into the custody of the marshal of the Court upon this writ, the Plaintiff

(a) The various questions respecting bills of exchange, which arose from the bankruptcy of Livesey and Co. and Gibson and Co. seem at length to be finally settled. The several stages through which they passed may be seen by referring to 3 Term Rep. B. R. 174. *Tatlock v. Harris*, *ibid.* 182. *Vere v. Lewis*, 484. *Minet v. Gibson*, ante, vol. i. 569. *Gibson v. Minet*, and vol. ii 187. *Gibson v. Hunter*, [6 Br. Pa. Ca. 235, 255].

may exhibit a bill against him, as in the custody of the marshal for any cause of action whatsoever, upon which fiction rests this branch of its jurisdiction at [300] this day; and the Defendant being taken, and brought into the custody of the marshal of the Court upon this writ, the Plaintiff may exhibit a bill against him as in custody of the marshal, for any cause of action whatsoever, upon which fiction rests this branch of its jurisdiction at this day. This writ, except in cases where an *ac etiam* for bail is inserted, is not executed upon the Defendant's person, but he is served with a copy of it and appears, and files common bail, which is a proceeding by which a Defendant, instead of being committed to the custody of the marshal, is supposed to be delivered on bail upon a *cepi corpus* to John Doe and Richard Roe, which is the same as a commitment to the custody of the marshal. It is evident this mode of proceeding never could apply to a peer, because his person could never be arrested and brought into the custody of the marshal by a *capias* in trespass, as no such *capias* lies against a peer: and therefore, Lilly in his entries, page 21, observes in a note, that a peer cannot be sued in the King's Bench by bill, by reason he is therein alleged to be in the custody of the marshal. The next, and only other jurisdiction which the King's Bench has in civil actions, is by an authority delegated to the Court by an original writ issued from the Court of Chancery, returnable in the King's Bench, and this applies to peers as well as other persons, with this difference as to the process by which the Defendant is brought into Court to answer as against all persons (except peers, or privileged persons, during the time of privilege) the process is Summons, Attachment, and *Capias*, against peers, summons and *distingas* in *infinitum* only as no *Capias* lies, the common law having given no jurisdiction to the King's Bench of proceeding against peers, except by original writ only. The next question is, whether the statute of the 12th and 13th W. 3, has given that Court a jurisdiction of proceeding against them by original bill: that statute enacts, "that from and after the four and twentieth day of June, one thousand seven hundred and one, any person or persons shall and may commence and prosecute any [301] action or suit, in any of his Majesty's Courts of record at Westminster, or High Court of Chancery, or Court of Exchequer, or the Duchy Court of Lancaster, or in the Court of Admiralty, and in all causes matrimonial and testamentary in the Court of the Arches, the prerogative Courts of Canterbury and York, and the delegates, and all courts of appeal against any peer of this realm, or lord of parliament, or against any of the knights, citizens, and burgesses of the House of Commons for the time being, or against their or any of their menial or other servants, or any other person entitled to the privilege of parliament at any time from and immediately after the dissolution or prorogation of any parliament until a new parliament shall meet, or the same be re-assembled, and from and immediately after any adjournment of both Houses of Parliament for above the space of fourteen days, until both Houses shall meet or re-assemble; and that the said respective Courts shall and may after such dissolution, prorogation, or adjournment as aforesaid, proceed to give judgment and to make final orders, decrees and sentences, and award execution thereupon, any privilege of parliament to the contrary notwithstanding; provided nevertheless, that this act shall not extend to subject the person of any of the knights, citizens, and burgesses of the House of Commons, or any other person intitled to the privilege of parliament to be arrested during the time of privilege; nevertheless, if any person or persons having cause of action or complaint against any Peer of this realm, or Lord of parliament, such person or persons after any dissolution, prorogation, or adjournment as aforesaid, or before any sessions of parliament, or meeting of both Houses as aforesaid, shall and may have such process out of his Majesty's Courts of King's Bench, Common Pleas, and Exchequer, against such Peer or Lord of Parliament, as he or they might have had against him out of the time of privilege; and if any person or persons having cause of action against any of the said knights, citizens, or burgesses, or any other person intitled to privilege of parliament, after any dissolution, prorogation, or such adjournment as [302] aforesaid, or before any sessions of parliament, or meeting of both houses as aforesaid, such person or persons shall and may prosecute such knight, citizen, or burgess, or other person intitled to the privilege of parliament in his Majesty's Court of King's Bench, Common Pleas, or Exchequer, by summons and distress infinite, or by original bill, and summons, attachment, and distress infinite thereupon, to be issued out of any of the said Courts of record."

It is sufficient only to read the act above mentioned, to see that the form of pro-

ceeding against a Peer is not thereby varied, and that the original bill is not given against peers, but only against knights, citizens, or burgesses, or other persons entitled to privilege of parliament, which words, other persons, can by no rule of construction be contended to apply to Peers, but only to inferior degrees of persons, as officers, ministers, and clerks of the Houses of Parliament, &c. And what is the most convincing proof that the Peers did not mean to give a jurisdiction by original bill against them is, that the bill originally sent up to the Lords by the Commons at the parts above marked, had the words "Peer of this realm, or Lord of parliament," and the Lords struck out those words: vide journals of the House of Commons, vol. 13, 567. Notwithstanding the above, the Court of King's Bench in a case of *Gosling v. Lord Weymouth*, determined that the original bill was the common law mode of proceeding against Peers of parliament, before the statute of 12 W. 3, on the authority of a case of *Say v. Lord Byron*. Lord Mansfield gives the judgment thus: "the note I have of the case of *Say v. Lord Byron*, is as follows, Mich. 26 Geo. 2, B. R. Mr. L. Robinson moved, (upon an affidavit, that the plaintiff had sued out two writs of distringas, whereupon the sheriff had levied 40s. and 4d.; and that no bill was filed) for a rule to shew cause why the said two writs should not be quashed, and the money levied thereon be restored, he objected that a Peer ought not to be sued by bill, but by original writ; and that the statute 12 and 13 Wm. 3, c. 3, does not make any variation in the proceedings against Peers, [303] but respects, in this particular, commoners only: Mr. Stowe shewed cause, and the rule was enlarged. Upon shewing cause at a further day the Court declared, that there were many precedents of actions against Peers of parliament, for many years before the statute of Wm. 3, as certified by the Master and Mr. Day the clerk of the rules, and said, why could not the Court support its ancient jurisdiction as well as the Court of Exchequer hold plea as debtor Domini Regis? and the Court in that case discharged the rule." This is an authority in point. The original bill was the common law process.

"Per Curiam, Judgment quod Defendens respondeat ouster."

It is a singular thing, that if the proceeding by original bill as against Peers, was the common law proceeding before the statute of Wm. 3, that it should not have been also the mode of proceeding against members of the House of Commons, and yet that has not been pretended; if it were so, it is also singular it should not have been known to some writer upon the law, or that it should not be found in some case, or book of reports or practice; and yet it may with confidence be asserted, that no such thing is ever noticed in any book of law or practice, neither is it consistent with any principle of law; therefore, the Plaintiff in error trusts, that neither a supposed certificate of a master and clerk of the rules in the King's Bench, in a matter in which they were materially interested in point of emolument to establish the proceeding they certified, nor any erroneous practice which may have followed from the precedent of *Gosling v. Lord Weymouth*, will be sufficient to establish this jurisdiction.

2d. In the next place, it is contended, that the Plaintiff in error by not having pleaded his Peerage in abatement, has precluded himself from taking any objection in a Court of error to the mode of proceeding by bill. In answer to which, the Plaintiff in error submits that the want of jurisdiction is matter of error; and that if a Court has no jurisdiction, even the Defendant's consent [304] could not give it jurisdiction: that the want of jurisdiction in this case appears on the record, and therefore as the Court sees it, there is no occasion for a plea to disclose it, as there is of a matter dehors the record. The proceeding by original bill inverts the whole course of proceeding against Peers, from the beginning to the end of the suit. The returns of writs in every stage of the suit are totally different, where the proceeding is by original writ, and where by bill; and not only so, but a new jurisdiction in error is created by proceeding by bill instead of original, for where the proceeding is by original bill in the King's Bench, a writ of error is given to the Court of Exchequer Chamber, which is not the case where the proceeding is by original writ in the King's Bench, as there the writ of error is returnable in Parliament only.

Reasons for the Defendant in Error.

1st. The Court of King's Bench has jurisdiction to proceed against a Peer of the realm by bill. This appears by the stat. 12th and 13th Will. 3, c. 3, which authorises against a Peer such process, during the times there limited (which limitations are since

removed, and extended to all times by stat. 10th Geo. 3, c. 50,) as might have been had against him out of the time of privilege. Before that statute, Peers were by the practice of the Court (and the practice of the Court constitutes the law of the Court) sued there out of the time of privilege by this form of proceeding, namely, by bill and by summons and distress thereupon; and may now therefore by virtue of the above statutes, be so sued at any time. That this was the practice of the Court before the statute of King William, not only is to be inferred from the same continued subsequent practice, the legality of which has till the present case been unobjected to (except in the two instances after mentioned, by which its legality is established), but also appears from precedents certified to that Court when this very point was there [305] agitated, in the case of *Say* against *Lord Byron*, so long since as Michaelmas Term, 26th Geo. 2, (Sayer's Reports, 63; and Cowper's Reports, 845). The Court in that case, on reference being made to the statute of King William, confirmed the precedents and practice; and that decision was afterwards confirmed by the same Court in the case of *Gosling* against *Lord Weymouth*, in Trinity Term, in the 18th year of his present Majesty. (Cowper's Reports, 844.)

2d. These two cases are not only determinations in point, but are even stronger than the present case; as in both those cases this objection to the mode of proceeding was taken as it ought to be (if a valid objection) in the first instance: in the one case by motion before defence to the action, and in the other by plea in abatement. There appears not any appeal from either of those decisions, and they have ever since been acquiesced in, and acted upon by the same continued practice as the law of the land.

3d. But even if these cases could be over-ruled, and allowing that the Plaintiff in error, being a Peer, might in the present action have objected to this mode of proceeding against him by bill; yet the objection cannot now be taken as matter of error: it is merely an objection of form. The objection is, that although the Court has jurisdiction over the subject-matter of the suit, and over the party, though a Peer, and has power to proceed by bill, yet this is not the proper form of proceeding in the present case against a Peer. The objection cannot be extended to every case of proceeding by bill against a Peer; for if a Peer were in the custody of the marshal of the King's Marshalsea (as he may by law be upon a criminal charge), whilst he remains in such custody a bill may be exhibited against him in the Court of King's Bench, as against any other person. In that case the objection could not hold. In other cases if it could avail, it should be taken by plea in abatement, as a reason for not answering to the bill. If not so taken, but the party makes defence, and answers to the bill, [306] the jurisdiction of the Court is admitted, and the objection waived; and it cannot afterwards be received. The party by making a full defence, by praying an imparlance, and pleading to the merits, submits to answer, and by praying that those merits may be inquired of by a jury, admits that the Court has on those very proceedings power to direct and take the inquiry. Even in ancient times, when the jurisdiction of the Court of King's Bench to proceed by bills seems to have been confined to the case of persons actually prisoners of the Court, so that others (except perhaps the officers of the Court) were not compellable to answer to a bill, yet it was in the election of others so to answer if they would; and if they did answer, the proceeding against them by bill was good. This appears by Brook's Abridgement, tit. Bill, Pl. 6, and Responder, Pl. 30. As this objection might be thus waived by a common person, so a Peer in this case may waive his privilege; and he does waive it, if he does not insist upon it at the proper time. The objection cannot now be allowed in this action, without determining not only that every judgment that has been had against a Peer, where the proceeding has been by bill, is illegal; but that all such judgments given within the last twenty years, though upon the authority of adjudged cases, and the constant practice of the Court of King's Bench, are liable to be reversed by writ of error.

After argument at the bar of the House, the following questions were proposed to the Judges.

I. Whether the Court of King's Bench has any jurisdiction to hold plea in a personal action against a Peer of the realm, and Lord of Parliament, who is neither in the custody of the marshal, nor is an officer or minister of that Court, without the King's original writ issuing out of his Chancery, to warrant such action?

II. If the Court has no such jurisdiction, can it derive such jurisdiction from the

acquiescence of the Defendant by pleading to issue, and proceeding to trial in an action commenced without the King's original writ?

In answer, Lord Chief Justice Eyre stated the unanimous opinion of the Judges, that the first question would have admitted considerable doubt, if the objection had been made in an earlier stage of the cause, and that the cases of *Say v. Lord Byron*, and *Gosling v. Lord Weymouth*, were not to be considered as decisive authorities on the subject. But that after pleading in chief, it was too late for the Defendant to object to the jurisdiction of the Court.

Judgment affirmed.

DIXON *against* BIRCH AND TYTE. Monday, May 26th, 1794.

A. grants an annuity to B. the whole of which B. assigns to C. There being a memorial inrolled of all the original securities, it is not necessary that there should be also one of the assignment (a)¹.

In this case a rule was granted to shew cause why an indenture, bond and warrant of attorney entered into to secure an annuity should not be given up to be cancelled, and the money levied under an execution staid in the hands of the sheriff. The facts were simply these; Birch granted the annuity to Dixon, Tyte joining as a security, Dixon assigned the whole of it to Cousins, and the execution issued in the name of Dixon: there was a memorial of the original indenture, bond and warrant, but none of the assignment from Dixon to Cousins, on the omission of which the application to the Court was founded. But after argument, the Court held that as there was a memorial of the original securities inrolled, the object of the statute 17 Geo. 3, c. 26, which was the protection of the grantor was fully complied with, and it was not necessary to inroll the assignment.

Rule discharged (b).

[308] BRANDON AND OTHERS, Assignees of Brandon, a Bankrupt, *against* PATE. Monday, May 26th, 1794.

The assignees of a bankrupt may recover from the winner, money lost by the bankrupt before his bankruptcy at play, in an action of debt on the Stat. 9 Anne, c. 14 (a)².

This was an action of debt, brought to recover money lost by the bankrupt at hazard; and the first count of the declaration stated "that whereas before the bankruptcy of the said Abraham Brandon, and within three months next before the commencement of this action, to wit, on &c. at &c. the said Robert (the Defendant) received to the use of the said Abraham Brandon the sum of one hundred and seventy-eight pounds and ten shillings of lawful money of Great Britain, being so much money lost by the said Abraham Brandon to the said Robert at one sitting, by then and there playing with him together with certain other persons, to the said Sarah Thomas and Daniel Isaac (the Plaintiffs) unknown, at a certain game called Hazard, and which money so lost was, on the day and year aforesaid, at London aforesaid, in the parish and ward aforesaid, paid by the said Abraham Brandon to the said Robert

(a)¹ [Vide *Hammond v. Forster*, 5 Term Rep. 635.]

(b) A similar decision has lately taken place in the Court of King's Bench, *Bromley v. Greathead*, Hil. 34 Geo. 3. Hunt on Annuities, 188, in which case, as well as in the present, the whole annuity was assigned to one person. But if it had been assigned in parts to different persons, it seems necessary from the case of *The Duke of Bolton v. Williams*, 4 Brown's Chan. Cas. 297, that each assignment should be registered. So also where a gross sum arising from a certain fund is given to trustees for the payment of several annuities, the memorial is bad, if it state the grant to be of only one annuity of such gross sum. *Hood v. Burlington*, 4 Brown's Chan. Cas. 121. Hunt on Annuities, 79.

(a)² [Vide *Holmes v. Walsh*, 7 T. R. 458, where assignees recovered the penalty against a person convicted of falsely swearing to a debt. See also *Clark v. Calvert*, 8 Taunt. 750.]

the winner thereof; whereby and according to the form of a certain act made in the ninth year of the reign of Queen Anne, intituled 'an act for the better preventing of excessive and deceitful gaming,' an action accrued to the said Abraham Brandon before he became a bankrupt, to demand and have of and from the said Robert, the said sum of one hundred and seventy-eight pounds and ten shillings, parcel of the said sum of seven hundred and fourteen pounds above demanded." The second count stated that before the bankruptcy of the said Abraham Brandon, and within three months next before the commencement of this action, to wit, on &c. at &c. the said Abraham lost to the said Robert at one sitting, by then and there playing with the said Robert at the said game called Hazard, another large sum of money, to wit, the sum of one hundred and seventy-eight pounds and ten shillings, of like lawful money, and on the day and year aforesaid, at, &c. paid the said sum of money so lost as last aforesaid to the said Robert the winner thereof; and which said last mentioned sum of money was not repaid to the said Abraham Brandon at any time before his said bankruptcy, &c. The third count stated that the Defendant after the bankruptcy was indebted to the Plaintiffs as assignees, &c. similar to the second count. The fourth count [309] was for money had and received by the Defendant to the bankrupt's use before his bankruptcy.

There was a general demurrer to the three first counts, and *nil debet* pleaded to the last.

This demurrer was twice argued; the first time in Hilary Term by Runnington, Serjt., for the Defendant, and Lawrence, Serjt., for the Plaintiffs; and a second time in the present term, by Bond, Serjt., for the Defendant, and Adair, Serjt., for the Plaintiffs. In support of the demurrer, the substance of the arguments was as follows.

The assignees of the bankrupt cannot maintain this action, since there was not such a debt due to him as could be vested in them by the assignment. At common law gaming was not illegal, and when a statute makes that unlawful which before was lawful, and points out a particular mode of proceeding, that mode must be pursued. Cro. Jac. 644, *Castle's case*, 2 Burr. 803, *Res v. Robinson*. Now the statute 9 Anne, c. 14, which gives the action to the loser of 10l. to recover the money back from the winner, enacts that if within three months the loser does not himself sue, the action may be brought by a common informer, who shall recover the same and treble the value together with costs. The right of action therefore is personal in the loser, of which, if he does not avail himself, it passes to another person: there cannot be then a debt vested in him which will go to his representatives under a commission of bankruptcy. It depends on the choice of the loser, whether he or a common informer shall recover the money, and no debt or duty could vest in him till he made his election by commencing the action, by parity of reason to other cases of election, where nothing passes before election made. Co. Litt. 145 a. 2 Co. 35 a. *Heyward's case*. There is also another reason why this action cannot be supported; the stat. 12 Geo. 2, c. 8, makes the playing at hazard equally penal both to the winner and the loser, and when both parties are equally criminal, the maxim may be applied, "*in pari delicto potior est conditio defendentis*," according to the doctrine of the cases of *Smith v. Bromley*, Dougl. 696 in notis, *Clarke v. Shee*, Cowp. 197, *Browning v. Morris*, id. 790, *Jacques v. Golightly*, 2 Black. 1073.

On behalf of the Plaintiffs, it was contended that the loser of the money had a debt vested in him from the winner, and [310] being vested, that it passed to his assignees. The statute enacts, that the loser may recover the money by action of debt, and when it prescribes the form of the declaration, it says "in which action it shall be sufficient for the Plaintiff to allege, that the Defendant or Defendants are indebted to the Plaintiff, or received to the Plaintiff's use the monies so lost and paid, or converted the goods won of the Plaintiff to the Defendant's use." Now the two first of these phrases clearly imply that a debt is due to the plaintiff, and the last, that the property of the goods, where goods have been lost, is also in him. In *Turner v. Warren*, 2 Stra. 1079, the sum lost was considered so much as a debt, that the winner was holden to bail: and in *Bones v. Booth*, 2 Black. 1226, it is said by one of the judges, that the statute makes the winning 10l. at sitting a nullity, and therefore gives the loser an action to recover back what still properly continues to be his own money: and in both those cases the statute is considered as a remedial law with respect to the loser; and being remedial, it is to be liberally construed for the purpose

of the remedy. With regard to the supposed analogy from cases of election, it is to be observed that the party here has not an election to do one of two things, but only to do one thing, or leave it undone.

LORD CHIEF JUSTICE EYRE. After two arguments, I still feel a difficulty in saying this action can be maintained. It seems to me that unless a duty attached in the bankrupt, the action cannot be supported. Now if there was any duty in him, it must have been given by the statute, and not in consequence of any supposed contract. But though the statute has vested a right of action in the loser, liable to be divested at the expiration of three months, yet I think no duty vests in him till the action is brought (*a*)¹. If there be a duty in him on principle, it is difficult to deny that it would go to his executors, or that they might maintain an action against the executors of the winner, but the statute enacts, that if the party himself does not sue within three months, any other person may bring the action. On principle too, it should seem, that if there be a duty, assumpsit would lie for it; but that cannot be, as the statute specifies an action of debt. It appears therefore to me to be the plainest and best construction to say, that no duty is fixed in the loser till the action is brought.

[311] HEATH, J. An executor clearly could not bring the action, which by the statute is limited to the loser himself, within the three months. But the assignees of a bankrupt are different from other representatives; for if the party himself were to recover the money, he must pay it over to the assignees. It is to be considered as part of the bankrupt's estate, which has wrongfully passed to the winner; and if so, the assignees have a right to it, and ought in reason to sue for it. It cannot possibly be of any benefit, to hold that the debt does not vest in the assignees, and this being a remedial statute, we are so to construe it as best to answer the purpose for which it was made.

ROOKE J. I am of opinion that this action may be maintained. The meaning of the act is, that the money lost and paid to the winner is part of the property of the loser. Upon this principle it was holden in the case in *Strange*, that the loser might make an affidavit of debt, and hold the winner to bail. This is also a remedial act, and there is a clear distinction between remedial and penal acts, that in the former, a debt is due to the party grieved before the commencement of the action, but not in the latter. As the money then was part of the estate of the bankrupt, the assignees had a right to sue for the recovery of it.

LAWRENCE, J., having argued the case while at the bar, gave no opinion.

LORD CH. J. As I find that my Brothers are of a different opinion from me, I submit to their authority. Therefore let there be

Judgment for the Plaintiffs.

End of Easter Term.

[312] CASES ARGUED AND DETERMINED IN THE COURTS OF COMMON PLEAS, AND EXCHEQUER CHAMBER, IN TRINITY TERM, IN THE THIRTY-FOURTH YEAR OF THE REIGN OF GEORGE III.

PULLIN, ONE, &c. *against* STOKES, ONE, &c. Wednesday, June 25th, 1794.

In the Exchequer Chamber in Error.

It is not assignable for error, that the plaintiff is adjudged to be in misericordiâ instead of the Defendant (*a*)². A. having recovered judgment against B. and a *fi. fa.* being delivered to the sheriff, in consideration that A. at the special instance and request of C. had requested the sheriff not to execute the writ, C. promised to pay A. the debt and costs, together with the sheriff's poundage, bailiff's fees, and other charges.—On a judgment by default and error brought, the promise was holden to be binding on C., though it was not averred that the sheriff did in fact desist from

(*a*)¹ [No right or duty vests before action brought, where the suit is by a common informer (2 Bl. Com. 437), but quære where the party grieved sues?]

(*a*)² [Accord. *Myddleton v. Wynn*, Willes, 597. *Humble v. Bland*, 6 T. R. 255.]

the execution, nor what the amount of the poundage, &c. was, nor that the Defendant had notice of such amount.

In this case, the first count of the declaration stated that the Defendant in error had recovered judgment in the Court of King's Bench against one Mathias Taylor for a debt of 400l. and 63s. costs, and had sued out a *fi. fa.* directed to the sheriff of Somersetshire, &c. "and thereupon afterwards, and before the said sum of 400l. together with sixty-three shillings so as aforesaid recovered were made of the said goods and chattels of the said Mathias Taylor, and whilst the same writ was in force, to wit, on the 23d day of April in the year of our Lord one thousand [313] seven hundred and ninety-three, at the city of Bristol aforesaid, he the said James (the Plaintiff in error), in consideration that the said Thomas (the Defendant in error), at the special instance and request of the said James, would then and there withdraw the said execution, and would forbear and desist from further executing the said writ, undertook to indemnify the said Thomas against any loss or damage that might happen in consequence of his withdrawing the execution then levied, and did promise to pay and to satisfy to him the sum of 225l. 10s. being for principal, interest and costs due to him from the said Mathias Taylor, together also with sheriff's poundage, bailiff's fees, and other incidental charges, on the 14th day of May then next, to wit, at Bristol aforesaid; and the said Thomas in fact says, that he confiding in the promise and undertaking of the said James in form aforesaid made, afterwards, to wit, on the same day and year last aforesaid, did withdraw the said execution, and did forbear and desist from executing the said writ, and the said Thomas in fact says, that he hath not yet been paid and satisfied the said sum of 400l. and sixty-three shillings, or any part thereof, so as aforesaid recovered by him against the said Mathias Taylor, but the same and every part thereof still remains due and unsatisfied, whereof the said James afterwards, to wit, on the said 14th day of May in the year aforesaid, and often afterwards, to wit, at Bristol aforesaid, had notice, yet the said James not regarding his promise, &c."

The second count, after stating similar matter of inducement, went on, "and thereupon afterwards, and before the said last-mentioned sum of four hundred pounds, together with sixty-three shillings, were made of the goods and chattels of the said Mathias Taylor, and whilst the last-mentioned writ was in force, to wit, on the said 23d day of April in the said year of our Lord one thousand seven hundred and ninety-three, at Bristol aforesaid, he the said James in consideration that the said Thomas, at the like special instance and request of the said James, had then and there requested the said sheriff to forbear and desist from executing the said writ, undertook and to the said Thomas then and there faithfully promised to pay him the sum of two hundred and twenty-five pounds, and ten shillings, being for principal, interest and costs due to him from the said Mathias Taylor, together with sheriff's poundage, bailiff's fees, and other incidental charges, on the 14th day of May then next at the city of Bristol aforesaid, in the county of the same city, &c." There were also the common counts.

[314] The Plaintiff in error let judgment go by default in the court below, and having brought a writ of error, assigned the common errors, and "that the said James Pullin (the Plaintiff in error), is not in, or by the judgment aforesaid, amerced or declared or adjudged to be in *misericordiâ* or mercy, but on the contrary the said Thomas Stokes (the Defendant in error) is adjudged to be in mercy."

This was argued by Lawes for the Plaintiff in error, who contended that the judgment was erroneous on two grounds:—1. Because the Defendant in the action was in *misericordiâ* instead of the Plaintiff. 2. Because the second count was bad for want of a consideration, and also for want of averments; and the damages being general, if either count were defective, it was a good reason for reversing the judgment. 1. This is not a case within the statute 16 and 17 Car. 2, c. 8, which indeed enacts, "that no judgment shall be reversed for want of *misericordiâ* or *capiatur*, or by reason that a *capiatur* is entered for a *misericordiâ* or a *misericordiâ* is entered where a *capiatur* ought to have been entered;" but here the *misericordiâ* is annexed to the wrong person, to the Defendant instead of the Plaintiff, a fault for which the statute does not provide a remedy. 2. A consideration necessary to support an *assumpsit* must be such as is either beneficial to one party or detrimental to the other. Now in the second count it is merely stated, that the Defendant, in consideration that the Plaintiff, at his special instance and request, had requested the sheriff to forbear from executing the writ,

promised to pay the debt and costs, together with sheriff's poundage, bailiff's fees, and other incidental charges, &c. ; but it is not averred that the sheriff did actually forbear ; if he did not, there was no detriment to the Plaintiff, and clearly the Defendant in either case received no benefit. The Plaintiff ought also to have shewn that the sheriff was bound to attend to his request, if it had been made, otherwise the consideration fails. But a sheriff is not bound to attend to such a request, after the writ is delivered to him ; as on the one hand he cannot refuse to execute the process of the Court, so on the other, he has a right to go on with the execution to secure his poundage, which arises on the fact of seizure. In 1 Roll. Abr. 23, c. 27, it is said, that "if A. lease land to B. at will, and A. promise B., that in consideration that he will surrender the estate at will to him, that A. will provide a par-[315]-sonage for I. S., this is not a good consideration to have an action, because he may determine the lease at will at his pleasure ;" so in the present case, the Plaintiff might have revoked his request to the sheriff immediately after he had made it. Another defect in the count is, that though it is stated that the Defendant undertook to pay the poundage, bailiff's fees, and charges, there is no averment what the amount of the poundage, &c. was, or that he had notice of it ; for as he could not of himself know that amount, there could be no default on his part till notice was given him of the sum he was to pay. Hardr. 42.

Praed, *contrà*. With regard to the first objection taken on the other side, it seems only necessary to observe, that the statute 16 and 17 Car. 2, after specifying the objections which shall not prevail to reverse a judgment, goes on to say, "all such omissions, variances, defects, and all other matters of like nature, not being against the right of the matter of the suit, nor whereby the issue or trial are altered, shall be amended by the justices or other judges of the courts where such judgments are or shall be given, or whereunto the record is or shall be removed by writ of error." The stat. also 27 Eliz. c. 8, which first instituted the Court of Exchequer Chamber as a Court of Appeal from the King's Bench, expressly "excepts errors to be assigned, for any want of form in any writ, return, plaint, bill, declaration, or other pleading, process, verdict or proceeding whatever ;" and the 4 Anne, c. 16, s. 2, extends the statutes of Jeofail to judgments by default.

As to the second point, supposing for the sake of argument, that the second count were defective, yet the first is good, and a court of error may award a venire de novo to assess damages on that count. *Grant v. Astle*, Dougl. 722. But in truth there is a good consideration disclosed on the second count. The slightest detriment to the Plaintiff is sufficient, 3 Burr. 1673, and here it is to be presumed that the sheriff did not proceed, for if he had so done after the Plaintiff's request he would have been liable to have the proceedings set aside with costs. With respect to the notice, the amount of the poundage, &c., was a fact as much within the knowledge of one party as the other.

The Court held that all the objections failed : that clearly there could be no error assigned with respect to the misericordiâ ; that as to the consideration of the promise in the second count, it [316] was sufficient to state the request to forbear, if the contrary did not appear, that is, that the sheriff did not desist from proceeding in the execution ; and that though the want of statement of notice might have been a ground of special demurrer, yet as the amount of the poundage was capable of being ascertained on a writ of inquiry, it was not a substantial objection in error.

Judgment affirmed.

GOODALL *against* SKELTON. Saturday, June 26th, 1794.

[Applied, *Boulter v. Arnott*, 1833, 1 Cr. & M. 335.]

A. agrees to sell goods to B. who pays a certain sum of money as earnest ; the goods are packed in cloths furnished by B. and deposited in a building belonging to A. till B. shall send for them, but A. declares at the same time that they shall not be carried away till he is paid. This is not a delivery to B. (a).

This was an action for goods sold and delivered, in which a verdict was found for

(a) [The question as to the delivery of goods arises in many different ways :—

1. What delivery is sufficient to complete the contract, so as to pass the property

the Plaintiff, with liberty for the Defendant to move for a new trial or a nonsuit, in case the Court should be of opinion, on the report of the evidence, that the action could not be maintained.

The material facts which appeared from Mr. J. Ashhurst's report, were, that the Plaintiff had agreed to sell a quantity of wool to the Defendant, that a shilling earnest was paid on the part of the Defendant to bind the bargain, that the wool was packed in cloths furnished by the Defendant for that purpose, and left at a hovel belonging to the Plaintiff, and that the Defendant was to send his waggon in a few days to take it away. But while the Defendant's servant was weighing and packing it, and proposing to the Plaintiff to fix the time when the waggon should come, the Plaintiff declared that "it should not go off his premises till he had the money for it."

Le Blanc, Serjt., shewed cause against the rule, by contending that as the wool was packed in the Defendant's cloths, and deposited in a particular place till his waggon should come and take it away, there was a delivery to him. But the Court (absent the Lord Chief Justice) were so clearly of a different opinion, that they stopped the counsel on the other side.

BULLER J. In general, in questions of this sort, the usage of trade is resorted to in order to shew whether there has been a delivery or not: as in the case of wharfs and the like. But here the evidence is that the Plaintiff peremptorily insisted on not parting with the goods till he was paid; clearly therefore there was no delivery.

[317] HEATH, J. The Plaintiff seems to me to have countermanded the delivery of the wool.

ROOKE, J., of the same opinion. The Plaintiff had a right over the goods at the time, and if so, they were not delivered; for if they had been delivered, that right would have been in the Defendant.

Rule absolute for a nonsuit.

LYNN AND ANOTHER *against* BRUCE. Tuesday, July 1st, 1794.

A. declared, that in consideration that he at the request of B. had consented and agreed to accept and receive from B. a composition of so much in the pound upon a certain sum of money owing from B. to A. in full satisfaction and discharge of the debt, B. promised to pay the composition; this was not a good consideration to support an assumpsit against B., a mere accord not being a ground of action (a).

This was an action of assumpsit. The first count of the declaration was on a forbearance to sue on a bond given by the Defendant to the Plaintiffs for 200l. The second was as follows: "and whereas also afterwards, &c. in consideration that the said Robert and Thomas (the Plaintiffs) at the special instance and request of the said Charles (the Defendant) had then and there consented and agreed to accept and receive, of and from the said Charles, a certain composition of fourteen shillings in the pound, and so in proportion for a lesser sum than a pound, upon a certain other sum of one hundred and five pounds five shillings and two pence, then due and owing from the said Charles to the said Robert and Thomas, upon and by virtue of a certain other

to the purchaser. *Hanson v. Meyer*, 6 East, 614. *Rugg v. Minett*, 11 East, 210. *Wallace v. Breeds*, 13 East, 522. *Busk v. Davis*, 2 M. & S. 397. *Zagury v. Furnell*, 2 Campb. N. P. C. 240. *Austen v. Craven*, 4 Taunt. 644. *White v. Wiles*, 5 Taunt. 176.

2. What delivery is sufficient to defeat the right of stoppage in transitu. *Hannond v. Anderson*, 1 Bos. & Pul. N. R. 69. *Scott v. Pettit*, 3 Bos. & Pul. 469. *Whitehouse v. Frost*, 12 East, 614. *Stovell v. Hughes*, 14 East, 308. *Hurry v. Mangles*, 1 Campb. N. P. C. 452. *Harman v. Anderson*, 2 Campb. N. P. C. 242. *Withers v. Lyss*, 4 Campb. N. P. C. 237. *Spear v. Travers*, 4 Campb. N. P. C. 251. *Lucas v. Dorrein*, 1 B. Moore, 29. *Green v. Haythorne*, 1 Stark. N. P. C. 447. *Hawes v. Watson*, 2 B. & C. 540. 1 R. & M. N. P. C. 6, and see the note there.

3. What delivery is sufficient to constitute an acceptance of goods under the Statute of Frauds. *Chaplin v. Rogers*, 1 East, 192. *Elmore v. Stone*, 1 Taunt. 458. *Howe v. Palmer*, 3 B. & A. 321. *Tempest v. Fitzgerald*, id. 680. *Hanson v. Armitage*, 5 B. & A. 557. *Carter v. Toussaint*, 5 B. & A. 855. *Baldley v. Parker*, 2 B. & C. 37. *Bentall v. Burn*, 3 B. & C. 423. *Phillips v. Bistolli*, 2 B. & C. 511.]

(a) [Vide *James v. David*, 5 T. R. 141.]

writing obligatory, bearing date, &c. made and executed by the said Charles to the said Robert and Thomas, whereby he became held and firmly bound to them, in the sum of two hundred pounds, in full satisfaction and discharge of the said last mentioned writing obligatory, and all monies due thereon, he the said Charles undertook and then and there faithfully promised the said Robert and Thomas to pay them the said composition of fourteen shillings in the pound, and so in proportion for a lesser sum than a pound, upon the said last mentioned sum of one hundred and five pounds five shillings and two pence, upon request; and the said Robert and Thomas in fact say, that the said composition of fourteen shillings in the pound, and so in proportion for a lesser sum than a pound, upon the said last mentioned sum of one hundred and five pounds five shillings and two pence, amounted to a large sum of money, to wit, the sum of seventy-three pounds thirteen shillings and sixpence, to wit, at Westminster aforesaid, whereof the said Charles afterwards, to wit, [318] on the same day and year last aforesaid, at Westminster aforesaid, had notice; and although the said Charles hath paid to the said Robert and Thomas a certain sum of money, to wit, the sum of seventy pounds and six shillings, part of the said last mentioned sum of seventy-three pounds thirteen shillings and six pence, the amount of the said last mentioned composition, yet the said Charles not regarding, &c. hath not yet paid the sum of three pounds seven shillings and six pence, being the residue of the said sum of seventy-three pounds thirteen shillings and six pence, the composition last aforesaid, or any part thereof, &c."

A verdict having been found for the Plaintiffs on the whole declaration, a motion was made in arrest of judgment on the ground of the insufficiency of the second count, and after argument the opinion of the Court was thus delivered by

LORD CHIEF JUSTICE EYRE. This is a motion made in arrest of judgment, on an objection to the second count of the declaration. The substance of that count is, that in consideration that the Plaintiff at the Defendant's request, had consented and agreed to accept and receive from the Defendant a composition of fourteen shillings in the pound, and so in proportion for a lesser sum than a pound, upon 105l. 5s. 2d. due from the Defendant to the Plaintiff on a bond dated the 30th March 1792 for 200l., in full satisfaction and discharge of the bond and all money due thereon, the Defendant promised to pay the said composition. It is then averred, that the composition amounted to 73l. 13s. 6d., and that the Defendant had paid the Plaintiff 70l. 6s., part thereof. The breach is, that he did not pay 3l. 7s. 6d. the residue. This will be found to be a very clear case, when the nature of the objection is understood. The consideration of the promise is, as stated in this count, on an agreement to accept a composition in satisfaction of a debt. If this is an agreement which is binding, and can be enforced, it is a good consideration. If it is not binding, and cannot be enforced, it is not a good consideration. It was settled in the case of *Allen v. Harris*, 1 Lord Raym. 122, upon consideration of all the cases, that upon an accord, which this is, no remedy lies; it was said, that the books are so numerous that an accord ought to be executed, that it was impossible to overturn all the authorities: the expression is, "overthrow all the books." It was added, that if it had been a new point, it might have been worthy of consideration. But we think it was rightly settled [319] upon sound principles. Interest reipublicæ ut sit finis litium: accord executed is satisfaction: accord executory is only substituting one cause of action in the room of another, which might go on to any extent. The cases in which the question has been raised, whether an accord executory could be enforced, and in which it has been so often determined that it could not, have been cases in which it has been pleaded in bar of the original action. But the reason given in three of the cases in 1 Roll. Abr. title Accord, pl. 11, 12, 13, is, because the Plaintiff hath not any remedy for the whole, or where part has been performed for that which is not performed; which goes directly to the gist of this action, as it is stated in the count objected to. This is an action brought to recover damages, for that part of the accord which has not been performed. But an accord must be so completely executed in all its parts, before it can produce legal obligation or legal effect, that in *Peyton's case*, 5 Co. 79 b. it was holden, that where part of the accord had been executed, tender of the residue would not be sufficient to make it a bar to the action, but that there must be an acceptance in satisfaction. There are two cases in Cro. Eliz. 304, 305, to the same effect. It was argued according to the cases in Roll. Abr. that an accord executory in any part, is no bar, because no remedy lies for it for the Plaintiff. Perhaps it

would be a better way of putting the argument to say that no remedy lies for it for the Plaintiff, because it is no bar. But put either way, it concludes in support of the objection to the second count in this declaration, and consequently the judgment must be arrested.

Rule absolute to arrest the judgment.

NAISH *against* TATLOCK AND OTHERS, Assignees of Lediard a Bankrupt.
Wednesday, July 9th, 1794.

A tenant from year to year of a house at a yearly rent, becomes a bankrupt in the middle of the year, and his assignees enter and keep possession for the remainder of the year. The lessor cannot maintain an action for use and occupation against the assignees, for the bankrupt's occupation as well as their own, without proving their special instance and request for the bankrupt to occupy, during the time that elapsed before the bankruptcy (*a*).

In this action for use and occupation, the first count of the declaration stated that the Defendants "were indebted to the Plaintiff in the sum of seventy pounds of lawful money of [320] Great Britain, for the use and occupation of two counting houses, one dining room, and one chamber, parcel of a certain messuage or tenement with the appurtenances, of the Plaintiff, situate &c. before that time used, occupied, possessed and enjoyed, as well by one Thomas Lediard, whose term and estate therein the Defendants afterwards had, as by the Defendants, at their special instance and request, for a long space of time then elapsed, from and under, and as tenants thereof respectively, to the Plaintiff, and by her permission; and being so indebted, the Defendants undertook, and to the Plaintiff faithfully promised to pay, &c." The second count was on a quantum meruit for the same use and occupation by Lediard, "whose estate, term and interest the Defendants had," and by the Defendants. There were also the common counts. The general issue was pleaded, and 12l. paid into Court. After argument and time taken to consider, the judgment of the Court was thus given by

LORD CHIEF JUSTICE EYRE. The verdict passed for the Plaintiff in this cause, subject to the opinion of the Court on the matter of law, arising upon the facts appearing in evidence and found by the jury, considered with reference to the declaration. It is stated in the first count of this declaration, that the Defendants were indebted to the Plaintiff in seventy pounds, for the use and occupation of certain apartments in his house before that time used, occupied, possessed, and enjoyed, as well by one Thomas Lediard, whose term and estate therein the Defendants afterwards had, as by the Defendants at their special instance and request, for one year then elapsed, from and under, and as tenants thereof respectively to the Plaintiff, and by her permission, and that being so indebted, they promised to pay. The second count is upon a quantum meruit, in consideration that the Plaintiff at the like special instance and request of the Defendants, had permitted the said Thomas Lediard, whose estate, term, and interest, the Defendants had as well as the Defendants themselves respectively, to have, use, and occupy the same apartments, and that Lediard and the Defendants respectively, had accordingly had, used, and occupied the same for a year, by such permission of the Plaintiff. The material facts of the case were, that after Lediard had occupied these apartments for a certain part of the year under an agreement to pay seventy pounds a year for them, he became a bankrupt, and the Defendants, who were his assignees, then [321] entered into possession and continued in the occupation of them for the rest of the year; and that after the expiration of the year, Mr. Tatlock, one of the Defendants, wrote the following note to Mr. Ward, the solicitor for the commission of bankrupt against Lediard: "Mr. Tatlock's respectful compliments to Mr. Ward, the bearer is a Mrs. Naish, a widow lady, whom Mr. Lediard rented his house in Austin Friars of; there is due to her for rent, fifty pounds, we having paid her twenty pounds since the commission, there is also five

(*a*) [So a husband is not liable for the use and occupation of a house by his wife dum sola. *Richardson v. Hall*, 1 Brod. & Bing. 50. See *Gibson v. Courthorpe*, 1 Dow. & Ry. 205, which appears to be at variance with the principal case.]

pounds fifteen shillings and six-pence for coals likewise for our use since the commission; now I wish you to give an order upon Mr. Tatlock for the above, as we certainly are bound to pay her. London, 20th July, 1792." This paper was delivered to Mrs. Naish the Plaintiff, by Tatlock, to be delivered to Ward, and it was delivered, but some dispute arising, the fifty pounds were not paid, in consequence of which this action was brought, and then a proportion of the annual rent of seventy pounds for that part of the year during which the Defendants were in the occupation of the premises, was paid into Court. Upon this state of facts, it was insisted, on the part of the Defendants, that the Plaintiff had not proved her case stated in the declaration. The question was saved for the opinion of the Court, after it had been left to the jury to say distinctly, whether the agreement was or was not to pay the rent annually, which they found in the affirmative, and whether the seventy pounds mentioned in the note of the 20th July, 1792, was the year's rent, or was a sum which the defendants had agreed to pay for their own occupation; as to which the jury found, that it was the rent for the whole year, including the time of Lediard's occupation. At the trial, I was strongly inclined to agree in opinion with Mr. Tatlock, that the real merits of the case were on the side of the Plaintiff. It was at the same time apparent, that they were very much entangled and brought into great hazard in this form of action. This induced me strongly to recommend a compromise between the parties, which has not been acceded to; we are therefore called upon to decide the strict question of law, and after having heard a very full discussion of this case from the Bar, and taken time to consider of it, we find ourselves obliged to pronounce that the evidence on the part of the Plaintiff is not sufficient to maintain this action. It is stated in both the counts, of which I have given an abridg[322]-ment, that the Plaintiff's demand is founded upon a use and occupation by Lediard for a part of the year, and by the Defendants for the residue of the year, both occupations being had by the permission of the Plaintiff, at the special instance and request of the Defendants. These latter words, often mere words of form, are here words of substance and operative, connecting the occupation of the Defendants, for which they were bound to make a satisfaction, with the occupation of Lediard, a stranger, for whose occupation, *prima facie* at least, the Defendants were not bound to make a satisfaction. In point of fact, it was not at the request of the Defendants, that Lediard was permitted to occupy; the Defendants had no relation to Lediard, but as his assignees, and that relation did not commence till the close of his occupation; that relation therefore, alone, could not have the effect of making them personally liable to answer for his occupation before his bankruptcy. The averment that he had been permitted to occupy at the request of the Defendants, is therefore substance, and not mere form, and a failure in the proof of it is fatal. The framer of this declaration seems to have been aware of this difficulty, and to have endeavoured to obviate it by throwing into the declaration, the words "whose term and estate therein" in the first count, and the words "whose estate term and interest" in the second, the Defendants had. This very loose and general averment seems to have been calculated to facilitate the passage of the other averment "of the Defendant's request" through the cause at *nisi prius*; and if it had passed smoothly there, would probably have been the averment which would have been relied upon after a verdict, and this last would have been discarded. Loose, informal, and indistinct as it is, it might serve to introduce at the trial, that Lediard was a tenant for a year at a rent of seventy pounds payable at the end of the year, and that the assignees having entered into possession as assignees, entered under that demise and became assignees of the lease, and bound to pay the rent which became due after the assignment. It might then be with great colour urged, that rent due is recoverable in an action for use and occupation, and if the rent is really due, the manner of stating the use and occupation seems to have more form than substance in it. I was for a time inclined so to consider the case, but upon further consideration of the nature of the action for use and occupation, and of the scope and purview of the statute 11 Geo. 2, we are of opinion, that the circumstances under which the Defend[323]-ants succeeded to the occupation of the premises will not prove or dispense with the proof, that Lediard's occupation was at the request of the Defendants. The action for use and occupation is in its own nature collateral to the action on a contract for rent upon a demise, and it was so holden in the case of *Johnson v. May*, 3 Lev. 150: if the Defendant did in fact use and occupy by the permission of the Plaintiff,

and had expressly promised to pay, though the Plaintiff had no title or perhaps an equitable title only, the action lay (a)¹.

Under the statute, a landlord who has rent owing to him is allowed to recover, not the rent, but an equivalent for the rent, a reasonable satisfaction for the use and occupation of the premises which have been holden and enjoyed under the demise, by the action for the use and occupation; and it is provided on his behalf, that if the demise be produced against him it shall not defeat his action, as it would have done before the statute, but the fixed rent shall only be used as a medium, by which the uncertain damages to be recovered in this form of action shall be liquidated. What is given by this statute? A reasonable satisfaction for the use and occupation, is the thing intended to be given, the form of action marked out (being enlarged by a necessary construction, so as to be allowed to be maintained without an express promise) is the proper form in which such reasonable satisfaction is to be recovered; but the reasonable satisfaction which in its own nature must apply to something specific, by which it can be estimated, being here given for use and occupation, and for nothing else, it is a remedy which in its own nature is not co-extensive with a contract for rent, nor does it seem to have been within the scope and purview of the act, to make this remedy co-extensive with all the remedies for the recovery of rents claimed to be due, by the mere force of the contract for rent. The statute meant to provide an easy remedy in the simple case of actual occupation, leaving other more complicated cases to their ordinary remedy. In the case now under consideration, the Plaintiff must be left to such other remedy as she may be advised to pursue: she cannot recover in an action for use and occupation without proof of the use and occupation alleged, and if she can recover at all in this form of action, against one man for use and occupation by another, (as to which we give no opinion,) it must be upon the ground of that occupation having been permitted [324] at his request, and that request must be proved (a)². The consequence is, that a nonsuit must be entered, and the postea delivered to the Defendants.

Postea to the Defendants.

CALLAND *against* TROWARD. Wednesday, July 9th, 1794.

[6 T. R. 439. Affirmed on Error in K. B. and afterwards in Dom. Proc. ib. 778.
8 Br. P. Ca. 71, S. C.]

[If after a grant of the next presentation to a living, the incumbent be made a bishop, by which the living becomes vacant, and the King is entitled to present; the grantee may present on the next vacancy occasioned by the death or resignation of the King's presentee.]

This was an action of covenant, and the declaration stated "that by a certain indenture made at London aforesaid, to wit in the parish of Saint Mary-le-Bow in the ward of Cheap on the 26th day of July in the year of our Lord 1791, between the said Richard (the Defendant) of the one part, and the said John Calland of the other part, one part of which said indenture sealed with the seal of the said Richard, the said John now brings here into Court, the date whereof is the same day and year aforesaid, reciting that the said Richard was seised in fee simple of and in the advowson of the rectory, parsonage, or parish church of Blechingley in the county of Surry, of which living the reverend Matthew Kenrick doctor in divinity was then the incumbent, and further reciting, that the said John had contracted and agreed with the said Richard for the absolute purchase of the said advowson, at or for the price or sum of 7000l. it is witnessed that for and in consideration of the sum of 7000l. of lawful money of Great Britain, to the said Richard in hand well and truly paid by the said John, at or before the sealing and delivery of the said indenture, the payment and receipt of which said sum of money the said Richard did thereby acknowledge, and of and from the same and every part thereof did acquit, release and discharge the said John, his heirs, executors, administrators and assigns, and every of them for ever, by the said indenture, he the said Richard had granted, bargained and sold, and

(a)¹ [Vide *Hall v. Vaughan*, 6 Price, 157.]

(a)² [Vide *Bull v. Sibbs*, 8 T. R. 327.]

by that indenture did grant, bargain and sell unto the said John, and to his heirs and assigns, all that the advowson, donation, free disposition, and right of patronage and presentation in and to the rectory, parsonage, or parish church of Blechingley, otherwise Bletchingley, otherwise Blechingleigh, in the said county of Surry, with its appurtenances, and the reversion and reversions, remainder and remainders, and profits thereof, and all the estate, right, title, interest, trust, property, claim and demand whatsoever, both at law and in equity of him the said Richard, of, in, to or out of the said ad-[325]-vowson or right of patronage and presentation to the rectory or parsonage of the said parish church, and other the premises thereby bargained and sold, or expressed and intended so to be, with the appurtenances, to have and to hold the said advowson, donation, free disposition, right of patronage and presentation of, in and to the said rectory, parsonage, or parish church of the said parish of Blechingley, otherwise Bletchingly, otherwise Blechingleigh, and other the hereditaments and premises thereby bargained and sold, or expressed or intended so to be, with their and every of their rights, members and appurtenances, unto the said John, his heirs and assigns, to the only proper use and behoof of him the said John, his heirs and assigns for ever. And the said Richard for himself, his heirs, executors and administrators did covenant, promise and agree, to and with the said John, his heirs and assigns, by the said indenture in manner following, that is to say, that he the said Richard at the time of the sealing and delivery of the said indenture, was and stood lawfully, rightfully and absolutely seised of and in, or otherwise well and sufficiently intitled unto the said advowson, or right of patronage and presentation, hereditaments and premises, thereby bargained and sold, or expressed or intended so to be, and every part thereof, of and in a good, sure, perfect, lawful, absolute and indefeasible estate of inheritance in fee simple, without any manner of condition, contingent proviso, power of revocation, limitation, use or trust, or other matter, restraint, cause, or thing whatsoever, to alter, change, charge, revoke, defeat, determine, or make void the same; and also that he the said Richard then had in himself alone, good right, full power and lawful authority, to bargain and sell the said advowson, right of patronage and presentation, hereditaments and premises therein before bargained and sold, or expressed or intended so to be, and every of them, and every part and parcel thereof, with the appurtenances, unto the said John, his heirs and assigns for ever, in manner aforesaid, and according to the true intent and meaning of the said indenture. And likewise that the said advowson, right of patronage and presentation, hereditaments and premises, thereby bargained and sold, or expressed or intended so to be, and every part and parcel thereof, were then free and clear of and from all charges, and incumbrances whatsoever, as by the said last mentioned indenture, amongst other things, more fully appears. And the said John in fact says, that before the said Richard had any thing in the said advowson, and before the making of the said indenture, to wit, on the 30th day of May in the year of our Lord 1745, Sir Kenrick Clayton [326] Baronet was seised of the advowson of the church aforesaid as of one in gross by itself, as of fee and right, and being so seised thereof, he the said Sir Kenrick Clayton, afterwards, and before the making of the said indenture, to wit on the day and year last aforesaid, at London aforesaid, in the parish and ward aforesaid, the said church then being full of one John Thomas clerk, the then incumbent thereof, by a certain deed-poll bearing date the same day and year last aforesaid, sealed with the seal of him the said Sir Kenrick, for and in consideration of the counsel and advice of one Mathew Kenrick, Esq. given to the said Sir Kenrick Clayton, in his law and other affairs, and for and in consideration of the sum of five shillings of lawful money of Great Britain, to the said Sir Kenrick Clayton in hand well and truly paid, by the said Mathew Kenrick, Esq.; granted unto the said Mathew Kenrick, Esq. his executors, administrators and assigns, the next presentation, donation, and free disposition, of and to the rectory of the said parish church of Blechingley, otherwise Bletchingly, otherwise Blechingleigh aforesaid, to have and to hold the said next presentation, donation, and free disposition aforesaid, to the said Mathew Kenrick, Esq. his executors, administrators and assigns, to present one fit and able person to the said rectory and parsonage of Blechingley, otherwise Bletchingly, otherwise Blechingleigh aforesaid, and all other things which should be necessary to be done in and about the premises, to do and accomplish, as fully, freely and entirely, as the said Sir Kenrick Clayton or his heirs, might or could do or have done, if the said deed-poll had not been made, as by the said deed-poll, reference being thereunto had, will appear; by virtue whereof the said Mathew Kenrick, Esq. became

and was possessed of and intitled to the next presentation, donation and free disposition, so granted to him as aforesaid; and the said John Calland farther saith, that the said church being so full of the said John Thomas as aforesaid, and the said Mathew Kenrick, Esq. being so intitled as aforesaid, he the said John Thomas was afterwards, and before the making of the said indenture to wit on the 1st day of June in the year of our Lord 1774 rightfully and canonically created and consecrated Bishop of the Bishoprick of Rochester, and the said church thereupon then became vacant by the promotion of the said John Thomas to the said Bishoprick of Rochester, whereby our present sovereign Lord the King by reason of his royal prerogative, became entitled to present a fit person to the church aforesaid so vacant, and thereupon his said Majesty by his royal prerogative, before the making of the said indenture, that is to say on the same [327] day and year last aforesaid by his letters patent sealed with the seal of Great Britain, presented the said Mathew Kenrick in the said indenture mentioned, his clerk, to the said church, so being vacant as aforesaid, that is to say at London aforesaid, in the parish and ward aforesaid, who upon the said presentation of our said Lord the King, was afterwards and before the making of the said indenture, to wit, on the day and year last aforesaid, admitted, instituted and inducted into the same in the time of peace, in the reign of our Lord the present king, and thereby became and was, and continually from thence until the time of making the said indenture, and from thence hitherto hath been and still is, the parson and incumbent of the said church, on the said presentation of our said Lord the King; and the said church being so full of the said last mentioned Matthew Kenrick, the incumbent thereof as aforesaid, and the said Matthew Kenrick, Esquire, being so possessed of and entitled to the next presentation, donation, and free disposition granted to him as aforesaid, he the said Matthew Kenrick, Esquire, afterwards, and before the making of the said indenture now brought here into Court, to wit, on the 11th day of August in the year of our Lord 1777 at London aforesaid, in the parish and ward aforesaid, by a certain indenture sealed with his seal, and made between the said Matthew Kenrick, Esquire, of the one part, and the said Matthew Kenrick the said clerk of the said church of the other part, for the considerations therein mentioned, granted and assigned unto the said Matthew Kenrick the said clerk of the said church, his executors, administrators and assigns, the said next presentation, donation and free disposition so granted to him the said Matthew Kenrick, Esquire, as aforesaid, to have and to hold the same to the said Matthew Kenrick the said clerk, his executors, administrators and assigns, as by the said last mentioned indenture, reference being thereunto had, may more fully appear, by virtue whereof, the said Matthew Kenrick the said clerk, became and was possessed of and entitled to, and from thence until, and at the time of making the said indenture now brought here into court, continued to be, and still is possessed of, and entitled to the next presentation, donation and free disposition, of and to the said church, to present a fit person thereto, contrary to the form and effect of the said indenture, now brought here into court, and of the said covenant of the said Richard in that behalf made as aforesaid; and so the said John Calland saith, that the [328] said Richard has not, although often requested, kept with the said John Calland his said covenant, so made with him as aforesaid, but has broken the same, and to keep the same with him has hitherto wholly refused, and still doth refuse, to the damage of the said John Calland of 10,000l. and therefore he brings suit, &c.

To this declaration there was a general demurrer, which in the present term came on to be argued. On behalf of the Defendant, Bond, Serjt., contended that no breach of covenant was stated in the declaration, so as to enable the plaintiff to maintain the action. The ground on which the argument on the other side must rest, is that Sir Kenrick Clayton having granted the next presentation of the living to Matthew Kenrick prior to the transaction between the Plaintiff and the Defendant, the Defendant could not truly covenant that the advowson was free from "all manner of condition, contingent proviso, &c." But the effect of that grant, it is submitted, was done away by the intervention of the prerogative of the crown, on the promotion of Thomas the incumbent to the bishoprick of Rochester. The grantee could not have a greater interest than the grantor himself. Now the words of the deed are, "as fully, freely and entirely, as the said Sir Kenrick Clayton or his heirs might or could have done, if the said deed poll had not been made," but the right of Sir Kenrick Clayton the grantor was subject to the possible exertion of the royal prerogative, on the preferment of the incumbent. The term next presentation must be taken to mean, on the

face of the grant, the presentation on the first vacancy that should happen, or none at all: but the presentation on the first vacancy was satisfied by the King's prerogative, which prevented the grant from taking effect. That this is the true construction of the grant appears from 1 Bulstr. 26. *Starkey v. Poole*, 7 Co. 28 a. *Baskerville's case*, Bro. Abr. tit. Present. al Eglise, pl. 52. Co. Litt. b. Dyer, 35 a. and the case cited in the margin, Mich. 9 Jac. in C. B. Cro. Jac. 691, *Woodley v. The Bishop of Exeter*, Winch. Rep. 94, S. C. If the case of *The Grocers' Company v. The Archbishop of Canterbury* (2 Black. 770. 3 Wils. 214) be cited on the other side, it is to be observed that in that case the authority of *Woodley v. The Bishop of Exeter* and the former cases is not expressly denied, but the Court proceeded on the ground that the act of law did not work an injury; there was no question there as to the construction of a deed, containing a grant of the next presentation as fully, freely, &c. as the grantor himself had it. There is therefore a material difference between that case and the present.

Le Blanc, Serjt., contra. In the cases cited on the part of the Defendant, except that of *Woodley v. The Bishop of Exeter*, there was no question as to the prerogative of the crown, but the grantee of the next presentation, having neglected to take advantage of the first avoidance, was holden to have lost his turn by his own laches. Those cases are therefore inapplicable to the present. With respect to *Woodley v. The Bishop of Exeter*, it appears from comparing the two reports of it in Cro. Jac. and Winch, that the Court were inclined to be of opinion that the King had no right to present to a living on the promotion of the incumbent to a bishoprick, unless he were the patron of the living. But the law is now clearly otherwise; this therefore takes off from the authority of the other point there said to be decided, viz. that the grantee of the next avoidance must have the next or none at all, and must lose his right by the intervention of the prerogative, on the promotion of the incumbent to a bishoprick. And that authority is expressly contradicted by the anonymous note in the margin of Dyer, 228 b. (which is apparently the same case) where it is stated that the Court resolved, "that the grantee should have the next avoidance after the prerogative presentation, because that was the act of law, and the prerogative of the King, which excluded him from the first presentation, injures no one." If that note alludes to *Woodley v. The Bishop of Exeter*, it throws a doubt on the authenticity of the reports of that case in Croke and Winch; if it does not, it shews that the Court within a very short time decided the same point in a different manner: and being inserted among the notes of Chief Justice Treby, it seems to prove that it was agreeable to his opinion.

It is true that in Co. Litt. 478 and 9, cited, on the other side, it is said, that "If a man seised of an advowson in fee by his deed granteth the next presentation to A., and before the church becometh void, by another deed grant the next presentation of the same church to B., the second grant is void, for A. had the same granted to him before; and the grantee shall not have the second avoidance, by construction to have the next avoidance which the grantor might lawfully grant, for the grant of the next avoidance doth not import the second [330] presentation." Now in the case there put, the grantor having by his own act parted with the next presentation, has it not in him to grant. But Lord Coke goes on, "But if a man seised of an advowson in fee take wife, now by act in law is the wife intitled to the third presentation, if the husband die before. The husband grant the third presentation to another, the husband die, the heir shall present twice, the wife shall have the third presentation, and the grantee the fourth; for in this case it shall be taken the third presentation which he might lawfully grant: and so note a diversity between a title by act in law, and by act of the party; for the act in law shall work no prejudice to the grantee." Now this distinction is applicable to the present case, the prerogative presentation of the crown being an act in law. And this principle was fully recognized in *The Grocers' Company v. The Archbishop of Canterbury*. The case too of *The Bishop of London v. The Mercers' Company*, 2 Stra. 925, proceeded on the ground of its being a clear rule of law, that the prerogative presentation of the crown, on the incumbent being created a bishop, did not break in upon any right to present by turns.

Cur. advis. vult.

LORD CHIEF JUSTICE EYRE. The merits of this demurrer depend upon the question, whether the grant of the next presentation, donation and free disposition of and to the rectory of Bletchingley, is either satisfied or disappointed by the next presentation happening to be a prerogative presentation, or an avoidance in consequence of the incumbent being made a bishop. The case has been argued on the part of the Defen-

dant, upon a nice and literal construction of the grant against good sense and the plain intent of the parties to it. It is said that the grant being of the next presentation, the grantee can take nothing but the next presentation, and consequently if he cannot take that, he can take nothing. It is said likewise, that the next is the first, and that a grant of the next is not a grant of the second, or that which is not the next; and literally it certainly is not. But the language of a deed is to be expounded between the parties to it, and with reference to the subject matter of it. As between the grantor and grantee, where every thing is to be taken against the grantor, that his grant may take effect, is not this a grant of the first presentation, which it belonged to the owner of the inheritance of this advowson to make, and which he could lawfully, or at least could by possibility [331] make? The whole title being by law subject to a prerogative presentation paramount, or rather collateral to it, which suspends the effect of it, and prevents it from being productive for a time, and which is founded on the general law of the land, of which all take notice, and by which all are bound, could this prerogative presentation have been in the contemplation of the parties to this contract, unless for the purpose of being tacitly excepted out of it? And shall the general law of the land, contrary to one of its most established maxims, work to the prejudice of the grantee, by a strict and literal exposition of the words of the grant?

Grant imports covenant; and shall the grantor be construed to have contracted and bound himself to do that which by no possibility he could do, to grant that which by no possibility he could have to grant, and which both parties knew, at the time of the grant, that by no possibility he could have? A man may certainly take upon himself to grant that interest which is not in him, which he has not to grant; but ordinarily it will be an interest of such a nature, that by a possibility he might have it.

It was argued that the grantor of the next presentation might, by using other words, have effectually granted the next presentation which it should belong to the owner of the inheritance to make. Suppose he had said his next presentation, instead of the next presentation; no circumlocution could express with more certainty what it was that he meant to grant. We are then to examine the difference between the effect of the word his and that of the word the. I admit that the difference would be of great importance in some cases. If for instance, in an action of trespass for taking goods, the Plaintiff were to state in his declaration, that the Defendant had taken the goods, instead of his goods, it would be a fatal objection on the record, because it is necessary in such an action for the Plaintiff to shew that his goods have been taken. But if a man bargains and sells the goods described in the bill of sale, it will amount to the same thing as if he had said his goods. It is certainly true, that deeds are to be expounded with more strictness than wills, or other writings framed with less solemnity; but this strictness chiefly regards the technical sense of law terms: it never was the rule of construction of deeds, that the words were to be taken in their literal grammatical sense, if the [332] plain intent and meaning of the deed demanded that they should be understood in any other sense which the words would bear.

It must be admitted, that the exposition of this grant of the next presentation of the rectory of Bletchingly attempted by the Defendant, receives great countenance from the case of *Woodley v. The Bishop of Exeter*, reported in Cro. Jac. (691), and in Winch (94); there, the Plaintiff intitled himself by a grant of the next avoidance of the church. The incumbent was created a bishop, and had a commendam for six years, and according to the report of the case in Winch, after the six years the King presented, and then the incumbent died, whereby the church became void, and the Plaintiff presented. The Court, consisting of Hutton, Winch, and Hobart, held, that when the incumbent is created a bishop, if the grantee of the next avoidance do not then present, he hath lost his presentation, for he ought to have the next avoidance, and can have no other, and that if the next avoidance should be taken from him by a former title, (except in dower only) statute, or by any other title whatever, he hath lost it for ever, for he cannot claim any by the grant, but the next; and they denied the case put by Lord Coke, Co. Litt. 379 a. that if one deviseth the third avoidance and dies, and the feme recover the third, the devisee should have the fourth. According to the report in Croke, Hobart said, that the presentee of the king being in the next turn after the grantor, the grantee hath no remedy, but must suffer the prejudice by reason of the prerogative. In Winch's report of this case, Bro. Abr. tit.

Present. pl. 52, is cited, "If a man grant the next presentation to A. and afterwards and before avoidance he grants the next presentation to B, the second grant is void, for it was granted over by the grantor before; and the second grantee shall not have the second presentation, for the grant does not import that." I agree that this case is law. Every grant may be defeated by an elder title. Perhaps dower is an elder title, and therefore we are not bound to maintain the case in Co. Litt. which is denied in *Woodley v. The Bishop of Exeter* to be law. If a man has not in him, in point of title, the thing which he grants, it is apparent that his grant cannot take effect. The fallacy of the argument is in the application of this doctrine to the case of a prerogative presentation intervening, which ought not to be considered as a [333] presentation by an elder title, but as arising out of a prerogative right collateral to the title, operating not to defeat but to suspend the title, leaving every thing derived out of the title, or in any manner connected with it, to remain in statu quo. The king presents, not by reason of title to the advowson, but *ratione prerogative sue*.

These observations furnish an answer to the case of *Woodley v. The Bishop of Exeter*; but Winch, who argued that case, puts a case which he admits to be law, and which is of itself sufficient to overturn that case. "I grant," says he, "that if two coparceners had an advowson and the eldest presented, and then she granted the next avoidance, that in this case the grantee shall have the next which may be granted, and the reason is, because she may not dispose of the estate of another." In order to reach the conclusion that the grantee shall have the next which the eldest could grant, it will be necessary to construe the grant of the next avoidance to be not literally a grant of the next avoidance, but of the next to which the grantor could lawfully present. This construction must be grounded upon the intent of the parties, and upon those rules stated by Lord Coke, Co. Litt. 183, "*Quælibet concessio fortissimè contra donatorem interpretanda est, et legis constructio non facit injuriam.*" If we inquire further into the effect of a prerogative presentation upon the title of the advowson, independent of the question of construction of the grant of the next presentation with which it is entangled in this case, we shall find, as I collect from some inquiries that I have made, that a prerogative presentation to a church of which the advowson is in common, has not in practice passed for the turn of the otherwise rightful patron. Instances have occurred in London, where the union of churches has occasioned a distribution of turns to present, and we all remember that in the case of *The Grocers' Company v. The Archbishop of Canterbury*, 2 Black. 770, the point was solemnly adjudged. In that case, all the principles which govern this case, except as to the construction of the grant, are recognized. It is there stated, that the prerogative right of presentation is not a right of patronage, not a right of eviction, nor an usurpation, but a contingent casual right arising upon a particular event; that it does not supply but only suspends or postpones the turn of the patron, and of all the patrons if more than one, and does not take away the right of [334] one and leave the rest entire, which, say the Court, would be rank injustice, and this being the act of law, *nemini facit injuriam*. To this nothing can be added, there must be therefore

Judgment for the Plaintiff.

PINKERTON AND OTHERS, Assignees of Gale, a Bankrupt, against MARSHALL.
Wednesday, July 9th, 1794.

A. having recovered a verdict for a certain sum of money against B, B. commits an act of bankruptcy. Afterwards, A. having had no notice of the bankruptcy, gives time to B., and instead of entering up judgment and suing out execution, takes a bill drawn by B. on C. at a distant period, for the amount of the sum recovered. This is not a payment protected by the stat. 19 Geo. 2, c. 32. A. therefore, is liable to refund the money received for the bill to the assignees of B.(a).

This was an action for money had and received to the use of the Plaintiffs as assignees of Gale, the circumstances of which were the following: at the Sittings after

(a) [Vide *Cox v. Morgan*, 2 Bos. & Pul. 398. *Hovill v. Browning*, 7 East, 154. *Harwood v. Lomas*, 11 East, 127. And see the provision in the new Bankrupt Act, 6 Geo. 4, c. 16, s. 82, which makes valid all payments really and bona fide made, or which shall hereafter be made by any bankrupt or by any person on his behalf, before

Hilary Term, 1793, Marshall, who was a ship owner, recovered a verdict against Gale, who was a merchant, in an action on a charter-party for 428l. 11s. 11d. Early in the next April Gale committed an act of bankruptcy; afterwards, Marshall having had no notice of the bankruptcy, was requested by Gale to give him time for the payment of the sum recovered by the verdict, instead of immediately entering up judgment and taking out execution. To this Marshall consented, on receiving a bill of exchange drawn by Gale in his favour on one Younghusband, who was a debtor of Gale's for that sum at four months after date, and on payment of the costs to the attorney. When the bill became due, it was paid by Younghusband by another bill drawn on Sir James Esdaile and Co. the amount of which, together with the costs, this action was brought to recover, and a verdict found for the Plaintiffs subject to the opinion of the Court, whether the debt for which the bill was given being for money recovered by a verdict for freight, was of such a nature that the payment of it was protected by stat. 19 Geo. 2, c. 32.

On the part of the Defendants, Adair and Cockell, Serjts., contended, that the case came within the provision of the statute. The words of it are, "That no person who is or shall be really and bonâ fide a creditor of any bankrupt, for or in respect of goods really and bonâ fide sold to such bankrupt, or for or in respect of any bill or bills of exchange really and bonâ fide drawn, negotiated, or accepted by such bankrupt in the usual or ordinary course of trade and dealing, shall be liable to refund or repay to the assignee or assignees of such bankrupt's estate any money which before the suing forth of such commission was really and bonâ fide, and in the usual and ordinary course of [335] trade and dealing received by such person of any such bankrupt before such time as the person receiving the same shall know, understand, or have notice that he is become a bankrupt, or that he is in insolvent circumstances." Here the bankrupt was really and bonâ fide indebted to Marshall in a large sum for freight, a debt contracted in the usual and ordinary course of trade and dealing; and it was in discharge of this debt ascertained by the judgment of the Court, that the bill of exchange was drawn, and the payment made. The statute being of a remedial nature ought to receive a liberal construction, so as best to answer the end for which it was designed. The payment being enforced by the sentence of a Court could not be resisted, and compulsory payments were holden to be within the statute, in the case of *Holmes and others, assignees of M'Dougall v. Winnington (a)*, in Scacc. Hil. 30 Geo. 3, which recognized and confirmed that of *Calvert and others, assignees of Jones v. Lingard* at Nisi Prius, tried before Lord Loughborough, 1783.

Bond, Serjt., contra. By the assignment of the commissioners, all the property of the bankrupt is vested in the assignees by relation to the act of bankruptcy, so as to defeat all intermediate acts done by the bankrupt to dispose of his property. This being the general rule, the statutes which introduce an exception to it are to be strictly construed, and not to be extended beyond the particular cases for which they were made. The 1 Jac. 1, c. 15, is for the protection of debtors to the bankrupt, who shall have paid money to him without notice of the bankruptcy, and this in all cases. The 19 Geo. 2, c. 32, is confined to particular instances of payments made by the bankrupt, and the present case cannot be brought by any rule of construction within either of those instances. That this is the true interpretation of the statute 19 Geo. 2, appears from *Vernon v. Hall*, 2 Term Rep. B. R. 648, and *Bradley v. Clark*, 5 Term Rep. B. R. 197 (b).

The Court, after consideration, on this day declared, that they thought the authorities of *Vernon v. Hall*, and *Bradley v. Clark*, were decisive of the point in dispute, particularly the former, where, as well as in this instance, a personal credit was given to the bankrupt; that if the payment by the bankrupt in [336] those cases could not be supported, neither could it be in the present.

Postea to the Plaintiffs.

the date and issuing of the commission against such bankrupt to any creditor of such bankrupt (such payment not being a fraudulent preference of such creditor) and provided the person had not notice of any act of bankruptcy.]

(a) Those were both cases in which payments compelled by legal process, were holden to be within the meaning of the stat. 19 Geo. 2, c. 32.

(b) [See also *Copeland v. Stein*, 8 T. R. 199.]

DE BERDT *against* ATKINSON. Wednesday, July 9th, 1794.

[Dissented from, *Sands v. Clarke*, 1849, 8 C. B. 760; *Maltass v. Siddle*, 1859, 6 C. B. N. S. 499.]

A. draws a promissory note payable to B. or order, which B. indorses, having given no value for it and knowing that A. is insolvent. In an action by the indorsee against B. it is not necessary to prove that the note was presented for payment to A. immediately when it became due, or that notice was given to B. of A.'s refusal to pay it (a)¹.

This was an action by the indorsee of a promissory note made by one Brown, against the payee who indorsed it. The facts which appeared at the trial were, that the note was not presented to the maker till the day after it became due, that notice of his refusal to pay it was not given to the Defendant till five days after that refusal, but that the Defendant gave no value for it, and lent his name merely to give credit to the note, well knowing at the time it was drawn and indorsed, that Brown was insolvent. On this evidence under the direction of the Lord Chief Justice, a verdict was found for the plaintiff.

A rule having been granted to shew cause why there should not be a new trial, Adair, Serjt., shewed cause. Under the circumstances of this case, no notice was necessary to be given to the Defendant, because no loss could happen to him from the want of it; and that is the principle upon which notice is in any case required. Thus if the drawer of a bill of exchange has no effects in the hands of the drawee, it is not necessary to give him notice of the bill being dishonoured, 1 Term Rep. B. R. 405, *Bickerdike v. Bollman*. 2 Term Rep. B. R. 713, *Rogers v. Stephens*. Now the maker of a promissory note stands in the place of the acceptor of a bill of exchange, and the indorser of a note in that of the drawer of a bill. The rules therefore which govern bills of exchange, are in this respect applicable to promissory notes. And indeed the case is much stronger where the drawer of a bill knows that the drawee is insolvent, than where the drawee has simply no effects of the drawer in his hands, because if he were not insolvent, he might possibly pay it for the honour of the drawer. Here the payee knew the maker to be insolvent, and as he lent his name merely to give credit to the note, he was a party to a fraudulent transaction.

Watson, Serjt., *contra*, argued, first, that notice ought to have been given to the Defendant, for which he cited 2 Stra. 1087, *Collins v. Butler*: secondly, that as the Plaintiff had not [337] presented the note to the drawer in due time, he had given credit to him, and discharged the indorser; and thirdly, that as the defendant received no benefit from the transaction, he ought not in justice to be charged with the payment of the note.

LORD CHIEF JUSTICE EYRE. It is clear that the money was to be raised on the note, entirely on the credit of Atkinson: Brown was known by all parties to be insolvent, and Atkinson to be in opulent circumstances; the merits therefore, as well as the strict law of the case, are against the Defendant. Admitting that there must be a demand of payment made on the drawer, here there was a demand. But it is objected that the demand was not made in due time. But consider on what ground an early demand is in general required. It is, because if any delay takes place, the effects may be gone out of the hands of the acceptor, and if the holder chooses to wait, he does it at his own risk. But apply this rule to the case of known insolvency: what does it signify to the person who is liable in the second stage, at what time the demand is made on the drawer, who was known to be insolvent from the beginning (a)²? General rules are established for general convenience, and I agree, that if the drawer is not known

(a)¹ [See *Smith v. Becket*, 13 East, 187, which appears to overrule the principal case. See also *Brown v. Maffry*, 15 East, 216. *Free v. Hawkins*, 8 Taunt. 92. *Nicholson v. Gouthet*, post, 609. *Corney v. Da Costa*, 1 Esp. N. P. C. 302.]

(a)² [In the present case the Defendant on payment of the note would have had a remedy for the amount against the maker, which appears to take the case out of the principle on which *Bickerdike v. Bollman* was decided, and to render notice necessary. See *Cory v. Scott*, 3 B. & A. 623, and the observations in Bayl. on Bills. 248, 4 ed. *Leach v. Hewitt*, 4 Taunt. 733.]

to be insolvent, the fact of insolvency will not excuse the want of an early demand: but the fact of knowledge excludes all the presumptions that would otherwise arise. Then as to notice, and the application for payment to the Defendant, what did it signify to him, when that application was made? It could make no difference to him whether it were made on one day or another; he meant to guarantee the payment of the note, and there was no possibility of any loss happening to him from the want of notice. In this instance therefore, the general rule fails in its application.

BULLER, J. The general rule has been long settled, but it is only applicable to the case of fair transactions, where the bill or note has been given for value in the ordinary course of trade. There were many early cases at Guldhall to that effect, and the same point was afterwards decided by Lord Mansfield. It is said that the insolvency of the drawer does not take away the necessity of notice; that is true where value has been given, but no further. Here it is plain that Atkinson lent his name, merely to give credit to the note, and was not an indorser in the common course of business. It is no answer to say that he received no benefit: he never meant to receive any. This case [338] therefore may be decided, without breaking in upon any rules hitherto laid down, in cases of notes given for value.

HEATH, J., of the same opinion.

ROOKE, J., of the same opinion.

Rule discharged.

BENDELACK against MORIER. Wednesday, July 9th, 1794.

A. a merchant in London draws a bill of exchange on B. at Pisa, payable to the order of C. a French merchant resident in France: C. indorses it to D. of Nice, and D. to E. of Leghorn. The bill not being paid when due, E. draws another bill for the amount of the former on A. in favour of F. of Leghorn, which is indorsed to G. a merchant in London, in the course of trade, and accepted by A. The stat. 34 Geo. 3, c. 9, s. 4, prevents G. from maintaining any action on the latter bill against A.; and if such action be brought, the Court will stay the proceedings (a).

The facts of this case were the following. The Plaintiff and Defendant being both resident merchants in London, on the 6th of August 1793, the Defendant drew two bills of exchange on Grantonne and Co. of Pisa, payable at Leghorn to the order of Ryeault and Co. of Marseilles, for value received of Ransom Morland and Co. in London, and ordered for acceptance to De Berte of Leghorn: Ryeault and Co. indorsed them at Marseilles, to the order of Freres and Co. of Nice, dating the indorsement according to the style adopted in France, 15 Pluviose 2 year of the French Republic, i.e. the 4th of February 1794, and Freres and Co. indorsed them to Levy of Leghorn. When the bills became due, they were not paid by De Berte, in consequence of which, on the 14th of March 1794, Levy drew a bill on the Defendant for the amount of them, payable at sight to Aberdarham of Leghorn, to be placed in balance for the return of those other bills, and by him indorsed to the Plaintiff, in the course of business. This bill on the 8th of April the Defendant specially accepted, if De Berte had not paid, or declined to pay the other two bills, upon those bills with protests being produced, and also De Berte's declaration (in answer to a letter of the Defendant's) that he had not, and would not pay those bills.

When the latter bill became due, the Defendant refused to pay it, on account of the statute 34 Geo. 3, c. 9, (commonly called the French Property Act) having passed, the 4th section of which enacts, "That if any person residing or being in Great Britain, shall after the first day of March 1794, knowingly and wilfully, in any manner pay or satisfy any bill of exchange, note, draught, obligation, or order for money, in part or in the whole, which since the first day of January 1794, has been, or at any time during the said war shall be [339] drawn or accepted, or indorsed, or in any manner negotiated in, or in any manner sent from any part of the dominions of France, or any country, territory, or place, which was on the said first day of January 1794, or at any time during the said war, and at the time of such act done, shall be under the government of the persons exercising, or who shall hereafter exercise the powers of government in France, or drawn, accepted, or indorsed, or in any manner negotiated

(a) [Vide *Mellish v. Simeon*, post, 378.]

by or for the use of, or upon the credit of the effects of, the persons exercising the powers of government in France, or of any person or persons, who on the said first day of January 1794, were or was, or at any time since have or has been, or who at the time of such act done, shall be in any of the dominions of France, or in any such country, territory, or place as aforesaid, every person so offending shall forfeit and lose double the value of such bill of exchange, &c. &c. and the payment of such bill of exchange, &c. shall not be effected against any person or persons whatsoever, who might otherwise have demanded the same, or the money thereby made payable, &c."

In consequence of the refusal by the Defendant to pay this bill, the present action was brought; and a rule having been granted to shew cause why the proceedings should not be staid, on the ground of the case being within the statute, *Adair and Le Blanc, Serjts.*, shewed cause, contending that the only person who would be benefited by the special acceptance was *Bendelack*, and he being resident in this country was not within the act.

BULLER, J. (a)¹. The only question is, Whether this bill was not a mode of paying the former bills? Now there were two objects which the act had in view; one, that a Frenchman should not receive money, the other, that an Englishman should not pay it. But as the effect of the bill was to discharge the indorsement made at *Marseilles*, the case comes directly within the act.

ROOKE, J., of the same opinion.

Rule absolute.

[340] JACKSON *against* FAIRBANK. Wednesday, July 9th, 1794.

[Commented on, *Brandram v. Wharton*, 1818, 1 B. & Ald. 470. Followed, *Burleigh v. Stott*, 1828, 8 B. & C. 41. Applied, *Manderston v. Robertson*, 1829, 4 Man. & Ry. 445. Commented on, *Davies v. Edwards*, 1851, 7 Ex. 25. Held overruled, *Taylor v. Holland*, [1902] 1 K. B. 680.]

One of two makers of a joint and several promissory note having become a bankrupt, the payee receives a dividend under the commission, on account of the note: this will prevent the other maker from availing himself of the Statute of Limitations, in an action brought against him for the remainder of the money due on the note, the dividend having been received within six years before the action brought (a)².

This was an action on a joint and several promissory note made July 18th, 1784, by James Fairbank and William Fairbank his son, to the Plaintiff, for 100l.

In the same year James Fairbank became a bankrupt, and the Plaintiff received several dividends under the commission, in respect of the 100l. secured by the note in question, the last of which was paid in the course of the year 1793, and there remained due 58l. 6s. 8d. for which this action was brought. The Defendant pleaded non assumpsit and the Statute of Limitations, but a verdict was found for the Plaintiff, under the direction of Mr. Justice Heath, before whom the cause was tried. A rule being granted to shew cause why there should not be a new trial, the question was, Whether the payment of part of the money due on the note by the assignees took the case out of the Statute of Limitations?

Clayton, Serjt., who shewed cause, contended that the act of the assignees was the act of the bankrupt himself, and if the bankrupt had acknowledged, or paid part of the debt, the presumption raised by the length of time would have been repelled. It is decided in *Whitcomb v. Whiting*, Dougl. 651, that the acknowledgment of one of several drawers of a joint and several promissory note takes it out of the Statute of Limitations as against the others, and may be given in evidence, in a separate action against any of the others.

Cockell, Serjt., on the other hand, insisted that as the bankrupt himself had done no act to acknowledge the debt, the case came within the Statute of Limitations, of which, the assignees of one of the drawers could not prevent the other from availing himself. But

(a)¹ Absent the Lord Chief Justice and Heath, J.

(a)² [Vide *Brandram v. Wharton*, 1 B. & A. 468. *Atkins v. Tredgold*, 2 B. & C. 23. *Perham v. Ruqual*, 2 Bingh. 311. 2 Saund. 64 (notis), 5th edit.]

The Court were clearly of opinion, that the payment of the dividend under the commission, was such an acknowledgment of the debt, as took the case out of the Statute of Limitations.

Rule discharged.

[341] COMER *against* BAKER. Wednesday, July 9th, 1794.

Where in an action of trespass *quare clausum fregit*, a special plea is pleaded, and the issue found for the Plaintiff, he is intitled to full costs, though the damages are under 40s. and there is no certificate of the judge (a)¹.

To this action of trespass *quare clausum fregit*, with cattle, &c. there were several pleas:—1. The general issue. 2. Disclaimer of title, that the trespasses were involuntary and tender of amends. 3. A distress taken damage-feasant, for the same trespass. 4. That the cattle escaped on account of the fences being out of repair. 5. A licence. To all the special pleas, except that of the licence, there were new assignments, and to the new assignments similar pleas, and issues taken on them, on which a general verdict was found for the Plaintiff, with five shillings damages; but the judge did not certify.

The prothonotary having taxed full costs to the Plaintiff, on the ground that wherever an issue on a special plea was found for the Plaintiff, he was intitled to full costs, though the damages were less than forty shillings, a rule was granted to shew cause why the taxation should not be reviewed. Against which Runnington, Serjt., now shewed cause, relying on the case of *Redridge v. Palmer*, ante, 2, as decisive of the point in question.

On the other side, Le Blanc, Serjt., said that this case was brought before the Court in order that the authority of *Redridge v. Palmer* might be reconsidered. In that case, the report of the prothonotaries as to the practice in the office, proceeded on a mistake, in not distinguishing between such pleas as might bring the title to the freehold in question, and such as could not. The statute 22 and 23 Car. 2, c. 9, is positive, that in all actions of trespass and assault and battery, wherein the judge at the trial of the cause shall not certify that an assault and battery was sufficiently proved, or that the freehold or title of the land mentioned in the declaration, was chiefly in question, the Plaintiff, if the damages are under forty shillings, shall have no more costs than damages. It is true indeed, that where the plea is of such a kind, that it appears on the face of the record that the title to the freehold must come in question at the trial, there a certificate is holden to be unnecessary. But in the present case, the title to the freehold could not come in ques-[342]-tion (a)² on any of the pleas pleaded; and it is not a mere special plea, that will entitle the Plaintiff to full costs, without a certificate. No such arbitrary rule was ever laid down, prior to the case of *Redridge v. Palmer*. In *Page v. Creel*, 3 Term Rep. B. R. 391, where in trespass for an assault and battery the Defendant justified the assault only, and the damages were under forty shillings, the Plaintiff had no more costs than damages. But if the justification in that case had extended to the battery as well as the assault, a certificate would not have been necessary to intitle the Plaintiff to full costs, because then the battery would have been admitted, and the requisite of the statute, that the battery should be fully proved, would have been complied with. That case therefore shews that a mere special plea found against the Defendant, will not intitle the Plaintiff to full costs, without a certificate; but that such a plea as will have that operation, must be in effect tantamount to a certificate. The same doctrine is also laid down in *Washer v. Smith*, 2 Barnadist. 180, 277, and in *Philpot v. Jones* there cited, and in *Dover v. Robinson*, Barnes, 128. To the same effect likewise is *Cockerill v. Allanson*, Trin. 22 Geo. 3, in B. R. (b).

(a)¹ [Vide ante, p. 2, note (a).]

(a)² There was an express disclaimer of title on the record; it should seem therefore that a certificate that the title came chiefly in question, could not have been granted. If so, the statute 22 and 23 Car. 2, c. 9, appears, independent of adjudged cases, to be decisive.

(b) Bull. N. P. last edit. 330. Hullock's Law of Costs, 86. Tidd's Law of Costs, 82, and vol. ii. of the excellent Treatise of the Practice of the Court of King's Bench, by the same author, p. 653 [1001, 8th edit.].

The Court said (*c*), that if this had been a new case, they should have thought that the construction of the statute 22 and 23 Car. 2, c. 9, contended for on the part of the Defendant, ought to be adopted. But that as a different practice had long prevailed, and as that practice was confirmed by the case of *Redridge v. Palmer*, which was decided upon great consideration, they did not think it right to depart from it.

Rule discharged.

[343] KEWLEY AND ANOTHER *against* RYAN. Wednesday, July 9th, 1794.

A policy of insurance is effected on certain goods on board a certain ship on a voyage, at and from A. to B., and another policy is also made on any kind of goods as interest should appear on board ship or ships, on the same voyage, warranted to sail within a limited time, but no circumstances relating to the first policy are communicated to the underwriters of the second, nor do they know that the first was made. Goods to the full amount of the sum insured in the first policy are put on board the specified ship, which arrives in safety. Goods also to the full amount of the sum insured in the second policy are put on board another ship, which sails within the time limited from A. with an intention to touch at C. in her course to B., but is lost before she arrives at the deviating point (*b*). The underwriters of the second policy are answerable for the loss.

This was an action on a policy of insurance, and the material facts of the case were as follow:—On the 24th of May 1793, Freeland and Rigby, merchants at St. Vincents, wrote (*a*) to the Plaintiffs, merchants at Liverpool, who were also partners in a house of the same name at Grenada, requesting them to get 1260l. insured on 70 bales of cotton shipped on board the “Elizabeth,” from Grenada to England, and also 1300l. on another cargo of cotton and other goods, which they intended to ship on board some other ship that should sail with the first convoy, and therefore directing the latter insurance to be on ship or ships. The Plaintiffs accordingly by their broker insured 1260l. on board the “Elizabeth” in London, and 1300l. on board ship or ships, viz. 700l. at Liverpool, and 600l. in London. The policy for 700l. of which the Defendant underwrote 50l., and on which the action was brought, was at and from Grenada to Liverpool, on any kind of goods as interest should appear, in ship or ships on account of Freeland and Rigby, warranted to sail on or before the 1st of August 1793, and to return 3 per cent. if the ship sailed with convoy bound to Great Britain, and arrived, &c. without any exception of the goods on board the “Elizabeth.” The policy for 600l. effected in London, was also on ship or ships at and from Grenada to Liverpool, but with an exception to 1260l. “on 70 bales of cotton per ‘Elizabeth Crettin,’” the same underwriters in London having before subscribed the policy on the “Elizabeth.” But the Plaintiffs did not communicate to the underwriters at Liverpool, the letter of Freeland and Rigby [344] by directing an insurance on the “Elizabeth,” nor any circumstance

(*c*) Absent Mr. Justice Buller.

(*b*) [Vide *Middlewood v. Blakes*, 7 T. R. 162. *Heslton v. Allnut*, 1 M. & S. 46. *Tasker v. Cunninghame*, 1 Bligh, 87.]

(*a*) The following was the letter:—

“24th May 1793.

“Messrs. John and Patrick Kewley.

“Dear Sir,—By a letter received this morning from your Mr. Wm. Kewley, I find he has shipped on board your ‘Elizabeth’ 70 bales of cotton belonging to your house, and addressed it to you, on which I request you will get insured twelve hundred and sixty pounds sterling, valuing it at 18l. per bale.—I am, &c.

“THOMAS RIGBY.”

“P.S. Upon considering our affairs I have determined to return our boat immediately to Grenada with another load of cotton, and have it shipped to your address by some vessel that will sail with the first convoy, therefore be pleased to make insurance for 1300l. sterling on our accounts by ship or ships at 18l. per bale at and from Grenada to England. The Government sloop is just arrived from the fleet, and brings account that the convoy will be appointed to sail the first week in June.”

respecting the goods shipped on board the "Elizabeth," and the insurance made on that ship.

The "Elizabeth" sailed early in June, and arrived safe at Liverpool, in August, 1793. The "Heart of Oak" (a)¹, on board of which Freeland and Rigby had shipped their second cargo of cotton, &c. sailed the latter end of July, bound for Liverpool, but with a design formed before the commencement of the voyage (as appeared by the clearances, and was admitted on all sides) to touch at Cork in her way to Liverpool, but was totally lost before she arrived at the deviating point.

The Defendant pleaded the general issue, and a tender of 1l. 10s. on account of the safe arrival of the "Elizabeth," which the Plaintiff took out of court, and obtained a verdict for 48l. 10s.

A rule having been granted to shew cause why there should not be a new trial, Adair and Heywood, Serjts., shewed cause.

Considerable doubts having been thrown out at the trial, whether such a policy as this on ship or ships were a good one, the validity of it is first to be considered. Now policies of this kind are well known to foreign nations, Emerigon, 173, tit. Assurance in quovis, and are constantly used in the West India trade by us in time of war, when it is uncertain by what ships the produce of the different islands may be sent to Europe; and they are also supported by authorities, *Tierney v. Etherington*, cited 1 Burr. 349, 2 Stra. 1248, *Dick v. Barrel*, and Parke, 19. There are, therefore, only two questions; 1. Whether the policy on ship or ships was discharged by the safe arrival of the "Elizabeth," or in other words, whether the insured had a right to apply the insurance to the "Heart of Oak" that was lost? 2. Whether the voyage insured being from Grenada to Liverpool, the policy was rendered void by an intention to touch at Cork in the way to Liverpool, the ultimate port of delivery, that intention not having been carried into effect? 1. The Plaintiffs had clearly a right to apply the insurance to the ship that was lost. The insurances were totally distinct, and so were the risks, and the one is in no degree applicable to the other. If the "Elizabeth" had been lost, the Defendant would clearly not have been liable, there being a separate insurance on that ship, but the benefit and loss must be [345] reciprocal, and if he would not have been answerable in case of the loss, he cannot be benefited by the safety of the "Elizabeth."

[Mr. Justice Buller, in this part of the argument, cited the case of *Henchman v. Offley* (a)², in confirmation of the doctrine [346] that the insured had a right to appro-

(a)¹ It did not appear that the Plaintiffs when they effected the insurance in question, knew on board what ship Freeland and Rigby had shipped this cargo.

(a)² *Henchman v. Offley*, B. R. Mic. 23 Geo. 3.

This was an action on a policy of insurance of 6000l. on goods, to come in ship or ships from Bengal to London; and the facts of the case were the following: the Plaintiff in India wrote to his correspondent in England, to get two insurances, one of 6000l. on goods on board any ship or ships which should sail between the first of November, 1779, and the first of July, 1780, and the other of 4000l. on goods on board any ship or ships, which should sail between the first of February and the thirty-first of December, 1780. The two insurances were accordingly effected, and the Plaintiff loaded goods to the amount of 4889l. on board the ship, "General Barker," and 4500l. on board the ship, "Ganges," and at the time of the loading entered a certificate before Sir Elijah Impey, the Chief Justice, that he had put such goods on board the one ship, and such on board the other, and that he had shipped on board the "General Barker" 4889l. of the risk intended to be covered by the 6000l. policy. Both ships sailed within the time mentioned in the first policy; the "General Barker" was lost, but the "Ganges" arrived safe at the place of her destination; and this action was brought on the policy for 6000l. which the Plaintiff contended he had a right to apply to the "General Barker," and went for a total loss. At the trial, two objections were made: 1st. that evidence could not be given of what passed in the East Indies: 2d. that there ought to be a contribution, all the underwriters called upon as for an average loss, and both policies taken into the account, and that the Plaintiff ought only to recover in the proportion of 4889l. to 4500l. or at most as 4889l. was to 1111l.

Lord Mansfield over-ruled the objection as to the evidence, and was of opinion,

private: and also intimated a decided opinion, that the mere intention to put it into Cork in the course of the voyage to Liverpool, did not vitiate the policy.]

But supposing the "Elizabeth" to be one of the ships on which the policy in question might attach, still the Plaintiff is intitled to keep his verdict, for he had a right to appropriate; and then the different insurances might be brought into average. 1 Emerigon, 174. There is nothing in the law of England which says, that the first arrival shall discharge the underwriter. 2. The policy was not avoided by a simple intention to touch at Cork, in the course of the voyage to Liverpool, which was the port of delivery. The ship originally sailed on the voyage insured, and an intention to deviate not carried into effect, does not vitiate the policy. *Foster v. Wilmer*, 2 Stra. 1249. *Carter v. The Exchange Assurance Company*, *ibid.* *Thelsson v. Ferguson*, Dougl. 361. It is true, that in *Wooldridge v. Bopdell*, Dougl. 6, the policy was holden to be void, but that case was essentially different from the present; there the voyage insured was "at and from Maryland to Cadiz," but the ship was in fact bound to Falmouth, and there was no intention of going to Cadiz at all; here Liverpool was the place of final destination, to which the ship would have really proceeded. The true criterion to determine whether a voyage on which a ship sets out is the same as that insured, is to discover whether she is in fact bound to her ostensible port of delivery; if that be the case, an intention to go out of the track, not carried into execution, does not alter the nature of the voyage.

Le Blanc, Serjt., *contra*. The ground on which it is to be contended that the policy was satisfied, is, that a ship answering the description in it arrived in safety, having the full amount of the sum insured on board. Every circumstance respecting the specific insurance on the "Elizabeth" having been concealed from the Defendant, it was the same with regard to him, as if no such insurance had been made on that ship. If, therefore, the "Elizabeth" had been lost, and the "Heart of Oak" had arrived in safety, the Plaintiffs had it in their power, by suppressing the letter of the 24th of May, to have charged the Defendant on that loss. In common justice, therefore, the underwriter ought to be benefited by the safety of the same ship, for the loss of which, if it had happened, he would have been liable to pay. The Plaintiff, too, by concealing the particular insurance [347] on the "Elizabeth," acted without the good faith required

that the Plaintiff might apply the 6000l. policy entirely to the "General Barker"; and a verdict was found accordingly. But a new trial was moved for, and a rule granted to shew cause.

In support of the rule, Lee, Cowper, and Pigot contended, that all the underwriters were liable for losses on both ships; that if the "Ganges" had been lost, the Defendant would have been called upon, and therefore, that as he would have in that case been liable for the loss, he was in justice intitled to the benefit of salvage. There was no appropriation of any particular ship or goods, and this is an attempt to appropriate after a loss. At the time when the policy was underwritten, it was not communicated to the underwriters, that so much was shipped on board the "General Barker," and so much on board the "Ganges," and they shall not be affected by a declaration afterwards made without their privity. The contract must be explained according to the situation in which things stood between the parties, at the time when it was made. The Plaintiff shipped 4889l. on board the "General Barker," and 1100l. on board the "Ganges," and this at a time when he did not know that the premiums and expence of insurance would make up the exact sum of 6000l.

Wallace, *contra*. The material question is, whether the 4500l. on board the "Ganges," shall be taken into the account of the loss of the "General Barker." The owner in India meaning to ship 6000l. property, sends to insure it. The meaning of this policy is, that he may load goods to that amount, on board any ship or ships. As he had not the policies, he could not make any indorsement on them, but he not only writes to his correspondent here, but makes a solemn oath before the chief magistrate in India, of the manner in which he shipped the goods, and of the appropriation. Suppose he had said he put all, covered by the 6000l. policy, on board the "General Barker," the underwriter could not have objected. This was an appropriation made before any loss that happened, or the ships had sailed, which the insured had clearly a right to make.

The Court discharged the rule, but ordered the salvage on the 1111l. to be deducted out of the damage recovered, which made a deduction of about one-fifth.

in mercantile transactions, and contrary to the directions expressed in the ordinances of other nations, for the purpose of preventing frauds, Weskett, 520. They shall not, therefore, be permitted to avail themselves of their own wrong.

As to the case of *Turney v. Etherington*, that was not a case of a general insurance, for it was specified in the policy, that the goods were to be on board a British ship or ships: so in *Dick v. Barrett*, the insurance was equally certain, being on any ship in which the Plaintiff should come from Virginia to London, which was the same in effect as if the ship itself had been specified. Those cases, therefore, are not applicable to that of a general insurance like the present. The only case where the policy was similar, is, *Henchman v. Offley*, and there it does not appear that the validity of the policy came in question: there also the appropriation was not made till after the insurance, but here it was made before.

The next question is, whether the voyage insured was not a different one from that on which the ship set out; for though a mere intention to deviate, not carried into effect, will not vitiate the policy provided the voyage be the same, yet if the voyage be different, the policy is clearly void, according to the doctrine laid down in *Wooldridge v. Boydell*, Dougl. 6, and *Way v. Modigliani*, 2 Term Rep. B. R. 30. Now it cannot be fairly said, that a voyage from Grenada to Liverpool, and from Grenada to Cork and Liverpool, are one and the same. So clear indeed was Lord Kenyon on this point, that at Guildhall (a)¹ the Plaintiff was nonsuited in an action on a policy of insurance on this very ship the "Heart of Oak," on the ground that it was not the voyage insured, and that there had been no inception of that voyage.

Cur. advis. vult.

On this day, the Court, consisting of the Lord Chief Justice (b), Mr. J. Heath, Mr. J. Rooke, declared their opinion as to the first point which had been made in the argument, that the legality of the policy on ship or ships was too well established both by usage and authority to be disputed; as to the second, that the insured had clearly a right to apply such an insurance to whatever ship he thought proper within the terms [348] of it, for which the case of *Henchman v. Offley* was an authority; as to the third, that where the termini of the intended voyage were really the same as those described in the policy, it was to be considered as the same voyage, and a design to deviate, not effected, would not vitiate the policy. That in *Wooldridge v. Boydell* it appeared there was no intention that the ship should go to Cadiz at all, which was mentioned in the policy as her port of delivery, and in *Way v. Modigliani* there was an actual deviation by the ship going to fish on the banks of Newfoundland; those cases therefore were wholly different from the present, for here the ship was really bound to Liverpool, though there were also clearances for Cork. The remaining question therefore was, whether the letter of the 24th of May, by which Freeland and Rigby directed an insurance to be made on the "Elizabeth," and the actual circumstances of that insurance ought to have been communicated to the underwriters on the present policy? But as nothing was necessary to be disclosed but what was material to the risk run, and as the insurance on the "Elizabeth" was not material to that risk, the concealment was not fraudulent, and therefore could not affect the right of the Plaintiffs to recover.

Rule discharged.

End of Trinity Term.

[350] CASES ARGUED AND DETERMINED IN THE COURTS OF COMMON PLEAS, AND EXCHEQUER CHAMBER, IN MICHAELMAS TERM, IN THE THIRTY-FIFTH YEAR OF THE REIGN OF GEORGE III.

CORNISH against ROSS. Saturday, Nov. 15th, 1794.

A clerk to an attorney, though not articulated, cannot be bail to the action (a)².

It was objected to a person who was going to justify himself as bail, that he was a clerk to an attorney though not articulated. It was contended, on the other hand, that

(a)¹ *Stott v. Vaughan*, sittings after Hilary term, 34 Geo. 3.

(b) Mr. Justice Buller was absent, but it was stated by the Lord Chief Justice that he fully concurred with the rest of the Court.

(a)² [Vide ante, vol. i. p. 76, n. (a).]

the rule prohibiting attornies from being bail, had never yet been extended beyond their articted clerks. But on Mr. J. Buller's observing, that in the King's Bench the rule comprehended clerks who were not articted, as well as those who were, the

Bail was rejected.

PAYNE *against* ROGERS. Saturday, Nov. 15th, 1794.

[Commented on, *Russell v. Shenton*, 1842, 3 Q. B. 458. Distinguished, *Nelson v. Liverpool Brewery Company*, 1877, 2 C. P. D. 313. Referred to, *Alabaster v. Harness*, [1894] 2 Q. B. 901; [1895] 1 Q. B. 339. Distinguished, *Cavalier v. Pope*, [1905] 2 K. B. 762; [1906] A. C. 433.]

If the owner of a house is bound to repair it, he, and not the occupier, is liable to an action on the case for an injury sustained by a stranger from the want of repair (*a*).

Le Blanc, Serjt., moved for a rule to shew cause why the verdict found for the Plaintiff in this cause should not be set aside, and a nonsuit entered. It was an action on the case against the Defendant as owner of a house in the occupation of one Platt his tenant, for an injury sustained by the Plaintiff by his leg slipping through a hole in the foot pavement, into a vault or cellar, owing to some plates or bars, which went under [351] the pavement, being out of repair. And the ground of the motion was, that the action ought to have been brought against the actual occupier of the house, whose more immediate business it was to know what repairs were necessary, and to see that they were made, and not against the landlord. Though the landlord might bear the expence of the repairs, yet, as between the occupier and the public, the occupier was bound to look to the state of them, and ought to be liable for any accident that might happen by his neglect. Thus in *Chectham v. Hampson*, 4 Term Rep. B. R. 318, it was holden that an action on the case for not repairing fences could only be maintained against the occupier.

BULLER, J. Who was to repair in the first instance?

LORD CH. J. Evidence was given of repairs being actually done by the landlord. And I thought at the trial, that though the tenant was *primâ facie* bound to repair, and therefore liable, yet if he could shew that the landlord was to repair, then that the landlord was liable.

BULLER, J. The direction of my Lord Chief Justice was most clearly right. I agree that the tenant as occupier is *primâ facie* liable to the public, whatever private agreement there may be between him and the landlord. But if he can shew that the landlord is to repair, the landlord is liable for neglect to repair.

HEATH, J. If we were to hold that the tenant was liable in this case, we should encourage circuitry of action, as the tenant would have his remedy over against the landlord.

ROOKE, J., of the same opinion.

Rule refused.

BARNEY *against* TUBB. Wednesday, Nov. 26th, 1794.

The Southwark Court of Requests Act 22 Geo. 3, c. 47, cannot be pleaded to an action brought in a superior Court. The proper mode for the Defendant to avail himself of it, is by entering a suggestion on the record, after verdict, or the execution of a writ of inquiry. Where the Plaintiff having obtained judgment on a general demurrer to such a plea, executed a writ of inquiry, on which the damages were assessed at less than 40s. five days before the end of the term, and signed final judgment on the last day of the term, the Court in the next term, refused to direct the prothonotary to review his taxation of costs to the Plaintiff, on an affidavit stating the former proceedings, and that the Defendant was resiant within the jurisdiction of the inferior court: because the Defendant ought to have entered

(a) [Vide *Leslie v. Pounds*, 4 Taunt. 649. *Bush v. Steinman*, 1 Bos. & Pul. 404. *Coupland v. Hardingham*, 3 Campb. N. P. C. 398.]

a suggestion, and that before final judgment was signed (a). And to intitle himself to such a suggestion, supposing it to be moved for in time, the Defendant must state in the affidavit, not only that he is resiant within the jurisdiction of, but also that he is liable to be warned or summoned to the Court of Requests (b). After judgment by default the Defendant is still in court, for many purposes, one of which is that of entering such suggestion (c). Semb. that judgment on a general demurrer to a plea in bar, the matter of which, even if well pleaded, would be no defence to the action, is to be considered as a judgment by default.

To this action for goods sold and delivered, the Defendant pleaded, that at the time of commencing the action he was not indebted to the said Nathaniel (the Plaintiff) in any [352] sum or sums of money amounting to the sum of forty shillings, and that at the time of commencing such action, he the said John (the Defendant) was inhabitant and resiant within the parish of Saint Mary Magdalen Bermondsey, in the county of Surrey, and liable to be warned and summoned for such debt before the Court of Requests mentioned in a certain Act of Parliament, made at Westminster in the county of Middlesex, in the twenty-second year of the reign of his late Majesty King George the Second, intituled An Act for the more Easy and Speedy Recovery of Small Debts within the Town and Borough of Southwark, and the several Parishes of Saint Saviour, Saint Mary at Newington, Saint Mary Magdalen Bermondsey, Christ Church, Saint Mary Lambeth, and Saint Mary Rotherhithe in the county of Surrey, and the several Precincts and Liberties of the same."

To this plea there was a general demurrer, which on this day was thus argued by Marshall, Serjt. :—

The ground of this demurrer is, that though the matter of the plea, if used by way of suggestion on the record after verdict, would have been good to deprive the Plaintiff of costs, and to give them to the Defendant, yet it cannot be pleaded as a bar to the action. To have enabled the Defendant to plead this plea, the act should have given an exclusive jurisdiction to the Court of Requests, by taking away the jurisdiction of all other courts in matters of this sort. This is done by the Westminster Act, 23 Geo. 2, c. 27, s. 21, which provides, that "no action for any debt under forty shillings, and recoverable in the Court of Requests, shall be brought against any person within the jurisdiction thereof in any other court whatsoever." This prohibitory clause is a bar to every action brought out of the Court of Requests, of which that court has jurisdiction; and the eighth section gives a short form of the form of the plea and replication, to prevent special pleading. The Tower Hamlets Act, 23 Geo. 2, c. 30, s. 21, has the same prohibitory clause, and though it gives no form of plea, yet it may be pleaded, or the facts which bring a case within it may be given in evidence under the general issue, and the judge would be bound to nonsuit the Plaintiff. The Southwark Act, 22 Geo. 2, c. 47, on which this plea is founded, has no prohibitory clause, but it leaves the jurisdiction of other courts as it stood before. That act, s. 6, provides, "that if in any action of debt or action on the case, upon an assumpsit for recovery of any debt to be sued or prosecuted [353] against any person or persons aforesaid, in any of the King's Courts at Westminster or elsewhere, out of the said Court of Requests, it shall appear to the judge or judges of the court where such action shall be sued or prosecuted, that the debt to be recovered by the Plaintiff in such action doth not amount to the sum of forty shillings, and the Defendant in such action shall duly prove by sufficient testimony, to be allowed by any judge or judges of the said court where such action shall depend, that at the time of commencing such action, such Defendant was inhabiting and resiant within the said town and borough of Southwark, or any of the parishes, limits and precincts aforesaid, in the county of Surrey, and was liable to be warned or summoned before the said Court of Requests for such debt; then, and in such case the said judge or judges shall not allow to the said Plaintiff any costs of suit, but shall award that the said Plaintiff shall pay so much ordinary costs to the party Defendant, as such Defendant shall

(a) [Accord. *Calvert v. Everard*, 5 M. & S. 510. See also *Hippesley v. Layng*, 4 B. & C. 863.]

(b) [*Tucker v. Crosby*, 2 Taunt. 169.]

(c) [Vide *Harris v. Lloyd*, 4 M. & S. 171. 1 Chitty's Rep. 636 (n). Tidd's Pr. 996, 8th edit.]

justly prove before the said judge or judges it hath truly cost him in the defence of the said suit." This clause points out the mode of laying the facts before the Court, in order to obtain leave to enter a suggestion on the record, which must be after verdict, for the Court has no other means of ascertaining that the Plaintiff's demand is under forty shillings, than by a verdict. And upon the London Act, 3 Jac. 1, c. 15, it has been determined in *Pennel v. Wallis*, cited 1 Stra. 46, that a suggestion after verdict was the proper mode of proceeding, and not a plea; and this appears in 2 Stra. 1120, 1191, Dougl. 244, to be the constant practice. If a suggestion be the proper mode of proceeding upon the London Act, it must be so upon the Southwark Act, because the sixth section of the latter, which directs the mode of proceeding, is copied from the fourth section of the former act. And where there is a particular mode of proceeding prescribed by a statute, the Court will oblige the party to follow that mode, and will not permit him to pursue any other. This was settled in *Taylor v. Blair*, 3 Term Rep. B. R. 452: therefore a suggestion after verdict is the only mode of proceeding, by which the Defendant can avail himself of the benefit of the Southwark Act. If the Defendant were to prevail on this plea, the Plaintiff must lose his debt altogether, because the judgment would be a bar to any other action for it. But the Westminster Act, s. 9, provides, that where the Defendant shall avail himself of his plea, the Plaintiff may afterwards sue for his debt in the Court of Requests. [354] Now there is no such provision in the Southwark Act, which is another decisive reason to shew that it cannot be pleaded. The Court, consisting of Buller, Heath and Rooke, Justices, in the absence of the Chief Justice, were so clearly of this opinion, that Runnington, Serjt., on the other side gave up the argument, and there was

Judgment for the Plaintiff.

The Plaintiff having thus obtained Judgment, on the 5th of July in Trinity Term, executed his writ of inquiry, the damages being assessed at 11. 1s. 3d. and entered up final judgment on the 9th, the last day of that term. On the fourth day of this term, Runnington, Serjt., obtained a rule to shew cause why the prothonotary should not review his taxation of costs, and why the proceedings on the judgment should not be staid, upon an affidavit which set forth the proceedings as above stated, and added, that the Defendant, at the time of the commencement of the action, resided within the jurisdiction of the Southwark Court of Requests. Marshall, Serjt., shewed cause against the rule, and contended, first, that this application was not in the proper and usual form; for the prothonotary could only tax costs to the party who appears on the face of the record to be entitled to them; but if he were, in compliance with this rule, to review his taxation, and tax the costs for the Defendant, instead of the Plaintiff, the judgment would not be warranted by the previous proceedings on the record, and would therefore be erroneous. The proper application in such cases is for leave to enter a suggestion on the roll, to which the Plaintiff may demur, if it do not set forth the facts which bring the case within the act of parliament, or he may traverse those facts if they be untrue. With such a suggestion properly entered, the prothonotary would have an authority to tax the costs for the Defendant, and the judgment would be consistent with the rest of the proceedings. Secondly, if the proper application were made in this case, it would be now too late: the writ of inquiry was executed on the 5th of July; the term did not end till the 9th, on which day final judgment was signed, and if the Defendant had any reason to allege why the Plaintiff should not have had judgment in the ordinary course, he ought to have applied to the Court in the interval between the execution of the writ of inquiry and that day. Having neglected to do that, he has lost his opportunity, [355] for the Court cannot alter or reverse a judgment regularly given in a former term. Thirdly, this was a judgment by default, and therefore the Defendant could not avail himself of the act, even if the application were right, and made in proper time. That it was to be considered as a judgment by default, appears from 1 Salk. 173, *Staple v. Haydon*, where it is laid down, that if a Defendant pleads an ill plea, but the matter if well pleaded would amount to a good bar, judgment cannot be given against him by confession; but where, as in this case, the matter, though well pleaded would signify nothing, the judgment may be given as by confession: and where he has suffered judgment by default, he is out of Court for every purpose except that of having final judgment against him, 1 Salk. 216, S. C. and Stra. 46, *Brampton v. Crabb*, and therefore he cannot now be received to make the suggestion. Fourthly, supposing the application to be regular in other respects, the affidavit is defective in not stating that the Defendant

was liable to be warned or summoned to attend the Court of Requests for Southwark. For any thing that appears, he may be exempt from the jurisdiction of that Court, in the same manner as attornies are, whose privilege exempts them from the jurisdiction of the Courts of Conscience, except in Westminster, where they are made liable by an express act of parliament.

In support of the rule, Runnington, Serjt., contended, that the act did not prescribe any particular term, nor any form in which the application should be made. The sixth section provides, that if the facts necessary to bring the case within the act, shall be proved by sufficient testimony, to be allowed by the judge or judges of the Court, the Defendant, and not the Plaintiff, shall have his costs. Those facts sufficiently appeared in the affidavit, and in the plea, which was confessed by the demurrer, so as to entitle the Defendant to the benefit of the act. The case in *Strange* has never been considered as law, since there can be no good reason why the Defendant, after judgment by default, should not have the benefit of the act, as well as after a plea of non assumpsit, and a verdict for the Plaintiff.

BULLER, J.(a). Upon the two first points I am of opinion with my Brother Marshall. I think it clear, for the reasons he has given, that an application for leave to enter a suggestion on the record, is the proper mode of proceeding. Without [356] such a suggestion, the judgment would not be warranted by the premises. I think also, that the application ought to have been made to the Court, before judgment was finally given, and therefore that it should have been made in the last term: and I hold that even if the writ of inquiry be executed on the last day of the term, the Plaintiff has a right to sign his judgment as of that term. But here the Defendant had from the 5th to the 9th of July to apply to the Court, and having neglected so to do, he is now too late. Upon the third point I am not so clear. Taking this to be a judgment by confession, I do not agree that the Defendant is thereby out of Court, for every purpose but that of having final judgment against him. It is not now necessary to give any opinion on the case in *Strange*. If it were, I think we ought to consider it well before we agree to establish the point there determined. I conceive that a Defendant, after judgment by default, may be deemed to be in Court for many purposes besides that of having final judgment against him. Some years ago it was holden on the authority of the case in *Strange*, that if the Plaintiff were nonsuited, he was out of court for all purposes but that of having judgment signed against him: and I remember the first instance in which that idea was over-ruled. It was done on a motion made by Mr. Merton, and since that time it has been the constant and settled practice of Westminster Hall to set aside nonsuits where the justice of the case required it. But upon the fourth ground, I agree with my Brother Marshall, that the affidavit ought to contain all the facts necessary to bring the case within the act, for if we are to grant leave to enter the suggestion, it must be upon such a state of facts as will warrant us in so doing. Here a material allegation is wanting, namely, that the Defendant was liable to be warned, which would alone have been a sufficient objection to this application, even if it had been right in all other respects.

HEATH, J., of the same opinion.

ROOKE, J., of the same opinion.

Rule discharged.

[357] WHITE, ONE, &C. *against* MILNER. Wednesday, Nov. 26th, 1794.

An attorney is not liable to pay the costs of taxing his bill, under the stat. 2 Geo. 3, c. 23, s. 23, where the deduction of one sixth is occasioned, not by the particular items being taxed, but by a whole branch of it being disallowed.

On the motion of Le Blanc, Serjt., a rule was granted to shew cause why the Plaintiff, who was an attorney, should not pay the costs of the taxation of his bill by the prothonotary, according to the stat. 2 Geo. 2, c. 23, s. 23, under the following circumstances. The bill had been referred to the prothonotary by a judge's order, and on the taxation more than one sixth part was taken off. But the deduction was caused, not from any over-charges of particular items, but from the whole of the

(a) Absent Lord Chief Justice.

expences of defending two actions for one Brandon being disallowed; which it was stated that the Defendant had undertaken to pay to the Plaintiff, but which the prothonotary on reading the affidavits on both sides was of opinion that he had not undertaken to do. On an application last term to the Court for the prothonotary to review his taxation, they were of opinion that he had done right, and refused that rule. And now they held that the statute of Geo. 2 was applicable only where an attorney made exorbitant charges on his client in the particulars of his bill, and the foundation of the demand was not denied, but only the amount of it. In the present case, the Plaintiff's charges for defending Brandon were not objectionable, provided he could have proved that the Defendant was liable to pay them, and the other items of the bill were not reduced one sixth.

Rule discharged.

[358] PROCTOR *against* THE BISHOP OF BATH AND WELLS, THOMAS MOORE an Infant, AND RICHARD GOLDSEBOROUGH AND EDWARD MOORE, his Guardians. Wednesday, Nov. 26th, 1794.

[Distinguished, *Tollemache v. Coventry*, 1834, 8 Bligh, N. S. 563; 2 Cl. & F. 623. Referred to, *Massey v. Barton*, 1844, 7 Ir. Eq. R. 97. Discussed, *Dungannon v. Smith*, 1846, 12 Cl. & F. 619, 632. Referred to, *Catlin v. Brown*, 1853, 11 Hare, 376. Distinguished, *Ecers v. Challis*, 1859, 7 H. L. C. 555. Referred to, *In re Bence*, [1891] 3 Ch. 249. Discussed and approved, *Hancock v. Watson*, [1902] A. C. 19.]

A. devises an advowson to the first or other son of B. that should be bred a clergyman, and be in holy orders, in fee, but in case B. should have no such son, then to C. in fee. Both devises are void, as depending on too remote a contingency; therefore though B. dies without having had a son, the heir at law of the devisor, and not C. is intitled (a).

In this quare impedit, brought to recover the presentation to the church of the rectory of West Coker in Somersetshire, the declaration stated, that one William Ruddock was seised in fee of the advowson, and presented, that on his death it descended to his two nieces Jane and Mary Hall, that Jane Hall intermarried with Nathaniel Webb, and Mary with Thomas Proctor: that Nathaniel Webb died, his wife surviving him, whereby the said Jane in her own right, and Thomas Proctor and Mary in her right were seised, that the church then became vacant by the death of the incumbent, whereby the said Jane Webb and Thomas Proctor in right of the said Mary, presented their clerk; that Jane Webb died, upon whose death her whole share of the advowson descended to her son Nathaniel Webb, who thereupon became seised in fee in coparcenary, with Thomas Proctor and Mary his wife; that Thomas Proctor died, his wife surviving him, whereby the said Nathaniel Webb the son and Mary Proctor became seised. There were then set forth several presentations on vacancies by Nathaniel Webb and Mary Proctor. The death of the said Nathaniel Webb was then stated, whose share descended to his son Nathaniel Webb, who became seised in coparcenary with Mary Proctor. That Mary Proctor died, upon whose death her share descended to her grandson Thomas Proctor, who became seised together with the last mentioned Nathaniel Webb. That the church again became vacant, upon which they not agreeing upon any person to be presented by them jointly, the said Nathaniel Webb presented the said Thomas Proctor, as in the first turn of the said Jane Webb, the elder sister of the said Mary Proctor; that he died, and his share descended to Elizabeth Proctor his sister, the present Plaintiff, who was intitled to present in the first turn of the said Mary Proctor, the younger sister of the said Jane Webb, yet, &c.

The bishop pleaded the usual plea as ordinary; and the other Defendants, "that true it was that the said Nathaniel Webb the grandson of Jane Webb and the said Mary Proctor [359] were seised of the advowson in coparcenary, and that Mary Proctor died so seised, and that the said Nathaniel Webb presented as in the first turn of the said Jane Webb, &c. But the said Defendants further said, that the said Mary

(a) [Vide *Cambridge v. Rous*, 8 Ves. 12, 24. *Beard v. Wescott*, 5 Taunt. 412, 5 B. & A. 801, and see Mr. Butler's note. *Fearne*, Cont. Rem. 508 (k).]

Proctor being so seised, made her last will and testament, and gave and devised unto the first or other son of her grandson, the said last mentioned Thomas Proctor, that should be bred a clergyman and be in holy orders, and to his heirs and assigns, all her right of presentation to the said rectory, &c. But in case her said grandson the said last mentioned Thomas Proctor should have no such son, then she gave and devised the said right of presentation unto her grandson the said Thomas Moore, his heirs and assigns for ever. That afterwards the said Mary Proctor died so seised, leaving the said last mentioned Thomas Proctor and Thomas Moore her surviving, and that afterwards the said Thomas Proctor died without having ever had any son; whereby and by virtue of the said last will and testament of the said Mary Proctor, the said Thomas Moore became seised of all the share of the said Mary Proctor of and in the said advowson, &c. wherefore it belonged to the said Thomas Moore to present, &c. as in the first turn of the said Mary Proctor the younger sister of the said Jane Webb, &c.

To this plea there was a general demurrer, which was twice argued; the first time by Bond, Serjt., for the Plaintiff, and Heywood, Serjt., for the Defendants, and a second time, by Adair, Serjt., for the Plaintiff, and Le Blanc, Serjt., for the Defendants. The substance of the arguments on the part of the Plaintiff was as follows.

The question in this case is, whether the devise to Thomas Moore can take effect as an executory devise, since it is clear that it cannot create a contingent remainder, there being no particular estate to support it? Now the established rule of law is, that the event or contingency on which an executory devise is limited, must be of such a kind as to happen, if at all, within the period of a life or lives in being, or twenty-one years after. *Fearne*, 314, 315 (edit. 1776). *Cas. Temp. Talbot*, 228. *Stephens v. Stephens*, 2 Mod. 289. *Taylor v. Bidlal*. Here the first devise is not within those limits; Thomas Proctor had no son born at the death of the testatrix, and if he ever should have one, such son would not necessarily be in orders, within [360] twenty-one years after his birth. By the canons of the Church, no person can be admitted into deacon's orders before the age of twenty-three without a faculty, nor can he be ordained priest before twenty-four. *Gibs. Cod. tit. 6, c. 5*. The stat. 13 Eliz. c. 12, also is positive, that no person shall be admitted to a benefice with cure, except he be of the age of twenty-three at the least, and it was clearly the intention of the testatrix that the son of Thomas Proctor should be presented himself to the living. But it may be perhaps contended on the other side, that though the devise to the son of Thomas Proctor should be void as being too remote, yet that the devise over to Thomas Moore may take effect, as if the prior devise had not been made. But the devise to Moore is liable to the same objection on account of the remoteness of the contingency, as the other: for supposing there were no previous devise to the son of Proctor, the devise to Moore would be to him "if Thomas Proctor should have no son in orders;" but no time is fixed for his taking orders. And such a devise being void in its original creation, could not be made good by the subsequent circumstance of Thomas Proctor having no son, according to the doctrine established in *Goodman v. Goodright*, 2 Bur. 873.

On the part of the Defendants the arguments were as follow. The intention of the testatrix clearly was to exclude her heir at law; the Court therefore will construe the will with a view to that intention, and will not presume, that she meant that the son of Thomas Proctor should be in such orders as would defeat it, instead of those which might carry it into effect. As by means of a faculty or dispensation he might take deacon's orders at twenty-one, the Court will intend that those were the orders which he had in contemplation. The rules respecting an executory devise depend on the period when the devisee may come into the enjoyment of the thing devised. Now here the thing devised is the right of presentation, which a son of Thomas Proctor might have exercised within the time limited by law, by taking deacon's orders by virtue of a faculty, for it was not necessary to give effect to the devise that he should himself be the incumbent of the living; he might have presented some other person. There are three contingencies on which the devise depends, the first that of Thomas Proctor having a son, the second on that son being bred a clergyman, and the third, on his being in holy orders: but if either of those contingencies were good and the event never happened, [361] the devise over to Moore might take effect, 2 Black. 704, *Longhead on dem. of Hopkins v. Phelps*. But supposing the prior devise to be bad, yet

there is nothing to render void the devise to Moore: the limitations in the will are alternate; if Proctor should have a son in orders to take as devisee, Moore would be entirely excluded; this case therefore is not like those where the second devise is to take place after the first has been satisfied. And it is a rule of law, that where there are two limitations in a will, and the former is avoided either from the nature of its original creation, or by matter ex post facto, the latter shall have effect (*a*)¹, 1 Vin. Abr. 103, 104. *Andrews v. Fulham*, 1 Vezey, 420. *Avelyn v. Ward*, 1 Salk. 229. *Scatterwood v. Edge*, Prec. in Chanc. 316. *Jones v. Westcomb*, 1 Eq. Cas. Abr. S. C. 1 Salk. 226. Skin. 408. *Goodright v. Cornish*, 1 Wils. 105. *Gulliver v. Wickett*. But secondly, as Moore was in esse at the death of the testator, and there was then no son of Thomas Proctor, the advowson vested in Moore, subject to be divested by the birth of such son. *Alleyn*, 81. *Udal v. Udal*, 2 Rol. Abr. 119.

The substance of the reply was, that in truth there was but one contingency, on which the devise to Moore was limited, which was that of Proctor having a son in holy orders; for the words "bred a clergyman" were otherwise insensible: this case therefore was materially different from *Longhead v. Phelps* where the contingencies were expressly in the disjunctive, and, where as the first was clearly good, viz. that of John and Mary Phelps dying without leaving issue male, the Court would not enter into the consideration of the second, which did not come in question. That in each of the other cases cited, the subsequent devise might have taken effect though the prior devise had not been in the will at all. But here, the devise to Moore depended on the former one, and could not take effect unless Proctor should have no son in orders, which was too remote an event; for the rule of law was, that an executory devise must be such, as not that the estate devised might by bare possibility, but must necessarily vest in the devisee, within the compass of a life in being, or twenty-one years after.

[362] The Court (*a*)² were very clearly of opinion, that the first devise to the son of Thomas Proctor was void, from the uncertainty as to the time when such son, if he had any, might take orders; and that the devise over to Moore, as it depended on the same event, was also void, for the words of the will would not admit of the contingency being divided, as was the case in *Longhead v. Phelps*, 2 Black. 704; and there was no instance in which a limitation after a prior devise, which was void from the contingency being too remote, had been let in to take effect, but the contrary was expressly decided in the House of Lords, in the case of *The Earl of Chatham v. Tothill*, 6 Brown Cas. in Parl. 451, in which the judges founded their opinion on *Butterfield v. Butterfield*, 1 Vezey, 134. Consequently the heir at law of the testatrix was intitled.

Judgment for the Plaintiff.

MORRIS against LUDLAM. Thursday, Nov. 27th, 1794.

If a plea of foreign attachment state the custom to be "that if any person be or hath been indebted to any other person within the said city," &c. it ought to aver that the Defendant in the plaint was indebted to the Plaintiff within the city (*a*)³.

To this action for goods sold and delivered, with the usual counts, the Defendant pleaded. 1. Non assumpsit, and 2dly. That the city of London is and from time

(*a*)¹ This position seems to be founded on the dicta of Lee, Ch. J., in *Andrews v. Fulham*, and Lord Hardwicke in *Avelyn v. Ward*. But it will appear upon an examination of those cases, and the others in which the same principle is recognized, that it is not applicable to a devise over limited after a prior devise, which prior devise is originally void from the remoteness of the contingency on which it depends.

(*a*)² Absent Mr. Justice Buller.

(*a*)³ [This case has only decided that where the custom is stated to be "that if any person, &c. be indebted within the city," the Defendant must bring his case within the custom, as stated, and must shew the person indebted within the city, but not that the custom should be so stated; see *M'Daniel v. Hughes*, 3 East, 379; accordingly it was held in *Banks v. Self*, 5 Taunt. 234 (*n*) that it is not necessary to aver the custom, nor consequently the fact that the Defendant in the plaint was indebted

whereof the memory of man is not to the contrary, hath been an ancient city, and that there now is, and from time immemorial hath been, a certain custom used and approved of within the same city, that is to say, that if any person be, or hath been indebted to any other person within the said city, in any sum of money, and for recovery thereof, such person affirm or hath affirmed a plaint in debt, in the court of his present Majesty or his predecessors, Kings or Queens of England, held or to be holden before the Mayor and Aldermen of the said city, for the time being, in the chamber of the Guildhall of the said city, within the said city, according to the custom of the said city, against such persons so indebted, and by virtue of such plaint it be or hath been commanded by the said court to any of the said serjeants at mace, and ministers of the said court, to summon such person named Defendant in the said plaint to appear in the same court, held before the Mayor and Aldermen of the [363] said city for the time being, in the chamber of the Guildhall of the said city, to answer the Plaintiff in such plaint, and if such serjeant at mace and minister of the said court, by virtue of such precept return and certify, or hath returned and certified to the said court so holden as aforesaid, that the Defendant in such plaint hath or had nothing within the said city or the liberties thereof, whereby he can or could be summoned, nor is nor was to be found within the said city, and such Defendant at that court being solemnly called doth not appear, or hath not appeared, but makes or hath made default, and in the same court it be or hath been alleged by the Plaintiff in the said plaint, that any other person owes or hath owed to any such Defendant any sum of money amounting to the sum of the debt in such plaint specified, or any part thereof, then at the petition of the said Plaintiff, it is and hath been commanded by the said court, to one of the serjeants at mace and a minister of the said court, to attach such Defendant in such plaint, by such sum of money so being in the hands or custody of such other person, so that such Defendant appear at the same court, or at the then next court held or to be holden before the said Mayor and Aldermen as aforesaid, to answer such Plaintiff in the plea in such plaint specified; and if such serjeant at mace and minister of the said court, at the same or the then next court held or to be holden as aforesaid, return and certify to the said court such Defendant to be attached by such sum of money so being in the hands or custody of such other persons, and the same sum in the hands and custody of such other person to be defended and kept, so that such Defendant in such plaint named appear at such same or the then next court held or to be holden as aforesaid, to answer such Plaintiff in the plea in such plaint specified, and if such Defendant at that, and three other courts from thence next severally held or to be holden before the Mayor and Aldermen of the said city as aforesaid, that is to say at four such courts, be or hath been solemnly called and appears not, or hath not appeared, but makes or hath made default, and such defaults according to the custom of the said city be recorded against such person Defendant after such attachment made as aforesaid, such Plaintiff in such plaint named, at every of such four courts in his proper person or by his attorney appearing, and offering himself against such Defendant, in the plea in such plaint specified, according to the custom of the said city, then [364] at the last of the four courts, or at any court held or to be holden as aforesaid, after such four defaults recorded as aforesaid, at the petition of such Plaintiff in such plaint named, made to the said court, it is and hath been used for the said court to command such or any other serjeant at mace and minister of the said court, to warn such other person, according to the custom of the said city, to be and appear at any court afterwards to be holden before the said Mayor and Aldermen as aforesaid, to shew if anything he hath or knows of to say for himself, why such Plaintiff in such plaint named ought not to have execution of such sum so attached as aforesaid, and if at such court such serjeant at mace return and certify to the same court such other person, in whose hands such sum of money is or hath been attached as aforesaid, to be warned according to the custom of the said city, to be and appear in the same court to shew cause as aforesaid, and if such person so warned, being solemnly called at such court, do not appear, or hath not appeared, but makes or hath made default, then it is, and time immemorial as aforesaid hath been used and accustomed for the said

within the city. See also *James v. Williams*, 2 Chit Rep. 438. *Harrington v. Macmorris*, 5 Taunt. 232. 1 Marsh. 33, S. C.; *Nonell v. Hullett*, 4 B. & A. 646. 1 Saund. 67 b. (n.) 5th Ed.]

court to award such Plaintiff to have execution for such sum so attached as aforesaid, to satisfy such Plaintiff the debt in such plaint specified, or so much thereof as such sum so attached extends or hath extended to satisfy, by sufficient pledges to be found and given by such Plaintiff in such plaint named, in the same court, according to the custom of the same city, to restore to such Defendant such sum of money so attached as aforesaid, if such Defendant within a year and a day from thence next ensuing, come, or hath come into the said court holden as aforesaid, and disproves or hath disproved or avoided the said debt in the said plaint mentioned, according to the custom of the said city; and that after such pledges found, and execution had of such sum so in the hands and custody of such other person attached and defended, by the Plaintiff in such plaint named, such other person in whose hands or custody such sum is or hath been attached as aforesaid, is or hath been discharged against such Defendant of the said sum so attached and had in execution as aforesaid, and such Defendant in such plaint named, is or hath been discharged against the said Plaintiff of so much of his debt in such plaint demanded by such Plaintiff, so long as such judgment and execution remain in force and effect, not revoked or disproved by such Defendant. And if such sum of money so attached and defended and in execution, [365] amounts not, nor hath amounted to the whole sum of the debt, in and by the said plaint demanded by such Plaintiff against such Defendant, then such Plaintiff by the custom of the said court is, and time immemorial as aforesaid hath been used and accustomed to have process against such Defendant, according to the custom of the said city, for the residue of his said debt by him in such plaint demanded. And the said Anthony further saith, that the said custom, and all other customs of the said city, obtained and used in the same city, during all the time aforesaid, by authority of a parliament of Richard the Second, late King of England, after the Conquest, holden at Westminster, in the seventh year of his reign, were ratified and confirmed to the then Mayor and Commonalty and Citizens of the said city, and their successors. And the said Anthony further says, that one William Ludlam before the suing out of the original writ of the said Samuel against the said Anthony, to wit, on the 9th day of June, in the year of our Lord 1792, in his own proper person came into the court of our Lord the now King, before the Mayor and Aldermen of the said city, in the chamber of the Guildhall of the said city, situate and being in the parish of Saint Michael Bassishaw in the ward of Bassishaw in London aforesaid, according to the custom of the said city, and then and there in the same court (a) affirmed a certain plaint against the said Samuel, in a plea of debt upon demand for 90l. of lawful money of Great Britain. And the said William Ludlam then and there in the same court, according to the custom of the same city, found pledges to prosecute the said plaint, to wit, John Doe and Richard Roe, and then and there appointed in his stead William Windall his attorney against the said Samuel in the plea of the said plaint, according to the custom of the said city, and by his said attorney then and there pray'd process to be thereupon made to him against the said Samuel, according to the custom of the said city; and it was then and there granted to him, &c. whereupon at the petition of the said William Ludlam, made to the said court by his said attorney, and by virtue of the said plaint it was commanded by the said court to John Furnival, one of the serjeants at mace of the said court, that he according to the custom of the said city should summon by good summons the said Samuel to appear at the same court, so as aforesaid holden before the Mayor and [366] Aldermen of the said city in the chamber of the Guildhall of the city aforesaid, to answer to the said William Ludlam in the plea in the said plaint specified, and that the said John Furnival should return and certify what he should do by virtue of the said precept; and afterwards, to wit, at the same court, the said serjeant at mace according to the custom of the said city returned and certified to the same court that the said Samuel had nothing within the said city of the liberties thereof whereby he could be summoned, nor was he to be found within the same: and thereupon the said Samuel was then and there at the same court solemnly called, and did not appear, but made default: and thereupon afterwards and before the suing out of the original writ of the said Samuel against the said Anthony, to wit, on the same day and year last mentioned, at the same court it was alleged by the said William Ludlam by his said attorney, that the said Anthony

(a) Here it ought to have been averred, that Morris was indebted to William Ludlam within the city.

owed to the said Samuel thirty pounds, seven shillings and ten-pence in monies numbered, as the proper monies of the said Samuel, and then had and detained the same in his hands and custody: and therefore the said William Ludlam by his said attorney prayed process according to the custom of the said city to attach the said Samuel, by the said thirty pounds, seven shillings and ten-pence, so being in the hands and custody of the said Anthony, so that the said Samuel might appear at the next court of our said Lord the King to be holden before the Mayor and Aldermen of the said city, in the chamber of the Guildhall of the said city, to answer the said William Ludlam in the plea in the said plaint specified: whereupon, at the petition of the said William Ludlam, it was commanded by the same court to the said serjeant at mace and minister of the said court, that he according to the custom of the said city, should attach the said Samuel by the said thirty pounds, seven shillings and ten-pence, so being in the hands and custody of the said Anthony as aforesaid, and the same in his hands and custody defend and keep, according to the custom of the said city, so that the said Samuel might appear at a Court of our said Lord the King, to be holden before the said Mayor and Aldermen of the said city, in the chamber of the Guildhall of the city aforesaid, on Tuesday the 12th day of June, in the year aforesaid, according to the custom of the said city, to answer to the said William Ludlam in the plea in his said plaint specified, and that the said serjeant at mace and minister of the said court should then return and certify to the said court [367] what he should do by virtue of the said precept, and the same day was then and there given to the said William Ludlam. And afterwards, and before the suing out of the original writ of the said Samuel against the said Anthony, to wit, at the said court of our said lord the King, holden before the said Mayor and Aldermen of the said city in the chamber of the Guildhall of the said city aforesaid, on Tuesday the 12th day of June in the year aforesaid, the said William Ludlam by his said attorney appeared, and the said serjeant at mace returned and certified to the same court, that he by virtue of the said precept on the 9th day of June in the said year of our Lord 1792, between the hours of one and two o'clock in the afternoon, had attached the said Samuel by the said thirty pounds, seven shillings and ten-pence, so being in the hands and custody of the said Anthony, and the same defended and kept in his hands and custody according to the custom of the said city, so that the said Samuel might appear at the said court of our said lord the King holden before the said Mayor and Aldermen of the said city in the chamber of the Guildhall of the said city, on Tuesday the said 12th day of June in the said year of our Lord 1792, to answer to the said William Ludlam in the plea in his said plaint specified: and thereupon the said Samuel at the same court was solemnly called, and did not appear, but then and there made a first default, which said first default at the same court was recorded according to the custom of the said city; and thereupon according to the custom of the said city, a further day was given by the same court to the aforesaid Samuel to appear at the then next court of our said lord the King, to be holden before the Mayor and Aldermen of the said city in the chamber of the Guildhall of the city aforesaid, on Wednesday the 13th day of June then next following, to answer the said William Ludlam in the plea in his said plaint specified; and the same day was then and there by the same court given to the said William Ludlam in the plea aforesaid, according to the custom of the said city; at which said next court holden before the Mayor and Aldermen of the said city in the chamber of the Guildhall of the city aforesaid, on the day and year last mentioned, the said William Ludlam by his said attorney appeared and offered himself against the said Samuel in the plea in his said plaint specified according to the custom of the said city; and thereupon at the same court the said Samuel was [368] again solemnly called and did not appear, but then and there made a second default, which said second default was recorded at the same court according to the custom of the said city; and thereupon according to the custom of the city, a further day was given by the said court to the aforesaid Samuel, to appear at the then next court of our said lord the King, to be holden before the Mayor and Aldermen of the said city in the chamber of the Guildhall of the city aforesaid, on Tuesday the 14th day of June then next following, to answer the said William Ludlam in the plea in his said plaint specified; and the same day was then and there by the same court given to the said William Ludlam in the plea aforesaid, according to the custom of the said city; at which said next court holden before the Mayor and Aldermen of the said city in the chamber of the Guildhall of the city afore-

said, on the day and year last mentioned, the said William Ludlam by his said attorney appeared and offered himself against the said Samuel in the plea in his said plaint specified, according to the custom of the said city; and thereupon at the same court the said Samuel was again solemnly called and did not appear, but then and there made a third default which was recorded at the same court, according to the custom of the said city; and thereupon according to the custom of the said city, a further day was given by the said court to the aforesaid Samuel to appear at the then next court of our said lord the king, to be holden before the Mayor and Aldermen of the said city in the chamber of the Guildhall of the city aforesaid, on Tuesday the 15th day of June then next following, to answer to the said William Ludlam in the plea in his said plaint specified, and the same day was then and there by the same court given to the aforesaid William Ludlam in the plea aforesaid, according to the custom of the said city; at which said next court holden before the Mayor and Aldermen of the said city at the Guildhall of the city aforesaid, on the day and year last mentioned, the said William Ludlam by his said attorney appeared, and offered himself against the said Samuel in the plea in his said plaint specified, according to the custom of the said city; and thereupon at the same court, the said Samuel was again solemnly called and did not appear, but then and there made a fourth default, which default was recorded at the same court according to the custom of the said city; and thereupon afterwards, and after the said four defaults had been recorded at the said court against the said Samuel in the plea aforesaid, according to the custom of the said city, the said William Ludlam by his said [369] attorney prayed process according to the custom of the said city to warn the said Anthony the garnishee, to be and appear in the court of our said lord the king, to be holden before the Mayor and Aldermen of the said city in the chamber of the Guildhall of the city aforesaid, to shew cause why the said William Ludlam ought not to have execution of the said thirty pounds seven shillings and ten-pence so attached in his hands and custody as aforesaid; whereupon at a court of our said lord the king holden before the Mayor and Aldermen of the said city in the chamber of the Guildhall of the city aforesaid, on Monday the 16th day of July in the year aforesaid, at the petition of the said William Ludlam made in the said court, it was commanded by the same court to the said serjeant at mace, that he according to the custom of the said city, should warn and make known to the said Anthony to be and appear in the court of our said lord the king, to be holden before the Mayor and Aldermen of the said city in the chamber of the Guildhall of the city aforesaid, on Thursday the 19th day of July then next following, to shew cause why the said William Ludlam ought not to have execution of the said thirty pounds seven shillings and ten-pence so attached in his hands and custody as aforesaid, and that the said serjeant at mace should then return and certify to the said court what he should do by virtue of the said last mentioned precept; and the same day was then and there given by the said court to the said William Ludlam, to be there, &c. At which said court holden before the Mayor and Aldermen of the said city in the chamber of the Guildhall of the city aforesaid on the day and year last mentioned, the said William Ludlam by his said attorney appeared, and the said serjeant at mace then and there returned and certified to the same court, that he by virtue of the said last mentioned precept to him directed, and according to the custom of the said city, had warned and made known to the said garnishee to be and appear at this same court, to shew cause as above commanded; and thereupon at the same court, the said Anthony was solemnly called according to the custom of the said city, and did not appear, but then and there made default, whereupon according to the custom of the said city, it was considered by the said court that the said William Ludlam should have execution of his said thirty pounds seven shillings and ten-pence in monies numbered so attached as aforesaid, and that he the said William Ludlam should retain and hold the said thirty pounds seven shillings and ten-pence, in full satisfaction of the [370] like sum of thirty pounds seven shillings and ten-pence parcel of the said debt in the said plaint mentioned, by sufficient pledges to be found and given by the said William Ludlam in the same court according to the custom of the said city, to restore to the said Samuel the said sum of thirty pounds seven shillings and ten-pence, so attached as aforesaid, if the said Samuel within a year and a day from thence next ensuing, should come into the said court, and disprove or avoid the said debt in the said plaint mentioned, according to the custom of the said city. Whereupon the said William Ludlam at the same court, according to the custom of

the said city, found sufficient pledges, to wit Henry Anderson of Three Cranes Wharf, Queen Street, Merchant, and George Mackreth of Billiter Lane, in the city of London, Merchant, citizens of the said city, to restore to the said Samuel the said sum of thirty pounds seven shillings and ten pence, so attached as aforesaid, if the said Samuel within a year and a day from thence next ensuing, should come into the said court holden as aforesaid, and disprove and avoid the said debt, in the said plaint mentioned, according to the custom of the said city. And thereupon the said William Ludlam at the same court, by the consideration of the same court, had execution of the said thirty pounds seven shillings and ten pence, according to the tenor of the judgment aforesaid in that behalf given; as by the record and proceedings thereof now remaining in the chamber of the Guildhall of the city of London aforesaid more fully appears. And the said Anthony in fact says, that the said thirty pounds seven shillings and ten pence so attached as aforesaid, and of which the said William Ludlam bath execution by virtue of the said judgment, are part and parcel of the said several sums of money in the said declaration mentioned, and not other or different; and that the said Samuel Morris the now Plaintiff, and the said Samuel Morris in the said plaint of the said William Ludlam mentioned, are one and the same person, and not other or different; and that the said Anthony Ludlam the now Defendant, and the said Anthony Ludlam in the aforesaid judgment and proceedings mentioned, are one and the same person, and not other or different: and that the said judgment and execution are still in force, and not in the least by the said Samuel disproved or avoided: and the said Anthony farther says, that he the said Anthony at the time of suing out the original writ of the said Samuel, against the said Anthony, was not nor is indebted to the said Samuel, in more money than the said sum of thirty pounds seven shillings and ten pence so attached and [371] taken in execution by the said William Ludlam as aforesaid, by virtue of the judgment aforesaid, and that the said sum of thirty pounds seven shillings and ten pence, in which the said Anthony was indebted to the said Samuel, is the very same and identical sum of thirty pounds seven shillings and ten pence, so attached and taken in execution by the said William Ludlam by virtue of the judgment aforesaid, and this he the said Anthony is ready to verify, wherefore &c.

To this plea there was a special demurrer, for that it amounted to the general issue, and was in other respects, &c.

In support of the demurrer, Watson, Serjt., argued that the plea was bad, because it neither averred that the Defendant in the foreign attachment was indebted to the Plaintiff, nor that the debt arose within the city of London, which were necessary averments. *Lutw.* 977. *North v. Winkell*, 1 *Roll. Abr.* 553. *Latch.* 208. *Hem v. Stubbers*, *Cro. Eliz.* 598. *Paramore v. Pain*, 830. *Coke v. Brainforth*, *Co. Entr.* 139, 140. *Dyer*, 196 b. 3 *Wils.* 267. *Fisher v. Lane*. The custom therefore as stated, was not pursued.

Adair, Serjt., contra. Though it is assigned for cause of demurrer, that the plea amounts to the general issue, yet it is a good plea even to an action on the case, 1 *Roll. Abr.* 552, and indeed the rule is, that whatever confesses and avoids the cause of action, may be pleaded. With respect to the objection, that there is no averment of a debt due from the Defendant in the attachment to the Plaintiff, such an averment is not material, where, as in the present case, there are three parties in the attachment, for the proper point to be put in issue then is, whether the garnishee has money or effects of the Defendant in his hands (*a*). Where indeed the Plaintiff and the garnishee are one and the same person, there it is highly reasonable that he should shew the consideration of the judgment, of which he himself is to have the advantage, by gaining a priority over other creditors.

The Court seemed to admit the distinction made by Adair, between the case of the garnishee being a third person and that of the Plaintiff attaching a debt in his own hands (*b*), as to the necessity of averring the existence of the original debt: but they

(*a*) But though the general question in issue upon an attachment is, whether the garnishee at the time of the attachment is made, or at any time after, had money or goods of the Defendant in his hands, *Bohun, Priv. Londini*, 191, yet the debt from the Defendant to the Plaintiff is also traversable by the garnishee, *ibid.* 208.

(*b*) [But see *Nonell v. Hullett*, 4 B. & A. 649, where Bayley, J., intimated an opinion that a custom to attach a debt in a man's own hands would not be a good custom.]

were clearly of opinion that as the Defendant had stated [372] the custom to be, that "if any person be or hath been indebted &c." it ought to have been strictly pursued, and therefore that the plea was bad for want of such an averment. But leave was given to amend.

CURLING against INNES. Thursday, Nov. 27th, 1794.

A. having privilege of parliament, owes B. a sum of money, for which B. sues him; in consequence of which C. enters into a bond together with A. conditioned for the payment to B. of such sum as B. shall recover in the action against A., in pursuance of the stat. 4 Geo. 3, c. 33. In that action B. obtains judgment, and puts the bond in suit against C. To the action on the bond, C., being under terms by a judge's order to plead issuably, may plead in bar that a writ of error is depending on the judgment against A. (a).

The Plaintiff brought an action in this court for 3000l. against Beckford a trader having privilege of parliament, on his bond; in consequence of which Beckford together with the Defendant Innes and Keighley entered into another joint and several bond for 6000l. in pursuance of the stat. 4 Geo. 3, c. 33, conditioned for the payment to the Plaintiff of such sum as he should recover in that action; and judgment being afterwards entered up against Beckford, the second bond was put in suit, when the Defendant took out a summons for time to plead, and a judge's order was made, allowing him time for that purpose on the usual terms of pleading issuably, rejoining gratis, and taking short notice of trial. Under this order he pleaded after oyer of the bond and condition, "actio non, because he says that although the said Jesse Curling, after the making of the said writing obligatory, to wit, in Hilary term in the year of our Lord 1794 in the court of our lord the King of the bench, at Westminster in the county of Middlesex, by the consideration and judgment of the said court, recovered against the said Richard Beckford in the said action in the said condition of the said writing obligatory mentioned, as well a certain debt of 7000l. as 22l. 15s. which were then and there adjudged to the said Jesse Curling as well for the damages which he had sustained on occasion of the detaining that debt, as for his costs and charges by him in and about his suit in that behalf expended; yet that the record and process of the said judgment, so as aforesaid recovered, with all things touching the same, afterwards, to wit, in Hilary term, in the said year of our Lord 1794, by virtue of a certain writ of our said lord the King for correcting errors, directed to our said lord the King's trusty and well beloved Sir James Eyre, Knt. his Chief Justice of the Bench, at the suit of the said Richard Beckford, were sent and had into the court of our said lord the King before the King himself, the said court then and still being holden at Westminster in the [373] county of Middlesex, and such proceedings were thereupon had in the said court of our said lord the King before the King himself there, that afterwards to wit in Easter term in the said year of our Lord 1794, the judgment of the said Court of our said lord the King of the bench, was by the consideration of the said court of our said lord the King before the King himself, in all things affirmed: and the said William Innes further saith that afterwards, to wit, in Easter term in the said year of our Lord 1794, the record and process of the said judgment, and all things touching the same, were by virtue of a certain writ of our said lord the King for correcting errors, directed to our said lord the King's right trusty and well beloved Lloyd Lord Kenyon Chief Justice assigned to hold pleas before our said lord the King, at the suit of the said Richard Beckford, sent and had before our said lord the King, and the Lords spiritual and temporal in parliament assembled, at Westminster aforesaid, which said last mentioned writ for correcting errors is still depending and undetermined; and the said judgment as yet is neither affirmed nor reversed by the Lords spiritual and temporal in parliament assembled. And this be the said William Innes is ready to verify, wherefore &c."

Adair, Serjt., obtained a rule to shew cause why this plea should not be withdrawn, as not being an issuable plea within the terms of the order, the attorney also making an affidavit, that he verily believed the writ of error was brought merely for delay. Le Blanc, Serjt., shewed cause, contending that the plea went to the merits;

(a) [As to what shall be deemed an issuable plea, see Tidd's Pr. 477, 5th ed.]

this was an action against a surety on a contract of indemnity, and the plea shewed that the debt was not due, which the sureties undertook to pay, for while the writ of error was depending, it could not be said that the debt was really due.

Adair, in support of the rule, said that this plea could not be pleaded in bar, but that if it were pleadable at all, it must be in abatement. Carth. 1. But in fact it was good neither in bar nor abatement, Skinn. 388, for the action was of the same nature with an action of debt on a judgment, and in such an action, the plea was holden to be bad in the authorities cited. It is to be observed too, that one object of the stat. 4 Geo. 3, c. 33, was to prevent delay in the recovery of debts from traders who were members of parliament, and this must be allowed to be a dilatory plea.

[374] The Lord Chief Justice and Heath, J.^(a) seemed at first inclined to adopt Adair's argument, but Rooke, J., being decidedly of opinion that the surety could not be liable, till the money was actually recovered against the principal in the former action, and that while the writ of error was depending the money was not actually recovered,

The rule was discharged.

GUTTERIDGE *against* SMITH. Thursday, Nov. 27th, 1794.

[Disapproved, *Anderson v. Shaw*, 1825, 3 Bing. 291.]

Payment of money into court on the whole declaration, in an action on a bill of exchange, is such an admission of the validity of the bill, as to prevent the necessity of proving the hand-writing of the drawer (a)². Q. Whether after such payment there can be a non-suit (b)?

This was an action brought by the payee against the drawer of two bills of exchange, to which non assumpsit was pleaded, and 3l. paid into court on the whole declaration. At the trial the Plaintiff was unable to prove the hand-writing of the drawer, and therefore, under the direction of the Lord Ch. J., was nonsuited. But a rule was granted to shew cause why the nonsuit should not be set aside and a new trial had, on two grounds: 1. that the payment of money into court on the whole declaration, was such an admission of the cause of action, as superseded the necessity of proving the hand-writing of the drawer of the bills; 2. that after such payment, there could not be a nonsuit.

And now Watson, Serjt., shewed cause. There is no case to prove that the payment of money into court necessarily admits the whole cause of action. In *Cox v. Parry*, 1 Term Rep. B. R. 464, it was stated by Ashhurst J., in the name of the court, that by paying money into court, the Defendant had admitted that the Plaintiffs were entitled to maintain their action on the policy, to the amount of that sum: but that he had admitted nothing more; and the same doctrine was holden by Lord Kenyon in *Baillie v. Cazelet*, 4 Term Rep. B. R. 579. It cannot therefore be fairly urged, that such payment admits the signature of a written instrument. In *Stodhart v. Johnson*, 3 Term Rep. 657, it is observed by Mr. Justice Buller, that it is expressed in the rule for paying money into court, that if the Plaintiff will not accept it with the costs, it shall be struck out of the declaration, and then it is not considered as part of the declaration; and if so the Plaintiff may be afterwards nonsuited. 2 Salk. 597, *Elliott v. Callow*.

[375] Le Blanc, Serjt., *contra*. When money is paid into court generally, it is the same as if it were paid in on every count, and then it admits the whole cause of action, which is the doctrine laid down in *Cox v. Parry*. With respect to *Stodhart v. Johnson*, the only question there related to the costs; and as to *Baillie v. Gazelet*, the money was in that case paid in on a particular count, a practice designed to prevent the advantage which the Plaintiff derives from a general payment on the whole declaration. But in *Watkins v. Towers*, 2 Term Rep. B. R. 275, the Court held, that

(a)¹ Absent Buller, J.

(a)² [Accord. *Guillot v. Nock*, 1 Esp. N. P. C. 347. *Bennet v. Francis*, 2 Bos. & Pul. 556. *Randall v. Lynch*, 2 Campb. N. P. C. 357.]

(b) [So the Plaintiff may be nonsuited after judgment by default against one of two Defendants, *Murphy v. Doulau*, 5 B. & C. 178.]

payment of money into court superseded the necessity of the proof which the Plaintiff must otherwise have adduced, and approved of the rule laid down by Mr. J. Buller, at the trial of the cause, that the payment of money into court was an admission of the contract, and therefore that it was not necessary to prove the deed. And in *Jenkins v. Tucker*, ante, vol. i. 90, Lord Loughborough held, that after paying money into court there could be no nonsuit.

LORD CHIEF JUSTICE EYRE. Though I feel some difficulties in this case, I am not sorry that the discussion of it has taken place, as it may answer the purpose of informing the practisers what the effect is of paying money into court, and may serve to correct an extravagant notion that has prevailed, that after such payment there can be no nonsuit. If this were true, it would reduce the state of the cause after money were so paid in to that of a mere writ of inquiry. But I hold that after payment of money into court there may be a nonsuit, judgment as in case of a nonsuit, a demurrer to evidence, a plea puis darrein continuance, in short, that the cause goes on substantially in the same manner as if the money had not been paid in at all. In the case which was decided in this court (a)¹, Lord Loughborough appears to have been of opinion that after payment of money into court there could be neither a demurrer to evidence, nor a nonsuit. But the rest of the court do not seem to have concurred with his Lordship in that opinion; and my Brother Heath, who tried the cause a second time, notwithstanding the money was paid into court on the whole declaration, directed the jury to confine their attention to the funeral expences, and rejected the other evidence, being of opinion that the debts of the deceased, which the Plaintiff had paid in the absence of the husband, could not be recovered. [376] Yet it is difficult to say, that money paid in generally shall be applied to one part of the demand, and not to another. So in the case in the King's Bench on the policy of insurance (a)², though the Court held that by paying money into court the cause of action was admitted to a certain extent, yet the Defendant was permitted to object to the policy itself, and the Plaintiff did not recover. But in the other case (b), when the Plaintiff was going to prove the deed, my Brother Buller thought it not necessary, as he held that the paying money into court was an admission of the whole contract, and the Court decided according to that opinion. It appears therefore on the authorities, to be loosely and uncertainly stated what the real effect is of paying money into court, and there is nothing to shew that the cause is not, in all material respects, in the same situation after payment as before. It is indeed an act which affords evidence of the ground of action, and so far it ought to be admitted, and no farther; as for instance, in an action on a promissory note for 20l., the payment of 5l. into court would have the same effect as if 5l. were paid on the note before action brought, and would afford a just inference for the jury to draw of the existence of a debt. But I have very great doubts whether it ought to go so far as to admit written instruments so as to supersede the necessity of proving them, and all other circumstances which depend on parol evidence, for I cannot distinguish between writings and other circumstances which constitute the ingredients of the demand; if it be an admission of the one, it seems also to be an admission of the other. The practice of paying money into court on particular counts, removes the perplexity in great measure, because in that case there is room to distinguish the specific demand which the Defendant means to admit. But still there is a difficulty remaining, how far the payment is evidence of the whole ground of action.

HEATH J.(c). I have looked into the books, in order to discover the origin of this proceeding of paying money into court, but without being able to fix the period of its commencement though I think it highly probable that it took its rise early in the present century (a)³. At that time the statute 4 Anne c. 16, was passed, the 13th section of which enacts, that if at any time, pending an [377] action on a bond with a penalty, the Defendant shall bring into the Court, where the action shall be depending, the principal, interest and costs, the money so brought in shall be taken to be in

(a)¹ *Jenkins v. Tucker*, ante, vol. i. 90.

(a)² *Cox v. Parry*, 1 Term Rep. B. R. 464.

(b) *Watkins v. Towers*, 2 Term Rep. B. R. 275.

(c) Mr. J. Buller was absent.

(a)³ ["I remember the time when paying money into court was not an admission of any thing." Per Sir J. Mansfield, *Rucker v. Palsgrave*, 1 Campb. N. P. C. 558.]

full satisfaction and discharge of the bond. Now it appears to me that from the equity of this statute, extended to simple contracts, the practice now in use of paying money into court arose, being designed to protect a Defendant against a litigious Plaintiff, by giving him the advantage of a tender, when he is in fact too late to make one. If the money be taken out of court, it operates as payment of so much; if it be not taken out, it operates as a tender. Coming in lieu of a tender, it has all the effect which a tender would have had, and it is clear that after a tender the Plaintiff cannot be nonsuited (*b*). So in the present instance I am of opinion that the payment of money into court had the effect of admitting the hand-writing of the drawer of the bills, so as to prevent a nonsuit.

ROOKE, J. Whether the payment of money into court be an admission of the validity of a written instrument, seems to me to depend on the nature of the instrument itself. If it be paid in on a promissory note, as for instance 10l. on a note for 50l., it is an admission that the Defendant owes the Plaintiff so much by virtue of that note, and therefore it admits the note itself, though not the whole sum demanded (*c*). So on a policy of insurance, where the Plaintiff goes for a total loss, though it may admit the policy itself, yet it does not admit that the Defendant is liable for more than the sum paid in. The principle which governs other payments of money, seems to be the same as that which respects payment of money into court, viz. that where there are several demands, the party paying may apply the money to whichever debt he thinks proper, but if he does not, the receiver may so apply it. *Goddard v. Cor*, Bull. N. P. 174. So a Defendant paying money into court, may, if he pleases, apply it to a particular count; and if he does not, but pays it in generally, then the Plaintiff may make the application (*a*)¹. In this case it was in the Plaintiff's power to apply the money to the particular count on the bills of exchange, and being so applied, it seems to admit that the Defendant signed them.

Rule absolute for a new trial.

[378] MELLISH AND ANOTHER *against* SIMEON. Wednesday, Nov. 27th, 1794.

A. in England draws a bill of exchange on B. in a foreign country, which after having been negotiated through another foreign country is presented to B. who refuses to pay it, on account of the law of the country in which he resides having prohibited such payment. The drawer is liable for the whole amount of the re-exchange between the different countries (*a*)².

On the 9th of July 1793, two bills of exchange were drawn by Simeon in London, on Boydan and Co. in Paris, one for 35,000, the other for 36,000 livres Tournois, amounting together to 603l. 19s. 10d. sterling, according to the rate of exchange between London and Paris, of 6½d. for the French crown of three livres, and payable to the order of Mellish and Co. who indorsed them in London to Joysset and Co. at Amsterdam. Joysset and Co. indorsed them to Meryolet at Amsterdam, and Meryolet to Androine at Paris. When they were presented for acceptance, Boyd and Co. refused to accept them, but promised that they should be paid when they became due.

In the mean time the French convention passed a decree prohibiting the payment of any bills drawn in any of the countries at war with France, and of course the bills in question were not paid. In consequence of this, they were sent back by Androine to Meryolet at Amsterdam, protested for non-acceptance and non-payment, and at the same time Androine drew another bill on Meryolet for the amount of them at

(*b*) [Accord. *Harding v. Spicer*, 1 Campb. N. P. C. 327. But it is now settled that the Plaintiff may be non-suited after a plea of tender. *Anderson v. Shaw*, 3 Bingh. 290.]

(*c*) [Vide *Mellish v. Allnutt*, 2 M. & S. 106. *Rucker v. Palsgrave*, 1 Campb. N. P. C. 557. 1 Taunt. 419, S. C. *Stovell v. Brewin*, 2 B. & A. 116. *Long v. Greville*, 3 B. & C. 11.]

(*a*)¹ [See *Ribbans v. Crickitt*, 1 B. & P. 264, that payment of money into court is an admission of a legal demand only, and that money so paid cannot be applied towards satisfying an illegal contract; and see *Wright v. Laing*, 3 B. & C. 165.]

(*a*)² [Vide *Pollard v. Herries*, 3 Bos. & Pul. 335. *De Tastet v. Baring*, 2 Campb. N. P. C. 65.]

the rate of 18½ groots for the French crown of three livres, for the re-exchange between Paris and Amsterdam, together with the ordinary charges, which bill Meryolet paid, and was reimbursed by Jeyssset and Co. by compromise between them, at the rate of 18 groots for the French crown, amounting to 905l. 13s. 9d. sterling, for which sum, together with charges at Amsterdam, and the re-exchange between that place and London, making in the whole 913l. 4s. 3d. sterling, Jeyssset and Co. drew a bill on Mellish and Co., which they paid, and took back the former bills, on which they brought the present action against Simeon the drawer, and recovered a verdict for the whole sum of 913l. 4s. 3d. And now Le Blanc, Serjt., moved for a new trial, on the ground that the Defendant was not liable for the loss on the re-exchange. It is true, he said, that the drawer of a bill of exchange undertakes by the act of drawing it that the drawee shall be found in the place where he is described to be, and shall have effects in his hands, but the undertaking does not extend to the case of a prohibition to accept or pay the bill, imposed by the law of a foreign country in which the drawee resides. When a person takes a [379] bill, circumstanced as this was, he must submit to the laws of that country. There was no default in the drawer; he therefore cannot in justice be liable for more than the sum he originally received for the bills, with interest, and the expences of protesting them.

LORD CHIEF JUSTICE EYRE. I see no distinction between this case and the common one of a bill being refused payment. The drawer must pay for all the consequences of the non-payment, and the loss on the re-exchange seems to me to be a part of the damages arising from the contract not being performed. I thought indeed at the trial, that it might be a question whether the drawer were liable for the re-exchange occasioned by the circuitous mode of returning the bills through Amsterdam, but the jury decided it.

BULLER, J. What is the engagement of the drawer of a bill of exchange? He undertakes that the bill shall be paid when due. If it be not paid, it is not necessary for the holder to inquire for what reason it is not paid, and if the holder has been guilty of no default, the drawer is answerable for the amount of the bill; and if he is liable for the bill, he must also be liable for the re-exchange, which is a consequence of the bill not being paid.

HEATH, J., of the same opinion. He who undertakes for the act of another, undertakes that it shall be done at all events.

ROOKE, J., of the same opinion.

Rule refused.

MITCHELL AND OTHERS, Assignees of Robertson, a Bankrupt, *against* COCKBURN, surviving Assignee of Elizabeth Tyler, a Bankrupt. Wednesday, Nov. 27th, 1794.

A. and B. are engaged in a partnership in insuring ships, &c. which is carried on in the name of A., and A. pays the whole of the losses. Such a partnership being illegal by stat. 6 Geo. 1, c. 18, A. cannot maintain an action against B. to recover a share of the money that has been so paid (a).

The facts on which this case arose, were the following:—The two bankrupts were engaged in a partnership for the purpose of insuring ships, &c. which was carried on in the name of Robertson, who, previous to his bankruptcy, had paid a much larger sum for losses than he had received for premiums. One moiety of this sum his assignees claimed to be due to them from Tyler, and it was agreed between them and the assignees of Tyler, that the account should be referred to arbitrators, to ascertain the amount of the demand. The arbitrators awarded 1636l. 13s. 6d. to be due to the estate of Robertson on the score of insurances, and his assignees accordingly petitioned the Lord Chancellor to [380] have that sum allowed them out of the estate of Tyler. Upon which his Lordship made an order that the petitioners should be at liberty to bring such action at law as they should be advised, and that the assignees of Tyler should not set up her bankruptcy in defence of that action.

In consequence of this, the present action was brought, the declaration containing

(a) [Vide *ex parte* Bell, 1 M. & S. 751. *Simpson v. Bloss*, 2 Marsh. 542, and the cases cited post, p. 382, note (e).]

only two counts, the first, for money had and received by the Defendant to the use of the Plaintiffs; the second, on an account stated (*b*), and the Defendant pleaded the general issue.

At the trial the Plaintiffs were nonsuited, the Lord Ch. J. being of opinion that as partnerships in the business of insuring were prohibited by the stat. 6 Geo. 1, c. 18, no action could be maintained on a transaction which arose out of such a partnership, but the point was reserved for the opinion of the court. And now, a rule having been obtained to shew cause why the nonsuit should not be set aside, *Le Blanc* and *Heywood*, Serjts., shewed cause. This action is brought in affirmance of the contract of partnership, but such a contract is declared to be void by the stat. 6 Geo. 1; no action therefore which goes to affirm it can be supported. Upon this principle Lord Kenyon decided a similar case at *Nisi Prius*, *Sullivan v. Greaves*, Sittings after East. 29 Geo. 3, *Park's Law of Insurance*, 8. There is a difference indeed where a third person pays money for two others who are jointly engaged in an illegal transaction, and one of them with the consent of the other, repays the whole to that third person, as was the case in *Petrie v. Hannay*, 3 Term Rep. B. R. 418, where the party who had so repaid the money, recovered a moiety for his companion, as having paid a debt due from him. But even there Lord Kenyon doubted whether the action could be maintained. And in *Faikney v. Reynous*, 4 Burr. 2069, the Court proceeded on the ground, that the transaction was fair as between the parties to the bond, money being lent by one man to another to pay the differences of stock transactions.

Adair and Cockell, Serjts., contra. The object of the statute 6 Geo. 1, c. 18, was to give protection to the insuring companies, and to prevent a competition between them and any other persons who might choose to insure in partnership. Such a part-[381]-nership therefore as the statute meant to prohibit, could only be an open and ostensible one, which might gain credit in opposition to the companies. But here only one party appeared as the insurer, on whose single security the insured relied. And this sort of contract has nothing in it immoral or against public policy; it bears therefore no analogy to the instances of gaming and stock-jobbing.

LORD CH. J. EYRE. This question depends on the true construction of the statute 6 Geo. 1, c. 18. By that act the two corporations became the purchasers of the exclusive privilege of insuring on a joint stock, and to give effect to that privilege all other persons are prohibited from insuring on a joint stock. Now it appears clearly on the first view, that the provisions of the act are at an end, if a person by merely insuring in his own name can have the advantage of a joint capital, which the act meant to prohibit. This partnership therefore is contrary to the spirit of the act; and it is also contrary to the letter of it. The 12th section directs, that all societies and partnerships (except the two corporations) shall be restrained from under-writing any policy, or making any contract of assurance, and if any person acting in such society or partnership shall presume to underwrite any such policy, or make any contract of assurance, every such policy shall be void, and the sum under-written shall be forfeited. This does not at all go to confine the meaning of the legislature to an avowed partnership, insuring publicly in their own names; but the object is to prevent any other joint stock being embarked in insuring. This being so the consequence unavoidably is, that no contract can arise directly out of such a proceeding, so as to be the foundation of an action. The cases which have been cited were one step removed from the illegal contract itself, and did not arise immediately out of it (*a*). Thus in *Faikney v. Reynous* (4 Burr. 2069), the bond was given to secure the repayment by a third person, of his proportion of the money paid by the Plaintiff in stock-jobbing. So in *Petrie v. Hannay* (3 Term Rep. B. R. 318) the money had been paid to the broker by *Keeble*, and the action was brought to reimburse his executors for the Defendant's share. In that case indeed Lord Kenyon seemed to be of opinion that the action could not be maintained, and it was decided expressly on the authority of *Faikney v. Reynous* ([3 Taunt. 12]). But perhaps it would have been better, [382] if it had been decided otherwise, for when the principle of a case is doubtful, I think

(*b*) As there was no count in the declaration for money paid, and no account in fact stated, the Plaintiffs would probably have been nonsuited, though the objection to the principle of the action had not been made.

(*a*) [*Vide Ex parte Bell*, 1 M. & S. 756. *Simpson v. Bloss*, 2 Marsh. 546.]

it better to overrule it at once, than build upon it at all (e). But be that as it may, it is sufficient now to say, that those cases go one step short of the direct illegal transaction, but that the present case arises immediately out of it.

HEATH, J. (f). I am of the same opinion. It seems to me that the object of the statute would be totally defeated, if it were to extend only to those policies in which the names of all the partners were inserted. It expressly declares, that every policy subscribed by any person acting in a partnership shall be absolutely null and void, though it may be true that the party subscribing shall be estopped from setting up a secret partnership, to defeat a bona fide insurance. And the reason is obvious; trade is carried on according to the capital employed. Now the insurances would run to the extent of the capital, in whatever name the policy might be subscribed. The object therefore of the statute was to prevent the employment of a joint capital, which would afford the greatest competition with the established corporations. With respect to the case of *Petrie v. Hannay*, one judge there hinted that his opinion might have been different if the question had been *res integra*. But it is sufficient to rest on the opinions of the two other judges, that in the case of partners in illegal contracts, if one pays the whole partnership debt without the express consent and direction of the other, he cannot acquire a right of action against the other. So in the present case, as it does not appear that the payments were made by Robertson at the request or by the express direction or consent of Tyler, this action cannot be maintained.

ROOKE, J. As to the second point, I agree that if the contract be illegal, no action can arise out of it. But as to the first question, whether this contract were illegal or not, I must confess I had great doubts, till I heard the opinions of my Lord Chief Justice and my Brother Heath, and also the case cited from Park's Insurance, for it seemed to me that the statute only meant to prohibit insurances where both parties knew that a partnership existed, but not where there was a sleeping partnership. But I was very much struck with the observations of my Brother Heath, that the extent of the insurance would be in proportion to the capital employed, and if there were an increased capital, there would be an increased rivalry with the corporations. Whatever doubts therefore I had, I submit to the authority of the other judges.

Rule discharged.

[383] TAYLOR against PARKINSON. Thursday, Nov. 28th, 1794.

It is not necessary that a warrant of attorney to confess a judgment should be read over to the party giving it (a).

This was a motion to set aside a judgment entered up on a warrant of attorney, on the ground that the warrant was not read over to the party who gave it, according to a rule 14 and 15 Geo. 2, stated in Imp. Pract. C. P. 471, 4th edition.

BULLER, J. asked the prothonotary if he had ever known the rule acted upon, as it appeared to him to be a very absurd and inconvenient one, and not productive of any good consequence, for if there were fraud, it was still open to the party to apply to the court, and there was no such rule in the court of King's Bench. The prothonotary answered, that he never knew an instance of a judgment being set aside on that rule. Upon which the court said, that it would be proper to make the practice in this respect conformable to that of the King's Bench, and therefore that the old rule of the 14 and 15 Geo. 2, was no longer to be considered as in force.

Rule refused.

(e) [The cases of *Faikney v. Rymous* and *Petrie v. Hannay* have been repeatedly doubted. See *Webb v. Brooke*, 3 Taunt. 12. *Booth v. Hodgson*, 6 T. R. 409. *Aubert v. Maze*, 2 Bos. & Pul. 374. *Ex parte Mather*, 3 Ves. 373. *Cunnam v. Bryce*, 3 B. & A. 183.]

(f) Absent Mr. J. Buller.

(a) [Vide Tidd's Pr. 595, 8th Ed.]

HENSCHEN *against* GARVES. Thursday, Nov. 28th, 1794.

A foreign seaman having brought an action for his wages, against a foreigner, the court refused to compel him to give security for costs, on account of his being on a voyage on board an English ship (a)¹.

The Plaintiff who was a foreign seaman, having brought an action for his wages against the Defendant who was a foreign owner of a Swedish vessel and holden him to bail, a rule was granted to shew cause why the proceedings should not be staid, till the Plaintiff gave security for costs, on an affidavit which stated, "That the above named Plaintiff Peter Henschen is a foreigner, and as this deponent hath heard and believes does not reside in this kingdom, but at this time is in a ship or vessel on a voyage up the Baltic Sea. And this deponent farther saith, that he verily believes the said Plaintiff hath not any goods or chattels, lands or tenements within this kingdom" (b).

Adair, Serjt., in shewing cause, stated that it was an English ship on board which the Plaintiff was, and that he was under articles to return to England; that according to the practice of [384] the court, the circumstance of his being a foreigner was not alone sufficient to induce the court to require such a security.

Williams, Serjt., on the other hand contended, that as the Plaintiff had withdrawn himself from the jurisdiction, and was out of the reach of the process of the court, he ought not to be permitted to harass the Defendant with an action, unless he gave a security to pay the costs in case he did not succeed. But

The LORD CHIEF JUSTICE and HEATH, J.(c), held that it would be highly impolitic in the present state of public affairs, when men were wanted in the navy, to throw difficulties in the way of a foreign sailor recovering his wages in our courts, who was serving on board an English ship, and who if he were compelled to give security, would probably not be able to recover them at all, and therefore that the security ought not to be required.

But ROOKE, J., was of opinion, that as the Plaintiff was a foreigner, not domiciled in England, and out of the jurisdiction of the Court, the circumstance of his being on board an English ship was not a sufficient reason to exempt him from giving the security.

Rule discharged (a)².

End of Michaelmas Term.

[385] In the vacation after Easter term, Mr. Justice Lawrence resigned his seat in this court, and was appointed one of the Judges of the Court of King's Bench, in the room of Mr. Justice Buller, who succeeded him in this Court.

In Trinity term Samuel Heywood, Esq., and John Williams, Esq., both of the Inner Temple, were called to the honourable degree of Serjeants at Law.

(a)¹ [Vide ante, 118, note (1).]

(b) This is an exact copy of the affidavit.

(c) Absent Buller, J.

(a)² Vide ante, 118, *Ganesford v. Levy*, and vol. i. 106, *Parquet v. Eling*, and *Porrier v. Carter*, from which it will appear, that the decisions of the court respecting the Plaintiff giving security for costs, which have taken place since the commencement of these Reports, have not been altogether uniform. But the practice seems now to be, that the fact of the Plaintiff being a foreigner, or being resident abroad, is of itself a ground upon which a rule to shew cause will be granted, but that such rule will not be made absolute, unless some special circumstances appear to induce the court to order the security: and if the rule be made absolute, that it will be on condition of the Defendant making such reasonable admissions as may be required.

[386] CASES ARGUED AND DETERMINED IN THE COURT OF COMMON PLEAS AND EXCHEQUER CHAMBER, IN HILARY TERM, IN THE THIRTY-FIFTH YEAR OF THE REIGN OF GEORGE III.

CULLEY *against* SPEARMAN. Wednesday, Feb. 4th, 1795.

One tenant in common cannot avow alone for taking cattle damage-feasant, but he ought also to make cognizance as bailiff of his companion (a)¹.

Replevin for taking cattle. Avowry, that John Addison was seised in fee of seven undivided eighth parts of the locus in quo, and demised the said seven undivided eighth parts to the Defendant, who took the cattle damage-feasant, &c.

To which there was a special demurrer, shewing for causes, "That the Defendant hath not set forth or disclosed in or by that avowry, who is seised in fee of the other undivided eighth part of the said place, in which, &c. nor shewn nor deduced any title to the same, nor hath avowed under any title deduced to himself of that eighth part of the said place, in which, &c. nor made cognizance under any person seised or possessed of such eighth part as tenant in common with himself as he ought to have done, and for that, he hath avowed the said taking of the said cattle in his own right only, whereas he ought also to have made cognizance as bailiff of [387] the person or persons seised or possessed of the said other undivided eighth part of the said place, in which, &c."

Le Blanc, Serjt., in support of the demurrer. It is a clear rule of law, that tenants in common must all join in actions concerning the personality. Co. Lit. 198 a. Now an avowry stating that the cattle were taken damage-feasant, is in the nature of a declaration in trespass for the injury done, and within the principle of the rule: the avowant is quasi Plaintiff, and is intitled to damages, if the verdict be in his favour. There may be several avowries for rent, because that is in the realty, but not for damage-feasance, which is in the personality. In 1 Roll. Abr. 220, pl. 14, it is said, that a tenant in common cannot avow the taking of cattle damage-feasant without making himself bailiff or servant of his companion, and the same point is laid down, Sir W. Jones, 253. Thel. Dig. 27.

Clayton, Serjt., *contra*. The case in Sir W. Jones is the same as is stated in 1 Roll. Abr. 220, viz. *Lamshud v. Leate*, and is also to be found in 3 Vin. Abr. 388. But it is directly contradicted by that of *Willis v. Fletcher*, Cro. Eliz. 530. It by no means follows, that tenants in common must join in an avowry for an injury to the land, because they must do so in a personal action. They are several in every point except in their possession, and are like commoners who, though they have an unity of possession, may yet make several avowries for an injury to the common. 1 Roll. Abr. 405, pl. 5. 9 Co. 112 b. Yelv. 129. 4 Burr. 2426. Tenants in common must make separate demises in ejectment, Show. 342, *Moore v. Fursden*. 2 Wils. 232, *Heatherley v. Weston*. So because the freehold is several, one may enfeoff, but cannot release to the other, whereas, where the freehold is joint as between joint-tenants, one may release to, but cannot enfeoff the other, Co. Lit. 200 b. It is not a necessary consequence, that because they must join in an action, they must do the same in an avowry. If they lease their tenements to another, they must join in an action of debt for the rent, but must make several avowries for it, Co. Lit. 198 b. In *Ward v. Everard*, Carth. 340. 1 Salk. 389. 1 Lord Raym. 422, it was admitted, that tenants in common, grantees of a rent charge, could not be joined in a cognizance for the rent; it is objected, that one ought to shew himself bailiff to the other. But whether bailiff or not is traversable, Bull. N. P. 55, and suppose one should be hostile to the other, conspire with the owner [388] of the cattle, and not consent to his companion being his bailiff, the other could not prove himself bailiff, and then what remedy could he have, if he could not avow alone?

BULLER, J.(a)². My Brother Clayton has made more of his part of the argument than I thought could have been made of it: but the authorities on the other side are too strong to be got over. Of the two contradictory cases, the one in Cro. Eliz. and

(a)¹ [But in an avowry for rent, which is a demand in the realty, tenants in common must avow for their separate portions, *Harrison v. Barnby*, 5 T. R. 249.]

(a)² Absent the Lord Chief Justice.

the other in *Sir W. Jones*, there cannot be a doubt which ought to prevail. That in *Cro. Eliz.* was decided quite on a different point : but there, the two judges, who were of contrary opinions to *Walmsley*, held expressly, that an avowry was in the nature of an action. If so, there is an end of the question, for it is admitted that in an action of trespass and other actions which concern the personalty, all the tenants in common must join. In the case cited by my Brother *Le Blanc* in *Sir W. Jones*, all the court held, that they must join in an avowry for damage-feasant, and as that was the very point on which it turned, and as it is of a much later date than the case in *Cro. Eliz.* we must be bound by it. But independent of authorities, let us see how my Brother *Clayton's* reasoning will bear him out : he says, the interests of tenants in common are several in every respect, except what regards their possession ; but by that, he admits the whole argument on the other side ; this case arises from an injury to the possession, and the taking cattle damage-feasant is taking a pledge for satisfaction for that injury. Then he compares this to the case of commoners, who may bring several actions for disturbing their right of common, but that instance is not applicable to the present case. Commoners have not one estate, but each has a different estate within the manor ; and the property of the waste, on which they have common, is in the lord. An injury therefore to their several rights of common, is totally different from an injury to the land, in which tenants in common have but one estate. As to the supposed hardship, if two tenants in common were hostile to each other, and the one were obliged to avow as bailiff of the other, without obtaining the other's consent that it is incident to the nature of the estate ; if he dislikes his situation, he may put an end to the tenancy by a writ of partition. With respect to the case of *Ward v. Everard*, there the rent was expressly granted to be paid in several portions to the grantees who has several titles, [389] and each a power of distress reserved in the deed. That case, therefore, does not contradict the rule, that in an avowry concerning the personalty, all the tenants in common must join.

HEATH, J., of the same opinion. It is a matter of necessity, and for the sake of justice, that both the tenants in common should join, for if one were to distrain without the other, as there could not be a double satisfaction for the same injury, the other would have no remedy.

ROOKE, J., of the same opinion. I think the authority of the case cited from *Sir W. Jones* outweighs that in *Cro. Eliz.* Tenants in common have been improperly, in the argument, compared to commoners, who are so called, not from any community of interest between themselves, but because they have a right to pasture on the waste in common with the lord.

Judgment for the Plaintiff.

But leave was given to amend.

TERRY AND ANOTHER *against* DUNTZE, BART. Wednesday, Feb. 4th, 1795.

A. covenants to build a house for B. and finish it on or before a certain day, in consideration of a sum of money, which B. covenants to pay A. by instalments as the building shall proceed. The finishing the house is not a condition precedent to the paying the money, but the covenants are independent. A. therefore, may maintain an action of debt against B. for the whole sum, though the building be not finished at the time appointed (a).

This was an action of debt, and the declaration stated, that by certain articles of agreement made on the 25th of March 1789, between *Sir George Yonge, Bart.* the said *Sir John Duntze* (the Defendant), one *Henry Reed*, and one *Thomas Southcomb*, and the Plaintiffs, the said Plaintiffs in consideration of the sum of 3800*l.* to be paid as hereinafter mentioned, did jointly and severally covenant with the said *Sir George Yonge, Sir John Duntze, Henry Reed, and Thomas Southcomb*, and each of them, that the said Plaintiffs or one of them would at their own proper costs and charges finding all materials whatsoever, and with the best materials of every kind, and in a good substantial and workmanlike manner, build, erect, and finish a certain building

(a) [*Vide Heard v. Wadham*, 1 East, 681, *Duke of St. Alban's v. Shore*, ante, vol. i. p. 270.]

for a manufactory at Ottery Saint Mary, in the County of Devon, according to certain drawings and plans, and would erect the said building according to such rules, and in such manner as by the particulars thereof thereunder written were mentioned and specified; and also that the said building, including the wheat case, to be adjoining or within the same, should be in every respect finished and completed, on or before the 29th day of September then next. In [390] consideration whereof they the said Sir George Yonge, Sir John Duntze, Henry Reed and Thomas Southcomb, covenanted to pay the 3800*l.* in the following manner, that is to say, the sum of 1266*l.* 13*s.* 4*d.* as soon as the second floor should be laid, the further sum of 1266*l.* 13*s.* 4*d.* as soon as the fourth floor should be laid, and the remaining sum of 1266*l.* 13*s.* 4*d.* as soon as the whole building should be covered in, and fully finished and completed, and the same building should be surveyed and approved of by such persons as should be by the said Sir George Yonge, Sir John Duntze, Henry Reed and Thomas Southcomb, or either of them, appointed to examine the same for that purpose, within one month after the same should be so as aforesaid finished and completed. And the said Sir George Yonge, Sir John Duntze, Henry Reed and Thomas Southcomb, did, and each of them did also agree, to advance and pay unto the workmen and labourers employed by the said Plaintiffs in erecting the said building, such sum or sums of money weekly as might be necessary for their weekly wages or subsistence, the same to be deducted and allowed out of the instalment, portion or share of the said 3800*l.* which should be by them next paid, according to the covenant and agreement aforesaid, relating thereto; and also to pay unto the said Plaintiffs at the time of paying the last of the three several sums of 1266*l.* 13*s.* 4*d.* in manner hereinbefore mentioned, the further sum of 150*l.* for freight and carriage of materials, travelling expences for workmen and labourers, and all other incidental charges, not included in the particulars thereunder written; provided always, and it was thereby also agreed between the said parties thereto, and each and every of them jointly and severally, that if the foundation should not prove good, so as that it should be necessary to put in sleepers or a greater depth of brick-work than was described in the plans annexed, and the particular thereunder written, then the said Plaintiffs should be paid in addition to the several sums above mentioned as extraordinary work, but in a reasonable proportion, according to the extent of such extraordinary work, provided also, that neither such extraordinary work, nor any other variation which might be agreed on in the course of the carrying on the building, should make void that agreement, but the same should be binding and valid, notwithstanding such variation or extraordinary work as aforesaid, and the same should be allowed for or [391] deducted, at a proportionable estimate to the whole of the contract money, &c. It was then averred that the Plaintiffs after making the articles and before exhibiting their bill did at their own proper costs and charges, finding all materials whatsoever, and with the best materials of every kind, and in a good, substantial and workmanlike manner, build, erect and finish the said building, in the said articles of agreement mentioned, and so thereby agreed to be erected and built, for a manufactory as aforesaid, together with such wheat case as aforesaid, according to the said drawings, sections and plans delineated in the two several papers thereto annexed as aforesaid, and also according to such rules and in such manner as by the particular thereof thereunder written, were and are mentioned and specified as aforesaid, except as is herein-after mentioned; and that the said building including such wheat case aforesaid, would have been in every respect finished and completed by them the said Plaintiffs, on or before the twenty-ninth day of September next, after the making of the said articles of agreement, according to the tenor and effect of the said articles, but the said Plaintiffs further said, that in erecting and building the said manufactory and wheat case, they the said Plaintiffs by the direction, and at the special instance and request of the said Sir George Yonge, Sir John Duntze, Henry Reed and Thomas Southcomb, made and caused to be made divers alterations and variations therein, and in many respects deviated from the said drawings, sections, plans, particulars and rules, in the said articles of agreement mentioned, and were thereby, and in consequence thereof, and without any neglect or default of the said Plaintiffs not only hindered and prevented from finishing and completing the same, upon or before the said twenty-ninth day of September next after the making of the said articles of agreement, but also forced and obliged to do and perform certain extraordinary work, in and about the said building and wheat case, over and besides what

was originally designed and stipulated for as aforesaid (a)¹. It was then averred that a surveyor was appointed who surveyed and approved of the building and the extraordinary work, &c. and that the Plaintiffs reasonably deserved to have the sum of 7059l. 1s. 9½d. exclusive of the sum of 150l. as a farther allowance for divers expences not included in the particular written under the articles of agreement, according to the estimate of the surveyor, &c. and the breach assigned was the non-payment of any of the sums of money in the articles of agreement specified, &c.

[392] There were also counts for work and labour, money paid, and on an account stated.

To the first count there was a general demurrer, and to the others nil debet was pleaded.

In support of the demurrer, Le Blanc, Serjt., argued, that as the Plaintiffs had positively agreed to complete the buildings on or before the 29th of September, it was necessary to shew that they were completed on or before that day. The excuse which is alleged, namely, that they made alterations deviating from the plan, by the direction of the Defendant, and were therefore prevented from finishing the buildings within the time, is not tantamount to a performance. The original undertaking was by deed, and cannot be dispensed with by the simple agreement of the parties. Thus if a bond be conditioned to perform an award, provided the arbitrator make his award on or before a certain day, and afterwards both parties agree that the time shall be enlarged, yet unless the award be made within the time mentioned in the condition, the bond is void. *Brown v. Goodman*, 3 Term Rep. B. R. 592, in notis. *Little v. Holland*, ibid. 590.

The counsel on the other side was stopped by

BULLER, J.(a)². The only question in this case is, whether the covenants were dependent, and whether the completing the buildings was a precedent condition. Now it is a rule long established in the construction of covenants, that if any money is to be paid before the thing is done, the covenants are mutual and independent. It is accordingly laid down by Lord Holt in *Thorpe v. Thorpe* (b), that "if a day be appointed for payment of the money, and the day is to happen before the thing can be performed, an action may be brought for the money before the thing be done: for it appears the party relied upon his remedy; and intended not to make the performance a condition precedent;" and he cites the Year Book, 48 Ed. 3, 2, 3, 7 Co. 10 b. *Ughtred's case*, 1 Vent. 147, and 1 Sand. 319. The case in the Year Book, 48 Ed. 3, 2, 3, is inaccurately stated by Lord Coke in *Ughtred's case*, to be "that Sir Ralph Tolecler covenanted with Sir Richard Pool to serve him with three esquires of arms in the war with France, and Sir Richard covenanted therefore to pay him forty-two marks, and [393] that each party had equal remedy, one for the service, and the other for the money." But it appears in the Year Book, that the covenant was that half the money was to be paid in England before they went to France: the principle therefore of that case agrees with the doctrine of Lord Holt in *Thorpe v. Thorpe*, as is observed by him 12 Mod. 461. So also in *Pordage v. Cole*, 1 Saund. 319, where there was an agreement by the Defendant to give a certain sum to the Plaintiff for his lands and house, &c. to be paid at a fixed period, and only five shillings of the purchase-money was advanced at the time of making the agreement, an action on the agreement was holden to lie for the residue amounting to 774l. 15s. without shewing that he had either made or tendered a conveyance of the lands. Now let us apply this principle to the present case. The Plaintiffs covenant to finish and complete the buildings on or before the 29th of September then next; in consideration of which the Defendant covenants to pay 3800l. by instalments, viz. a certain sum when the second floor should be laid, a further sum when the fourth floor should be laid, and the remainder of the money when the whole should be covered in and finished. By the terms of the contract then two several sums of money were to be paid, before the thing to be done was done. The Plaintiffs therefore were clearly intitled to their action for the money without averring performance, and the Defendant to his remedy on the covenants.

(a)¹ [Vide *Pepper v. Burland*, Peake's N. P. C. 103. *Robson v. Godfrey*, Holt's N. P. C. 236.]

(a)² Absent the Lord Ch. J.

(b) 1 Salk. 170. 1 Lord Raym. 662. Comyn's Rep. 98, and more at length 12 Mod. 455.

HEATH, J., of the same opinion.

ROOKE, J., of the same opinion.

Judgment for the Plaintiff.

FITCH *against* RAWLING, FITCH AND CHATTERIS. Wednesday, Feb. 4th, 1795.

[Referred to, *Mayor of London v. Cor*, 1867, L. R. 2 H. L. 274; *Warrick v. Queen's College, Oxford*, 1870-71, L. R. 10 Eq. 129; L. R. 6 Ch. 716. Followed, *Hall v. Nottingham*, 1875, 1 Ex. D. 3. Referred to, *Bourke v. Davis*, 1889, 44 Ch. D. 120. Discussed, *Edwards v. Jenkins*, [1896] 1 Ch. 311. Referred to, *Mercer v. Denne*, [1904] 2 Ch. 550; [1905] 2 Ch. 586.]

A custom for "all the inhabitants of a parish to play at all kinds of lawful games, sports and pastimes (a) in the close of A. at all seasonable times of the year, at their free will and pleasure," is good. But a similar custom, "for all persons for the time being, being in the said parish," is bad.

This was an action of trespass for breaking and entering the Plaintiff's close at Steeple Bumstead in Essex, and playing there, with divers other persons to the Plaintiff unknown, at a certain game called cricket, and other games, sports, and pastimes, and in so doing, &c.

Pleas. 1st. Not guilty by all the Defendants. 2d. By Chatteris, "That there now is and from time whereof, &c. hath been a certain ancient and laudable custom used and approved of in [394] the said parish, that is to say, that all the inhabitants for the time being of the parish aforesaid, have during all the time aforesaid, used and been accustomed to have, and of right ought to have had, and still of right ought to have the liberty and privilege of exercising and playing at all kinds of lawful games, sports and pastimes, in and upon the said close in which, &c. every year, at all seasonable times of the year at their free will and pleasure;" he then averred, that at the several times when, &c. he was an inhabitant of the said parish, and at those times, being seasonable times, he entered the locus in quo, and played at cricket, &c. The third plea, by Rawling and Fitch, stated the custom to be for "all persons for the time being, being in the said parish, to have the liberty and privilege of exercising and playing at all kinds of lawful games, sports and pastimes, in and upon the locus in quo at all seasonable times, &c." and justified under that custom.

The replication to each plea traversed the customs alleged, and on the traverses issues were joined, and a verdict found for the Defendants. And now Le Blanc, Serjt., shewed cause against a rule to arrest judgment (b). There is no good objection to the customs stated on this record, and therefore no ground for arresting the judgment. It is laid down in *Gateward's case*, 6 Co. 59 b. that though a custom for the inhabitants of a place, as such, to take an interest or profit in the soil of another is bad, yet a custom for them to have an easement in another's soil is good. In *Abbot v. Weekly*, 1 Lev. 176, a custom for the inhabitants of the vill to dance in the Plaintiff's close for their recreation, was holden to be a good one. Here the case is stronger than that of *Abbot v. Weekly*, the custom being alleged to be, to play at lawful games and sports at all seasonable times. As to the custom in the second plea, there is no material difference between the inhabitants and persons being in the parish. The claim of both is merely for an easement, and there seems to be no more ground to object to all persons being in the parish enjoying the easement, than to all the King's subjects passing over a highway, in the soil of another.

(a) [But see *Millechamp v. Johnson*, Willes, 205 (n), where the Court were of opinion, that a similar custom extending to any rural sports was too general and uncertain. See also *Bell v. Wardell*, Willes, 202, and *Steel v. Houghton*, ante, vol. i. p. 51. *Rex v. Ecclesfield*, 1 B. & A. 360.]

(b) When the rule was moved for, Mr. Justice Buller observed that as there was a verdict for the Defendants on the whole record, it was useless to move in arrest of judgment, for as it appeared that they had not committed the trespasses complained of, it was immaterial what became of the special issues. The postea therefore was amended by entering a verdict for the Plaintiff on the general issue, and for the Defendants on the others.

[395] Bond and Heywood, Serjts., in favour of the rule. Neither of the customs stated on this record can be supported. With respect to the first, a custom for all the inhabitants of a parish to have the liberty of exercising and playing at all kinds of lawful games at seasonable times of the year, at their free will and pleasure, is bad. There is great uncertainty in the description of inhabitants; it includes all servants, visitors, women and children: it depends neither on time nor estate: their interest is transitory, and not in general noticed by the law. There is a jealousy therefore entertained by the law, of the inhabitants of particular districts claiming rights in the soil of others. They cannot claim by prescription, but only by custom. But when they claim by custom for that which others prescribe, which is allowed from the necessity of the thing, the legality of the custom is to be examined by the same rules as if it were a prescription. Hob. 86, *Day v. Savage*, 1 Ventr. 383, *Potter v. North*. Now it is clear, that nothing can be prescribed for which is not the subject of a grant, a prescription supposing an original grant. But a grant to all the inhabitants of a place would be bad for its uncertainty. They cannot claim a profit à prendre in the soil of another, but are restrained to matters of discharge in their own, as from toll. 3 Mod. 290, *Pain v. Patrick*, from tithes, Cro. Jac. 152, or to matters of easement in that of another. The matters of easement which they may claim, are to be classed under two heads, such as are necessary for the enjoyment of their own estates, and such as are for the public good. Instances of the first kind are customs to water cattle at a certain watering place, to turn a plough in another's land, 3 Mod. 293, to use a way to a church or market, Cro. Jac. 152, Cro. Car. 419, or to a well or spring, 15 Ed. 4, 29, and the like. Of the second kind are customs to perambulate a parish, Cro. Eliz. 441; to erect a stall in a market, 3 Mod. 292, for fishermen to dry their nets, Cro. Car. 419, and the like. The custom stated in the second plea, if it can be supported, falls within the latter class. But in order to make it good, it ought to have shewn that the games were for the recreation and health of the inhabitants, and that Chatteris played for his recreation, on which ground the custom in *Abbot v. Weekly* was holden to be good; it is not sufficient that they were merely for pleasure. This plea is also bad, as not being an answer to the trespass laid in the declaration, which is [396] "that the defendants broke and entered and remained in the Plaintiff's close, and there played together with divers other persons to the Plaintiff unknown, at a certain game called cricket." The Defendant, Chatteris, justifies this by saying, that the inhabitants by custom have a right to play there, and therefore he as one of them played there. It appears therefore on the record, that he played with the other defendants who were not inhabitants, and with other persons. To them this justification cannot be applied: they were trespassers, but what they did together was one act, 2 Roll. Rep. 224, *Storey v. Rice*, and if they were trespassers he was one too, for he aided and assisted them. If he be supposed to have been there by licence of law, he became a trespasser ab initio, by abusing that licence.

With respect to the third plea, the custom there stated is also bad, it being for all persons being in the parish, that is for all persons in the world, who may choose to come into the parish. This is void for its generality. If there be such a right, it is by the common law, and not by custom. Co. Litt. 110 b. So a right for all the men of Kent to make trenches and bulwarks on the coast against an enemy, is by the common law, and not by custom. Bro. Abr. tit. Customs, pl. 45. So for all the fishermen of Kent to go on the land of another to fish. Ibid. 46. So for all executors to be sued by action of debt in the mayor's court of London, Fitzgibb. 51. If there be such a right for all persons, any one might bring an action for an obstruction of it, Co. Litt. 56 a. *Westbury v. Powell*. But surely it will not be contended that such an action could be maintained, independent of property or inhabitancy. The right claimed resembles a right for all the king's subjects to pass and repass over a public highway, but no action could be maintained for obstructing the highway, without special damage.

But be these customs good or bad, the Plaintiff is intitled to judgment, or at least there must be a venire de novo. On the same record the jury have found that two contradictory customs exist in the same place. Admitting that Defendants may sever in their pleas, and plead inconsistent matters, the jury cannot find such inconsistent matters, because they cannot exist in fact. The larger custom in this case cannot prove the smaller, because the larger is void in law, and because the persons are different who are to enjoy the benefit claimed. Thus a custom for a [397] copyholder

to have common as belonging to this customary tenement, is not supported by evidence of a custom extending to all the tenants. *Brook v. Smith*, MSS. of Perrott, Baron (a). So a prescription for a general right of common for 100 sheep, is not proved by shewing such right for 120 sheep. Cro. Eliz. 722, though a prescription for a general right of common will prove a prescription for any particular sort of common, Bull. N. P. 59, and though a prescription for 100 sheep is supported by evidence for 100 sheep and 6 cows, Cro. Eliz. 722.

Le Blanc, Serjt., who was going to reply, was prevented by the Court.

BULLER, J.(b). Some nice and critical objections have been made to the pleadings in this case, which I shall first consider. It is said that the plea of the Defendant Chatteris does not answer the complaint laid in the declaration, which is, that all the Defendants together with divers other persons unknown to the Plaintiff, played at cricket in the Plaintiff's close, but that the plea alleges the custom to be for the inhabitants of the parish to play at cricket there, and that Chatteris as an inhabitant so played, that is, says my Brother Heywood, that he played there with other persons who were not inhabitants, and who were therefore trespassers, and that he himself by aiding them in their trespass, was guilty of an abuse of a licence in law, and therefore a trespasser ab initio. But this objection, supposing it to be a good one, does not arise on the face of the plea, and if the Plaintiff would have availed himself of it, he ought to have set it out by way of replication. It cannot prevail on a motion in arrest of judgment, for admitting it to have more weight than I think it has, after verdict, it is cured by the statutes of Jeofails.

Another objection made is, that the customs, whether good or bad, are repugnant to each other, and therefore that the Court cannot give judgment on either of the special pleas, though found for the Defendants. But it would be very strange if one Defendant should plead a good plea, and it were found for him, that he should not have judgment, according to the justice and truth of the case, though the other Defendant should plead a bad plea. But why are these customs in-[398]-consistent with each other? It might happen, that there might be at first a limited custom, and afterwards a more extensive one, and I do not see why the second should root up the first, or why they might not both exist together, supposing the second to be a good one.

But the real question is, whether the customs as stated are good. It is objected to the first custom, that it is not alleged to be for the necessary recreation of the inhabitants, nor that the Defendant Chatteris went into the close in question for his recreation. But in the case in Levinz, the Court say that it is necessary for the inhabitants to have their recreation. If so, it is a matter of law, and though there may be precedents which state such customs to be for either the health or recreation of the inhabitants, yet when the Court lay it down that recreation is necessary, it is not necessary to be averred in pleading. As to the objection, that it is not stated that the Defendant Chatteris went into the locus in quo for his recreation, the words of the plea are, that "he entered into the said close in which, &c. for the purpose of exercising and playing at divers lawful games, sports and pastimes, and at those several times respectively there played at the said game of cricket, and the said other games, sports and pastimes, &c." Now what are sports and pastimes but recreations? With respect to the case in Bro. Abr. Custom, pl. 46, there the custom was holden to be bad, not because it was for the fishermen of Kent to dry their nets on the Plaintiff's land, (which the case in Cro. Car. shews to be good,) but either because the digging in the soil, in order to pitch stakes to hang the nets upon, was unnecessary, or it tended to the destruction of the inheritance. But that is not the case here. There is no authority therefore to oppose the case in Levinz; and upon the whole I think that this custom is reasonable, and the plea good.

But I hold the other custom to be as clearly bad, as the first is good. How that which may be claimed by all the inhabitants of England can be the subject of a custom, I cannot conceive. Customs must in their nature be confined to individuals of a particular description, and what is common to all mankind, can never be claimed

(a) This case is mentioned in the MSS. of Mr. Baron Perrott, as having been tried at Nisi Prius, before Carter, Serjt., Judge of Assize, 1726, who ruled the point, which was acquiesced in by the Bar.

(b) Absent the Lord Chief Justice.

as a custom. And I perfectly agree, that no action could be maintained for interruption of it, any more than in the instance put by my Brother Bond of a [399] highway. There must be therefore judgment for the Defendant Chatteris on the first special plea, and for the Plaintiff against the other two Defendants.

HEATH, J. I am of the same opinion. The lord might have granted such a privilege, as is claimed by the first custom, before the time of memory. As to the second, it is infinitely bad, being for all mankind, and on that the case in *Fitzgibbon*, 51, is in point.

ROOKE, J. There seems to me no objection to the first custom, and no ground for the second.

DOE, ON THE DEMISE OF CLARKE, *against* CLARKE AND OTHERS.
Monday, Feb. 9th, 1795.

[Applied, *Goodale v. Gawthorne*, 1854, 2 Sm. & G. 377; *In re Corlass*, 1875, 1 Ch. D. 463. *In re Burrows*, [1895] 2 Ch. 499. Referred to, *In re Wilmer's Trusts*, [1903] 1 Ch. 884; *Villar v. Gilbey*, [1906] 1 Ch. 591; [1907] A. C. 139; *In re Salaman*, [1908] 1 Ch. 8.]

Lands, &c. are devised to B. for life, and after his decease to all and every such child or children of B. as shall be living at the time of his decease: a posthumous child of B. shall share equally with those who were born in his lifetime. An infant en ventre sa mere is considered as born, for all purposes which are for his benefit (a).

This ejectment, brought to recover one undivided fourth part of two rectories impropriate, with the parsonages of the churches of Tunstead and Sco Ruston, in the parishes of Tunstead and Sco Ruston in the county of Norfolk, and also one undivided fourth part of certain lands, &c. in the said parishes, and of the advowson of the vicarage of Tunstead and Sco Ruston, was tried at the summer assizes 1793, for the county of Norfolk, before the Lord Chief Justice of this court, when a verdict was found for the Plaintiff, subject to the opinion of the Court on the following case, viz.

William Pearce Clarke being seised in fee of the rectories, &c. in the declaration mentioned, by his will dated the 27th of February 1782, devised amongst other things "all that his rectory or rectories impropriate, parsonage or parsonages of the church and churches of Tunstead and Sco Ruston, in the county of Norfolk, and all tithes, tenths, oblations, obventions, profits, emoluments and commodities whatsoever to the same belonging or appertaining, and also all his messuages, buildings, glebe lands, tenements, and hereditaments whatsoever, to the said rectory or rectories belonging or appertaining, with their and every of their appurtenances, and also all that his advowson, donation, right of patronage, and presentation of the vicarage of the church and churches of [400] Tunstead and Sco Ruston, with the rights, members and appurtenances thereunto belonging, to his brother Henry Clarke, and his assigns, for and during the term of his natural life, and from and after the decease of his said brother Henry Clarke, to the use and behoof of all and every such child or children whether male or female, of his said brother Henry Clarke, as should be living at the time of his decease, (other than and except Bridget his the testator's niece,) as tenants in common, and not as joint-tenants, and of the several and respective heirs and assigns of such child or children for ever." The testator William Pearce Clarke died on the first of May 1782, without altering or revoking his will, leaving his said brother Henry Clarke surviving, who died on the 21st of October 1782, leaving Elizabeth Clarke, his widow, Bridget his daughter by his first wife, and Elizabeth, Mary and Judith, his three daughters by the said Elizabeth his second wife, which said three daughters are the above named Defendants; and also leaving his said wife Elizabeth pregnant at the time of his death, who was delivered of a daughter Harriet Clarke on the 23d of May 1783; which said Harriet Clarke was the lessor of the Plaintiff; and was actually ousted by the Defendants before the action was brought.

Le Blanc, Serjt., was going to argue on behalf of the lessor of the Plaintiff, when the Court said they wished to hear the other side. Accordingly

Bond, Serjt., on the part of the Defendants, stated the question to be, whether

(a) [*Vide Long v. Blackall*, 7 T. R. 100. *Whitlock v. Heddon*, 1 Bos. & Pul. 243. *Fearnle*, Cont. Rem. 309, 6th edit. Bull. N. P. 105.]

an infant en ventre sa mere at the time of the decease of the father could be considered as a child living at his decease? Unless the will expresses the contrary, a devise to such children of A. who are living at the time of his decease, means to such as are born at that time. 1 Vesey, 111, *Ellison v. Airey*, *Hales v. Hales* there cited, 2 Brown Chan. Cas. 38. *Pierson v. Garnet*, id. 63. *Cooper v. Forbes*.

LORD CHIEF JUSTICE EYRE. I have no doubt on any view of this case. It is plain on the words of the will, that the testator meant that all the children whom his brother should leave behind him should be benefited: but independent of this intention, I hold that an infant en ventre sa mere, who by the course and order of nature is then living, comes clearly within the description of "children living at the time of his decease."

[401] BULLER, J. In equity, there are two classes of cases on this subject, the first, where the bequest is in the nature of a portion or provision for children, and there an after born child takes his share with the rest, of which class is the case of *Miller v. Turner*, 1 Vesey, 85: the second, where the bequest arises from some motives of personal affection, and there it is confined to children actually in existence. Of this second class was the case of *Cooper v. Forbes*, which therefore makes a striking difference between that case and the present. Here the bequest is not confined to children living at the death of the testator, but is kept open till the death of his brother. It seems indeed now settled, that an infant en ventre sa mere shall be considered, generally speaking, as born for all purposes for his own benefit, *Lancashire v. Lancashire*, 5 Term Rep. B. R. 49. And in a sensible treatise lately published, Watkins's Law of Descents, 142, after a discussion of the interest of posthumous issue, the whole is well summed up by saying, "It is now laid down as a fixed principle, that wherever such consideration would be for his benefit, a child en ventre sa mere shall be considered as absolutely born."

HEATH, J., of the same opinion.

ROOKE, J., of the same opinion.

LORD CHIEF JUSTICE EYRE. The two classes of cases in equity proceed on a distinction which has always appeared to me extremely unsatisfactory, and unfit to be the ground of any decision whatever.

Postea to the Plaintiff.

[402] THOMAS PHILLIPS, NATHANIEL JOHN PHILLIPS, ROBERT PHILLIPS, AND WILLIAM CRAMMOND, against HUNTER AND OTHERS, Assignees of Blanchard and Lewis, Bankrupts, in the Exchequer Chamber, in Error. Wednesday, Feb. 11th, 1795.

A. B. and C. being partners in trade in England, A. and B. reside in England, and C. goes to a foreign country for the purpose of managing the concerns of the house in that country. D. is also resident in England, where a debt is contracted by D. to A. B. and C. D. becomes insolvent, and C. knowing that D. has stopped payment, and after a commission of bankrupt has in fact issued against D. attaches in the names of himself and his partners, a debt due to D. in the foreign country by legal process, and obtains payment of it under the judgment of a court of justice of that country. The assignees of D. have a right to recover the money so received by C. in an action against A. B. and C. for money had and received to the use of the assignees.

This was an action for money had and received, brought by the Defendants against the Plaintiffs in error in the Court of King's Bench, in which a special verdict was found at Guildhall, stating, "that before the bankruptcy of Blanchard and Lewis, Phillips and Co. had sold and delivered a large quantity of goods to them, at 12 months credit: that the debt was contracted in England, and that the Defendants in error as well as the bankrupts before and at the time of the bankruptcy, and at the time the said debt was so contracted, were resident in England, and continued to reside in England long after the debt was contracted, and until the attachments hereinafter mentioned were issued in the Court of Common Pleas in Philadelphia, in the Commonwealth of Pennsylvania, in North America: that the Plaintiffs in error before and at the time of the bankruptcy, and at the time when the debt was so contracted, were traders and copartners and carried on trade and commerce at Manchester, in the county of Lancaster; that the Phillipses during all the time last aforesaid were resident

in England, and continued to reside in England long after the said debt was so contracted, and until the attachments hereinafter mentioned were issued, but the other Plaintiff in error, William Crammond, before the year 1784, and before the bankruptcy, went from England to America for the purpose of transacting in that country the commercial concerns of the house of Phillips and Co. so carrying on trade and commerce at Manchester as aforesaid, and remained and continued in America till after the issuing of the attachments hereinafter mentioned: that William Crammond on the 23d of October, 1783, knowing that Blanchard and Lewis had stopped payment in the month [403] of August preceding, and after the said commission of bankrupt had issued against them, commenced an action for himself and partners against the bankrupts in England, in the Court of Common Pleas, in Philadelphia, in the Commonwealth of Pennsylvania, in North America, according to the laws and customs of the said Commonwealth, for the recovery of the money due for divers of the said parcels of goods so sold and delivered to the bankrupts; and thereupon, on the said 23d of October, 1784, being after the provisional assignment of the said bankrupts' effects caused to be attached by the process of the same court as the goods and chattels of the said bankrupts in the hands and possession of Duncan Ingraham the younger, of Philadelphia aforesaid, merchant, Stephen Austin of the same place, merchant, and John Blanchard and Thomas Russell of the same place, merchants, certain monies which before Blanchard and Lewis became bankrupts, were due to them from the said Duncan Ingraham the younger, Stephen Austin, John Blanchard, and Thomas Russell, and which at the time of the said attachment remained unpaid, and did afterwards in the said Court of Common Pleas so holden as aforesaid, on the 1st of June 1786, according to the laws and customs of the said Commonwealth, recover judgment against the said Blanchard and Lewis for the said debt and damages demanded in the said action, the sum of 2639l. 18s. 3d. current money of the said Commonwealth of Pennsylvania, being 1403l. 0s. 6d. of sterling money of Great Britain, and also costs of suit taxed at 19l. 2s. of like current money of the said Commonwealth; that the said William Crammond did, by virtue of, and under such attachment and judgment as aforesaid, obtain and receive payment from the said Duncan Ingraham the younger, and Stephen Austin, of the sum of 1403l. 0s. 6d. of lawful money of Great Britain, in full, for the damages recovered by Phillips and Co. under the said judgment from the said monies in the hands of the said Duncan Ingraham the younger, and Stephen Austin, together with such costs and suit as being part of the monies and effects of the said Blanchard and Lewis within the said Commonwealth: it was then stated, that Crammond had recovered a further sum of 23l. 9s. 9d. in Philadelphia, by a similar process against Ingraham and Austin, for the residue of the goods sold and delivered to Blanchard and Lewis, and that the two sums of 1403l. 0s. 6d. [404] and 23l. 9s. 9d. were before the commencement of the action received by the said Phillips and Co. which they claimed to hold to their own use, and refused to pay over to the assignees. But whether, &c."

Judgment having been given in the Court of King's Bench for the Defendants in error without argument, the case being considered as decided by that of *Hunter v. Potts*, 4 Term Rep. B. R. 182, a writ of error was brought which was twice argued, the first time by Park for the Plaintiffs in error, and Heywood, Serjt., for the Defendants; and the second, by Bower for the Plaintiffs in error, and Law for the Defendants. As the arguments were nearly the same as those contained in *Hunter v. Potts*, 4 Term Rep. B. R. 182, and *Sill v. Worswick*, ante, vol. i. p. 665, and were entered into by the court in giving judgment, they are here omitted.

On this day, after time taken to consider, the opinions of the judges were delivered in the following manner; Mr. J. Rooke, Mr. B. Thompson, Mr. J. Heath, Mr. B. Perryn, Mr. B. Hotham, and the Lord Ch. B. Macdonald, held, that the judgment of the Court of King's Bench ought to be affirmed: but the Lord Ch. J. Eyre was of opinion, that it ought to be reversed.

The course of reasoning pursued by those of their Lordships above mentioned, who thought the judgment right, was to the following effect.

The general question arising upon the facts which appear on this record, is, whether the creditor of a bankrupt in England, who became such creditor in England, having recovered a debt due to the bankrupt in a foreign country by process of attachment in that country, is entitled to retain the money so recovered to his own use, or whether he has not received it to the use of the assignees? It must be remembered, in dis-

curring this question, that it is found by the special verdict, that Blanchard and Lewis the bankrupts were English traders, that the Defendants were partners in an English house, that the debt from the bankrupts to the Defendants was contracted in England, that the bankrupts as well as the Defendants were resident in England, and that Crammond, who on this verdict must also be taken to be an English subject, went from this kingdom to America, for the special and temporary purpose of transacting business for the English house at Manchester, in which he [405] continued to be a partner. That house was the only one the Defendants had, it not being found that they had any house in America. All these facts appearing on the record, this case must be argued as arising between English subjects upon English property. When the debt therefore was contracted, all the parties were as much subject to the bankrupt laws, as to the other laws of England under which they lived. It is a proposition not to be disputed, that previous to the bankruptcy the bankrupts themselves might have transferred or assigned this property though abroad, as absolutely as if it had been in their own tangible possession in this country, and it seems that the assignees under the commission were intitled by operation of law to do with it after the bankruptcy what the bankrupts themselves might have done before. The great principle of the bankrupt laws is justice founded on equality. No creditor shall be permitted to acquire an undue preference, and by so doing, prevent an equal distribution among all the creditors. This being the principle of those laws, it seems to follow, that the whole property of the bankrupt must be under their control, without regard to the locality of that property, except in cases which directly militate against the particular laws of the country in which it happens to be situated. No creditor, whose debt was contracted within the sphere of the operation of those laws, and who has notice of the insolvency of the debtor, can recover any part of the common fund for his own particular advantage; after an assignment has taken place, his interest is transferred to the assignees, and if he do recover, he must account to the other creditors for the sum received.

If the bankrupt laws were circumscribed by the local situation of the property, a door would be open to all the partiality and undue preference which they were framed to prevent; it being easy to foresee how frequently property would be sent abroad with that unjust view, immediately previous to, and in contemplation of an act of bankruptcy. If the personal property of merchants employed in the course of their dealings in foreign countries, were to be taken by an individual creditor going from hence for that purpose, and not to be distributable among the creditors at large, such merchants would be materially affected in their credit at home. It is true, that the laws of the country where the property is situated, have the [406] immediate control over it, in respect to its locality, and the immediate protection afforded it; yet the country where the proprietor resides, in respect to another species of protection afforded to him and his property, has a right to regulate his conduct relating to that property. This protection afforded to the property of a resident subject, which is situated in a foreign country, is not imaginary, but real. The executive power of this kingdom protects the trade of its subjects in foreign countries, facilitates the recovery of their debts, and if justice be delayed or denied, the King by the intervention of his ambassadors demands and obtains redress. Even in the treaty of peace with America, the recovery of private debts due from the inhabitants of that country to the subjects of this, made the ground of a particular article. The property which this country protects it has a right to regulate. And in fact our bankrupt laws have made such regulation. The statute 13 Eliz. c. 7, enables the commissioners to take the bankrupt's money, goods, chattels, wares, merchandizes and debts, wheresoever they may be found or known. This expression is very extensive, and seems to look beyond the debts and effects of a trader locally situated in this kingdom. In a country, a great part of whose commercial capital is employed abroad, it is peculiarly proper that such capital over which the trader has a disposing power, although situated out of the kingdom, should be considered as referable to the domicilium of the owner ([ante, vol. i. p. 690]). In testamentary cases and in the *successio ab intestato*, the effects are subject to the law which governs the country of the testator or intestate, as was determined in *Pipon v. Pipon* (Ambl. 25), and *Thorn v. Watkins* (2 Ves. 35). The statute 1 Jac. 1, c. 15, s. 13, which enables the commissioners to assign debts due to the bankrupt, directs that the same shall not be attached as the debt of the bankrupt, according to the custom of the city of London or otherwise. The assignment being

made by the authority of parliament, every subject of this kingdom is a party to it, inasmuch as he is a party and consenting to an Act of Parliament, and having joined in the assignment, he cannot be permitted to contravene it by attaching the debt in the hands of the debtor: and if by means of an attachment he receives the money, it is received to the use of the assignees.

[407] The words of the statute Jac. 1 extend to all foreign attachments, both at home and abroad, in countries subject to and independent of the crown of Great Britain. As debts due to bankrupts from the subjects of foreign countries pass under the assignment, the attachment must be considered as co-extensive with the debts mentioned in the statute. The equal distribution, which it is the policy of the bankrupt laws to establish, is as much infringed by attachments in foreign countries, as in the British dominions: the mischief is the same, and the remedy ought to be advanced to meet the mischief. The words "according to the custom of London" mean, "in such manner as is warranted by the custom of London;" which is put by way of instance or illustration. Many cases already decided on the subject of bankruptcy, go a great way to prove that an individual creditor is precluded from retaining what he shall recover abroad and bring into this country. In *Mackintosh v. Ogilvie* (cited 4 Term Rep. B. R. 191), Lord Hardwicke by the writ of ne exeat prevented the creditor from going to sue in Scotland, after the bankruptcy. By giving this preventive remedy against an unconscientious preference, which one creditor might have obtained over the others, his Lordship must be understood to say, that the creditor was bound, as far as the circumstances would enable him to apply them, by the bankrupt laws of this country; and had that creditor effectuated his payments in Scotland, it should seem that his Lordship, in order to be consistent, would have obliged him to have accounted with the assignees, if the fund had been brought within his jurisdiction. In *Solomons v. Ross* (ante, vol. i. 131), money attached by an individual creditor, after an assignment in Holland, was decreed by Lord Hardwicke to be paid to the attorney of the assignees for the benefit of the creditors; plainly considering each creditor as bound by the assignment, and the money recovered here as referable to Holland, the country of the debtor. The same is likewise to be inferred from *Jollet v. Deponthieu* (ibid. 132), and *Neale v. Cottingham* (ibid.). It has been urged, that those cases turned upon this circumstance, viz. that we admit the claim of the assignees in preference to a particular creditor, where bankrupt laws are instituted in the domicile of the bankrupt, but as there are no bankrupt laws in America, the reason is not applicable in this [408] case. Now it does not appear upon this record whether there are bankrupt laws in America or not. There were none in Holland nor France peculiar to insolvent traders. The courts therefore here must in those cases have proceeded on a larger principle. But the judgment of Lord Loughborough in *Sill v. Worswick* (ante, vol. i. 665), is an authority directly in point, and in favour of the Plaintiffs in the present action. The cases opposed, of *Le Chevalier v. Lynch* (Doug. 169, 8vo.), *Cleeve v. Mills* (Cooke, Bank. Law, 370), and *Allen v. Dunulas* (3 Term Rep. B. R. 125), prove only, that where a debtor has paid (not where a creditor has received) money under due process of local law, he shall not be compelled to pay it over again: and *Wilson's case* is truly and satisfactorily explained by Lord Loughborough in his judgment in *Sill v. Worswick*, to have turned on the several liens which different creditors had by the law of Scotland: but there Lord Hardwicke held, that the arresters of the fund which was not so bound, after the bankruptcy, should be postponed to the assignees.

But it is objected that the judgment in Pennsylvania is final and conclusive, and binds the property. That it must be so taken to be between the parties, is not disputed. But as the recovery of the Plaintiffs in error, otherwise than for the use of the Defendants, would be in violation of an Act of Parliament, such recovery shall be taken to be for the use of the Defendants. In an action for money had and received, the receipt shall be always deemed to enure to the use of him who hath the right, even though it be taken under an adverse title; as for instance, when this species of action is brought to try the title to an office (e). Indeed in the present

(e) [See *Howard v. Wood*, 1 Freeman, 478, 2d ed., and the note there, in which the cases are collected as to the recovery of money taken under an adverse title in an action for money had and received.]

action the judgment of the court in Pennsylvania is affirmed. Another objection has been made, that the residence of Crammond in America enabled him to recover this debt, without accounting for it to the Defendants in error. In order to raise that question, the special verdict should have found that he was resident within the state of Pennsylvania. But if that question were raised, no residence in foreign parts can exempt a British subject from the operation of an Act of Parliament, much less an occasional residence. It is also imputed to the assignees, and much relied upon, that they did not state their claim in the foreign court, which they ought to have done, instead of bring-[409]-ing their action here. But it is not found by the verdict that they had any notice of the proceedings in that court. No English subject can be affected by the proceedings in a foreign court without clear and direct notice: for however English subjects are bound by the proceedings in our own courts from a presumption of their having notice of them, no such presumption can be raised with respect to foreign courts. When it is argued, that in many instances the bankrupt laws of this country do not operate in another, it is to be observed, that though to some purposes they do not, yet to all civil purposes they do, when such purposes are neither repugnant to the law of the particular state, nor to the general law of nations. And it is on wise principles that foreign states acknowledge and act according to the different civil relations which subsist between men in their own country. If then there be no law of the particular state, nor any law of nations that forbids the operation of the English bankrupt laws on the personal property of an English subject wherever it is found, there is nothing to restrict the large words of the statutes 13 Eliz. and 1 Jac. 1, but an implied power in a foreign country, to declare that an English subject becoming bankrupt, shall notwithstanding continue to be invested with all his rights, and in the enjoyment of all his property in defiance of those laws to which he owes submission. But such a power cannot be assumed by any foreign state, nor ought this country to make to any so important a surrender. For these reasons it appears that the judgment of the Court of King's Bench ought to be affirmed.

LORD CHIEF JUSTICE EYRE This case, in point of circumstances, lies within a very narrow compass. A British subject, a partner in a house at Manchester, residing in America for the purpose of collecting the debts of the house, having notice of a commission of bankruptcy being issued against a debtor of the house, institutes a suit against the debtor in the Court of Pennsylvania, and attaches a debt due to the debtor in the hands of his debtor, resident in Pennsylvania, finally recovers judgment against the garnishee, and receives from him the amount of his debt. The assignees of the bankrupt debtor bring their action against such British subject in the Court of King's Bench, to recover the amount of the money so received, as money had and received to their use. The question is, whether this action can be maintained? This judgment against the garnishee in the Court of [410] Pennsylvania was recovered properly or improperly. If notwithstanding the bankruptcy, the debt remained liable to an attachment according to the laws of that country, the judgment was proper: if according to the laws of that country, the property in the debt was divested out of the bankrupt debtor, and vested in his assignees, the judgment was improper. But this was a question to be decided in the cause instituted in Pennsylvania, by the courts of that country, and not by us: we cannot examine their judgment, and if we could, we have not the means of doing it in this case. It is not stated upon this record, nor can we take notice, what the law of Pennsylvania is upon this subject. If we had the means, we could not examine a judgment of a court in a foreign state, brought before us in this manner. It is in one way only that the sentence or judgment of the Court of a foreign state is examinable in our courts, and that is, when the party who claims the benefit of it applies to our courts to enforce it. When it is thus voluntarily submitted to our jurisdiction, we treat it, not as obligatory to the extent to which it would be obligatory perhaps in the country in which it was pronounced, nor as obligatory to the extent to which by our law sentences and judgments are obligatory, not as conclusive, but as matter in pais, as consideration *primâ facie* sufficient to raise a promise: we examine it as we do all other considerations of promises, and for that purpose we receive evidence of what the law of the foreign state is, and whether the judgment is warranted by that law. In all other cases, we give entire faith and credit to the sentences of foreign courts, and consider them as conclusive upon us. It has been distinctly admitted in the argument, that we cannot

examine this judgment, that the judgment proper or improper must stand, and in particular it is admitted, that for the protection of the garnishee it is a good judgment. If we cannot examine the judgment, there is an end of all consideration of the operation and effect of our bankrupt laws in Pennsylvania, that inquiry tending directly to try whether the judgment was proper or improper. The giving up the remedy against the garnishee, was a concession though absolutely necessary to give colour to this proceeding, and the consequences were not adverted to; it is in truth giving up every thing. If a garnishee in foreign attachment here, suffers the goods of A. to be condemned in his hands as the goods of B., [411] the condemnation will not protect him against an action by A. If he is protected, it is upon the ground of the goods being to be taken to be the goods of B., *modo et formâ* as they are condemned. In neither case can A. follow the goods into the hands of him who recovers the judgment; his only remedy is against the garnishee. But it is said, that upon grounds collateral to the judgment, nay even affirming it, the money recovered in Pennsylvania shall be deemed to have been received to the use of the assignees. What are these grounds? If it be said that according to the bankrupt laws in force in England, the debt recovered in Pennsylvania as a debt due to the bankrupt, was in truth not due to the bankrupt, but to the assignees, and consequently in the popular sense the Defendant may be said to have recovered the money of the assignees, then it ought not to have been recovered, which is so far from being collateral to the judgment, that it goes to the very point of it. Another, and the only other ground which has been taken in the argument, is a proposition roundly asserted, that a British subject shall not be allowed to contravene our bankrupt laws, by pursuing that legal diligence in a foreign country, which all persons who are not British subjects may lawfully pursue. This must be admitted to be a ground perfectly collateral to the judgment. It is a specious and very splendid proposition, but it is not solid; and if it were solid, it concludes nothing towards the support of this action. It was said, that every British subject owes obedience (allegiance it was called) to the statute laws of the country. These are fine words; what do they mean? I know that the statute law, and the bankrupt laws in particular, create and establish a rule of property, which may be enforced against every British subject in the due course of law; and that if a British subject were to fortify his house, and resist the sheriff by force, he would not be allowed so to contravene the bankrupt laws. But if we suppose such a British subject to have obtained a legal judgment here in our courts, in direct opposition to the whole scope and tenor of the bankrupt laws, either for want of proof, or by the error of the judge, or in any other manner that can be supposed, may he not lawfully hold that judgment, and pursue it to all its consequences until it is impeached in a due course of law, notwithstanding any moral or political obligation he may be said to be under not to contravene the bankrupt laws? As a proposition [412] in ethics, I have no objection to it, but considered as a proposition of law, it is too general, concluding, as I have before observed, in nothing. Lord Mansfield tried what he could make of this proposition, that a British subject should not be allowed to contravene the statute law of the land, in one of the strongest cases that can be imagined of wilful contravention, the case of marriage contracted abroad (*a*), by English subjects withdrawing themselves from England, for the express purpose of contravening the statute law respecting marriages, and he failed altogether. This should teach us not to hazard any thing upon so general a proposition, which breaks under us as often as we attempt to support any particular conclusion upon it. The proposition as applied to this particular case is as inconvenient, impolitic and unjust, as it is unfounded. It was well said in the argument, you admit that an American might in this case have pursued his legal diligence in the courts of his own country notwithstanding our bankrupt laws, and that you could not have taken the money recovered from him, and given it to the assignees; will you then compel the British subject to sit still, and see the foreigner exhaust that fund which might have satisfied his debt, and so far relieved the fund for the creditors at home? I have heard no answer to that question. Such small circumstances as notice and making affidavits here, for the ground of the suit in America, appear to have made some impression in the argument. Has not the foreigner his agent here? May he not have notice and the assistance of affidavits taken here? Shall he pursue his legal diligence by these means, and

(a) 2 Burr. 1080. Co. Litt. Hargr. and Butl. not. 79 b.

under these circumstances with effect? If he shall, I cannot discover either good sense or justice in the rule which shall take the money recovered by the British subject under similar circumstances, and give it to the assignees of the bankrupt, even for the laudable purposes of an equal distribution. In a case where the rule would produce no such unjust inequality as it must produce in this case, in the condition of a British subject and a foreigner, we are not accustomed to treat legal diligence with so much harshness. For instance, our courts of equity distribute among creditors of equal degree, or general creditors, as it shall happen to be a case of legal or equitable assets, *pari passu*. The rule is as well known as the bankrupt laws. But they do not complain that equity is con-[413]-travened by that creditor, who, using legal diligence, secures the payment of his whole debt perhaps of inferior degree. Even in the administration of the bankrupt laws, (these Acts of Parliament which no British subject is to contravene) legal diligence is every day pursued against the bankrupt, in direct opposition to the spirit of those laws. A creditor who has arrested him upon mesne process before the bankruptcy, may detain him in prison up to the moment of his obtaining his certificate; he may elect to proceed against him at law, and not to come in under the commission, and if he happens to have the good luck to have pursued his legal diligence to an execution, and sweeps away all the effects of a man notoriously insolvent, one minute before the debtor has committed an act of bankruptcy, he disappoints, with impunity, the whole effect of the bankrupt laws, and the claims of all the other creditors to an equal distribution of the estate of the debtor, founded upon those laws. So far is it from being true that a British subject shall not be allowed to contravene an Act of Parliament in any sense applicable to this case, that it is always a question *strictissimi juris* between a creditor pursuing legal diligence, and the assignees of a bankrupt. How much more rationally is this subject treated, in the loose note (as it was called) of *Waring v. Knight* by Lord Mansfield, who, we all know, carried the notion of fraud upon the bankrupt laws to its utmost extent! It is there said, if a man uses legal diligence in a foreign country and obtains a preference, it cannot be helped; but that if he afterwards come here for a dividend, he shall first refund what he has so acquired by his legal diligence, and come in equally with the rest of the creditors, or not come in at all. This is the only fair and practicable coercion that can be used towards creditors abroad, unless they happen to be so unfortunate as to be British subjects. These it seems are to have what they have acquired by their legal diligence abroad, taken from them by force of the new invented legal maxim, that no British subject shall be allowed to contravene an Act of Parliament. But if this maxim were as well known and established, as it is new and unheard of in our law, it would conclude nothing to the title of the Plaintiffs in this action, for we must go back again to the old question, whether the assignees of a bankrupt have by the laws of Pennsylvania, [414] the property of the bankrupt vested in them, of which we know nothing. And then comes a second question, not of easy solution, whether money received upon an adverse judgment, and where there is no other privity or relation than that which subsists between assignees and a particular creditor, can be considered as money had and received to the use of those assignees? The case of *Moses v. Macferlan* (2 Burr. 1006) is I believe the only decided case that countenances such an action, but I cannot subscribe to the authority of that case. I will state the case shortly and make some observations upon it. Macferlan sued Moses in the court of conscience, as indorser of a small bill of exchange, and recovered against him there, in breach of an agreement in writing between them, that Moses should not be liable nor prejudiced by reason of his indorsement. Moses paid the money, and brought an action in the King's Bench to recover it back, as money had and received to his use, and did recover it. In the argument of the case it is distinctly admitted, that the merits of a judgment can never be over-bauled by an original suit either at law or in equity, that till the judgment is set aside or reversed, it is conclusive as to the subject matter of it, to all intents and purposes. An attempt is made to distinguish between the judgment and the ground of that action, I think not with much success. The proposition that the ground upon which that action proceeded was no defence against the sentence, can hardly be maintained. Suppose it had been a suit in the Court of King's Bench, instead of a court of conscience, would it have been a defence there? If it would, why not in a court of conscience? Is there to be a recovery in a court of conscience only to be overturned by an action in the King's Bench? It is said, they might go

into agreements and transactions of great value; doubtless they might, if those transactions give a defence against a debt of which they have jurisdiction. Is it not necessarily incident? The true objection, if there be an objection, is, that such courts ought to have no jurisdiction at all, because the jurisdiction, if they have it, will draw to it cognizance of matters of which they must be very incompetent judges. It may be questionable whether a set off of a debt arising out of their jurisdiction can be pleaded or used; but that does not draw into question [415] the truth of the proposition that every thing that goes to the essence of the debt demanded, must of necessity be within their jurisdiction. To say that the merits of a case determined by the commissioners, where they had jurisdiction, never could be brought in question over again in any shape whatever, and to say that yet the Defendant ought not in justice to keep the money, is not intelligible to me. The cases put all suppose a real fact differing from the fact as represented and made the ground of the judgment. They are the cases of the indorsee recovering against the indorser on a bill paid by the drawer: the insured recovering upon the loss of a ship coming home, or upon a life where the party is still living (*a*)¹. In all of them, the very ground of the judgment is brought in question over again, contrary to the admission. Put another case: a man recovers a debt before paid, the receipt is mislaid, and afterwards found; the receipt disproves the whole ground of the recovery, yet this action was never thought to lie (*b*). In this case, perhaps the money paid on the receipt might be got back, because the party by bringing the action disaffirms the application of the money received to the payment of the debt. One of the cases put, is upon the representation of a risk deemed to be fair, which comes out afterwards to be grossly fraudulent. Is not this coming out produced by trying the question over again? If one could conceive an action by him who had been wronged by the judgment, founded upon the judgment, it might steer clear of the difficulty. Suppose one to say, "you have recovered a judgment against me, which you ought not to have done, whereby I am injured;" this is making the judgment a part of the gravamen. In the argument of the case of *Moses v. Macferlan*, it is supposed to be the same thing, as to the force and validity of the judgment, whether the action had been brought upon the agreement, or to refund the money. But it appears to me to be a very different thing. Must certainly the case of *Dutch v. Warren* (cited 2 Burr. 1010) does not prove the proposition. The ground of that case was the disaffirmance of the contract upon which the consideration money had been paid. If the contract could be disaffirmed, doubtless the consideration money remained money paid without consideration, and consequently money had and received to the Plaintiff's use. How does this apply to the case of money recovered by a judgment? It is agreed that the judgment cannot be disaffirmed, but must stand. If the contract in *Dutch v. Warren* could not have been disaffirmed, but must have stood, could the money have been recovered by this action? Would it not have remained the consideration of an agreement, and the party left to proceed upon his agreement. In the case of *Moses v. Macferlan*, I think the agreement was a good defence in the court of conscience; but if it were otherwise, the recovery there was a breach of the agreement, upon which an action lay; and this was in my judgment the only remedy. Shall the same judgment create a duty for the recoveror, upon which he may have debt, and a duty against him, upon which an action for money had and received will lie? This goes beyond my comprehension. I believe that judgment did not satisfy Westminster Hall at the time; I never could subscribe to it; it seemed to me to unsettle foundations (*a*)². I can imagine but one case, in which money recovered by one man shall be money had and received to the use of another. I mean the case of an attorney or agent, who may sue in his own name. In that case, the action by the principal for money had and received, does in truth affirm the judgment, and does proceed upon a ground collateral to it, which is sufficient to maintain the action. In that case the ground of the action for money had and received, is not adverse to the judgment; if it were,

(*a*)¹ [Vide *Moses v. Macferlan*, 2 Burr. 1009. Bull. N. P. 130.]

(*b*) [It has been decided that such an action cannot be maintained, *Marriott v. Hampton*, 7 T. R. 269. 2 Esp. N. P. C. 546, S. C. and see *Brown v. M'Kindly*, 1 Esp. N. P. C. 279. *Gower v. Popkin*, 2 Stark. N. P. C. 85.]

(*a*)² ["*Moses v. Macferlan*, has been properly questioned in many cases," per Heath, *J. Brisbane v. Dacres*, 5 Taunt. 160, and see ante, p. 415, note (*b*).]

it would neither affirm the judgment, nor be collateral to it. The other cases which were cited in the course of the argument, the identical case determined in the Common Pleas excepted, go but a very little way towards maintaining the judgment in the case now before us: perhaps they will be found to bear against it. Lord Hardwicke's injunction militates directly against it. Equity interposed in that (right or wrong I shall not inquire) for the express purpose of preventing that legal diligence being used, the effect of which, if used, could not be prevented or remedied. In our case legal diligence has been used. The case before Lord Bathurst, supposing the determination to have been right, proves that our laws adopt foreign bankrupt laws, and give them effect; upon which ground equity interposed, and prevented the judgment in foreign attachment obtained here from being set up against the creditors. The analogy is, that the laws of Pennsylvania should adopt our bankrupt laws, and that [417] their courts should be applied to interpose to prevent their judgments in foreign attachment being set up against the assignees. It does not follow from that case, that if the curators had made no application here, but had found the Plaintiff in the foreign attachment in Holland, that they could have taken from him the benefit of his judgment; and if they could by their laws, it would not follow that in this case we can do the same by our laws. The case from Ireland proceeds upon the same ground, and is in principle the same case with that before Lord Bathurst: they judged of the effect of their own foreign attachment; judging upon a subject which they were competent to judge of, they held that the law of Ireland adopted the bankrupt law of England, and so they defeated the judgment of their own courts in foreign attachment. In the case from Scotland, their courts decided upon the priorities and effects of their own process of legal diligence; whereas we are taking upon ourselves to judge of the effect of legal diligence in a foreign state. Upon the whole I rest my judgment upon the following propositions, 1st. That the Plaintiffs' demand in this action, arising out of a transaction in a foreign state, though it may follow the person, must be judged of according to the laws of that state. 2dly. That upon this record we may have no means of knowing, and cannot take notice of the laws of the foreign state in which this transaction arose, and consequently cannot know that the Plaintiffs are entitled to maintain this action. The conclusion from these two propositions to the particular case of the Plaintiffs appears to me to be irresistible. They claim as assignees of a bankrupt, under a title derived to them under our bankrupt laws, to recover a debt due to the bankrupt in America. If our bankrupt laws are allowed to operate in America, they may be entitled to recover that debt against somebody; if they are not allowed to operate in America, they cannot be entitled to recover against any body. But we cannot know whether our bankrupt laws are or are not allowed to operate in America, and therefore cannot know whether the Plaintiffs have or have not title to recover against any body. My third proposition is, that if it had been clear that our bankrupt laws have as full effect in America as they have here, the assignees ought to enforce them against the garnishee, and not against the Plaintiffs in error, with whom they have nothing to do: I repeat with whom they have nothing to do, because I mean to negative [418] a 4th proposition, viz. that a British subject shall not be allowed to contravene a British Act of Parliament. This proposition can hardly be said to be true in a popular and vulgar sense, and as I take it, is not true in any sense, in which it can be made to bear upon the assignees' title to recover in this action. My last proposition is, that upon a judgment recovered and executed, which for the sake of the argument I suppose ought not to have been recovered, an action for money had and received will not lie for any body, not even for the person against whom the judgment has been so unjustly recovered.

The result of the whole is, that upon this record it cannot be collected that the assignees have any ground of action here or elsewhere against the Defendants; at any rate this action will not lie, and consequently, in my opinion the judgment ought to be reversed. But as the majority of the judges are of a different opinion, the judgment of this court will be, that the judgment of the Court of King's Bench be affirmed.

Judgment affirmed.

BENGOUGH *against* ROSSITER. Wednesday, Feb. 11th, 1795.

In the Exchequer Chamber, in Error.

(See 4 Term Rep. B. R. 505.)

A bond given to the sheriff, conditioned for the appearance of a person arrested by him on process issuing upon an indictment at the quarter-sessions, is void. [The Sheriff can only take a recognizance for their appearance.]

Debt on bond. The Defendant, after cravingoyer of the bond, by which he and two others became jointly and severally bound to the Plaintiffs as Sheriffs of Bristol; and of the condition, which was for the Defendant to appear before the Mayor and Aldermen of Bristol, justices assigned to keep the peace, &c., at the next general quarter-sessions to be holden, &c., in the Guildhall in the said city, on, &c. to answer, &c. touching a certain trespass and assault whereof he was indicted, pleaded, that at the time of making the said writing obligatory, he had been indicted for the trespass and assault in the condition mentioned, and that a capias was issued out of the Court of Sessions of Bristol, directed to the then Sheriffs of Bristol, commanding them to take the said Defendant, and him safely keep, so [419] that they might have his body before the said justices in the condition mentioned, at the next general quarter-sessions, &c. there to answer, &c. The plea then stated the delivery of the writ to the Plaintiffs as Sheriffs, and the arrest of the Defendant by virtue thereof, and that the Defendant executed the said bond with the said condition in order to obtain his discharge from out of the custody of the Plaintiffs, who thereupon set him at liberty; the said indictment in the said condition of the said writing obligatory mentioned then being pending and wholly undetermined; and that the Defendant did not upon, or at any time before or after the making the said writing obligatory, or before the exhibiting of the Plaintiff's bill, enter into any recognizance, or other security whatsoever to our said lord the now king, for his appearance at the said sessions, in the condition of the said writing obligatory mentioned, or at any other court or sessions whatsoever, to answer the said indictment, &c. or in any other manner whatsoever touching the said trespass, &c., nor was any such recognizance or security entered into or given to our said lord the king in that behalf. The second plea was the same as the former, except that it stated that the Defendant while in custody upon the arrest, executed the bond in order to obtain, and in consideration of then and there obtaining his discharge out of custody; which bond the Plaintiffs accepted on the occasion and for the cause and consideration aforesaid, and thereupon then and there set at liberty and permitted the Defendant to escape and go at large, &c., the said indictment being then pending and wholly undetermined, &c. The third plea was also the same as the first, as far as the averment of the Plaintiffs having set the Defendant at liberty, after having executed the bond, in order to obtain his discharge; and then was added this further averment, that no writ of venire facias issued or was sued out against the Defendant upon the said indictment mentioned, &c., previous to the issuing of the said writ of capias against the Defendant; nor was he thereby or by any other writ or process whatsoever summoned to appear or answer to the said indictment, before the issuing of such writ of capias.

The Court of King's Bench having given judgment for the Defendant, on a demurrer to these pleas, a writ of error was brought, which was twice argued, the first time by Marryat for the Plaintiffs, and Lawes for the Defendant; the second, by N. Bond for the Plaintiffs, and Gibbs for the Defendant. As the [420] Court (being divided in the same manner as in the preceding case of *Hunter v. Phillips*) entered fully into the subject in giving judgment, the arguments of the counsel are not stated. Those Judges who were of opinion that the judgment of the Court of King's Bench was proper, reasoned in the following manner:—

The question in this case is, whether the Sheriffs of Bristol were enabled by the statute of 23 H. 6, to take the obligation mentioned in the pleadings? Now though the words of the statute are sufficiently large, taken in their literal sense, to give sheriffs the power of bailing on indictments of trespass before justices, yet the interpretation of this as well as other antient statutes, must be made, not merely according to the literal sense, but according to the subject-matter, the interpretation of other

statutes made in *pari materia*, precedents, the authority of text writers, and long and constant usage. In order to arrive at the true interpretation, it is necessary to inquire what the sheriff's power of bailing was antecedent to the statute in question. At common law the sheriff might bail either on writ or *ex officio*. The latter power only appertains to the present inquiry. This power of bailing *ex officio* was incident to his power of awarding process, and giving judgment on indictments. The principle on which it is founded demonstrates its extent. The first statute which limits his power is the statute of Westminster 1st (3 Ed. 1, c. 15) which was a remedial and a declaratory law. In the declaratory part it states, that except in three cases therein specified, it was doubtful in what case the sheriff ought to replevy prisoners in his custody; and it proceeds to mention the cases, in which he is commanded to let them on mainprize, adding these material words "*sans rien donner de leur biens*," by which he is forbidden by necessary inference, to take an obligation for money. This clause will serve to interpret that of 23 H. 6, as will hereafter be shewn. It is evident that this statute (Westminster 1) does not extend to persons indicted before justices, who did not exist at the time when it was passed. They were created by virtue of a subsequent statute 4 Ed. 3, c. 2, which first gave them a power of taking indictments, which were afterwards to be tried by the justices of gaol delivery, and which expressly enacts, "that such as shall be indicted, or taken by the said keepers of the peace, shall not be let to mainprize by the sheriffs, nor by none other minis-421-ters, if they be not mainpernable by the law, and that such as shall be indicted, shall not be delivered but at common law." This statute shews the policy of the legislature, which expressly prohibits the sheriff from bailing, *ex officio*, persons indicted before justices; for that seems to be the true construction of this statute. It evinces the decided preference given to the jurisdiction of the justices, and the jealousy entertained by the legislature, lest the authority of the sheriffs so corruptly exercised, should interfere with the new and favourite jurisdiction. As at the time of making the statute 23 Hen. 6, c. 9, sheriffs had a most extensive criminal jurisdiction in their tours, and incidentally a power of bailing persons indicted before them, the question is, whether the power given to them of bailing by obligation, is to be restrained to indictments for trespass taken in their tours, or to be extended to indictments for trespasses before justices. If the latter interpretation were to take place, it would follow, that the legislature would by the same words modify an existing power, and create a new one in the same subject-matter, without announcing such an intention. But it seems to be a good rule of construction, that where a statute modifies an existing power of a known officer, it shall not be construed to give a new power, unless such intention be clearly expressed, or may be collected by necessary legal inference. And this would be the more extraordinary in the present case, where the mischief to be remedied is the abuse of the then existing power confided to the sheriffs. If all the ancient statutes be examined from Magna Charta to the 1 Edw. 4, both inclusively, a period of two hundred years, relative to the criminal jurisdiction of sheriffs, and to the abuse of their power of bailing, they will be found most ample in the detail of the extortions, perjuries and oppressions of the sheriffs and their officers. One grievance is stated in all the statutes; they bailed for money such as ought not to be bailed, and they extorted money from those who were intitled, and demanded to be bailed. Their jurisdiction was become most odious. The legislature in every reign abridged some part of their power, and increased the jurisdiction of the justices, until at last they were deemed so incorrigible, that their whole criminal jurisdiction was expressly, and the power of bailing for of-422-fences in their tours incidentally, taken away, and transferred to the justices of the peace, by the statute 1 Edw. 4, c. 2, which was deemed the first and most welcome present that a young king on the accession of a new family to the throne, could make to his people. These observations may serve as an answer to an argument that has been used on the part of the Plaintiff in error, in considering this statute, namely, that as it gives a new power in civil cases, therefore it may be construed to give a like power in criminal cases; and that the one should be considered co-extensively with the other. But the cases are also in themselves different. Before the passing the statute 23 H. 6, sheriffs had no power *ex officio* to bail without writ, persons in their custody on civil process; they could only do so on the writ *de homine replegiando*; but in criminal cases they had a power of bailing persons indicted before them in their tours. In respect to civil process, the power of bailing given to them was totally new; in respect to criminal process, it was

only new as to the mode of taking an obligation ; for the sheriff without writ, before the statute, might have let out on mainprize such persons as were indicted in his tourn. This statute being in *pari materia* with the statute of Westminster 1, the true exposition of the one may be found by comparing it with the other. By the express terms of the statute, Westminster, 1, sheriffs are restrained from taking any thing of those they let to bail, whether they be indicted for felony or trespass. This, by necessary implication, restrained the sheriffs from taking bonds of those whom they bailed. The statute of 23 H. 6, in fact repeals as much of the statute of Westminster, 1, as prohibits sheriffs from taking bonds of those who were indicted of trespasses in their tourns ; but as the statute of Westminster, 1, does not extend to justices of peace, the subsequent statute which in part repeals it, ought not to receive a more extensive construction. A contrary construction of the statute 23 Hen. 6 would be inconvenient in another respect, that the sheriff cannot judge what bail he ought to require of persons indicted before justices for offences not appearing in the *capias* ; but he was under no such difficulty in bailing those who were indicted in his tourn, for he might see the indictments. And no mischief can arise to the public from the construction contended for, since the party in prison may be [423] bailed at present by the justices of the peace. It can scarcely indeed be imagined that the uniform policy of the legislature, manifested in all the other statutes from Magna Charta to the 1 Edw. 4, and the constant preference given to the jurisdiction of the justices, should in this statute alone, which equally condemns the excesses of the sheriffs, be changed and altered. The statute of 1 Edw. 4 is clearly a virtual repeal of 23 H. 6, so far as respects indictments taken in the sheriff's tourn, because it takes away his power of awarding process, and giving judgment on such indictments. From thence the inference was probably drawn, that it was a virtual repeal in toto ; for it would be a whimsical construction of the statute of 1 Edw. 4, to make it abrogate the power of bailing by the sheriffs, in respect to their own jurisdiction, and to let it subsist in respect to the jurisdiction of the justices. Suppose that the sheriff as conservator of the peace should have committed a person to gaol for a breach of the peace, and that an indictment in his tourn had been found against the person for the offence, the sheriff could not have bailed him : but if the arguments on the other side be well founded, as soon as the indictment had been delivered to the justices of the peace, he might have bailed him. Again, the sheriff could not bail on indictments in his tourn, where he could apportion the bail to the magnitude of the offence, but he could bail on indictments of trespass before justices where he had no rule to guide his discretion. For these reasons, and from these apparent incongruities, it is evident, either that indictments before justices are not within the purview of the statute 23 Hen. 6, or that the statute is virtually repeated in toto by the statute 1 Edw. 4. It has been alleged, that the statute of 1 Edw. 4, could not have been considered as a repeal of the statute of 23 Hen. 6, because the practice of bailing, by the sheriff, prisoners for trespass by obligation, subsisted after the 1 Edw. 4, and the year book 7 Edw. 4, 5, is insisted on. In that case the obligation was taken to a stranger. The statute 23 Hen. 6, was pleaded, and Catesby a Serjeant of counsel with the Plaintiff, objects to the conclusion of the plea, which objection is allowed. The reporter seems to have no other object in view than to give the opinion of the court as to the plea, for the report is very short, and only to one point ; what became of the case afterwards does not appear. [424] No conclusion can be drawn from this case of usage ; it should rather seem that the sheriff in taking the bond in the name of a stranger, was conscious that he could not take it in his own name, and meant to elude the law. The authority of the text writers is next to be considered, and the usage since the statute of 1 Edw. 4 was passed. The counsel for the Plaintiff have insisted on the passages in Fitz. Nat. Brevium 564, and 565, Tit. Mainprize, where it is laid down, that the sheriff is bound by the statute of 23 Hen. 6, to let to bail persons indicted before justices in trespass, if they be not condemned. But in the same chapter, and in the next paragraph, it is likewise said, that the sheriff, upon a writ sued out of chancery, may bail persons condemned in trespass before justices, which is clearly not law. This shews the inaccuracy of the author, and invalidates his first proposition, so far as it depends on his authority. The first proposition relative to the statute of 23 Hen. 6 has nothing to do with the writ of mainprize which is the subject of the chapter ; and there is a manifest contradiction between that and the subsequent paragraph, in respect to persons condemned by justices. From the inconsistency therefore of the paragraph

relied on with the next that follows, and from its irrelevancy to the subject, there arises a suspicion that it is an interpolation by some injudicious person. Stress has also been laid on what is said by Hale, 2 P. C. 132 and 136. In the former passage he observes, that persons in custody by writ or process issuing from other courts, although bailable by such courts, were not bailable by the writ *de homine replegiando*, nor by the sheriff *virtute officii*, till the passing of the statute 23 Hen. 6, c. 9. From this dictum it should appear that he thought the power of the sheriff was enlarged by the statute; and in p. 136, he expressly says, that in some respects the sheriff's power of bailing in offences not capital, was enlarged by the statute, and that there is not only power, but command to the sheriff, to let out by sufficient sureties parties arrested in personal actions, and upon indictments of trespass. But Lord Hale does not furnish us with the grounds on which his opinion, as far as it can be collected from these dicta, is founded, in that accurate and satisfactory manner which is usual with him. It does not appear, that he anywhere considered the effect which the statute 1 Edw. 4, c. 2, might have upon the 23 Hen. 6, c. 9, admitting the sheriff's power [425] to have been thereby extended. To this authority of Hale may be opposed that of Hawkins, who says, b. 2, c. 10, s. 74, "there is not the least intimation of an intent to enlarge the sheriff's power in taking indictments, but the whole purport of it (the statute 1 Edw. 4) is to restrain him from proceeding upon them. It has also been held, that this statute takes away the power which sheriffs had by the common law, and the statute 23 Hen. 6, c. 9, of bailing persons indicted before him in his tourn, and obliges him to return such indictments to the justices at the next sessions." And b. 2, c. 15, s. 27. "It seems certain that by the common law, the sheriff might bail any person who was indicted before him at his tourn, for felony, or any other crime that is bailable, because he might both award process, and also give judgment against the person so indicted; and it is a general rule that whosoever is judge of the offence may bail the offender. But it is holden that at this day the sheriff has lost his power by reason of 1 Edw. 4, c. 2."

To the authority also of Hale may be opposed the silence of Lord Coke (2 Inst. West. 1, c. 15. 4 Inst. c. 31) and Staunford (B. 2, c. 18, tit. Mainprize), who make no mention of the statute 23 Hen. 6, though each of them has written expressly on the subject of bail. Dalton (Cap. 96) indeed mentions it, without the least comment, and takes no notice of 1 Edw. 4. On the whole, therefore, it appears that no great weight can be laid on the authority of text writers, who have considered the statute 23 Hen. 6, in respect to this point, as an existing law, for they do not seem to have paid much attention to the subject, nor to have taken into their consideration the several statutes *in pari materia*. It is sufficient to warrant the judgment of the Court of King's Bench, if, for the reasons already given, this construction of the statute shall only appear to be probable, since the main ground on which that judgment will rest is the universal usage that has taken place throughout the kingdom, except in the city of Bristol. Such usage must now be understood to have prevailed from the time of the statute 1 Edw. 4. Supposing then a construction of the 23 Hen. 6, to be doubtful, and that the authorities cannot be reconciled, constant usage would, in such case, be the best expositor of an ancient statute. For these reasons it seems that the judgment ought to be affirmed.

[426] LORD CHIEF JUSTICE EYRE. I am so unfortunate as to differ a second time from my Brethren; but I am bound by my opinion, and it is my duty to deliver it.

The effect of the judgment in this cause for the Defendant in error, is to make the solemn act and deed of the party, his writing obligatory under seal, null and void. The grounds in law producing such an effect ought to be clear and cogent. Both parties refer themselves to the statute 23 H. 6, c. 9; the Defendants in error to impeach the bond, as a bond taken by sheriffs by colour of their office in other form than that which is warranted by that statute, and therefore by the express words of the statute declared to be void; the Plaintiffs in error to maintain the bond, as made to them by the name of their office, upon the condition and in the form warranted and even required by that statute. If the words of the statute, according to their literal and obvious interpretation, were to be our sole guide, this bond must be held to be good; for that statute requires, "that sheriffs shall let out of prison all manner of persons by them arrested, or being in their custody by force of any writ, bill, or warrant, in any action personal, or by cause of indictment of trespass, upon reasonable

sureties of sufficient persons, having sufficient within the counties where such persons be so let to bail or mainprize, to keep their days in such place as the said writs, bills, or warrants shall require ;” and the obligation to be taken for any cause aforesaid, of any person or by any person which shall be in their ward, is to be to themselves by the name of their office, upon condition that the prisoner shall appear at the day contained in the writ, bill, or warrant, and in such place as the writ, bill, or warrant shall require. Such being the requisition of the statute, this is in point of fact an obligation made to the Plaintiffs in error, by the name of their office by the Defendant in error, who was in their ward by the course of the law upon a *capias* by cause of an indictment of trespass, upon condition that he should appear, which is keeping his day at the general quarter-sessions, which was the place in which the writ required him to appear. But it has been argued that by construction, the words “by cause of indictment of trespass” in the first of the two branches of the statute, which I have stated, are to be qualified and restricted to indictment of trespass before the sheriff in his tourn, and it is added, that by an implication from the statute of 1 Ed. 4, which statute takes from the sheriff [427] the power of proceeding upon indictments taken before him in his tourn, sheriffs have no power under 23 H. 6 to let out of prison upon surety any persons arrested or being in their custody by cause of indictment of trespass. I may have occasion to take some notice of this implication hereafter ; at present, I shall only observe upon it, that it will suffice for the Defendant in error, if he can make out that the indictment for trespass mentioned in the statute of 23 H. 6 means indictment taken before the sheriff in his tourn, even though he should fail to establish his implication from the statute of 1 Ed. 4 ; for I agree, that if by the statute 23 H. 6 the sheriff could only bail persons in his custody upon indictment of trespass taken before him in his tourn, this obligation by a person arrested by *capias* upon an indictment taken before the justices at their quarter-sessions, will be null and void. To maintain the proposition as I have stated it, on the part of the Defendant in error, he must begin with proving, that by the true construction of the statute 23 H. 6, the indictment of trespass there mentioned, means an indictment taken before the sheriff in his tourn. If he argues, that because the statute 1 Edw. 4 hath taken from the sheriff the power of proceeding upon indictments taken before him in his tourn, therefore by implication the sheriff’s power of taking bail upon indictments for trespass under the statute of 23 H. 6 is taken away, he begins at the wrong end. It may be taken away, if it never extended to any indictments but those taken before him in his tourn, but if it did extend further, there is no colour for such an implication : he must first prove, therefore, that it did extend no further. But this he has not proved to my satisfaction. Such a construction of the statute would, in my judgment, be as contrary to the spirit, as it would be to the letter of it. I am of opinion that neither the letter nor the spirit of the statute, nor the law as it stood at the time of the making of the statute, nor the law as it stands at this day respecting bail and mainprize, will bear out such a construction,—I go further,—will admit of it. This proposition I take to be clear, at the common law, and in the result of all the old statutes upon the subject, all persons in custody upon *mesne process* for any cause short of treason or felony (some forest cases, and cases of commitments per [428] *speciale mandatum* (Hawk. b. 2, c. 15, s. 36, 37, 38, tit. Bail. 2 Inst. 186), perhaps excepted) were replevisable, and were to be delivered out of prison by those who had the custody of them, who were principally sheriffs, and bailiffs of franchises upon security. All the writers agree, that the sheriff did *ex officio* deliver to mainprize all such persons in custody upon *mesne process*, issued by himself. It appears from the register, as well as from all the text writers, that either by the writ *de homine replegiando*, or *de manucapione*, (not to mention the writ *de odio et atia*, which being very special, and confined to one case, I pass by.) the sheriff did deliver to mainprize all persons in custody upon *mesne process* issued by himself. It also appears from the register, that the friends of the persons in custody might, if they thought fit, go to the Court of Chancery, and there take those persons to mainprize, and then obtain a writ to the sheriff to deliver them. Assuming it therefore, as the law of the land, that in one manner or other all persons in custody on *mesne process* on indictments for trespass were replevisable by the sheriff, and also by Chancery, in which last case, the sheriff was the minister to deliver the party, I ask, whether when a mode was to be devised for taking bail in all personal actions, it was not sound policy, and in the strictest analogy to the law as it then stood, that Parliament should interpose to give

ease to the subject by substituting the ready and cheap method of taking bail, and to remove the occasions of the extortion mentioned in the preamble of the statute, by requiring and compelling the sheriff to take bail in the case of all indictments for trespass, in the room of the circuitous and expensive course by writ, or by taking the prisoner to mainprize in the Court of Chancery. I confess I did not imagine that any man could read the statute of 23 H. 6, supposing the ground which I have taken to be solid, and doubt whether it was the meaning of that statute to give this easy mode of letting to bail persons in custody on mesne process in the case of all indictments for trespass. The language of the statute is not neutral in this argument, it is not only proper for the case of mesne process on all indictments, wheresoever found, but the whole composition and arrangement of the words of this branch of the statute, and the whole context require, that the relief intended for the subject should not be confined to the case of process upon indictments before the sheriff himself, and in truth hardly admit of that case being included in the statute. Let the words of the statute-book speak for them-[429]selves: "And that the said sheriffs, and all other officers and ministers aforesaid, shall let out of prison all manner of persons by them or any of them arrested, or being in their custody by force of any writ, bill, or warrant, in any action personal, or by cause of indictment of trespass upon reasonable sureties of sufficient persons having sufficient within the counties where such persons be so let to bail or mainprize, to keep their days in such place, as the said writs, bills, or warrants shall require." That these were words proper to be used by the legislature, supposing them to have intended to extend the provision to all indictments for trespass wheresoever taken, I think no man will deny. Let us attend to the arrangement of them: they close the enumeration of the cases, in which the sheriffs and other officers are to let persons out of prison. "By cause of indictment of trespass" is as comprehensive a term, as "any action personal" which immediately precedes it; and it stands part of an enumeration of cases, followed by the declaration of the condition upon which all these persons are to be let out of prison. Now mark the condition, it is upon reasonable sureties, &c. "to keep their days in such place as the said writs, bills, or warrants shall require." This condition, from the nature of it, as well as from the place it holds in the composition of the whole period, must apply to persons arrested upon indictments of trespass, as well as to persons arrested in personal actions. Then let it be considered for what these persons arrested on indictments of trespass are to give sureties. It is "to keep their days in such place as the said writs, bills, or warrants shall require;" apply these words to the personal actions, and they mark distinctly that it is a personal action in any place and before any court. Can they be construed differently as applied to the indictment for trespass? And particularly, can they, without extraordinary violence, be tied up to one place only, the sheriff's own tourn? I will here observe, that the condition for keeping their day in such place as the said writs, bills, or warrants shall require, being necessarily applicable to the case of persons arrested by cause of indictment of trespass, as well as to persons arrested in personal actions, will afford an answer to a verbal criticism, by which it was attempted to restrain the writ, bill, or warrant in the first part of the sentence to the personal action. That criticism had its use; it was meant to smooth [430] the way for a limited construction of the words, "indictment of trespass," consistent with a general construction of the words "personal action;" for which there could hardly be a colour, if the words "writ, bill or warrant," were understood to apply to both. That they must apply to both, is not only manifest from the frame and composition of the whole paragraph, but this absurdity will follow if they are not so understood, that the legislature must be supposed to have intended to command the sheriffs and other officers, to let persons arrested on some indictments of trespass out of prison, without any condition at all. This condition of keeping their day, &c. being necessarily applicable to the persons indicted of trespass, this further observation arises upon the terms of it. They are to keep their day in such place as the writs, bills or warrants, shall require; in a subsequent branch of the statute this is explained to mean, that the prisoners shall appear at the day, and in such places, as the writs, bills or warrants shall require, which I take to be perfectly inapplicable to the case of a prisoner in custody on an indictment in the sheriff's tourn, who would stand committed till he should be delivered in due course of law. If we consider this branch of the statute with the whole context, we shall find that it is a part of a general plan for the regulation of the conduct of sheriffs and other officers, in their ministerial capacity only,

and in respect of articles in which they have a duty in common. It was hardly to be expected, that in a well digested statute of such a kind, one should find so anomalous a provision crowded in as a regulation of the conduct of the sheriff in his judicial capacity, in which he must always act when he lets out of prison upon surety persons taken upon indictments before himself in his tourn. When the legislature thought fit to interpose for the regulation of the conduct of sheriffs in their judicial capacity, as was done in the first year of the reign of Edw. 4, when the act passed authorizing justices of peace to award process upon indictments taken in sheriffs' tourns, they confined themselves strictly to his judicial capacity, and stewards and bailiffs of franchises, who are connected with him in his ministerial capacity only, are not even mentioned in the act. That statute requires him to send indictments taken before him in his tourn, to the justices of the peace at their next sessions, who are to issue process upon them, and forbids the sheriff to issue any such process. The text writers have taken occasion from hence to [431] imply, upon very probable grounds, that this takes away the power of a sheriff to bail *ex officio*, as at the common law, which power to bail they suppose to be inherent in the power to proceed; and from thence it was too hastily concluded, in the argument in this cause, that the sheriff's power to bail persons arrested upon indictments of trespass, under the statute 23 H. 6, which is not *ex officio*, nor at the common law, nor inherent in his judicial capacity, but wholly attached to his ministerial capacity, as I have before observed, was also by implication taken away. But so far is this consequence from being just, that I think it might be maintained, that in the case of a person arrested by virtue of process from the sessions, upon an indictment taken before the sheriff in his tourn, and removed according to the statute of 1 Ed. 4, though the sheriff could not bail him *ex officio*, he would be bound to bail him by the statute of 23 H. 6. Some passages in Mr. Serjeant Hawkins's book in his chapter upon bail, have been supposed to countenance this notion, that the statute of 1 Ed. 4 hath, by implication, taken away the sheriff's power to bail on indictment for trespass, by virtue of the statute of 23 H. 6. But if those passages are considered with their context, and with other passages upon the same subject, in 2 Hale's Pleas of the Crown, c. 17, it will manifestly appear that they have been misunderstood. The passage in Hawkins relied upon, was a part of the 27th section of c. 15, b. 2, title "Bail." I will barely state it with its context; it will speak for itself. "But it seems certain that by the common law the sheriff might bail any person who was indicted before him at his tourn, for felony or any other crime that is bailable, because he might both award process and also give judgment against the person so indicted: and it is a general rule that whosoever is judge of the offence may bail the offender. But it is holden, that at this day, the sheriff has lost his power, by reason of 1 Ed. 4, c. 2, by which it is enacted, that the sheriff shall not proceed on any such indictment, but shall remove it to the next sessions of the peace." What is the power which Hawkins supposes the sheriffs to have lost by reason of 1 Ed. 4? Evidently that power which he says the sheriff had at the common law, because he might award process. Having thus shewn what Hawkins has not said respecting the statute 23 H. 6, I will now state [432] what Fitzherbert in his *Natura Brevium* has said, respecting the sheriff's taking bail on indictment of trespass. The passage I refer to is in fo. 565 of the edition by Sir M. Hale, upon which circumstance I would observe, that the opinion of Fitzherbert, who wrote long after the passing of the act of 1 Ed. 4, for he was a judge of the Court of Common Pleas in the time of Henry 8, has in a degree the sanction of the whole intervening period between him and Sir M. Hale, who published his edition in the year 1660; for it can hardly be imagined, that if the law had been taken to be otherwise during any part of that period and particularly in Sir M. Hale's own time, that he would have suffered it to pass without observation. The passage is this, "If a man be sued in debt or trespass, and be arrested by *capias* or *exigent*, and kept in prison, he may sue a writ to the sheriff out of the Chancery, to take bail of him to appear at a day, &c. and that he set him at liberty, &c. But now by the statute made 23 H. 6, every sheriff is bounden to let to bail every one in his custody who is arrested by writ, bill or warrant, in any action personal, or upon indictment of trespass, if they offer reasonable sureties to appear at the day, &c., in such places where the writ, bill, &c. is returnable." The case cited at the Bar from the Year Book of 7 Ed. 4, fo. 5, pl. 15, which arose upon a bond for the appearance of a person arrested on an indictment for trespass, which was held to be void, because not made to the sheriff by his

name of office, according to the statute of 23 H. 6, is a case in point against this extravagant notion of the effect of the statute of 1 Ed. 4, and affords a very strong inference that the statute 23 H. 6 was at that time understood to extend to indictments for trespass, and that it was the practice of the sheriff to take bail in that case. I have not been able to trace when it began to grow into disuse; I agree that it is now gone into disuse in a very great degree, and I conjecture that it could not have been in general use even in Sir Edward Coke's time, or at any time since; for I believe neither he nor Hawkins, when they are treating of bail in criminal cases, take the least notice of the statute of 23 H. 6 as applicable to the case of bail on indictment for trespass. Sir M. Hale does mention the statute, but passes it over without observation. Why it should have gone into disuse is very easily accounted for. Justices of the peace have authority by statute in some cases, in others, as incident to their judicial authority, to take bail, and to take bail by recognizance, which is more effectual than bail by obligation. The Court of King's Bench, and the individual judges of that court take bail, and the application is now made to them. This disuse seems to have puzzled the framers of the 4 and 5 W. & M. c. 18. The statute of 23 H. 6 had excepted out of the number of persons to let out of prison, upon surety by that act, such as should be in ward by *capias utlagatum*. The statute of 4 and 5 W. & M. directs the sheriff to let one in ward by *capias utlagatum* out of prison, and it provides, that all persons outlawed in the Court of King's Bench, other than for treason or felony which must I think include outlawry on indictment for trespass, and arrested upon any *capias utlagatum* out of the said court, should be let out of prison by the sheriff upon surety. That is a repeal of the saving in 23 H. 6, and seems to be an extension of the power given by that statute to the sheriff, to bail in the case of indictment for trespass. But then the statute proceeds to regulate the terms upon which the party is to be discharged, with reference to personal actions only, for the sheriff is to take an attorney's engagement to appear, or a bail bond, as it may happen to be a case where a special bail is or is not required. But let this non-user be of an old or a late date, will it repeal this statute of 23 H. 6, as to bail on indictments, when as to every other part of it it is daily and hourly acted upon? Could it be said to the Court of Chancery, that it shall not issue the writ de *homine replegiando*, because the habeas corpus act has provided another and a better remedy, or that it shall not issue the writ de *manucapione*, nor let a prisoner to mainprize, by its own immediate authority, because since the passing of this statute of 23 H. 6 it has not been the practice to apply to that court? If this is not to be said, I cannot discover upon what grounds of law this bond is to be impeached, unless a great deal more can be made than I conceive can be made in this case, or ought to be made in any case of the argument *ab inconvenienti*. Justices of the peace may be fitter to be trusted with a discretion, as to the quantity of security to be taken on indictment for trespass, than sheriffs. The judges of the Court of King's Bench, are in my judgment fitter to be trusted with such a discretion, and both justices of the peace and the judges take a better security than sheriffs can take. Let then the legislature, if the matter is of sufficient weight to merit its interposition, alter the law. [434] When it was said, that the sheriff who cannot take a recognizance, and must take a bond, will put the money in his own pocket, if the party should not appear at the day, that the prosecutor will have no remedy, and that the public justice of the country will be defeated, I answer that this is not well understood. I take it, that as well in cases of arrest upon indictments for trespass, as personal actions, if the sheriff has let the party out of prison upon bail, he must return a *cepi corpus*; and when he has made that return, he is by the express words of the statute of 23 H. 6 in the 14th branch of the first section, chargeable to have the body of the person at the day of the return, according to the course of the court; if he has not the body to produce, I say that he is to be amerced, and being amerced he may then, and not till then, put the bond in suit to reimburse himself. This is laid down in Dalton's Sheriff, and this I take to have been the ancient course of proceeding in all cases where the sheriff had not the body ready after his return of *cepi corpus*, though I have not hitherto been able to trace when the mode of proceeding by attachment against the sheriff was first substituted in the room of the amercement (a). If this be so, the inconvenience is far less urgent than it was

(a) Though there are some instances of attachments being granted against sheriffs for a total disobedience to the king's writ, as in 43 E. 1. 3, 26, pl. 5, and other books,

supposed to be; but more or less urgent, I am of opinion that it cannot repeal the statute of 23 H. 6; that there is nothing to impeach the validity of this bond, and consequently that the [435] judgment of the court of King's Bench is erroneous and ought to be reversed. But as the majority of the judges are of a different opinion, the judgment of the court must be affirmed.

Judgment affirmed.

BROOKE *against* WILLET. Thursday, Feb. 12th, 1795.

Where the Plaintiff in replevin pleads several pleas in bar of an avowry, on which issues are joined, and one of them is found for him, which establishes his right of action, and the others for the Defendant, and the judge does not certify under stat. 4 Anne, c. 16, the Defendant is intitled to the costs, not only of the pleadings which form, but also of the trial of those issues which are found in his favour (a).

In this action of replevin (ante, 224), the declaration contained two counts, the first for taking sheep at the parish of Mildenhall in a place called Undley Common the second, for taking them at the parish of Lakenheath in a place called Undley Common.

To the first count non cepit was pleaded, on which issue was joined, and found for the Defendant. To the second, avowry for damage-feasant to the Defendant's right of common for all commonable cattle, except sheep.

Pleas in bar, 1. A prescription for common for 20 sheep on the locus in quo, viz. Undley Common, on which issue was joined and found for the Plaintiff. 2. Common by cause of vicinage, on which the issue was found for the defendant; and the judge did not certify that the Plaintiff had probable cause for pleading such matter, under 4 Ann. c. 16. And now a rule being granted to shew cause why the prothonotary should not tax the Defendant the costs of those issues which were found for him, and why they should not be deducted from the costs of that issue which was found for the Plaintiff, and also from the general costs of the cause to which the Plaintiff was intitled, by having one issue found in his favour, by which it appeared that he had a cause of action,

Le Blanc, Serjt., shewed cause. By the practice in this court the Plaintiff having obtained a verdict on any one issue, is intitled to the costs, not only of that, but also of all the others, though found for the defendant. Bull. N. P. 335, Mic. 4 Geo. 3. *Bridges v. Raymond*, 2 Black. 800. *Norris v. Waldron*, ibid. 1199. This being the general rule, the next question is, in what manner the stat. 4 Anne, c. 16, is to be construed? That statute s. 4 enacts, "that it shall be lawful for any Defendant or tenant in any action or suit, or for any [436] Plaintiff in replevin, with the leave of the Court, to plead as many several matters as he shall think necessary for his

yet where there was a return of cepi corpus, and the sheriff did not produce the Defendant, the mode of compelling him so to do, was an amercement, Year Books, 7 Hen. 4, 11. 11 Hen. 4, 57. 36 Hen. 6, 24. 27 Hen. 8, 29, cited Bro. Abr. tit. Amercement, 1 Roll. Abr. 93, pl. 17. 8 Co. 40 b. Cro. Eliz. 624, 808, 852. 1 Ventr. 55, 85. 2 Saund. 60. 3 Mod. 84. 3 Salk. 314. Dalton Sher. c. 37. Lilly's Prac. Reg. 83. Stat. 13 Car. 2, St. 2, c. 2, s. 3. This practice of amercing the sheriff appears to have continued from the earliest times down to the beginning of the reign of Geo. 2, and to have given way to the proceeding by attachment, at some period between the years 1724 and 1729: for in Bohun, Instit. Leg. 24 and 25, third edit. 1724, an amercement is pointed out as the method to compel the sheriff to return the writ, and also to bring in the body, after being ruled, not a word being mentioned of an attachment for that purpose: in the Instr. Cler. B. R. 7th edit. 1727, vol. i. pp. 57, 58, an amercement is mentioned as the course usually pursued after ruling the sheriff to bring in the body; or after a peremptory rule an attachment, as being a more speedy way of proceeding. And in the case of *Smith v. Norton*, Mic. Geo. 2, 1729. 1 Barnardist. Rep. B. R. 246, on motion for an attachment for not bringing in the body after several rules, it is stated that amercements only used to be the method of enforcing these rules, but lately they had granted attachments."

(a) [*Vide Vollum v. Simpson*, 2 Bos. and Pull. 368. *Cook v. Green*, 5 Taunt. 594. *Othir v. Calvert*, 1 Bingh. 275. *Tidd's Pr.* 712, 8th edit.]

defence." And s. 5 provides, "that if any such matter shall upon a demurrer joined, be judged insufficient, costs shall be given at the discretion of the court; or if a verdict shall be found upon any issue in the said cause, for the Plaintiff or Defendant, costs shall also be given in like manner, unless the judge who tried the said issue shall certify that the said Defendant or tenant, or Plaintiff in replevin had a probable cause to plead such matter which upon the said issue shall be found against him." Now it has been determined, that this statute extends only to the costs of the pleadings, and does not include those of the issues, *Page v. Creed*, 3 Term Rep. B. R. 391.

Adair, Serjt., contra, urged the distinction taken in *Butcher v. Green*, Dougl. 677 (8vo Edition) viz. that where the general issue only was pleaded, and a verdict found for the Plaintiff on some counts, and for the Defendant on the others, there the Defendant was not intitled to his costs on those counts which were found for him; but where different issues were joined on different pleas, there the Defendant was allowed the costs of the issues which were found in his favour. He also cited *Dodd v. Jodrell*, 2 Term Rep. B. R. 235, in which it was holden, that where some issues in replevin were found for the Plaintiff which intitled him to judgment, and others for the Defendant, the Defendant should be allowed the costs of those issues which were found for him, out of the general costs of the verdict, unless the judge should certify.

After time taken to consider, the court on this day declared that it appeared upon inquiry to be by no means the settled practice of the court of King's Bench to confine the statute 4 Ann. c. 16, to the costs of the pleadings in all cases, and that both on the words and spirit of the statute, and on principles of justice, the Defendant was entitled to have the costs allowed of the trial of the issue which was found for him, and not of the pleadings alone. The rule therefore was made absolute.

Rule absolute.

[437] LATKOW against EAMER AND BURNETT Sheriff of Middlesex. Thursday, Feb 12th, 1795.

An inquisition made by the sheriff's jury to ascertain to whom the property of goods taken under fi. fa. belongs, though found in favour of A., is not admissible evidence in an action of trover for the goods, brought by A. against the sheriff (a).

This was an action of trover, the circumstances of which were the following. The late sheriff had levied an execution at the suit of one Barlow on the goods of one Martin, the value of which, Latkow, in order to assist Martin, advanced to the officer in possession, but neither took a bill of sale, nor removed the goods from Martin's lodgings, in which they were taken. After this, another execution was levied by the present sheriff on the same goods, at the suit of one Holbird against Martin, upon which notice was given by Latkow, that he had purchased them under the former execution; notwithstanding which the sheriff removed them, and in consequence this action was commenced. After service of the writ, the sheriff summoned a jury to determine in whom the property of the goods was, who declared them to be the property of Latkow, Holbird being present at the inquisition. However, the sheriff being indemnified by Holbird, did not deliver up the goods to Latkow, who therefore proceeded in the action. At the trial, the inquisition was received in evidence by Mr. J. Buller, who sat for the Chief Justice, and who left it to the jury upon the whole of the case, to decide whether Latkow meant merely to redeem the goods for the use of Martin, or to become himself the real purchaser; and the verdict was found for the Defendants.

Clayton, Serjt., now moved for a new trial, on the ground that the verdict was contrary to evidence, contending that the inquisition on the claim of the property was conclusive evidence in favour of the Plaintiff as against Holbird, who was present at the time when it was made before the sheriff.

LORD CHIEF JUSTICE EYRE. This proceeding of the sheriff could not be conclusive in any case, for inquests of office are always traversable. In trespass where the sheriff was the real Defendant, and not the nominal one, as in the present instance, such an

(a) [So in *Glossop v. Pole*, 3 M. & S. 175, it was held that a similar inquisition was not evidence for the Defendant in an action on the case against the Sheriff for a false return.]

inquisition would perhaps be evidence to lessen the damages, by a sort of argumentum ad hominem (*b*), but in the present case I doubt whether it can be evidence at all of pro-[438]-perty in a third person. I much doubt indeed, whether a sheriff can, strictly speaking, hold any inquisition as to property, except under a writ de proprietate probandâ, in replevin.

BULLER J. I have not been able to find any case in which this point has come in question. In Dalton's Office of Sheriffs (p. 146, cap. 30), it is said, "the safest and surest course for the sheriff or officer to take, is to inquire by a jury, in whom the property of the goods is;" and this is repeated in Impey's Sheriff (p. 153). The only case in which I have seen it mentioned is *Cooper v. Chitty* (1 Burr. 20, 1 Blac. 65), where it is alluded to in the argument, but taken no notice of by the Court. But I think I ought not to have admitted the evidence at the trial, for the inquisition is not under the king's writ, but merely a proceeding by the sheriff of his own authority.

Rule refused.

CRAUFURD AND OTHERS Executors of Sir Hew Craufurd *against* CAINES.
Thursday, Feb. 12th, 1795.

A fine levied of a rent-charge, assigned by way of annuity, will not give this court authority to set aside the annuity, securities, &c. on account of a defective memorial, there being neither a warrant of attorney to enter, nor judgment actually entered in this court.

The circumstances of this case were the following. Anne the wife of the Defendant was first married to William Blomberg, who left her at his death, lands in Yorkshire of the value of 1200l. a year, for her life. She afterwards married Walter Nisbet, which marriage was dissolved by an act of Parliament, by which the lands were confirmed to Nisbet during their joint lives, subject to a rent-charge of 200l. a year, which was thereby settled on the wife, during the same period. She then married the Defendant Caines, who together with her assigned the rent-charge to Sir Hew Craufurd, during the joint lives of Nisbet and her, and by the same deed covenanted to levy a fine of it, and further granted a rent charge to Sir Hew of the same sum for ninety-nine years, to be computed from the death of Nisbet, in case he should die in the life-time of Anne, if she should so long live, and also demised the lands to a trustee for a long term of years, to be computed in the same manner, in trust for the better securing the rent-charge. A fine sur cognizance de droit tantum was accordingly levied by [439] the Defendant and his wife, and he gave, as a farther security, a bond and warrant of attorney to confess a judgment in the Court of King's Bench. A motion was soon afterwards made in that court to set aside the annuity; but pending the rule, Sir Hew died, no judgment having been entered on the warrant. And now a rule was granted in this court to shew cause why the annuity should not be set aside, the deed, bond, &c. given up to be cancelled, and the fine vacated, on the ground that the memorial did not truly set forth the consideration, 1700l. being the sum stated to have been paid, when in truth part of it was kept back by Sir Hew, that the demise to the trustee was omitted, and no mention made of the fine or the covenant to levy it.

Adair, Serjt., shewed cause. This application, if made at all, ought to be to the Court of King's Bench, in which the warrant of attorney was given, and where a motion to this effect has been already made. The only part of the transaction of which this court can take cognizance, is the fine; but as that was regularly levied, and nothing appears to impeach its validity, it must stand. Another objection to the rule is, that this is one of the excepted cases in stat. 17 Geo. 3, c. 26, the eighth section of which enacts, that nothing in that act contained shall extend to any annuity granted "under any authority or trust, created by Act of Parliament." But however that may be, it is obvious that nothing has been done in this case to give this court jurisdiction of the subject-matter. Le Blanc, Serjt., who was going to argue on the same side, was stopped by the Court.

Clayton, Serjt., *contra*. With respect to the objection, that the application ought

(*b*) ["Perhaps it might be evidence if the question were whether the Sheriff had acted maliciously." Per Lord Ellenborough, *Glossop v. Pole*, 3 M. & S. 177.]

to have been made to the Court of King's Bench, it is to be observed, that the warrant of attorney which was to confess a judgment, in an action at the suit of Sir Hew Craufurd, was at an end with his death. It would therefore be useless to apply to that court. The fine gives this court jurisdiction. It is an assurance according to the terms of the act, and comes within the principle of those cases in which a jurisdiction has been assumed, *Haynes v. Hare*, ante, vol. i. 659. *Ex parte Chester*, 4 Term Rep. B. R. 694. A fine is also the sanction of the court to the agreement of the parties, where an action has been brought, and if there is good cause, they will order it to be vacated, Cro. Eliz. 531, *Hubert's case*, 3 Lev. 36, *Hutchinson's case*, 3 Wils. 115, *Watts v. Birkitt*. The memorial is defective [440] in not stating the consideration truly, and also in omitting to state the levying of the fine, which was in the nature of a fresh grant, distinct from the assignment, and which alone conveyed the interest of the wife. And the memorial being void in part, is void in the whole. As to the argument, that this is one of the excepted cases in the statute 17 Geo. 3, c. 26, it must be remembered that the annuity in question as far as it respects Sir Hew Craufurd, was not created by the act for dissolving the marriage between Nisbet and the wife of the Defendant.

The Court without giving any decided opinion, as to the alleged defects in the memorial, held that as there was neither a judgment nor warrant of attorney in this court, they had no jurisdiction of the matter in question; that the fine did not give them jurisdiction, for it was not an action within the meaning of the 4th section of the statute, nor was it such an assurance as was meant by the 3d section; and that as there was no intrinsic defect in it, or irregularity in the mode of levying it, they had no authority to interfere, and order it to be vacated.

Rule discharged.

VAUGHAN against DAVIES. Thursday, Feb. 12th, 1795.

A. having obtained a verdict against B. for a small sum, and B. having previously recovered judgment against A. for a larger sum, and taken him in execution, the Court will permit the sum recovered by A. by the verdict and the costs to be deducted from the amount of the judgment of B., and satisfaction to be entered for so much, notwithstanding A. is insolvent, and has no means of paying his Attorney's bill, but by the sum for which he obtained the verdict (a)¹.

The Plaintiff recovered a verdict for 200l. against the Defendant in an action of trespass for taking his goods, and the Defendant had previously obtained judgment against the Plaintiff on a bond for 2000l. who was surrendered in execution of that judgment. And now on the motion of Bond, Serjt., a rule was granted to shew cause why it should not be referred to the prothonotary to take an account of the damages recovered on the verdict obtained by the Plaintiff, and tax his costs thereon, and why the Defendant should not be discharged from the payment of such damages and costs, when so ascertained and taxed, upon his entering satisfaction for the amount [441] thereof on the judgment recovered by him, in part discharge of that judgment, 2 Black. 826. *Thrustout v. Crafter*, ante, vol. i. 23. *Schoole v. Noble*, 217. *Nunez v. Modigliani*, 657. *O'Connor v. Murphy*.

Adair, Serjt., shewed cause on the part of the attorney for the Plaintiff, on affidavits stating that he had no fund to resort to but the sum recovered by the Plaintiff for the payment of his bill, the Plaintiff himself being insolvent; the set-off therefore ought not to be allowed till the attorney's bill was satisfied. He said that the Court would protect an attorney who was their officer, who would otherwise be without remedy, and that in the Court of King's Bench the equitable right of setting off the sum recovered in one action against that recovered in another, was always subject to the attorney's lien for his bill, for which he cited *Mitchell v. Oldfield*, 4 Term Rep. B. R. 123, and *Morland v. Lashley*, B. R. Trin. 34 Geo. 3 (a)². But

(a)¹ [Vide ante, vol. i. p. 23, note.]

(a)² *Morland and Hammersley v. Lashley. Same v. Lashley & Ux.*

Both these causes were tried at the sittings Trin. 34 Geo. 3. The first was an action upon the separate bond of the Defendant; the second upon the joint bond of the

On this day after consideration, the Court said that the attorney's lien did not extend to prevent the parties in the cause from having the benefit of the set-off which was applied for in this case, and therefore made the Rule absolute.

BULLER, J., mentioned that a similar decision had taken place this term in the Court of Chancery, in a case of *Barton v. Etherington*.

End of Hilary Term.

[441] CASES ARGUED AND DETERMINED IN THE COURTS OF COMMON PLEAS AND EXCHEQUER CHAMBER, IN EASTER TERM, IN THE THIRTY-FIFTH YEAR OF THE REIGN OF GEORGE III.

MORLEY *against* GAISFORD. Monday, April 27th, 1795.

[Dictum adopted, *Sharrod v. London and North Western Railway*, 1849, 4 Ex. 585.]

An action on the case, and not an action of trespass, is the proper remedy for an injury done to the Plaintiff's carriage by the servant of the Defendant negligently driving his carriage against it (a).

This was an action on the case, and the declaration, which consisted of only one count, stated that the Plaintiff "on, [442] &c. at, &c. was lawfully possessed of a certain

Defendant and his wife. In the first, the Plaintiff obtained a verdict, and in the second was nonsuited. In the same term Henderson on the part of the Plaintiff obtained a rule to shew cause why the costs of the nonsuit should not be deducted from the sum given by the verdict in the first cause.

Palmer shewed cause, contending on the authority of *Mitchell v. Oldfield*, 4 Term Rep. B. R. 123, that the attorney for the Defendants had a lien on the judgment for his costs. In support of the rule Henderson cited *Barker v. Braham*, 3 Wils. 396, and attempted to distinguish the present case from *Mitchell v. Oldfield*, because there were different attorneys in the different causes in that case, but here the attorney was the same in both. But

LORD KENYON said, that circumstances made no difference between the cases; and as to the case in *Wilson*, it did not there appear that any application was made on the part of the attorney. That an attorney had a lien on the judgment for his costs, which it would be unjust in the Court to take from him. The rule therefore was made absolute, with a reservation of the attorney's lien. But as his costs were equal to the costs of the nonsuit, the rule was afterwards abandoned.*

(a) [So where the Plaintiff declared in case that A. so negligently steered his vessel, that it ran foul of B.'s, the declaration was held proper, *Ogle v. Barnes*, 8 T. R. 188. And where the Plaintiff declared in case against the Defendant for sinking his boat, and after averring a non-feazance in the Defendant, stated him to have acted with great force and violence; on error brought, it was held, that the Plaintiff had declared rightly in case, *Turner v. Hawkins*, 1 Bos. & Pul. 472. Again, where the declaration was for driving the Defendant's cart against the Plaintiff's horse with force and violence, alleging it to have been done "by and through the mere negligence, inattention, and want of proper care" of the Defendant, the Court of Common Pleas on demurrer held, that case was the proper form of action, *Rogers v. Imbleton*, 2 Bos. & Pul. N. R. 117. So in *Huggett v. Montgomery*, Id. 446, the same Court held, that if one ship run against another by the negligence of the pilot while the owner is on board, the remedy against the owner is an action on the case. So also, where an action in case was brought against three Defendants, and the declaration stated that the Defendants so carelessly managed their coach and horses, that the coach ran against the Plaintiff and broke his leg; and it appeared in evidence that one of the Defendants was driving at the time when the accident happened, and the jury found that it happened through his negligent driving, it was held, that the Plaintiff might maintain case against all the proprietors, although he might perhaps have been

* See also 6 Term Rep. B. R. 456, *Randle v. Fuller*.

carriage called a chaise, and of a certain horse then and there drawing the same; and the Defendant was then and there also possessed of a certain cart and a certain horse, then and there drawing the said cart, and then and there by a certain then servant of him the said Defendant, had the care, conduct, and management of the said horse and cart of the said Defendant, and of the driving thereof, to wit, at, &c. yet the said Defendant by his said servant then and there so negligently and unskilfully managed and behaved himself in the premises, and so badly, ignorantly, and negligently, drove, managed, guided, and governed the said cart and horse of the [443] said Defendant, that the said cart for want of good and sufficient care and management thereof, and of the said horse so then and there drawing the same as aforesaid, then and there struck and ran to and against the said chaise of the said Plaintiff with great force and violence, and then and there pulled, forced, and dragged the same to a great distance, and then and there broke to pieces, destroyed, and damaged the said chaise, and one of the wheels of the said chaise, and the shaft thereof, to wit, at, &c. whereby the said chaise of the said Plaintiff then and there became and was crushed, broken, damaged, and injured, and he the said Plaintiff was forced and obliged to lay out and expend, and did lay out and expend a large sum of money, to wit, the sum of 30l. in and about the repairs and amendment thereof, to wit, at, &c. to the damage, &c."

A verdict having been found for the Plaintiff, Cockell, Serjt., now moved in arrest of judgment on the ground that the action ought to have been trespass, and not case,

entitled to bring trespass against the one that drove the coach, *Moreton v. Hardern*, 4 B. & C. 223.

On the other hand, in *Leame v. Bray*, 3 East, 593, an action of trespass against the Defendant for accidentally driving his carriage against another's, was held rightly brought; and in *Covell v. Laming*, 1 Campb. N. P. C. 497, it was held, that if the owner of a ship being himself on board, and standing at the helm, unintentionally runs her against another ship by unskilful management, trespass is maintainable. So in *Lotan v. Cross*, 2 Campb. N. P. C. 464, where the Defendant had run against and injured the Plaintiff's chaise, Lord Ellenborough held, that trespass was the proper remedy. So also, where the Defendant drove a chaise against another chaise, in which the Plaintiff's wife was then riding, whereby she sustained an injury, the Court of Common Pleas held, that the action was rightly brought in trespass by the husband and wife, *Hopper and Wife, v. Reeve*, 1 B. Moore, 407.

Upon the whole, the following distinctions seem deducible from the cases on this subject.

I. Where the injury arises from the negligence of the Defendant, and the act is at the same time immediate, as where the Defendant by negligent driving runs against the Plaintiff's carriage, the Plaintiff may maintain case for the negligence, waiving the trespass. As to the latter point, see *Hall v. Pickard*, 3 Campb. N. P. C. 188, where it is said by Lord Ellenborough, that it may be worthy of consideration whether in those instances in which trespass may be maintained, the party may not waive the trespass and proceed for the tort: see also *Branscomb v. Bridges*, 1 B. & C. 145. So it is said by Bayley, J., in observing upon the case of *Leame v. Bray*, that, "at the trial Lord Ellenborough thought it should have been case, but on further consideration, the Court was of opinion that trespass was maintainable, but they did not decide that an action on the case would have been improper." *Moreton v. Hardern*, 4 B. & C. 226. But instead of waiving the trespass, the Plaintiff may, if he please, proceed for the immediate injury, and bring an action of trespass.

II. Where the injury arises from the negligence of the Defendant's servants, case only, and not trespass, is maintainable against the master.

III. Where the injury arises not from the negligence of the Defendant, but the act is both wilful and immediate, trespass is the proper form of remedy.

IV. Where the injury is not immediate, but only consequential upon the act done, the remedy is case, and not trespass.

V. Where the Plaintiff is the owner, but not entitled to the immediate possession of a chattel, injured by the Defendant driving violently against it, case, and not trespass, must be brought, *Hall v. Pickard*, 3 Campb. N. P. C. 187. But a mere gratuitous permission to a third person to use a chattel, does not take it out of the possession of the owner so as to prevent him from maintaining trespass for an injury done to it while it is so used. *Lotan v. Cross*, 2 Campb. N. P. C. 464.]

as the injury was direct, and not consequential. It was not necessary, he said, that the act done should be unlawful, to make it a ground of trespass; as if a man lift up a stick to defend himself, and by accident strike another, there, though the act was lawful, yet trespass lies. A fortiori therefore where the act is unlawful, as in the present instance, trespass is the proper remedy. And he cited *Day v. Edwards*, 5 Term Rep. B. R. 648, and *Savignac v. Roome*, 6 Term Rep. B. R. where the ground of the decision was, not that the act was wilful, as the counsel contended, but that there was a direct, and not a consequential injury.

The Court seemed at first inclined to refuse the rule, saying that it was difficult to put a case where the master could be considered as a trespasser for an act of his servant (a)¹, which was not done at his command; but they said, that respect for the decisions of the Court of King's Bench would induce them to give the point farther consideration, and accordingly, a rule to shew cause was granted; but a few days afterwards, Cockell acknowledged that the rule could not be supported, in which the Court concurred, being clearly of opinion that case, and not trespass, was the proper form of action.

Rule discharged.

[444] SMITH AND OTHERS, Assignees of Eustace, a Bankrupt, against COFFIN AND UX. Tuesday, April 28th, 1795.

[Considered, *Doe v. Gilbert*, 1821, 3 Br. & B. 89. Distinguished, *Monk v. Mawdsley*, 1827, 1 Sim. 290. Applied, *Wilce v. Wilce*, 1831, 7 Bing. 672.]

A. by his will reciting "as to such worldly estate as God has pleased to bless me with" made a provision for his heir at law, and "devised all the rest and residue of his goods, chattels, rights, credits, personal and testamentary estate whatsoever to B. for his own use, benefit, and disposal." Under this clause, B. took an estate in fee in the lands of the testator (a)². The right to bring a real action, ex. gr. a writ of entry sur abatement, passes to the assignees of a bankrupt, by the usual words of the deed of assignment (b).

This was a writ of entry sur abatement, and the count was as follows (c).

"County of the City of Exeter, to wit, Henry Smith, Joseph Hunt, and William Spicer, assignees of the estate and effects of Thomas Eustace deceased, a bankrupt, according to the form of the statutes made concerning bankrupts, by Nathaniel Batten their attorney, demand against Edmund Coffin and Sarah his wife, one messuage with the appurtenances, and six acres of land in the parish of Saint Sidwell in the County of the City of Exeter, which they claim to be their right and inheritance as such assignees as aforesaid, and into which the said Edmund and Sarah have not entry, but by Hannah Eustace, who devised the said tenements with the appurtenances to the said Edmund and Sarah, and who unjustly abated into the same after the death of Thomas Eustace father of the said Thomas Eustace the bankrupt, who was heir of the said Thomas Eustace the father within fifty years now last past, and thereupon the said Henry Smith, Joseph Hunt, and William Spicer, assignees as aforesaid, say that the said Thomas Eustace the father was seised of the tenements aforesaid, with the appurtenances in his demesne as of fee and right, in time of peace, in the time of our lord the now king, to wit, within fifty years last past, by taking the esplees thereof to the value, and on the first day of June in the year of our Lord 1767, died so seised thereof, upon whose death the said Hannah Eustace abated into the said tenements with the appurtenances, and was seised thereof, and died so thereof seised on the 12th day of December 1792, and from the said Thomas Eustace the father, the right descended to the said Thomas Eustace the bankrupt, then being of the age of sixteen years, as son and heir of the said Thomas Eustace

(a)¹ [That a master is not liable in trespass for the wilful act of his servant, though he is answerable in an action on the case for his negligence, vide *M. Manus v. Crickett*, 1 East, 106. *Leame v. Bray*, 3 East, 601.]

(a)² [Vide *Dally v. King*, ante, vol. i. page 1, and the note there.]

(b) [Vide *Clarke v. Calvert*, 8 Taunt. 750, 3 B. Moore, 111, S. C.]

(c) Which not being in daily practice, is stated at length.

the father, and remained and continued in the said Thomas Eustace the bankrupt, till the time of his bankruptcy hereinafter mentioned." It was then stated, that after the right so descended to the said Thomas Eus-[445]-tace the bankrupt as aforesaid, and while the same so as aforesaid remained and continued in him, to wit, on the 25th of March 1774, he was a trader, and became a bankrupt on the 3d February 1789. The issuing the commission, and the proceedings under it were then set forth, the assignment by the commissioners being stated to have been made by an indenture of bargain and sale, by which they did "order, grant, bargain and sell, unto them the said Henry Smith, Joseph Hunt and William Spicer, their heirs and assigns, all and singular the messuages, lands, tenements and hereditaments, whatsoever and where-soever, of or belonging to the said Thomas Eustace the bankrupt, in fee simple, fee tail or for life, or otherwise, with their respective rights, members and appurtenances, and all the estate, right, title, interest, property, profit, benefit, and equity of redemption, claim and demand, whatsoever, which he the said Thomas Eustace the bankrupt at the time of his becoming bankrupt as aforesaid, had of, in or to all and singular the said messuages, lands, tenements and hereditaments, respectively, to have and to hold all and singular the said messuages, lands, tenements and hereditaments, with their and every of their rights, members and appurtenances, unto them the said Henry Smith, Joseph Hunt and William Spicer (the assignees), their heirs and assigns, to and for the only benefit and advantage of them the said Henry Smith, Joseph Hunt and William Spicer, their heirs and assigns for ever, or according to the said Thomas Eustace the bankrupt's right and interest therein, subject to such mortgage or mortgages, or other charges and incumbrances, if any such there should be, as the same were rightfully charged with and liable to, in trust nevertheless, &c." (a). It was then stated that the bankrupt obtained his certificate, and afterwards died: "and so the right of the said Thomas Eustace the bankrupt of and in the tenements aforesaid, with the appurtenances, came to and vested in the said Henry Smith, Joseph Hunt and William Spicer, as such assignees as aforesaid, who now demand the same as such assignees aforesaid, and into which, &c. and who after the death, &c., and therefore they bring suit, &c."

The Defendants came and defended their right when, &c. and pleaded, 1st. That Thomas Eustace did not become a bankrupt; [446] on which issue was joined. And 2dly, by leave of the Court, &c. that the said Thomas Eustace the father being seised in fee of the tenements aforesaid, made his will, and thereby devised the said tenements, with the appurtenances, to his wife the said Hannah Eustace in fee, and died; by virtue of which devise she the said Hannah, after the death of the said Thomas Eustace the father, entered into and was seised in fee of the premises, and being so seised, before the intermarriage of the said Edmund and Sarah, duly made her will, and devised the said tenements, with the appurtenances, to the said Sarah Coffin, by her then name and description of her daughter Sarah Eustace, her heirs and assigns for ever, and afterwards, and after the intermarriage of the said Edmund and Sarah died so seised. By virtue of which said devise the said Edmund and Sarah, in right of the said Sarah, after the death of the said Hannah, to wit, on the same day and year last aforesaid, entered into the said tenements, with the appurtenances, and became and were, and continually from thence hitherto have been, and still are seised thereof, in their demesne as of fee in right of the said Sarah, &c.

The replication, as to so much of the plea as related to the messuage with the appurtenances, part of the tenements in the declaration mentioned, was that Thomas Eustace, the father, did not devise the same to his wife Hannah Eustace and her heirs, modo et formâ, &c., on which issue was joined. And as to so much of the plea as related to the six acres of land, residue of the tenements, &c., that Thomas Eustace the father, at the time of making his will, was not seised in fee of those six acres, &c., on which also issue was joined.

This cause was tried at Exeter, at the Summer Assizes 1794, when the only question left to the jury was, whether Thomas Eustace the son committed an act of bankruptcy, which was found in the affirmative, every other fact respecting the first issue being admitted. It was also agreed that a verdict should be taken for the Plaintiffs

(a) This deed appears to be in the usual form used by commissioners of bankrupts, but as stress was laid upon it in the argument, it is particularly stated.

on the third issue, and the following case made for the opinion of the court, on the second.

Thomas Eustace the father, being seised in fee of the messuage in Saint Sidwell's mentioned in the declaration, and also having an interest in a house in another parish, in which he then lived, made his will bearing date the third day of May, 1763, in the following words; "As to such worldly estate, as God in his kind providence has been pleased to bless and [447] favour me with, I give and dispose of the same in manner and form following, that is to say; First, I give and bequeath unto my son Thomas Eustace the sum of two hundred pounds of lawful money of Great Britain, to be paid unto him out of my residuary estate and effects, by my executrix hereinafter named, when and if he shall attain the age of twenty-one years; but my will is, that if he shall happen to die under that age, that the said sum of two hundred pounds shall sink in my residuary estate, for the benefit of my said executrix. Also my will is, that my said son shall as soon after my decease, as my said executrix shall think fit and convenient, be by her placed and bound out to some trade, profession or business, and that she do and shall by and out of my said residuary estate, pay the consideration-money to be paid or given with him on that occasion, and also provide for, maintain and educate my said son, until he shall be so placed and bound out as aforesaid, in a decent and suitable manner, and during the time of such his apprenticeship, and until he shall attain his said age of twenty-one years or die, which shall first happen, find and provide for, and allow and give unto him proper and suitable cloaths, and wearing apparel, and all other necessities whatsoever, except such as the master with whom he may be placed and bound out, shall in and by the indenture of apprenticeship for that purpose to be made and executed, covenant and agree to provide, it being my express will and intention, that my said son shall be as much the object of my said executrix's care, as he would have been of mine had I been living, to educate, provide for and maintain him. Also all that my messuage, tenement or dwelling-house, wherein I now live, with the appurtenances and the reversions, remainders, rents, issues and profits thereof, (subject nevertheless with my personal estate, to the payment of the said legacy of two hundred pounds to my son, when and if he shall attain his said age of twenty-one years as aforesaid,) I hereby give and devise unto my dear wife Hannah Eustace her heirs and assigns for ever, also all the rest and residue of my goods, chattels, rights, credits, personal and testamentary estate whatsoever, wheresoever, and in whose hands soever, not hereinbefore particularly given and bequeathed, (subject nevertheless to the payment of the said legacy of two hundred pounds to my said son, and to such provision for binding out, maintaining and [448] educating him as aforesaid, and also to the payment of all my just debts and funeral expences, to and with the payment whereof, I hereby subject and charge the same,) I hereby give and bequeath unto my said dear wife Hannah Eustace for her own use, benefit and disposal. Lastly, I hereby make, ordain, nominate and appoint my said wife Hannah Eustace, whole and sole executrix of my last will and testament."

In June 1763 the testator died, and his widow Hannah Eustace entered into possession of the house in St. Sidwell's by virtue of the residuary clause in the will, and received the rents and profits until her death. And the question for the opinion of the court was,

Whether she took any, and what estate in the said messuage in St. Sidwell's under the will? If the court should be of opinion that she took an estate in fee, a verdict to be entered for the Defendants on the second issue; if she took no estate, or only an estate for life, the verdict on that issue to be entered for the Plaintiffs.

This question was argued in Hilary Term, by Le Blanc, Serjt., for the Plaintiffs in the following manner. On the true construction of this will, Hannah Eustace took no estate in the house in St. Sidwell's. The facts are that the testator had two houses, one in St. Sidwell's, and another in which he lived. But he makes no mention of that in St. Sidwell's in any part of the will, it therefore could not pass to the wife unless it be included in the residuary clause. But the court will not disinherit the heir at law, without seeing a clear expression of the intention of the testator that some other person should take the inheritance. Though it be true that where a legacy is given to the heir at law, an intention may be presumed in the testator, that he should not inherit, yet that circumstance will not be sufficient to exclude him unless the estate is expressly devised to somebody else, notwithstanding the introductory part of the will refers to all the estate and effects of the testator, according to the rule

laid down by Lord Mansfield in *Denn v. Gaskin*, Cowp. 657, and in *Shaw v. Russell* there cited. To the same point also is *Right v. Sibbtham*, Dougl. 759, 8 vo. The question then is whether the words "all the rest and residue of my testamentary estate," used in the residuary clause, contain such an express devise to the widow, as will exclude [449] the heir! Now when the testator devises the house in which he lived to her, he uses legal phrases in order to give her an estate in fee, he describes it as the house in which he lived, and gives it to "her heirs and assigns for ever." It appears therefore that he knew the force of technical expressions, and it is to be presumed, that if he had meant that she should take the house in *St. Sidwell's*, he would have described that house in the same manner. But the words testamentary estate are peculiarly applicable to personal property, and they are here coupled with the words "goods, chattels, rights and credits," which are expressive of that species of property alone.

Williams, Serjt., contra. Though the introductory clause mentioning all the testator's worldly estate, taken by itself proves nothing, yet when connected with the rest of the will, it affords a good ground on which to reason in favour of the devisee. 2 Vern. 690, *Beachcroft v. Beachcroft*. Cas. Temp. Talbot. 157, *Ibbetson v. Beckwith*. 1 Wils. 333, *Grayson v. Atkinson*. 3 Burr. 1618, *Frogmorton v. Holyday*. Cowp. 299, *Hogan v. Jackson*.

As to the case of *Denn v. Gaskin*, Lord Mansfield there makes a distinction between cases where the testator connects the introductory clause "as to all his worldly estate" with the particular devise, and where there is no such connexion; and neither in that case, nor that of *Shaw v. Russell*, was there any such connexion; but there is in the present. In those cases too, there was a mere formal bequest to the heir at law, of 10s. in one, and 1s. in the other, therefore no provision was made for him; but here, besides a legacy of 200l., express directions are given to defray the expences of apprenticing and maintaining the heir out of the residuary estate. It does not appear therefore that the testator meant to give him a larger share of any of his property. If he dies under 21, the legacy of 200l. is to sink into the residuary estate. Now the term sink into the estate is peculiarly applicable to land, and is accordingly used in marriage settlements when the portions of younger children who may die under age are not to be raised. And the word "estate," though coupled with expressions applicable to personal property, will pass a fee. 2 Term Rep. B. R. 659, *Tilly v. Simpson* (a).

It is also a rule of law, that every word in a will shall be effective if possible. But unless the word testamentary be here understood to relate to land, it will be useless, for the other [450] words are fully sufficient to pass all the personal property of the testator. In ancient times no man could dispose of his real estate by will. By degrees that privilege was allowed: as for instance, by the custom of particular towns. It was not till the passing of the statute 32 Hen. 8, c. 1, that a free disposition by will of lands was allowed. But that statute and the 34 and 35 Hen. 8, c. 5, both use the terms will and testament as synonymous. Where the intention also of the testator is to be collected from the context, even the word legacy will pass a real estate. 1 Burr. 268, *Hope v. Taylor*. 5 Term Rep. B. R. 716, *Hardacre v. Nash*. Here too the residuary bequest is charged with the payment of debts, the real estate therefore ought to pass for the benefit of creditors. And that the residuary clause in the will in question is sufficient to include a devise of land, appears from 1 Com. Rep. 164, *Hopewell v. Ackland*. Ibid. 337, *Scott v. Alberry*.

BULLER, J. (b). Cases of this sort depend on niceties of expression, and sometimes even on a single word, and as it has been frequently said, the nonsense of one man cannot be a guide for that of another. But the question always must be, what was the intention of the testator! That is the polar star by which we must be guided. Where it is apparent in the introductory part of the will, that the testator meant to dispose of the whole of his property, and the expressions in the residuary clause may include a real estate, that clearly is to be taken in the largest sense, in order to correspond with the introductory part. This case is different both from *Denn v. Gaskin* and *Shaw v. Russell*, for in neither of those cases did the introductory clause profess to dispose of all the property of the testator. That circumstance distinguishes this case,

(a) On this point see likewise *Doe v. Chapman*, ante, vol. i. 223.

(b) Absent the Lord Chief Justice.

and brings it within the authority of that of *Grayson v. Atkinson*, before Lord Hardwicke, where the introductory clause was, "as to all my temporal estate wherewith it hath pleased God to bless me, I give and devise the same as follows." Here the testator meant to devise all his property; the word testamentary is as well applicable to real as to personal estate; and if it be not applied in this case to the real property, it is merely tautologous; and in construing wills the Court will, if possible, give a meaning to every word. I am therefore of opinion that there should be judgment for the Defendant.

[451] HEATH, J. I am of the same opinion, and my reasons are these: first, The testator sets out with declaring his intention to dispose of all his property; secondly, he leaves 200l. to his heir at law; and thirdly, the residuary clause is sufficient to pass the estate in question; for the word testamentary is a most comprehensive term, and we should interpret it in much too narrow a sense, if we were to confine it to personal property. And there are no circumstances in the will to control this body of evidence, if it may be so called. Wills are frequently made in extremis, sometimes when the agonies of death are approaching, and it would be unfair to construe strictly the words used by an ignorant testator in that situation. Here, after the devise of the personal estate he might have changed his mind, and designed to give also his real estate, by the residuary clause. The word testamentary may therefore be considered as declaratory of a subsequent intention to that effect.

ROOKE, J., of the same opinion.

Postea for the Defendant.

The Court having thus given their opinions on the construction of the will, Williams, Serjt., afterwards obtained a rule to shew cause why the judgment should not be arrested, on two grounds: first, that a right of action to recover real property was not such an interest as would pass by the assignment of the commissioners to the assignees of the bankrupt; and secondly, that if it were such an interest as was assignable, yet it did not pass by the deed which was executed in the present instance.

Against which Le Blanc, Serjt., now shewed cause. The first question is, whether a right of action to recover real property is of such a nature as to be capable of vesting in the assignees of a bankrupt by the assignment of the commissioners? Now the stat. 13 Eliz. c. 7, enables the commissioners to dispose of whatever property or interest the bankrupt "may lawfully depart withal;" but this was an interest which the bankrupt might have released, therefore he might have departed with it. The 5 Geo. 2, c. 30, goes farther, and mentions "all such effects of which the party was possessed or interested in, or whereby he hath or may expect any profit, possibility of profit, benefit or advantage whatsoever." And it has been decided that a possibility may be devised and is assignable. *Roe on dem. Perry v. Jones*, ante vol. i. 30, affirmed in error, 3 Term [452] Rep. B. R. 88. The statute also 21 Jac. 1, c. 19, declares that all the statutes and laws concerning bankrupts shall be largely and beneficially construed, for the relief of creditors. Here the right descended to the bankrupt before the bankruptcy, and if it do not pass to the assignees, it must still remain in him, in opposition to the claims of his creditors, a position contrary to all legal notions of the effect of an assignment by the commissioners, which passes every thing vested in the bankrupt. And upon this principle Sir Joseph Jekyll founded his decision, in *Higden v. Williamson*, 3 P. Wms. 132.

Taking then this right to have been assignable by the commissioners, the next point is, that it passed by the deed in question. The material words are "hereditament, claim and demand." Now it clearly was included in one or other of those terms; a right of action was considered as an hereditament in *The Marquis of Winchester's case*, 3 Co. 1; and though in *Cromer's case* there cited, p. 4 b. such a right was holden not to pass by the Queen's grant on the attainder of a disseisee, yet that case proceeded on the principle that the grant of the crown shall be strictly construed, and shall pass nothing but what is specifically described; but a rule of construction directly contrary prevails in cases of bankrupts.

In support of the rule, Williams, Serjt., argued in the following manner.

The facts stated and admitted on this record are these:—Thomas Eustace the father was seised in fee of the lands in question, and died so seised on the 1st of June 1767, leaving Thomas Eustace his son then of the age of 16 years his heir at law. Upon the death of Thomas Eustace the father, Hannah Eustace abated into the premises, and was seised thereof, and died so seised on the 12th of December 1792.

On the 3d of February 1789, Thomas Eustace the son became a bankrupt, a commission of bankrupt duly issued against him, and the commissioners by indenture of bargain and sale, bearing date the 24th of March 1789, duly inrolled, did order, grant, bargain and sell, unto the demandants, the assignees, "all and singular the messuages, lands, tenements and hereditaments, whatsoever and wheresoever, of and belonging to the said bankrupt in fee simple, fee tail, or for life, or otherwise, with their respective rights, members and appurtenances, and all the estate, right, title, interest, property, profit, benefit and equity of redemp-[453]-tion, claim and demand whatsoever, which the said bankrupt at the time of his becoming bankrupt had of in or to all and singular the said messuages, lands, tenements and hereditaments, respectively." From the death of his father in the year 1767, until his bankruptcy in the year 1789, a period of more than twenty-two years, Thomas Eustace the son never entered into the premises at all, and therefore a right of action only remained in him at the time of his bankruptcy. His entry was taken away by the stat. 21 Jac. 1, c. 16, which enacts, that no person shall make any entry into any lands, &c. but within twenty years next after his right shall first descend or accrue, and in default thereof, such person shall be utterly excluded and disabled from such entry after to be made. There is a proviso in the statute in favour of infants, but the infant must, within ten years next after his full age, take the benefit of that proviso, and at no time after ten years. Thomas Eustace the son was of full age in the year 1772, and did not become a bankrupt until the year 1789, more than ten years after his full age; during which time he neither entered nor sued for the premises, and therefore his entry was taken away at the time of his bankruptcy. Under these circumstances, it is submitted that judgment ought to be arrested; first, because the commissioners have no authority whatever under the statutes of bankrupts, to grant any rights of action, which a bankrupt may have to any lands or tenements at the time of his bankruptcy; secondly, because, supposing they have such authority, this right of action did not pass to the assignees, by the bargain and sale stated upon this record.

As to the first point, it must be admitted that nothing can pass to the assignees of a bankrupt, but what the statutes of bankrupts give the commissioners authority to grant. From first impressions upon this subject, occasioned chiefly by referring to the interest which the assignees of a bankrupt take in his personal estate, the most frequent subject of discussion and therefore the most familiar, one is led to conclude that whatever actions the bankrupt himself might have had, before his bankruptcy, to enforce his right to any real estate, the same shall his assignees have after his bankruptcy. But the interest which the assignees take in the real estate of a bankrupt, is not co-extensive with that which they have in his personal estate, and it by no means follows, because rights of action which the bankrupt [454] has to recover debts or other personal property, are transferred to the assignees, that therefore his rights of action to recover real property are given to them by the bargain and sale. If it were a principle of law, that immediately on an act of bankruptcy committed, the real and personal estate of the bankrupt vested in his assignees by the mere act and operation of law, in the same manner as the real and personal estate vests in the heir and executor, then the inference contended for might be supported, because undoubtedly a right of action will descend to the heir. But the case of assignees of a bankrupt is very different, for their interest in both real and personal estate depends wholly upon positive provisions created by statute. With respect to rights of action to recover his personal property, the commissioners are authorized to assign them by the express provision of the statute of 1 Jac. 1, c. 15, s. 13, and the assignees are enabled thereby to bring such actions in their own names. But there is no such provision in any of the statutes, respecting the bankrupt's rights of action to recover real property. An act of bankruptcy does not divest the property out of the bankrupt. It continues in him until the assignment. 1 Atk. 96, *Drury v. Man*, and therefore it is no plea to an action brought by him after his bankruptcy, to say that he became a bankrupt, and a commission issued against him, without stating an assignment by the commissioners, 1 Salk. 108, *Carey v. Crisp*. Consequently no estate vests in the commissioners, but only a power to grant, and their grantees are considered in the light of every other vendee. They take by force of the assignment or bargain and sale, and not otherwise. Therefore if the commissioners grant any copyhold lands of the bankrupt to the assignees, they, like other vendees, must be admitted before they can surrender, 1 Atk. 96. So the assignment of a lease for years by the

commissioners, is considered as an assignment by the lessee himself. It being proved then, that the assignees derive their title solely under the bargain and sale or assignment, and that the commissioners have no power or authority to convey any thing but what is given them by the statutes of bankrupts, the next thing to be considered, is the authority which the commissioners derive from those statutes. There are but four, viz. 34 and 35 H. 8, c. 4, 13 Eliz. c. 7, 1 Jac. 1, c. 15, and 21 Jac. 1, c. 19, which relate to the [455] disposition of the real estate of a bankrupt. The 34 and 35 H. 8, enacts, that the persons therein named "shall have power and authority to take by their wisdoms and discretions, such orders and directions, as well with the bodies of such offenders aforesaid, as also with their lands, tenements, fees, annuities, and offices, which they have in fee simple, fee tail, term of life, term of years, or in right of their wives, as much as the interest, right and title of the same offender shall extend to be, and may then be departed with by the said offender, &c."

Now notwithstanding the words fee tail are here used, yet an estate tail could not, either by virtue of that statute, or of the 13 Eliz. be granted by the commissioners for a longer period than during the life of the bankrupt tenant in tail, because that was as much as the interest, right and title of the bankrupt tenant in tail extended to, and he could lawfully depart with. From hence therefore a strong argument arises. For tenant in tail might at that time, as well as the present, certainly have made an absolute disposition of the lands by recovery or fine; but as he could not depart with them by deed indented and inrolled, for a longer period than during his own life, it was thought necessary to give to the commissioners a power to do so, by the express provisions of the statute of 21 Jac. 1, c. 19. It might have been argued before the passing of that statute, with great plausibility and show of reason, that as tenant in tail might by particular modes of conveyance have departed with the estate tail, and have barred as well all remainders and reversions expectant as his own issue, therefore the commissioners were enabled by those other statutes, to grant the same interest in the estates tail of the bankrupt to the assignees by the bargain and sale, as the bankrupt himself might have done by recovery or fine, and that the Court ought to construe those statutes liberally in favour of creditors. But it is fair to presume that this kind of argument did not prevail; for if it had prevailed, it would have been nugatory to provide for this case by a particular act of Parliament. The stat. 13 Eliz. c. 7, repeats the provisions of that of Hen. 8, and uses the same expression as to what the bankrupt may "lawfully depart withal," and in the 11th section it enacts, that if at any time after the bankruptcy, lands, &c. shall be purchased by, or shall descend, revert, or by any means come to the bankrupt, before his creditors are satisfied, such lands, &c. shall be bar-[456]-gained, sold, &c. in such manner as other the lands, &c. of the bankrupt which he had when he was declared a bankrupt, should or might have been bargained, sold, disposed of, &c.

Lord Hardwicke, *ex parte Proudfoot*, 1 Atk. 252, takes a distinction upon this section, between the interest the assignees take in the real and in the personal estate of a bankrupt. His words are "when assignees are chosen, all the estate and effects of the bankrupt are vested in them, and he is incapable of carrying on any trade, and all his future personal estate is effected by the assignment, and every new acquisition will vest in the assignees; but as to future and real estates, there must be a new bargain and sale." Now suppose Thomas Eustace had, after his bankruptcy, brought an action and recovered the estate in question, in that case it is unquestionable that there must have been a new bargain and sale made to the assignees, because they were lands which had come by that means to the bankrupt after his bankruptcy, and are therefore within the express provision of the 11th section of the statute of 13 Eliz. His bankruptcy and the bargain and sale by the commissioners, would not have been any plea to such an action brought by him. If this position be well founded, which will scarcely be disputed, it follows, that the right which the bankrupt had to the lands in question did not pass by the bargain and sale; for if he could himself have recovered them in his own name, after his bankruptcy, and the execution of the bargain and sale, and the estate when recovered would have been considered as a new estate, which had come to the bankrupt after his bankruptcy, and of which there must have been new bargain and sale made, it is a necessary consequence that the right of action which he had to recover those lands, at the time of the bankruptcy, did not pass to the assignees by the assignment or bargain and sale. It is not contended, that this right of action which the bankrupt had could not by any means have been applied for the

benefit of his creditors; on the contrary, it may be admitted that this right did as much belong to his creditors, as any lands in his possession. But the point is, that this right did not pass by the assignment or bargain and sale. The remaining two statutes, which take notice of the real property of a bankrupt, viz. 1 Jac. 1, c. 15, and 21 Jac. 1, c. 19, merely extend the provisions of the 13 Eliz. c. 7, to other persons described to be bankrupts.

[457] It appears, then, that there are no words in either of those statutes, which can by any possibility be construed to give to the commissioners a power to grant rights of action to recover real property unless the words "may lawfully depart withal," or the word "hereditaments" in the statutes of Hen. 8 and Eliz. shall be supposed to include such rights. With respect to the words "may lawfully depart withal" they seem from the whole context of the statutes taken together, to mean such interests in real estates as the bankrupt himself might have departed with by bargain and sale, and deed indented and inrolled. If he was seised in fee, the whole estate would pass; if in tail, or for life, or in right of his wife, then no greater interest would pass than during his own life. But those words cannot be construed to pass rights of action; for they cannot lawfully be departed with. They cannot be granted, or pass by deed, though for a valuable consideration, and every such conveyance is void; for nothing in action, entry, or re-entry, can be granted over, Litt. s. 347. Co. Litt. 214 a. 2 Black. Comm. 290. The only conveyance by which lands and tenements were granted at the common law, was by feoffment and livery of seisin; but no feoffment and livery could be made unless the feoffor had entered into the lands. Co. Litt. 9 a. Rights of action cannot be devised, Com. Dig. Devise (M.). They are not forfeitable for treason or felony. There can neither be a tenancy by the curtesy, nor in dower of a right of action. No lease can be made by one who has only a right of action, and therefore in special verdicts it is always found that the lessor entered and was seised, prout lex postulat. Nor is this all. By the statute 32 H. 8, c. 9, it is made penal to "grant or buy any pretended right or title to any lands and tenements." In *Partridge v. Strange*, Plowd. 88, Montague, Ch. J., commenting upon this statute says, that "where one man is in possession of lands and tenements, and another that is out of possession claims them, or sues for them, that is a pretended right or title." And in Co. Litt. 369 a. it is said, that "if A. be disseised, in this case A. hath a good lawful right; yet if A. being out of possession granteth to or contracteth for the land with another, he hath now made his good right of entry pretended within the statute, and both the grantor and grantee within the danger thereof, a fortiori of a right in action." And in Plowd. 88, it is said, that this statute "has not altered the law; for [458] the common law before this statute was, that he who was out of possession might not bargain, grant or let his right or title; and if he had done it, it should have been void." Therefore such a right cannot be lawfully departed with. Hence it plainly appears, that the bankrupt himself could not have departed with his right of action by bargain and sale by deed indented and inrolled. And as he himself could not, neither can the commissioners grant it under the statutes, which enact, that the bargain and sale made by virtue of them shall only be as effectual as a bargain and sale made by the party himself, by deed indented and inrolled. The eleventh section of 13 Eliz. proves that nothing was intended to be granted by that statute, but either lands of which the bankrupt was actually seised at the time of the bargain and sale, or else some beneficial interest therein, of which he was possessed at that time. It is true, that the bankrupt may release his right of action; but that can only be to the abator or disseisor himself; and it enures only as a confirmation of his former estate, and not as a new grant. A release of a right differs from a grant, which conveys an interest. But it by no means follows, that because one may release his right to the tenant, he shall therefore be able to depart with it generally. A bankrupt might unquestionably release a condition, and therefore it might, with the same reason, be contended, that a condition would pass by the bargain and sale of the commissioners, under the general words "may lawfully depart with." But it is manifest that conditions were not grantable until the statute of 21 Jac. 1, c. 19, s. 13, enabled the commissioners to grant them. And the reason why they did not pass by the bargain and sale, under the general words "may lawfully depart with," was, because it is a principle of the common law that conditions, though they may be released, are not grantable over. Litt. Sect. 347. So the bankrupt might, without doubt, have released a power,

or equity of redemption, and therefore it might be urged that an equity of redemption was included under the general words "may lawfully depart with." But it is certain that an equity of redemption did not pass prior to the statute 21 Jac. 1, c. 19. So a bankrupt lessee might have released a covenant; as if the lessor had covenanted with him for the renewal of the lease; yet it has been holden, that such a covenant could not be granted by the commissioners, *Drake v. [459] Mayor of Exeter*, cited 2 Vern. 97. *Vandenanker v. Desbrough*. So a bankrupt who is seised of lands as a trustee, may depart with the lands for the purposes of the trust; but as he cannot lawfully depart with them for any other purpose, the commissioners cannot grant them to the assignees, and therefore he may sue in his own name for any thing in respect to such lands, notwithstanding his bankruptcy and the assignment by the commissioners, 1 Term Rep. B. R. 619. The case of *Higden v. Williamson*, 3 P. Wms. 131, is distinguishable from the present. That arose on a contingent interest in money, a possibility of having a share of a sum of money upon a contingency. Sir Joseph Jekyll indeed grounded his opinion upon the direction of the statute of 13 Eliz. that the commissioners shall assign over all that the bankrupt might depart withal; and that as the bankrupt might have released this contingent interest, so the commissioners were enabled to assign it. But it is obvious that this opinion is not well founded. For the words "may lawfully depart withal," in the statutes of Hen. 8 and Eliz. do not relate to the assignment of the personal estate of the bankrupt, but only to the bargain and sale of his real estate. And Lord King's chief reason for affirming the decree was, that the statutes for discharging bankrupts on certificates, never intended to intitle them to any estate by virtue of any claim anterior to the bankruptcy; and besides that the word "possibility" was in all the later statutes touching bankrupts. The statute he particularly alluded to was 5 Geo. 2, c. 20, the words of which are "all such effects of which the party was possessed or interested in, or whereby he hath or may expect any profit, benefit or advantage whatsoever." But in the present case there is neither a contingent interest, nor a possibility either in money or land; but simply a right of action to recover lands in the possession of another. The assignees might have recovered these lands in the name of the bankrupt, and the commissioners would then have been enabled to grant them by a new bargain and sale. Or if the bankrupt himself had voluntarily brought an action and recovered them, the commissioners would still have had it in their power to grant them by a new bargain and sale. For these reasons it is submitted to the Court, that rights of action are not included in the words "may lawfully depart withal." Nor are they comprehended under the word "hereditaments." A right of action indeed is so far an hereditament, that it will descend to the heir. 3 Co. 2 b. *Marquis of [460] Winchester's case*. But a thing may descend to the heir, which can neither be released nor discharged, as a possibility of a use, *Wood's case*, cited in *Shelly's case*, 1 Co. 99 a. So a condition is an hereditament, 3 Co. 2 b. Yet conditions to which the bankrupt was entitled, were not included in the general word "hereditaments," and therefore did not pass by the bargain and sale of the commissioners, until they are expressly authorized to grant them by name, by the statute 21 Jac. 1, c. 19. No instance can be adduced where a right of action has been held to be comprehended under the word "hereditaments." But there are instances to the contrary. All the lands, tenements and hereditaments of a man attainted of treason, were by the common law forfeited to the king. But it has been holden, that if a man committing treason has, at the time of committing it, only a right of action to recover lands, this right neither at common law, nor by the statute 33 H. 8, c. 20, is given to the King. 1 Hale, P. C. 242, s. 3. So the Statutes of Monasteries, 27 H. 8, c. 28, and 31 H. 8, c. 13, gave to the King all lands, tenements, hereditaments, rights, entries, conditions, &c. But it was holden, that rights of action were not given to the king by the general word hereditaments, 3 Co. 2 b. So a writ of error is a right of action, and also an hereditament, but assignees of a bankrupt cannot bring a writ of error in their own name. It is presumed therefore, for these reasons, that the Court will be of opinion that rights of action are not included under the word hereditaments. But secondly, supposing the commissioners to have had a power to grant the right of the present action, yet it did not pass to the demandants by the bargain and sale stated upon this record. The words of the bargain and sale are "all and singular the messuages, lands, tenements and hereditaments, whatsoever and wheresoever, of or belonging to the said Thomas Eustace the bankrupt, in fee simple, fee tail, or for life, or otherwise, with their respective rights, members and

appurtenances, and all the estate, right, title, interest, property, profit, benefit, and equity of redemption, claim and demand, whatsoever, which he the said Thomas Eustace the bankrupt, at the time of his becoming bankrupt as aforesaid, had of, in or to all and singular the said messuages, lands, tenements and hereditaments, &c." Now the Court must construe this deed in the same manner as they construe all other deeds. The ground of the objection is, that there are no special words used in the bargain and sale which are necessary to be used in order to pass such rights. The general words in the deed are not sufficient for that purpose. For a right of action is neither a messuage, nor land, nor a tenement, nor a hereditament, and the general words "and all the estate, right, title, &c." are confined to the said messuages, &c. Rights of actions, if grantable at all, can only be granted with a special recital of the nature of the right. Suppose the bankrupt had been seised of copyhold estates, will it be contended that they passed to the assignees by this bargain and sale? And yet the words "lands, tenements and hereditaments" comprehend all kinds of land. Therefore as there is no mention made of the nature of the right which the bankrupt had to the lands in question, and as it is not expressly granted, it did not pass by the deed stated on this record.

Le Blanc, who was going to reply, was stopped by the Court.

LORD CH. J. EYRE. This case has been very elaborately and ably argued by my Brother Williams; but his argument goes against the most express and plain spirit of the bankrupt laws, which is, that every beneficial interest which the bankrupt has shall be disposed of for the benefit of his creditors. Though this is the spirit of those laws, yet advantage may be taken of particular expressions to raise difficulties, and arguments may be drawn from the strict rules of law as applied to the letter of the statutes. It has been argued, that though the intent of the legislature was, that all the bankrupt's property should pass, yet that the Court is tied up by the expression "may lawfully depart withal." But it may as well be argued, that because in the statute of Hen. 8 the words bargain and sale are used, therefore nothing would pass but what the bankrupt might convey by a bargain and sale. But those words are omitted in the 13 Eliz. and all the bankrupt acts being in *pari materia* are to be construed together. It is true that on general principles rights of action are not forfeitable, nor assignable, except in a particular mode; but that rule is founded on the policy of the common law, which is averse to encourage litigation; but in this case the policy of the bankrupt laws requires that the right of action should be assignable and transferred to the assignees as much as any other species of property. It is an hereditament, and the words of the several statutes [462] are large enough to comprehend it, and no case has been shewn to prove that it ought not to pass. What then does the whole argument amount to but this, that in many cases, from the policy of the law, a right of action does not pass? But here the policy is, that every right belonging in any shape to the bankrupt, should pass to his assignees. And this being the clear intent of the law, a particular recital of this species of right could not be necessary. I therefore think it a clear case, both on the words of the acts of parliament and on the subject-matter.

BULLER, J. I entirely concur in opinion with my Lord Chief Justice on both points. All the statutes of bankrupts are in *pari materia*, and are to be taken together, and the object of them was, that every thing belonging to the bankrupt that can be turned to profit, shall pass by the assignment for the benefit of the creditors. My Brother Williams admits that this right may be used for their benefit, but he says that the action ought to be brought in the name of the bankrupt himself. But was it the intention of the Legislature that the bankrupt should bring actions? On the contrary, every thing is given to the creditors, and the assignees are to bring actions. With respect to the argument from the cases of trusts and a writ of error, neither of them are applicable, for no profit can be made of a trust or writ of error.

As to the case cited from 2 Vern., I very much doubt the authority of that case: as at present advised, I do not see why a covenant for the renewal of a lease, of which a profit may be made, may not be assigned: and that case is very much shaken by *Higden v. Williamson* which goes a great way to decide the present. There no distinction was thought of between real and personal property, but Sir Joseph Jekyll decided on the ground of the stat. 13 Eliz. having transferred every thing belonging to the bankrupt to the assignees. On the words indeed of that statute, there can be no doubt, as it directs that the conveyance by the assignees shall be good and

effectual in law, to all intents, constructions, and purposes, against the offender, and all persons claiming under him. If this be true, I think there can be no doubt on the words of the deed of assignment, which is not a particular conveyance of particular lands, but a general conveyance of all the real and personal property of the bankrupt. And the court is bound to construe the bankrupt laws in the [463] most liberal and beneficial manner for the creditors. I therefore hold that every species of right, of which by any possibility profit can be made, passes to the assignees.

HEATH, J. I am of the same opinion. My Brother Williams's argument goes to prove, that even a right of entry on a vacant possession would not pass by the assignment. But he says the assignees are not without remedy, for the action may be brought in the name of the bankrupt; but suppose the bankrupt were to release his right of action, or make a fraudulent conveyance, if he were to bring the action, such release or conveyance might be set up to defeat it. As to the case cited from Vernon, I think it a very strange one, for a covenant to renew a lease runs with the land. With respect to the second point, I am also of opinion that the words used in the assignment were sufficient. The commissioners are strangers to the bankrupt, and cannot describe every particular species of his property. We should therefore do infinite mischief, if we were to hold, that every thing belonging to him did not pass under the general words that are used.

ROOKE, J., of the same opinion.

Rule for arresting the judgment discharged.

BOULTON AND WATT *against* BULL. Saturday, May 16th, 1795.

A patent was granted to A. B. for a new invented method of using an old engine in a more beneficial manner than was before known. The specification stated, that the method consisted of certain principles, and described the mode of applying those principles to the purposes of the invention, and an act of parliament, reciting the patent to have been for the making and vending certain engines by him invented, extended to A. B. for a longer term than 14 years, the privilege of making, constructing and selling the said engines.—Q. Whether, under these circumstances, the patent right was valid (a)¹?

This was an action on the case for infringing a patent. The first count of the declaration stated, that the king by letters patent under the great seal, bearing date on the 5th of January, 1769, granted to the Plaintiff James Watt the sole benefit and advantage of making, exercising and vending a certain invention of him the said James, being a method by him invented of lessening the consumption of steam and fuel in fire engines, for the term of 14 years, with a proviso for a specification, &c. in the usual manner. It then stated, that by a private act of parliament passed in the 15th year of the king, the benefit of the patent (a)² was extended to 25 years, to Watt and his as-[464]-signs: that on the 5th of September, 1777, he assigned two thirds of the patent right to Boulton the other Plaintiff, for the remainder of the term of 25 years, and that the Defendant, against the consent of the Plaintiffs, made, constructed and sold divers engines, in imitation of the said engine so invented and

(a)¹ [This question came afterwards before the Court of King's Bench, in the case of *Hornblower v. Boulton*, 8 T. R. 95, on error from the Common Pleas, when it was unanimously resolved that the invention was the subject of a patent, and the patentee's right was valid. It seemed admitted there that under the statute 21 Jac. I. c. 3, s. 6, there cannot be a patent for a philosophical principle only, which has been since held in the case of *Rees v. Wheeler*, 2 B. & A. 345. Upon the construction of the word manufactures in the statute of James I., the Court in the last cited case observed, "It may perhaps extend also to a new process to be carried on by known implements or elements acting upon known substances, and ultimately producing some other known substance, but producing it in a cheaper or more expeditious manner, or of a better and more useful kind." As to patents for improvements, see *Harmar v. Playne*, 11 East, 110. *Macfarlane v. Price*, 1 Stark. N. P. C. 199. *Lord Cochrane v. Smethurst*, *ibid.* 205. *Campion v. Benyon*, 3 Brod. & Bing. 5. See also *Hill v. Thompson*, 8 Taunt. 375. 3 Merivale, 629. 2 B. Moore, 425, S. C. *Savory v. Price*, 1 R. & M. N. P. C. 1.]

(a)² This act is stated at large, in the arguments on the part of the Defendant.

found out by Watt, and of the like nature and kind, in breach of the said act of parliament, and against the privilege granted to Watt as aforesaid, whereby, &c. The second count was for making and constructing (not mentioning selling) engines, &c. like the first count. The third was for making, constructing and selling engines, &c. partly in imitation as aforesaid. The fourth, for making and constructing (omitting selling) engines partly in imitation &c. The fifth, for using and putting in practice the invention of the Plaintiff Watt. The sixth, for using and putting in practice part of the said invention. The seventh for counterfeiting the said invention, and using and putting in practice certain engines, counterfeiting the said engine mentioned in the said act of parliament. The eighth, for imitating the said invention. The ninth, for resembling the said invention. The tenth, for counterfeiting in part the said invention, and using and putting in practice engines counterfeiting in part the said engine &c. The eleventh, for imitating in part the said invention. The last, for resembling in part the said invention.

The general issue being pleaded, the cause came on to be tried before the Chief Justice at the sittings after Trinity term 1793, when a case was reserved for the opinion of the court, which stated, that his present majesty by letters patent dated the 5th day of January in the ninth year of his reign, granted to the Plaintiff James Watt, his special licence, full power &c. that he the said James Watt, his executors, administrators and assigns should and lawfully might, during the term of fourteen years therein mentioned, use, exercise and vend, throughout that part of Great Britain called England, the Dominion of Wales, and Town of Berwick upon Tweed, and also in his majesty's colonies and plantations abroad, his the said James Watt's new invented method of lessening the consumption of steam and fuel in fire engines, with the usual proviso for the inrolling of the specification. That Watt did in pursuance of the proviso, cause a specification or description of the nature of the said invention, to be inrolled in the Court of Chancery, which description was particularly set forth in the said act of [465] parliament, and was as follows, "my method of lessening the consumption of steam, and consequently fuel in fire engines, consists of the following principles. First, that vessel in which the powers of steam are to be employed to work the engine, which is called the cylinder in common fire engines, and which I call the steam vessel, must during the whole time the engine is at work, be kept as hot as the steam that enters it; first, by inclosing it in a case of wood, or any other materials that transmit heat slowly; secondly, by surrounding it with steam or other heated bodies; and thirdly, by suffering neither water nor any other substance colder than the steam, to enter or touch it during that time. Secondly, in engines that are to be worked wholly or partially by condensation of steam, the steam is to be condensed in vessels distinct from the steam vessels, or cylinders, although occasionally communicating with them. These vessels I call condensers, and whilst the engines are working, these cylinders ought at least to be kept as cool as the air in the neighbourhood of the engines, by application of water or other cold bodies. Thirdly, whatever air or other elastic vapour is not condensed by the cold of the condenser, and may impede the working of the engine, is to be drawn out of the steam vessels or condensers by means of pumps wrought by the engines themselves, or otherwise. Fourthly, I intend in many cases to employ the expansive force of steam to press on the pistons, or whatever may be used instead of them, in the same manner as the pressure of the atmosphere is now employed in common fire engines. In cases where cold water cannot be had in plenty, the engines may be wrought by this force of steam only, by discharging the steam into the open air after it has done its office. Fifthly, where motions round an axis are required, I make the steam vessels in form of hollow rings or circular channels, with proper inlets and outlets for the steam, mounted on horizontal axles, like the wheels of a water mill; within them are placed a number of valves, that suffer any body to go round the channel in one direction only. In these steam vessels are placed weights, so fitted to them as entirely to fill up a part or portion of their channels, yet rendered capable of moving freely in them, by the means hereinafter mentioned or specified. When the steam is admitted in these engines between these weights and the valves, it acts equally on both, so as to raise the weight to one side of the wheel, and by the re-action on the valves successively, [466] to give a circular motion to the wheel, the valves opening in the direction in which the weights are pressed, but not on the contrary: as the steam vessel moves round, it is supplied with steam from the boiler, and that which has performed its

office may either be discharged by means of condensers, or into the open air. Sixthly, I intend in some cases to apply a degree of cold not capable of reducing the steam to water, but of contracting it considerably, so that the engines shall be worked by the alternate expansion and contraction of the steam. Lastly, instead of using water to render the piston or other parts of the engines air and steam tight, I employ oils, wax, resinous bodies, fat of animals, quicksilver, and other metals in their fluid state."

And the said James Watt, by a memorandum added to the said specification, declared, that he did not intend that any thing in the fourth article should be understood to extend to any engine where the water to be raised enters the steam vessel itself, or any other vessel having an open communication with it. In the fire engines referred to in the said specification, and which were in use prior to the patent in question, motion was given to the piston by the pressure of the atmosphere acting upon one side of it, while a vacuum or certain degree of exhaustion was produced on the other side within the steam vessel denominated the cylinder, by means of the injection of cold water, whereby the steam was condensed; which operation, prior to the invention of the said James Watt, was always performed in the steam vessel or cylinder itself; when the steam had been condensed, and the piston had descended, such portions of air and water as remained under it within the steam vessel or cylinder, were expelled through valves by the next succeeding steam from the boiler, and that steam counterbalancing the pressure of the atmosphere at the open end of the cylinder, allowed the piston to rise up with that end of the lever to which it was attached, while the other end of the lever and the matters attached thereto descended by reason of their greater comparative weight, and thus the engine was restored to that state in which it was previous to the first condensation. The steam was, for this purpose, as occasion required, admitted through a pipe from a distinct vessel called the boiler, where it was generated, which occasionally communicated with the cy-[467]-linder by means of a valve, which was opened and shut by the action of the engine. The injection of cold water was in like manner admitted, as occasion required, into the cylinder through a pipe from another distinct vessel containing cold water, called the injection cistern, by means of a cock or valve which was also opened and shut by the action of the engine, and such pumps as were used in these engines were also wrought by the engines themselves. The construction and use of pumps for drawing out air, elastic vapour, or water from places or vessels where a vacuum or exhaustion was required, were known and practised before the obtaining the letters patent above mentioned, but had not been applied to the cylinders or condensers of steam engines. The said invention of the said James Watt was at the time of making the said letters patent, a new and a useful invention, and the said privilege vested by the said act of parliament in the said James Watt and his assigns, was infringed by the Defendant in the manner charged upon him by the declaration. The said specification made by the said James Watt, is of itself sufficient to enable a mechanic acquainted with the fire engines previously in use, to construct fire engines producing the effect of lessening the consumption of fire and steam in fire engines, upon the principle invented by the said James Watt.

And the questions for the opinion of the Court were,

1st. Whether the said patent was good in law, and continued by the act of parliament above mentioned?

2d. Whether the above specification of the Plaintiff James Watt was in point of law sufficient to support the above patent?

This case was twice argued, the first time by Watson, Serjt., for the Plaintiffs, and Le Blanc, Serjt., for the Defendant; and the second, by Adair, Serjt., for the Plaintiffs, and Williams, Serjt., for the Defendant.

On the part of the Plaintiffs, the substance of the arguments was the following. The Plaintiffs have a right to recover damages for the infringement of their patent, which is: 1st, both good in law, and continued by the act 15 Geo. 3, c. 61; and 2dly, duly supported by the specification. It is good in law, as being for a newly discovered method of producing an important effect in the use of the old steam engine, and comes within the provision of the stat. 21 Jac. 1, c. 3, s. 6, [468] which protects inventions of this kind from the declaration mentioned in the former part of the statute. By every fair rule of construction, the words "working or making any manner of new manufactures," must include the invention of the Plaintiffs. The term manufacture means "any thing made or produced by art," and the method or invention for which

the patent is granted, is to produce an effect by artificial means, by which the consumption of fuel shall be lessened in steam-engines. Whether the word method be used as in the patent, or engine as in the act for continuing it, the meaning is obviously the same, and the Court will not deprive the Plaintiffs, the merit and utility of whose invention is on all sides admitted, of the benefit of that invention by mere verbal criticisms.

[Heath, J. When a mode of doing a thing is referred to something permanent, it is properly termed an engine; when to something fugitive, a method.] This patent is not expressed in terms new or unusual; almost all the patents upon record that have been granted to those who have made discoveries or improvements in the mechanic arts, being for the method of doing the thing, and not for the thing done. [Heath, J. Is there any instance of a patent for a mere method?] The patent granted to Dollond for his improvement in making the object-glasses of telescopes was, for "an invention of a new method of making the object-glasses of refracting telescopes." So also, David Hartley's patent was for his method of securing buildings from fire. So likewise are the numerous patents that have been granted for the different improvements which have been made of late years, in chemistry and medicine (a). The patent, therefore, of the Plaintiffs is good in law: and it is also continued by the act 15 Geo. 3. That act expressly recites the patent, and extends the benefit of it for 25 years to Watt and his assigns. It was therefore clearly the intention of the legislature that the patent already granted should be continued, and the Court will construe the act in such a manner as to effectuate that intention.

With regard to the specification, that is sufficiently explicit to support the validity of the patent. The improvement made by Watt consists in a discovery, that by letting out the steam from the cylinder into another vessel in order to condense it, [469] instead of admitting cold water into the cylinder for that purpose, as was done in Newcomen's engine, and by keeping the cylinder hot, the consumption of steam and consequently of fuel would be diminished. The communication between the cylinder and the other vessel is formed by means of valves, which were before in use in Newcomen's engine, and therefore not necessary to be more accurately described, and the mode of keeping the cylinder hot is explicitly stated in the specification. There is no new mechanical construction invented by Watt, capable of being the subject of a distinct specification, but his discovery was of a principle, the method of applying which is clearly set forth, and therefore a drawing or model would have been unnecessary. So in Dollond's patent, (to take one of many instances) the specification describes the principle, but not the mechanical construction by which it is carried into effect. It recites, that a patent had been granted to him for the "invention of a new method of making the object glasses of refracting telescopes, by compounding mediums of different refractive qualities, whereby the errors arising from the different refrangibility of light, as well as those which are produced by the spherical surfaces of the glasses, were perfectly corrected." It then goes on to state, after mentioning the defects of the telescopes then in use, that in the new telescopes the images of objects were formed by the difference between two contrary refractions, the object-glass being a compound of two or more glasses put close together, whereof one was concave and the other convex: that the excess of refraction by which the image was formed was in the convex glass, which was made of a medium or substance in which the difference of refrangibility was not so great as in the substance of which the concave glass was formed; therefore, their refractions being proportioned to their difference of refrangibility, there remained a difference of refraction by which the image was formed, without any difference of refrangibility to disturb the vision: and that the radii of the surfaces of each of those glasses were likewise so proportioned, as to make the aberrations which proceeded from their spherical surfaces respectively equal, which being also contrary, destroyed each other. But there is no mention of any mechanism, nor does the specification state the degrees of sphericity or curvature of the concave or convex glasses, because it is well known that the curvature of one must be proportioned to that of the other, in order to correct the refrangibility of the [470] rays of light. It is also to be observed, that the jury have found that the specification is sufficient to enable a mechanic acquainted with the fire engines previously in use, to construct fire engines producing the effect

(a) A great variety of patents of this kind were cited which it is not necessary to repeat, as they all went to the same point.

of lessening the consumption of fire and steam upon the principle invented by the Plaintiff Watt. It is upon the whole, therefore, submitted to the court, that both the questions stated in the case must be answered in the affirmative.

[Buller, J. The objection to Dollond's patent was, that he was not the inventor of the new method of making object-glasses, but that Dr. Hall had made the same discovery before him. But it was holden, that as Dr. Hall had confined it to his closet, and the public were not acquainted with it, Dollond was to be considered as the inventor.]

On the part of the Defendant the arguments were the following.

This question may be argued on three grounds. 1. On the patent itself. 2. Upon the act 15 Geo. 3, c. 61. 3. Upon the act and patent taken together.

In considering the case upon the patent itself, the patent appears to be void, because it differs from the specification, the patent being for a formed instrument or machine, but the specification for principles unorganized. It is for a new invented method. Now the word invention, when applied to mechanical subjects, properly signifies something which has been already formed, some manufacture or machine, and is not applicable to mere unorganized principles. The Plaintiff Watt cannot be said to have invented the principles, for those principles were in use in the old or Newcomen's steam-engine. It is true, that the application of those principles in the manner described in the specification is new, but it was well known long before that steam had an expansive power, and was condensed by cold. It is in this sense that the word invention is used in the patent. It recites "that Watt had represented to the king, that he had after much labour and expense invented a method of lessening the consumption of steam and fuel in fire-engines." From these words it seems clear that he meant it to be understood by the crown, that the invention which he represented himself as having made, was completely formed, and not that he had merely conceived in his mind the application of certain [471] known principles by which the consumption of steam and fuel would be lessened in fire-engines: for the ideas of the principles before they were organized could not have been attended with great labour, and much less with great expense. That the representation was understood in this sense by the crown, will appear from considering other parts of the patent itself. The king grants to Watt that he shall "make, use, exercise and vend his said invention." In another part of the patent all persons are forbidden to counterfeit, imitate or resemble the same invention, and to make or cause to be made any addition thereto, or subtraction therefrom. In another part it is provided, that the patent shall not extend to give privilege to Watt to use or exercise any invention or work whatsoever which had theretofore been found out or invented by any other, and publicly used or exercised, but that every other person should use and practise their several inventions. Now it is impossible that any of the expressions thus cited from the patent can be applied to the invention of mere unorganized principles of science. If then the patent be, which it clearly is, for a formed instrument or machine, it is void, because it is admitted that there is no specification descriptive of any formed instrument whatever, nor is there any drawing or model.

But supposing it to be a patent for mere principles, (for the specification states that the invention consists of principles,) it is neither originally good in law, nor is it continued by 15 Geo. 3, c. 61. It is not good in law because it does not fall within the construction of the statute 21 Jac. 1, c. 3, upon which alone it must, if at all, be supported. The sixth section of that statute provides, that nothing therein contained shall extend to any letters patent, or grants of privilege for 14 years or under, thereafter to be made, of the sole working or making of any manner of new manufactures, within this realm, to the true and first inventors of such manufactures, which others at the time shall not use. The word manufacture is descriptive either of the practice of making a thing by art, or of the thing when made. The invention therefore of any instrument used in the process of making a thing by art, is a manufacture, and the subject of a patent within the statute, because such an instrument is itself a thing made by art. So also medicines may be said to be a species of manufacture, and within the provision of the statute, because they consist in the practice of mixing together and making up by art, the different ingredients of which they [472] are composed, and are the result of principles organized, as far as the nature of the thing will admit. The same observation may be made with respect to Dollond's telescopes, which are certainly a manufacture, and within the statute Jac. 1, but they consist of principles

reduced into form and practice as much as the subject will admit, and the patent is for glasses completely formed, not for mere principles, and the specification describes the manner in which the invention is to be carried into execution with all the perspicuity of which the thing is capable. That this is the true meaning of the term manufacture as it is used by the legislature, likewise appears from the words making or working being applied to it, and "which others at the time shall not use," and also from the provision that the patentee shall ascertain the nature of his invention, and in what manner the same is to be performed. The specification is the price which the patentee is to pay for the monopoly. In the construction of specifications it is a rule that the patentee must describe his invention in such a manner that other artists in the same trade or business may be taught to do the same thing for which the patent is granted, by following the directions of the specification alone, without any new invention or addition of their own, and without the expence of trying experiments. 1 Term Rep. B. R. 606, *Turner v. Winter*. This necessarily excludes any supposition that mere principles can be the subject of a patent. That this is the true construction of the word manufactures in the statute, appears also from Lord Coke's commentary on it, 3 Inst. 184, who, as appears from the journals of the House of Commons, was chairman of the committee to whom the bill was referred, and who therefore probably either drew or perused it. This construction of the word manufactures, in the statute, is also fortified by the opinion of Mr. J. Yates in the controversy respecting literary property, 4 Burr. 2361, *Miller v. Taylor*, who there held in illustration of the subject before him, that mere principles, not embodied and reduced into practice, were not the subject of a patent. Until they are so embodied, (to use the simile of that great judge,) they are like the sentiments of an author, while in his own mind. In that state they are alike the property of him or of another. But when once they are published, then, and not before, his exclusive property in them or in the organization of them commences. In *Sir Richard Arkwright's case* too (a) the learned judge before whom it was tried, stated in his sum-[473]-ing up, that for a principle alone a patent could not be obtained, for which he gave very convincing reasons. And independent of authorities, the reason of the thing shews that such a patent could not be obtained within the meaning of the statute. By obtaining a patent for principles only, instead of one for the result of the application of them, the public is prevented, during the term from improving on those principles, and at the end of the term is left in a state of ignorance as to the best, cheapest and most beneficial manner of applying them to the end proposed.

It is true indeed that the jury have found, "that the specification made by Watt, is of itself sufficient to enable a mechanic acquainted with fire-engines previously in use, to construct fire-engines, producing the effect of lessening the consumption of fuel and steam in fire-engines, upon the principle invented by Watt." But it is not found that the specification would enable a mechanic to construct Watt's fire-engines; nor is it found to what extent the consumption of steam and fuel would be lessened in fire-engines constructed upon the principles stated in the specification; nor whether those engines would have the effect of lessening the consumption of steam to the same degree with Watt's engines. All this is left uncertain. The merit of the invention must be measured by the quantity of fuel which may be saved by it. Now it is possible, that agreeable to this finding, a fire-engine might be made, which indeed would produce the effect of lessening the consumption of fuel and steam, upon the principles mentioned in the specification, but yet such engine might save only one bushel of coals or other fuel, where Watt's engine would save a hundred. The finding of the jury therefore does not mend the case. The specification ought to have described the method by which the machine might be made to save the greatest quantity of fuel which it was known to be capable of saving, and which it in fact does save when used by the inventor. It is a settled rule of law that if a patentee makes the thing for which the patent is granted with cheaper materials, or if he applies and uses it in a more advantageous and useful manner than is described in the specification, the patent is void, because he does not put the public in possession of his invention, or enable them to derive the same benefit that he himself derives from it. 1 Term Rep. B. R. 602, *Turner v. Winter*.

(a) See the printed account of that trial, at the Sittings at Westminster after Trinity Term 25 Geo. 3, before Mr. J. Buller.

It is to be shewn in the next place, that the patent is not continued by the act 15 Geo. 3, c. 61. The title of it is, an act for vesting in James Watt, "the sole property of certain steam-engines, called fire-engines, of his invention." It recites, "that [474] the king by his letters patent had given and granted to Watt the sole benefit and advantage of making and vending certain engines by him invented for lessening the consumption of steam and fuel in fire-engines, with a proviso, that Watt should cause a particular description of the nature of the said invention to be inrolled, and that he accordingly had caused a particular description of the nature of the said engine to be inrolled. It farther recites, that the said James Watt had employed many years, and a considerable part of his fortune, in making experiments upon steam-engines, commonly called fire-engines, but on account of the many difficulties which always arise in the execution of such large and complex machines, he could not complete his intention before the end of the year 1794, when he finished some large engines as specimens of his construction, and that his engines might be of great utility, and then enacts, that the sole privilege of making, constructing and selling the engines therein before particularly described, shall be vested in Watt for 25 years, and that he during the said term shall make, exercise and vend the said engines." Now is it possible to say, that this act continues a patent for mere principles? Certainly not. If therefore the patent be really for principles, it is not continued by the act. But supposing that though the act does not describe the patent according to the terms of it, yet it does describe it according to its import, namely, as a patent for principles; in that case it would not be within the protection of the statute of Jac. 1 for the reasons already offered.

There is a proviso in the act 15 Geo. 3, that every objection in law competent against the said patent, shall be competent against the act to all intents and purposes, except so far as relates to the term thereby granted. Though this therefore is a grant of a monopoly by the Legislature, yet it is to receive precisely the same construction, as if it had been a grant by letters patent. Now the grant itself is void, being founded on a false suggestion of the party to whom it is made, for it is a rule of law, that if the king's grant be founded on a false suggestion of the party to whom it is made, it is void; as if any thing mentioned in the consideration of the grant be false. 5 Co. 94 a. *Barwick's case*. The consideration, which is the foundation of this grant in the act, is the recital "that the king had in January 1765, by his letters patent, granted to Watt for the term of 14 years, the sole benefit and advantage of making [475] and vending certain engines, by him invented, for lessening the consumption of steam and fuel, and that owing to the reasons which are mentioned in the recital, it was probable, that the whole term granted by the patent would elapse before he could receive any compensation adequate to his labour; for which reasons the term granted by the patent is prolonged, and the act vests in him the sole privileges of making, constructing, and selling the said engines for 25 years; that is, the engines, the sole making and vending of which the king had granted by his said letters patent. But it is admitted, that the king did not grant by the patent a monopoly for making and vending any engines whatever. The recital therefore, which is the very foundation of the grant, is untrue. It has been also adjudged, that if a private act of Parliament like the present, be founded upon a false recital, the act is void: as where an act, reciting that A. had been attainted of treason, confirms the attainder, and farther enacts that he shall be attainted, and forfeit his lands; the king afterwards grants the lands of A. to another; if in fact A. never was attainted, or if his attainder appear on the face of it, to have been coram non judice, the act is void, and it shall not be made use of as an attainder de novo, notwithstanding it confirmed the attainder, and expressly enacted that he should be attainted, but A. shall take advantage of it by mere pleading without a writ of error, and shall oust the grantee of the king. Plowd. 390, *Earl of Leicester v. Heydon*, where it is laid down, that statutes which mis-recite things to which they refer, are void, and that in the principal case, the statute which recited that A. was attainted, when in fact he was not attainted, was void, *ibid.* 400, &c. Another objection to this act 15 Geo. 3, is that it professes to vest in Watt the exclusive property in an entire machine, notwithstanding the invention which he claims to be his, is admitted to be of an improvement only of a known machine. And upon this point, it is to be observed, that Lord Coke says, "such a privilege as is consonant to law, must be substantially and essentially newly invented; but if the substance was in esse before and a new addition thereunto, though that

addition make the former more profitable, yet it is not a new manufacture in law." 3 Inst. 184. The act is also defective in not setting forth any specification of a formed instrument or machine; it is indeed admitted that no such specification is to be found.

[476] If the subject be viewed as arising from the patent and act taken together, the arguments which have been already used respecting those instruments separately, apply themselves more strongly, inasmuch as if the act be considered as explanatory of the patent, or as a part of it, there cannot be a doubt but that it means to grant a monopoly for a formed engine or machine. Upon the whole therefore of the case, it appears either that the patent is for an entire formed machine, when it ought to have been for an improvement only, and in which case the specification does not correspond with it, or it is for mere principles, which, according to the stat. 21 Jac. 1, c. 3, cannot be the subject of a patent.

The sum of the reply was as follows. The patent is neither for a formed instrument, nor is the specification for a principle unorganized. The former is for "a new invented method of lessening the consumption of steam and fuel in fire engines," by whatever mode that effect may be produced: the latter states both the principle of the invention, and also the mode in which it is to operate, namely, the preserving the cylinder hot by the means described, and the condensing the steam in separate vessels communicating with the cylinder. The difference in the terms used in the patent and the specification, arises from the nature of the subject, but the real meaning of them is the same. Where an improvement is made upon a machine already known, the patent ought not to be for the machine itself, but for the method of improving it. Thus a patent was granted in 1759, to one Wood "for a scheme to work a fire engine, at half the expense of coals," an effect which must have been caused by an alteration of the engine, yet the patent was for the scheme, or method, and not for the engine itself. And in the case of an improvement in making watches, Jessop's patent was avoided, because it was for the whole watch, when the invention consisted of only one movement. But notwithstanding this rule, if from the nature of the thing a patent for the new method or improvement only should have the effect of giving a right to the whole machine, that is not of itself a ground on which the patent can be set aside.

On this day, after consideration, the judges thus delivered their respective opinions.

[477] ROOKE J., after stating the special case at length, thus proceeded. From this state of the case, and from the admission of counsel on both sides, I assume the following facts, viz. that the Plaintiff Watt is the inventor of a new and useful improvement in fire engines, whereby the consumption of steam, and consequently of fuel is considerably lessened: that the improvement is of such a nature that it may legally be the object of protection by royal patent: that a patent has been granted to the inventor, on the condition of a specification of the nature of the invention: that a specification has been made, sufficient to enable a mechanic to construct fire engines containing the improvement invented by the patentee: and that the Legislature six years after the patent had been granted, thought proper to extend the duration of it from the eight years then to come, to twenty-five years, the patent having been granted in the ninth, and the statute having passed in the fifteenth year of the present king.

Under these circumstances, I think I conform to the spirit of the stat. 21 Jac. 1, c. 3, s. 6, if I incline to support this patent, provided it may be supported without violating any rule of law: and I think so for two reasons, first, because the patentee is substantially intitled to the protection of the patent, and secondly because the public are sufficiently instructed, and will be duly benefited by the specification. Against the claim of the patentee certain objections have been made, which, it is contended, deprive him of all legal right to that protection. First, it is objected that the patent is not for fire engines upon the particular construction which contains this new improvement, but for a new invented method of lessening the consumption of steam and fuel: secondly, it is objected, that no particular engine is described in this specification, but that it only sets forth the principles: and the last objection is, that the statute has not duly prolonged the patent, because the patent is for a method, and the statute for an engine. It is obvious that these objections are merely formal: they do not affect the substantial merits of the patentee, nor the meritorious consideration which the public have a right to receive, in return for the protection which the patentee claims. With regard to the first objection, it is that the patent is not for a

fire engine of a particular construction, but for a new invented [478] method. It pre-supposes the existence of the fire engine, and gives a monopoly to the patentee of his new invented method of lessening the consumption of steam and fuel in fire engines. The obvious meaning of those words is, that he has made an improvement in the construction of fire engines, for what does method mean but mode or manner of effecting? What method can there be of saving steam or fuel in engines, but by some variation in the construction of them? A new invented method therefore conveys to my understanding the idea of a new mode of construction. I think those words are tantamount to fire engines of a newly invented construction; at least I think they will bear this meaning if they do not necessarily exclude every other. The specification shews that this was the meaning of the words as understood by the patentee, for he has specified a new and particular mode of constructing fire engines. If he has so understood the words, and they will bear this interpretation, then I think this objection, which is merely verbal, is answered. To which I add, that patents for a method or art of doing particular things have been so numerous, according to the lists left with us, that method may be considered as a common expression in instruments of this kind. It would therefore be extremely injurious to the interests of patentees, to allow this verbal objection to prevail. As to the second objection, that no particular engine is described, that no model or drawing is set forth, I hold this not to be necessary, provided the patentee so describes the improvement as to enable artists to adopt it when his monopoly expires. The jury find that he has so described it. It is objected, that he professes to set forth principles only; but we are not bound by what he professes to do, but by what he has really done. If he had professed to set forth a full specification of his improvement, and had not set it forth intelligibly, his specification would have been insufficient, and his patent void. It seems therefore but reasonable, that if he sets forth his improvement intelligibly, his specification should be supported, though he professes only to set forth the principle. The term principle is equivocal; it may denote either the radical elementary truths of a science, or those consequential axioms which are founded on radical truths, but which are used as fundamental truths by those who do not find it expedient to have recourse to first principles. The radical principles on which all steam engines are founded, [479] are the natural properties of steam, its expansiveness and condensibility. Whether the machines are formed in one shape or another, whether the cylinder is kept hot or suffered to cool, whether the steam is condensed in one vessel or another, still the radical principles are the same. When the present patentee set his inventive faculties to work, he found fire engines already in existence, and the natural qualities of steam already known and mechanically used. He only invented an improvement in the mechanism, by which they might be employed to greater advantage. There is no newly discovered natural principle as to steam, nor any new mechanical principle in his machine; the only invention is a new mechanical employment of principles already known. As to the specification, some part of it, so much as represents the future intentions of the patentee, may be considered, according to the language of the specification, as merely theoretical; but the greater part describes a practical use of improved mechanism, the basis on which the improvement is founded. The object of the patentee was to condense the steam without cooling the cylinder: the means adopted to effectuate this were to enclose the cylinder in a case which will confine the heat or transmit it slowly, to surround it with steam or other heated bodies, and to suffer neither water nor any other substance colder than the steam, to enter or touch it during that time. These means are set forth. The objection is, that there is no drawing or model of a particular engine; and where is the necessity of such drawing or model, if the specification is intelligible without it? Had a drawing or model been made, and any man copied the improvement, and made a machine in a different form, no doubt this would have been an infringement of the patent. Why? Because the mechanical improvement would have been introduced into the machine, though the form was varied. It follows from thence, that the mechanical improvement, and not the form of the machine, is the object of the patent; and if this mechanical improvement is intelligibly specified, of which a jury must be the judges, whether the patentee call it a principle, invention, or method, or by whatever other appellation, we are not bound to consider his terms, but the real nature of his improvement, and the description he has given of it, and we may I think protect him without violating any rule of law. As to the articles of the specification which denote intention only, and do not state the thing to which

[480] it is to be applied, I do not think he could maintain an action for breach of these articles; for he cannot anticipate the protection, before he is entitled to it by practical accomplishment. But the patent is for a method already adopted, and the two first and most material articles are set forth as already accomplished, and the case states it was new and useful at the time of making the patent. I therefore consider the most essential part of the patent, the keeping the cylinder hot, inclosing it in a case, and surrounding it with steam, as carried into practical effect at the time of granting the patent; this the Defendant has infringed; and I will presume after verdict, where nominal damages only are given, that the evidence was applied to, and the damages given for those articles only which are well specified. Now if he has infringed those articles which are well specified, he shall not be excused from an action, because he has been guilty of an additional infringement on that which is specified as matter of intention only. As to the objection of the want of a drawing or model, that at first struck me as of great weight. I thought it would be difficult to ascertain what was an infringement of a method, if there was no additional representation of the improvement, or thing methodized. But I have satisfied my mind thus: infringement or not, is a question for the jury; in order to decide this case, they must understand the nature of the improvement or thing infringed; if they can understand it without a model, I am not aware of any rule of law which requires a model or a drawing to be set forth, or which makes void an intelligible specification of a mechanical improvement, merely because no drawing or model is annexed. In the present case, I do not hear that the want of a drawing or a model occasioned any difficulty to the jury; they have expressly decided that Mr. Watt has the merit of a new and an useful invention, and that this invention was infringed by the Defendant. How then can I say, that they could not understand it for the want of a drawing? Especially when they have added, that the specification is sufficient to enable a mechanic acquainted with the fire-engines previously in use, to construct fire-engines producing the effect of lessening the consumption of fuel and steam, upon the principle invented by the Plaintiff. For these reasons I think the second objection, that no particular engine is set forth, is not of sufficient weight to destroy the effect of the patent.

[481] HEATH J. This patent is expressly for a new invented method for lessening the consumption of steam and fuel in fire-engines. It appears that the invention of the patentee is original, and may be the subject of a patent; but the question is, inasmuch as this invention is to be put in practice by means of machinery, whether the patent ought not to have been for one or more machines, and whether this is such a specification as entitles him to the monopoly of a method? If method and machinery had been used by the patentee as convertible terms, and the same consequences would result from both, it might be too strong to say, that the inventor should lose the benefit of his patent, by the misapplication of his term. In truth it is not so. His counsel have contended for the exclusive monopoly of a method of lessening the consumption of steam and fuel in fire-engines, and that therefore would better answer the purposes of the patentee, for the method is a principle reduced to practice; it is in the present instance the general application of a principle to an old machine. There is no doubt that the patentee might have obtained a patent for his machinery, because the act of parliament he obtained acknowledged his patent, and he himself in 1782 procured a patent for his invention of certain new improvements upon steam and fire engines for raising water &c., which contained new pieces of mechanism, applicable to the same. Upon this statement the following objections arise to the patent, which I cannot answer: namely that if there may be two different species of patents, the one for an application of a principle to an old machine, and the other for a specific machine, one must be good and the other bad. The patent that admits the most lax interpretation should be bad, and the other alone conformable to the rules and principles of common law, and to the statute on which patents are founded. The statute 21 Jac. 1 prohibits all monopolies, reserving to the king by an express proviso so much of his ancient prerogative, as shall enable him to grant letters patent and grants of privilege, for the term of fourteen years or under, of the sole working or making of any manner of new manufactures within this realm, to the true and first inventor and inventors of such manufactures. What then falls within the scope of the proviso? Such manufactures as are reducible to two classes. The first class includes machinery, the second [482] substances (such as medicines) formed by chemical and other processes, where

the vendible substance is the thing produced, and that which operates preserves no permanent form. In the first class the machine, and in the second the substance produced, is the subject of the patent. I approve of the term manufacture in the statute, because it precludes all nice refinements; it gives us to understand the reason of the proviso that it was introduced for the benefit of trade. That which is the subject of a patent, ought to be specified, and it ought to be that which is vendible, otherwise it cannot be a manufacture. This is a new species of manufacture, and the novelty of the language is sufficient to excite alarm. It has been urged that other patents have been litigated and established; for instance Dollond's, which was for a refracting telescope. I consider that as substantially an improved machine. A patent for an improvement of a refracting telescope, and a patent for an improved refracting telescope, are in substance the same. The same specification would serve for both patents, the new organization of parts is the same in both. I asked in the argument for an instance of a patent for a method, and none such could be produced. I was then pressed with patents for chemical processes, many of which are for a method, but that is from an inaccuracy of expression, because the patent in truth is for a vendible substance. To pursue this train of reasoning still further, I shall consider how far the arguments in support of this patent will apply to the invention of original machinery founded on a new principle. The steam engine furnishes an instance. The Marquis of Worcester discovered in the last century, the expansive force of steam, and first applied it to machinery. As the original inventor he was clearly entitled to a patent. Would the patent have been good applied to all machinery, or to the machines which he had discovered? The patent decides the question. It must be for the vendible matter, and not for the principle. Another objection may be urged against the patent, upon the application of the principle to an old machine, which is, that whatever machinery may be hereafter invented would be an infringement of the patent, if it be founded on the same principle. If this were so it would reverse the clearest positions of law respecting patents for machinery, by which it has been always holden, that the organization of a machine may be the subject of a patent, but principles cannot. If the argument for the patentee were [483] correct, it would follow, that where a patent was obtained for the principle, the organization would be of no consequence. Therefore the patent for the application of the principle must be as bad as the patent for the principle itself. It has been urged for the patentee, that he could not specify all the cases, to which his machinery could be applied. The answer seems obvious, that what he cannot specify, he has not invented. The finding of the jury that steam engines may be made upon the principle stated by the patentee, by a mechanic acquainted with the fire-engines previously in use, is not conclusive. This patent extends to all machinery that may be made on this principle, so that he has taken a patent for more than he has specified; and as the subject of his patent is an entire thing, the want of a full specification is a breach of the conditions, and avoids the patent. Indeed it seems impossible so specify a principle, and its application to all cases, which furnishes an argument that it cannot be the subject of a patent. It has been usual to examine the specification, as a condition on which the patent was granted. I shall now consider it in another point of view. It is a clear principle of law that the subject of every grant must be certain. The usual mode has been for the patentee to describe the subject of it by the specification; the patent and the specification must contain a full description. Then in this, as in most other cases, the patent would be void for the uncertain description of the thing granted, if it were not aided by the statute. The grant of a method is not good, because uncertain, the specification of a method or the application of principle is equally so, for the reasons I have alleged.

BULLER, J. Few men possess more ingenuity, or have greater merit with the public, than the Plaintiffs on this record; and if their patent can be sustained in point of law, no man ought to envy them the profits and advantages arising from it. Even if it cannot be supported, no man ought to envy them the profits which they have received; because the world has undoubtedly derived great advantages from their ingenuity. We are called upon to deliver our opinions on the dry question of law, whether upon the case disclosed to us, this patent can or cannot be sustained. And I shall deliver my opinion first upon the case itself, and secondly on the arguments which have been urged at the bar.

[484] The case states the Plaintiffs' patent, the specification, and the act of parliament. It gives a description of the old engine, and then states that the invention

of the Plaintiffs is a new and useful one, and that the specification is sufficient to enable a mechanic to construct fire-engines, producing the effect of lessening the consumption of fuel and steam in fire-engines, upon the principle invented by Mr. Watt. One objection made by the Defendant was, that it did not appear on the case, that a mechanic could, from the specification, construct an engine which should lessen the consumption of fuel and steam, with equal effect, or to the same extent as Mr. Watt himself did. If the negative appeared, viz. that a mechanic could not from the specification make an engine with equal effect, or if it required expense and experiments before it could be done, I agree that either of those facts would avoid the patent. But that is not so stated; and upon this case I think we are bound to say there is no foundation for either of those objections. There is another objection to the case, which I think more important, and that is, that the jury have not told us wherein the invention consists, whether it be in an additional cylinder, or other vessel to the old machine, or what the addition is, or whether it be only in the application of the old parts of the machine, or in what is called at the bar, the principle only, or in what that principle consists. These defects have opened a great field of argument, and have driven the Plaintiffs' counsel to the necessity of endeavouring to support his case on all possible grounds. The old engine consisted of a cylinder, a boiler, a pipe which occasionally communicated between them, an injection cistern, and pumps. The two material parts of the new engine, as mentioned in the specification, are the old cylinder, now called the steam vessel, and the vessel now called the condenser, which it is said must be distinct from the steam vessel, though occasionally communicating with it. The old boiler did occasionally communicate with the cylinder. The pumps, grease and other things are admitted to be trifling circumstances, and not worthy any observation. Upon this state of the case, I cannot say that there is any thing substantially new in the manufacture; and indeed it was expressly admitted on the argument, that there were no new particulars in the mechanism: that it was not a machine or instrument which the [485] Plaintiffs had invented: that mechanism was not pretended to be invented in any of its parts: that this engine does consist of all the same parts as the old engine: and that the particular mechanism is not necessary to be considered. The fact of there being nothing new in the engine drove the counsel to argue on very wide grounds, and to touch on the possibility of maintaining a patent for an idea or a principle, though I think it was admitted that a patent could not be sustained for an idea or a principle alone.

The very statement of what a principle is, proves it not to be a ground for a patent. It is the first ground and rule for arts and sciences, or in other words the elements and rudiments of them. A patent must be for some new production from those elements, and not for the elements themselves. The Plaintiffs' case is considerably distressed in many parts of it, and as it seems to me, the arguments which have been adduced were very much calculated to keep clear of difficulties, which the counsel foresaw might be introduced into the case; as first, that unless the principle can be supported as the ground of the patent, there may be some danger of confirming the Defendant's objection to it: secondly, that unless the principle can be supported, it may open a fatal objection to the specification, because that does not state in what manner the new machine is to be constructed, how it varies from the old one, or in what way the improvements are to be added: or thirdly, because the patent embraces the whole principle, and is founded on that alone; but the invention is taken to consist of an improvement or addition only. Another objection may arise both to the patent and specification, viz. that the patent is granted for the whole engine, and not for the addition or improvement only. Perhaps it may be convenient and judicious to keep these objections as much as possible in the back ground, and out of the view of the court. But it is our duty to sift and dive into the facts and circumstances of the case, and the bearings and consequences of them, as far as our abilities or knowledge of the subject will admit. There is one short observation arising on this part of the case, which seems to me to be unanswerable, and that is, that if the principle alone be the foundation of the patent, it cannot possibly stand, with that knowledge and discovery which the world were in possession of before. The effect, the power, and the operation of steam were known long [486] before the date of this patent; all machines which are worked by steam are worked on the same principle. The principle was known before, and therefore if the principle alone be the foundation of the patent, though the addition may be a great improvement, (as

it certainly is,) yet the patent must be void ab initio. But then it was said, that though an idea or a principle alone would not support the patent, yet that an idea reduced into practice, or a practical application of a principle was a good foundation for a patent, and was the present case. The mere application or mode of using a thing, was admitted in the reply not to be a sufficient ground (a); for on the court putting the question, whether if a man by science were to devise the means of making a double use of a thing known before, he could have a patent for that, it was rightly and candidly admitted that he could not. The method and the mode of doing a thing are the same: and I think it impossible to support a patent for a method only, without having carried it into effect and produced some new substance. But here it is necessary to inquire, what is meant by a principle reduced into practice. It can only mean a practice founded on principle, and that practice is the thing done or made, or in other words the manufacture which is invented.

This brings us to the true foundation of all patents, which must be the manufacture itself; and so says the statute 21 Jac. 1, c. 3. All monopolies except those which are allowed by that statute, are declared to be illegal and void; they were so at common law, and the sixth section excepts only those of the sole working or making any manner of new manufacture: and whether the manufacture be with or without principle, produced by accident or by art, is immaterial. Unless this patent can be supported for the manufacture, it cannot be supported at all. I am of opinion that the patent is granted for the manufacture, and I agree with my Brother Adair that verbal criticisms ought not to avail, but that principle in the patent and engine in the act of parliament mean and are the same thing. Besides, the declaration is founded on a right to the engine, and therefore, unless the Plaintiffs can make out their right to that extent, they must fail. In most of the instances of the different patents mentioned by my Brother Adair, the patents were for the manufacture, and the specification rightly stated [487] the method by which the manufacture was made: but none of them go the length of proving, that a method of doing a thing without the thing being done or actually reduced into practice, is a good foundation for a patent. When the thing is done or produced, then it becomes the manufacture which is the proper subject of a patent. Dollond's patent was for object-glasses, and the specification properly stated the method of making those glasses. And as I mentioned in the course of the argument, the point contested in that case was, whether Dollond or Hall was the first and true inventor within the meaning of the statute, Hall having first made the discovery in his own closet, but never made it public; and on that ground, Dollond's patent was confirmed. Mechanical and chemical discoveries all come within the description of manufactures: and it is no objection to either of them that the articles of which they are composed were known and were in use before, provided the compound article which is the object of the invention, is new. But then the patent must be for the specific compound, and not for all the articles or ingredients of which it is made. The first inventor of a fire-engine could never have supported a patent for the method and principle of using iron. Nor could Dr. James (supposing his patent had been clear of other objections) have sustained a patent for the method and principle of using antimony. In the first case, the patent must have been for the fire-engine, *eo nomine*; and in the second, for the specific compound powder. Suppose the world were better informed than it is, how to prepare Dr. James's fever powder, and an ingenious physician should find out that it was a specific cure for a consumption, if given in particular quantities; could he have a patent for the sole use of James's powder in consumptions or to be given in particular quantities? I think it must be conceded that such a patent would be void; and yet the use of the medicine would be new, and the effect of it as materially different from what is now known, as life is from death. So in the case of a late discovery, which as far as experience has hitherto gone, is said to have proved efficacious, that of the medicinal properties of arsenic in curing agues, could a patent be supported for the sole use of arsenic in aguish complaints? The medicine is the manufacture, and the only object of a patent, and as the medicine is not new, any patent for it, or for the use of it, would be void. The case of water tabbies which has often been mentioned in Westminster [488] Hall, may afford some illustration of

(a) By an error of the press, this question and the admission in answer to it are omitted in the statement of the reply.

this subject. That invention first owed its rise to the accident of a man's spitting on a floor cloth, which changed its colour, from whence he reasoned on the effect of intermixing water with oils or colours, and found out how to make water tabbies, and had his patent for water tabbies only. But if he could have had a patent for the principle of intermixing water with oil or colours, no man could have had a patent for any distinct manufacture, produced on the same principle. Suppose painted floor cloths to be produced on the same principle, yet as the floor cloth and the tabby are distinct substances, calculated for distinct purposes, and were unknown to the world before, a patent for one would be no objection to a patent for another.

The true question in this case is, whether the Plaintiffs' patent can be supported for the engine? I have already said I consider it as granted for the engine, and if that be the right construction of the patent, that alone lays all the arguments about ideas and principles out of the case. The objections to this patent, as a patent for the engine, are two: first, that the fire-engine was known before: and secondly, though the Plaintiffs' invention consisted only of an improvement of the old machine he has taken the patent for the whole machine, and not for the improvement alone. As to the first, the fact which the Plaintiffs' counsel were forced to admit, and did repeatedly admit in the terms which I mentioned, viz. that there was nothing new in the machine, is decisive against the patent. And the second objection is equally fatal. That a patent for an addition or improvement may be maintained, is a point which has never been directly decided; and *Bircol's case*, 3 Inst. 184, is an express authority against it, which case was decided in the Exchequer Chamber. What were the particular facts of that case we are not informed, and there seems to me to be more quaintness than solidity in the reason assigned, which is, that it was to put but a new button to an old coat, and it is much easier to add than to invent. If the button were new, I do not feel the weight of the objection that the coat on which the button was to be put, was old. But in truth arts and sciences at that period were at so low an ebb, in comparison with that point to which they have been since advanced, and the effect and utility of improvements so little known, that I do not think that case ought to preclude the question. In later [489] times, whenever the point has arisen, the inclination of the court has been in favour of the patent for the improvement, and the parties have acquiesced, where the objection might have been brought directly before the court. In *Morris v. Branson* which was tried at the sittings after Easter term 1776, the patent was for making oilet holes or net work in silk, thread, cotton, or worsted; and the Defendant objected that it was not a new invention, it being only an addition to the old stocking frame. Lord Mansfield said "after one of the former trials on this patent, I received a very sensible letter from one of the gentlemen who was upon the jury, on the subject whether on principles of public policy, there could be a patent for an addition only. I paid great attention to it, and mentioned it to all the judges. If the general point of law, viz. that there can be no patent for an addition, be with the Defendant, that is open upon the record, and he may move in arrest of judgment. But that objection would go to repeal almost every patent that was ever granted." There was a verdict for the Plaintiffs with 500*l.* damages, and no motion was made in arrest of judgment. Though his Lordship did not mention what were the opinions of the judges, or give any direct opinion himself, yet we may safely collect that he thought on great consideration, the patent was good, and the Defendant's counsel, though they had made the objection at the trial, did not afterwards persist in it. Since that time, it has been the generally received opinion in Westminster Hall, that a patent for an addition is good. But then it must be for the addition only, and not for the old machine too. In *Jessop's case*, as quoted by my Brother Adair, the patent was held to be void because it extended to the whole watch, and the invention was of a particular movement only. It was admitted in the reply, that the patent should be applied to the invention itself: but it was contended, that if in consequence the patent gave a right to the whole engine, that would be no objection. To this I answer, that if the patent be confined to the invention, it can give no right to the engine, or to any thing beyond the invention itself. Where a patent is taken for an improvement only, the public have a right to purchase that improvement by itself, without being incumbered with other things. A fire-engine of any considerable size, I take it, would cost about 1200*l.* and suppose the alteration made by the Plaintiff, with a fair allowance for profit would [490] cost 50 or 100*l.* is it to be maintained, that all the persons who already have fire-engines must be at the

expence of buying new ones from the Plaintiffs, or be excluded from the use of the improvement? So in the case of the watch, may not other persons in the trade buy the new movement, and work it up in watches made by themselves? Where men have neither fire-engines nor watches, it is highly probable that they will go to the inventor of the last and best improvements for the whole machine; and if they do, it is an advantage which the inventor gets from the option of mankind, and not from any exclusive right or monopoly vested in him. But here the Plaintiffs claim the right to the whole machine. To that extent their right cannot be sustained, and therefore I am of opinion that there ought to be judgment for the Defendant.

LORD CHIEF JUSTICE EYRE. Upon this case two questions are reserved for the opinion of the court; the first, whether the patent is good in law, and continued by the act of parliament mentioned in the case; the second, whether the specification stated in the case is in point of law sufficient to support the patent? As I take it, the facts of the case are stated with a view to the application of them to these questions, and not to any other question which may be thought to arise upon them. Perhaps indeed, if the court saw that another material question might arise out of these facts which had escaped the attention of the court and jury at *Nisi Prius*, they might direct the case to be amended or a new trial to be had in order to introduce it. These two questions were thus stated in order to bring before the court the points of law insisted on upon the part of the Defendant, and also to give an opportunity for considering a doubt which occurred to me upon my first view of the case at the trial, which was, whether a patent right could attach upon any thing not organized, and capable of precise specification. As these two questions are framed, there are three points for the consideration of the court. First, whether the patent was in its original creation good or bad? Secondly, taking it to be good, whether it was continued by the act of parliament? And thirdly, taking it to be good in its original creation, and to have been continued by the act of parliament, subject to an objection for the want of a specification, whether there has been a sufficient specification? Though [491] we have had many cases upon patents yet I think we are here upon ground which is yet untrodden, at least was untrodden till this cause was instituted, and till the discussions were entered into which we have heard at the bar, and now from the court. Patent rights are no where that I can find accurately discussed in our books. Sir Edward Coke discourses largely, and sometimes not quite intelligibly, upon monopolies, in his chapter of monopolies, 3 Inst. 181. But he deals very much in generals, and says little or nothing of patent rights, as opposed to monopolies. He refers principally to his own report of the case of monopolies. 11 Co. 86 b.; he also mentions a resolution of all the judges in 2 & 3 Eliz. from a MS. of Dyer, condemning a grant to the corporation of Southampton by Phillip and Mary, for the sole right of importing malmsey wine, and that no malmsey wine should be landed at any other place, upon pain to pay treble customs. He also mentions *Bircot's case* in the Exchequer Chamber, 15 Eliz. for a privilege concerning the preparing and melting of lead ore, but he states no particulars; and the principle on which that case was determined has been, as my Brother Buller observes, not adhered to; namely, that an addition to a manufacture cannot be the subject of a patent. There is also a case in Godbolt (a), and there are a few others condemning particular patents, which were beyond all doubt mere monopolies. The modern cases have chiefly turned upon the specifications, whether there was a fair disclosure. Such was the case of *Turner v. Winter*, 1 Term Rep. B. R. 602. The case of *Edgelberry v. Stephens*, 2 Salk. 447, is almost the only case upon the patent right, under the saving of the statute of Jac. 1, that is to be found. That case establishes, that the first introducer of an invention practised beyond sea, shall be deemed the first inventor: and it is there said, the act intended to encourage new devices useful to the kingdom; and whether acquired by travel or study it is the same thing. Deriving so little assistance from our books, let us resort to the statute itself, 21 Jac. 1, c. 3. We shall there find a monopoly defined to be "the privilege of the sole buying, selling, making, working or using any thing within this realm;" and this is generally condemned as contrary to the fundamental law of the land. But the 5th and 6th sections of that statute save letters patent, and grants of privileges of the [492] sole working or making of any manner of new manufacture within

(a) Godb. 252. *The Cloth-workers of Ipswich's case*, ib. 413. *Lord Zouch and More's case*.

this realm, to the first and true inventor or inventors of such manufactures, with this qualification. "so they be not contrary to the law, nor mischievous to the state," in these three respects: first, "by raising the prices of commodities at home;" secondly, "by being hurtful to trade;" or, thirdly, by being "generally inconvenient." According to the letter of the statute, the saving goes only to the sole working and making; the sole buying, selling and using, remain under the general prohibition; and with apparent good reason for so remaining, for the exclusive privilege of buying, selling and using, could hardly be brought within the qualification of not being contrary to law, and mischievous to the state, in the respects which I have mentioned. I observe also, that according to the letter of the statute, the words "any manner of new manufacture" in the saving, fall very short of the words "any thing" in the first section. But most certainly the exposition of the statute, as far as usage will expound it, has gone very much beyond the letter. In the case in *Salkeld*, the words "new devices" are substituted and used as synonymous with the words "new manufacture." It was admitted in the argument at the bar, that the word "manufacture" in the statute was of extensive signification, that it applied not only to things made, but to the practice of making, to principles carried into practice in a new manner, to new results of principles carried into practice. Let us pursue this admission. Under things made, we may class, in the first place, new compositions of things, such as manufactures in the most ordinary sense of the word; secondly, all mechanical inventions, whether made to produce old or new effects, for a new piece of mechanism is certainly a thing made. Under the practice of making we may class all new artificial manners of operating with the hand, or with instruments in common use, new processes in any art producing effects useful to the public. When the effect produced is some new substance or composition of things, it should seem that the privilege of the sole working or making, ought to be for such new substance or composition, without regard to the mechanism or process by which it has been produced, which, though perhaps also new, will be only useful as producing the new substance. Upon this ground *Dollond's* patent was perhaps exceptionable, for that was for a method of [493] producing a new object-glass, instead of being for the object-glass produced. If *Dr. James's* patent had been for his method of preparing his powders, instead of the powders themselves, that patent would have been exceptionable upon the same ground. When the effect produced is no substance or composition of things, the patent can only be for the mechanism if new mechanism is used, or for the process, if it be a new method of operating, with or without old mechanism, by which the effect is produced. To illustrate this. The effect produced by *Mr. David Hartley's* invention for securing buildings from fire is no substance or composition of things; it is a mere negative quality, the absence of fire. This effect is produced by a new method of disposing iron plates in buildings. In the nature of things the patent could not be for the effect produced. I think it could not be for the making of the plates of iron, which, when disposed in a particular manner produced the effect, for those are things in common use. But the invention consisting in the method of disposing of those plates of iron, so as to produce their effect, and that effect being a useful and meritorious one, the patent seems to have been very properly granted to him for his method of securing buildings from fire. And this compendious analysis of new manufactures mentioned in the statute, satisfies my doubt, whether any thing could be the subject of a patent, but something organized and capable of precise specification. But for the more satisfactory solution of the other points which are made in this case, I shall pursue this subject a little further. In *Mr. Hartley's* method, plates of iron are the means which he employs; but he did not invent those means, the invention wholly consisted in the new manner of using, or I would rather say, of disposing a thing in common use, and which thing every man might make at his pleasure, and, which therefore, I repeat, could not, in my judgment, be the subject of the patent. In the nature of things it must be, that in the carrying into execution any new invention, use must be made of certain means proper for the operation. Manual labour to a certain degree must always be employed; the tools of artists frequently; often things manufactured, but not newly invented, such as *Hartley's* iron plates; all the common utensils used in conducting any process, and so up to the most complicated machinery that the [494] art of man ever devised. Now let the merit of the invention be what it may, it is evident that the patent in almost all these cases cannot be granted for the means by which it acts, for in them there is nothing new, and in some of them nothing capable of appropriation. Even where the

most complicated machinery is used, if the machinery itself is not newly invented, but only conducted by the skill of the inventor, so as to produce a new effect, the patent cannot be for the machinery. In *Hartley's case* it could not be for the effect produced, because the effect, as I have already observed, is merely negative, though it was meritorious. In the list of patents with which I have been furnished, there are several for new methods of manufacturing articles in common use, where the sole merit and the whole effect produced are the saving of time and expence, and thereby lowering the price of the article, and introducing it into more general use. Now I think these methods may be said to be new manufactures, in one of the common acceptations of the word, as we speak of the manufactory of glass, or any other thing of that kind. The advantages to the public from improvements of this kind, are beyond all calculation important to a commercial country, and the ingenuity of artists who turn their thoughts toward such improvements, is in itself deserving of encouragement; and in my apprehension it is strictly agreeable to the spirit and meaning of the statute Jac. 1, that it should be encouraged: and yet the validity of these patents, in point of law, must rest upon the same foundation as that of Mr. Hartley. The patent cannot be for the effect produced, for it is either no substance at all, or what is exactly the same thing as to the question upon a patent, no new substance, but an old one, produced advantageously for the public. It cannot be for the mechanism, for there is no new mechanism employed. It must then be for the method; and I would say, in the very significant words of Lord Mansfield (4 Burr. 2397) in the great case of the copy-right, it must be for method detached from all physical existence whatever. And I think we should well consider what we do in this case, that we may not shake the foundation upon which these patents stand. Probably I do not over-rate it when I state that two-thirds, I believe I might say three-fourths, of all patents granted since the statute passed, are for methods of operating and of manufacturing, producing no new substances [495] and employing no new machinery. If the list were examined, I dare say there might be found fifty patents for methods of producing all the known salts, either the simple salt, or the old compounds. The different sorts of ashes used in manufactures are many of them inventions of great merit, many of them probably mere speculations of wild projectors: the latter ought to fall, the former to stand. If we wanted an illustration of the possible merit of a new method of operating with old machinery, we might look to the identical case now in judgment before the court. If we consider into what general use fire-engines are come, that our mines cannot be worked without them, that they are essentially necessary to the carrying on many of our principal manufactures, that these engines are worked at an enormous expence in coals, which in some parts of the kingdom can with difficulty be procured at all in large quantities, it is most manifest that any method found out for lessening the consumption of steam in the engines, which by necessary consequence lessens the consumption of coals expended in working them, will be of great benefit to the public, as well as to the individual who thinks fit to adopt it. And shall it now be said, after we have been in the habit of seeing patents granted, in the immense number in which they have been granted for methods of using old machinery, to produce substances that were old, but in a more beneficial manner, and also for producing negative qualities by which benefits result to the public, by a narrow construction of the word manufacture in this statute, that there can be no patent for methods producing this new and salutary effect, connected, and intimately connected as it is, with the trade and manufactures of the country? This, I confess, I am not prepared to say. An improper use of the word principle in the specification set forth in this case has, I think, served to puzzle it. Undoubtedly there can be no patent for a mere principle, but for a principle so far embodied and connected with corporeal substances as to be in a condition to act, and to produce effects in any art, trade, mystery, or manual occupation, I think there may be a patent. Now this is, in my judgment, the thing for which the patent stated in the case was granted, and this is what the specification describes, though it miscalls it a principle. It is not that the patentee has conceived an abstract notion that [496] the consumption of steam in fire-engines may be lessened but he has discovered a practical manner of doing it; and for that practical manner of doing it he has taken this patent. Surely this is a very different thing from taking a patent for a principle; it is not for a principle, but for a process. I have dwelt the more largely upon this part of the case because, in my apprehension, this is the foundation upon which the whole argument will be found to rest. If upon the true con-

struction of the statute there may be a patent for a new method of manufacturing or conducting chemical processes, or of working machinery, so as to produce new and useful effects, then I am warranted to conclude that this patent was in its original creation good. I will next consider the specification, before I proceed to the consideration of the question arising upon the statute for continuing this patent. The specification has reference to the patent, and not to the statute, and therefore it will be proper to consider it in this stage of the argument. I distinctly admit that if this patent is to be taken to be a patent for a fire engine, the specification is not sufficient; it is not a specification of mechanism of any determinate form, having component parts capable of precise arrangement, and of particular description. On the other hand, if the patent is not for a fire-engine, but in effect for a manner of working a fire-engine, so as to lessen the consumption of steam, which, as I conceive, the words of the patent import, let us see whether this specification does not sufficiently describe a manner of working fire-engines, so as to produce the effect expressed in the patent, and whether the only objection to the specification is not that it is loaded with a redundancy of superfluous matter. The substance of the invention is a discovery, that the condensing the steam out of the cylinder, the protecting the cylinder from the external air, and keeping it hot to the degree of steam-heat, will lessen the consumption of steam. This is no abstract principle, it is in its very statement clothed with practical application. It points out what is to be done in order to lessen the consumption of steam. Now the specification of such a discovery seems to consist in nothing more than saying to the constructor of a fire-engine, "for the future condense your steam out of the body of the cylinder, instead of condensing it within it, put something round the cylinder to protect it from the external air, and to preserve [497] the heat within it, and keep your piston air-tight without water." Any particular manner of doing this one should think would hardly need to be pointed out, for it can scarcely be supposed, that a workman capable of constructing a fire engine would not be capable of making such additions to it as should be necessary to enable him to execute that which the specification requires him to do. But if a very stupid workman should want to know how to go about this improvement, and in answer to his question was directed to conduct the steam which was to be condensed from the cylinder into a close vessel, by means of a pipe and a valve, communicating with the cylinder and the close vessel, to keep the close vessel in a state of coldness sufficient to produce condensation, and to extract from it any part of the steam which might not be condensed by the pump; and was also told to inclose the cylinder in a wooden case, and to use a resinous substance instead of water to keep the piston air-tight, can it be imagined that he would be so stupid as not to be able to execute this improvement, with the assistance of these plain directions? If any man could for a moment imagine that this was possible, I observe that this difficulty is put an end to, because the jury have found that a workman can execute this improvement in consequence of the specification. Some machinery it is true must be employed, but the machinery is not of the essence of the invention but incidental to it. The steam must pass from the cylinder to the condensing vessel, for which purpose there must be a valve to open a pipe to convey, and a vessel to receive the steam. But this cannot be called new invented machinery, whether considered in the parts or in the whole, and therefore there can be no patent for this addition to the fire-engines. Suppose a new invented chemical process, and the specification should direct that some particular chemical substance should be poured upon gold in a state of fusion, it would be necessary, in order to this operation, that the gold should be put into a crucible, and should be melted in that crucible, but it would be hardly necessary to state in the specification the manner in which, or the utensils with which the operation of putting gold into a state of fusion was to be performed. They are mere incidents with which every man acquainted with the subject is familiar. Some observations were made in the course of the argument at the bar, on its being left unascertained [498] both in the specification and case, to what extent the consumption of steam would be lessened by the invention; but the method does not profess to ascertain this: it professes to lessen the consumption: and to make the patent good, the method must be capable of lessening the consumption to such an extent as to make the invention useful. More precision is not necessary, and absolute precision is not practicable. The quantity of steam which will be saved in each machine must depend upon a great variety of circumstances respecting each individual fire-engine, such as the accuracy of casting

or boring the cylinder, or the dimensions of it, the accuracy of the workman in putting his apparatus together, the care in keeping the cylinder in a proper degree of heat, and the more or less perfect order for working, in which the engine is kept. All these circumstances will affect the quantity of steam to be lessened. Some weighty observations have been made upon parts of this specification, but those parts appear to me not properly to relate to the method described in the patent; they are rather intimations of new projects of improvement in fire-engines, and some of them, I am very ready to confess, either very loosely described or not very accurately conceived. I do not undertake to pronounce which, but one or the other is pretty clear. They are the fourth and fifth articles: the first, second, third and sixth appear to me to belong to this method, and very clearly to point out and explain the method to every man who has a common acquaintance with the subject, and to be intelligible even to those who are unacquainted with it. If there be a specification to be found in that paper, which goes to the subject of the invention as described in the patent, I think the rest may very well be rejected as superfluous. If indeed the Defendant could have shewn that he had not pirated the invention which is sufficiently specified, but that what he hath done hath a reference to another method of lessening the consumption of steam to which the questionable parts of the specification were meant to relate, the objection to the specification would have remained, and perhaps some other objections which have been alluded to, might have been taken both to the patent and specification. But I would observe here, that with regard to this and some other difficulties, there is no question reserved in this case respecting the infringement of the patent. The general fact only is stated; that it has been in-[499]-fringed by the Defendant and in the consideration of a case reserved, we are not to search for difficulties upon which the parties have not proposed to state any point to us for our judgment, and into which I think we are not at liberty to go. The difficulty which struck me, as it did my Brother Buller, with respect to the declaration, is applied to the patent as it originally stood, not as it now stands continued by the act of parliament. If we were at liberty to go into it, that difficulty might perhaps produce a nonsuit, and that nonsuit a new action in which the difficulty would be removed. But this cause was instituted to try the merits of the patent: I thought therefore that a formal objection was wisely overlooked. Supposing then the difficulty upon the patent itself and the specification to be got over, the act of parliament remains to be considered. The objection stated in the strongest manner would amount to this, that the act continues a patent for a machine, when in fact the patent is for a process. It is to be observed that there is nothing technical in the composition or the language of an act of parliament. In the exposition of statutes the intent of parliament is the guide. It is expressly laid down in our books, I do not here speak of penal statutes, that every statute ought to be expounded not according to the letter, but the intent. 2 Roll. Abr. 118, Plowd. 350, 363. This doctrine has been carried into effect by cases. Though a corporation be misnamed in an act of parliament, if it appears that the corporation was intended it is sufficient. 10 C. 5 b. So the statute of *quia emptores terrarum* has said that every one shall hold of the lord paramount *secundum quantitatem terræ*, but this shall be construed to be *secundum valorem terræ*; for so was the intent. Plowd. 10, 57. We all know that an act of parliament may be extended by equity. No authority has been cited which amounts to proof that a mistake in point of description in an act of parliament of this nature when the true meaning can be discovered, and when there is a foundation on which the act can be supported, shall vitiate it. The case cited from Plowden differs essentially from this case. The act of parliament in that case gave effect to a supposed legal attainder, and proceeded upon it altogether. If the groundwork fell, and there was no legal attainder, nothing remained: the supposed attainder in that case fell, consequently all fell. Now the difference between that case and the present is this, here the true patent meant to be described exists, and may [500] therefore be a ground-work to support the act. This case was compared to the case of the king being deceived in his grant. But I am not satisfied that the king, proceeding by and with the advice of parliament, is in that situation in respect of which he is under the special protection of the law, and that he could on that ground be considered as deceived in his grant: no case was cited to prove that position. The objection on the act of parliament is of the same nature as one of the objections to the specification: the specification calls a method of lessening the consumption of steam in fire-engines a principle, which it is

not; the act calls it an engine, which perhaps also it is not; but both the specification and statute are referable to the same thing, and when they are taken with their correlative are perfectly intelligible. Upon the wider ground I am therefore of opinion that the act has continued this patent. A narrower ground was taken in the argument, which was to expound the word engine in the body of this act, in opposition to the title of it, to mean a method; and I am ready to say I would resort to that ground if necessary in order to support the patent, ut res magis valeat quam pereat. But it is not necessary: for let it be remembered, that though monopolies in the eye of the law are odious, the consideration of the privilege created by this patent, is meritorious, because, to use the words of Lord Coke, "the inventor bringeth to and for the commonwealth a new manufacture by his invention, costs and charges." I conclude therefore that the judgment of the court ought to be for the Plaintiff.

The court being thus equally divided, no judgment was given, but the parties seemed disposed to put the case upon the record, in the form of a special verdict, in order that it might be carried on to a Court of Error.

[501] HOLLINGWORTH AND OTHERS, Assignees of Daniel, a Bankrupt, *against* TOOKE. Saturday, May 16th, 1795.

In the Exchequer Chamber in Error.

[See 5 Term Rep. B. R. 215.]

It is agreed between A. and B. that B. shall purchase of A. all the goods of a certain kind, which A. shall send him, at a fixed price, and that A. shall draw bills on B. for the amount of the purchase, and also that B. shall accept other bills drawn by A. for his convenience, to cover which A. shall remit value to B. After they have acted some time under this agreement B. becomes bankrupt, being under acceptances to a great amount. A. (being ignorant of the bankruptcy) sends a quantity of goods of the same kind together with other bills to B. for the purpose of discharging those acceptances, which come into the hands of the assignees. A. afterwards himself discharges the acceptances. Under these circumstances B. is to be considered as the factor or banker of A., and as having only a qualified property in the goods and bills which were so sent for a particular purpose, the general property being in A. Therefore that purpose not being answered, A. may recover back from the assignees of B. the amount of those goods and bills (a).

A Writ of Error having been brought on the judgment in this case, it was twice argued in this court; first by Wigley for the Plaintiff in error, and Walton for the Defendant; and secondly, by Pigot for the Plaintiff and Erskine for the Defendant; the substance of which arguments will be seen by referring to the three former ones which the case underwent in the Court of King's Bench 5 Term Rep. B. R. 215. And now the judgment of this court was pronounced by

LORD CHIEF JUSTICE EYRE, who, after stating the special verdict proceeded thus.

The case was well and laboriously argued at the bar. It was very full of thorny points, which necessarily required from us a good deal of investigation. The consequence has been that a length of time, perhaps somewhat inconvenient to the parties, has elapsed before we could come to an agreement. We have at length come to an agreement, and we are all of opinion that this judgment ought to be affirmed. I shall state very shortly the reasons which have induced me to concur in that opinion. The right of the parties to the light gold and bills, which are the subject of this action, appears to me to depend principally upon the true construction of the original agreement between Tooke and Daniel, made two years and upwards before the bankruptcy. That agreement consisted of [502] two parts; one being a contract for a bargain and sale of light gold by Tooke to Daniel at a given price, to be paid for by bills of

(a) [As to the specific appropriation of bills, see *Bent v. Puller*, 5 T. R. 494; *Parke v. Elason*, 1 East, 544; *Giles v. Perkins*, 9 East, 12; *Curstains v. Bates*, 3 Campb. N. P. C. 301; *Thompson v. Giles*, 2 B. & C. 422; *Ex parte Sarjeant*, 1 Rose, 153; *Ex parte Sollars*, 18 Ves. 229; *Ex parte Pease*, 1 Rose, 232; *Ex parte Rowton*, 1 Rose, 15.]

exchange payable at two months, a simple and unembarrassed transaction; the other being a contract, the effect of which was that Daniel should become Tooke's banker, that he should accept his bills, Tooke remitting value to the amount of such acceptances in bills and in light gold. That is plainly the effect of the latter part of the agreement. They might have dealt as mere merchants, the one selling and the other buying this article of light gold, and paying for it according to agreement. And had this been a case of that kind, the transaction would have had one complexion, and the argument upon it, I think, would have taken one course. But as they might act in that manner, so they might upon the latter branch of the agreement act as principal and factor, or principal and banker, and not as mere merchants; and the idea of bargain and sale would enter no farther into their transactions upon that branch of the agreement, than merely as it went to fix the price at which the light gold which should be remitted from time to time should be carried to the account of Tooke as cash, and be applied by Daniel, as Tooke's agent, in payment of the acceptances which he had made on the credit of Tooke. There would certainly be this mixture of bargain and sale in any transactions which should take place even under the latter branch of the agreement, which in other respects would be the transaction of principal and factor, or principal and banker. But though there be this mixture, yet I think the case of the light gold cannot, in respect of that circumstance, be separated from the case of the bills. If Daniel was to be considered as factor or banker only with respect to the bills which should be remitted, he ought to be considered as banker or factor only, as to the light gold, with an agreement on his part to apply that light gold in payment of his acceptances at the rate fixed in the former part of the agreement. In a word, the bargain and sale of the light gold, when considered under the second branch of the agreement as a remittance to pay the acceptances, is but an incident in the business of the principal character of factor or banker. Now if it can be established that Tooke and Daniel acted in the characters of principal and factor, their respective rights of property are very easily ascertained: the [503] general right of property would be in Tooke, the special right of property in Daniel, to enable him to execute the commission with which Tooke had entrusted him, and he would also have a lien as against the general property of his principal, for the balance of his account. In this way of considering the case, we may lay all this story of the bankruptcy entirely out of the question. For suppose Daniel had remained solvent, Tooke might at any time have paid him his balance, including any acceptances he might be under, and have withdrawn his effects out of Daniel's hands, and there could have been no room for a question between them, but merely as to the profit upon the light gold, estimated at the price in the agreement. Now I think that would depend upon the question whether the light gold was sold under the first part of the agreement, or whether it was to be considered as a mere article of remittance under the latter part; and according to my view of the case I think that question would be decided against Daniel. The assignees standing in the place of Daniel, certainly can be in no better condition than Daniel himself: they may be in a worse condition if many of the arguments which we heard at the bar, and of which we have an account in print, are well founded. But those arguments take a very wide compass indeed; they involve, as I have already said, points of considerable difficulty upon which we have not formed an opinion, and upon which perhaps an opinion ought not to be formed till the points come judicially and unavoidably before the court. If that discussion can be avoided now, I think we do our duty by delivering an opinion upon narrower grounds. The ground I have taken is very distinctly marked, and very well enforced in the argument of one of the judges of the Court of King's Bench (a). He concludes somewhat differently from me, but the ground-work is there. In my opinion it may be sustained, it steers clear of all difficulties, and it reaches the substantial justice of the case, because it meets the only argument of considerable weight that struck my mind, namely, the possibility that the bankrupt might have been the creditor, and the injustice which would have been done to his estate if these effects could, on account of the bankruptcy, have been withdrawn from the mass of his estate. In my opinion upon which [504] my opinion proceeds is, that the bankrupt would have a lien upon those effects for every thing for which his estate was creditor, that difficulty is removed. Upon this ground

(a) This probably alludes to the opinion of Grose, J., 5 Term Rep. B. R. 233.

I concur in thinking that the judgment in this case ought to be affirmed, and it is the unanimous opinion of the Court that the

Judgment be affirmed.

SLUBEY AND SMITH *against* HEYWARD, FOX, AND FOX. Saturday, May 6th, 1795.

[Discussed, *Hammond v. Anderson*, 1804, 1 B. & P. N. R. 72; *Hanson v. Meyer*, 1805, 6 East, 627. Distinguished, *Buncey v. Pognitz*, 1833, 4 B. & Ad. 570. Referred to, *Miles v. Gorton*, 1834, 2 Cr. & M. 509; *Tanner v. Scoell*, 1845, 14 Mee. & W. 36; *Ex parte Cooper*, 1879, 11 Ch. D. 77. See *Ex parte Falk*, 1880-82, 14 Ch. D. 455; 7 App. Cas. 573.]

A. at a foreign port, ships goods by the order and on the account of B. to be paid for at a future day, and bills of lading are accordingly signed by the master of the ship. One of the bills is immediately transmitted to B., who before the arrival of the ship at the place of destination, sells the goods, and indorses the bill of lading to C. After the arrival of the ship, and a delivery of part of the goods to the agent of C., B. becomes bankrupt without having paid A. the price of the goods. By this delivery the transitus is at an end as to the whole of the goods (a).

In this action of trover for a quantity of wheat, a special verdict was found at Guildhall, which stated,

That 7061 bushels of wheat, the property of the Plaintiffs, on the 23d of January 1793, at Baltimore in Maryland, were shipped by them on board a ship called the "Pomona," by the order and for the account of George and Henry Browne, to be paid for by the said George and Henry Browne at a future day. That the Defendant Heyward on the same day and year at Baltimore, being then the master of the said ship, signed five bills of lading, whereby he acknowledged the said 7061 bushels of wheat to have been shipped on board the said ship, and undertook to deliver the same at the port of Cork, or a market to the said George and Henry Browne, or their assigns. That one of the said bills of lading, afterwards and before the arrival of the said ship and cargo at Waterford hereafter mentioned, was transmitted by the said Plaintiffs to the said George and Henry Browne, and the said George and Henry Browne afterwards on the 7th of March 1793, sold the said 7061 bushels of wheat to Claude Scott, and thereupon indorsed the said bill, thereby ordering and directing the master of the said ship to deliver the said 7061 bushels of wheat to the said Claude Scott or his assigns, and delivered the same bill of lading so indorsed to the said Claude Scott, together with an invoice of the cargo of the said ship, and at the same time drew four bills of exchange on the said Claude Scott payable three months after date, for several sums of money, mentioned in the said bills of ex-[505]-change, the amount of, and as and for the price of the said wheat, which said bills of exchange the said Claude Scott accepted and duly paid. That the said Claude Scott afterwards, and before the arrival of the said ship and cargo at Falmouth after-mentioned, indorsed and delivered the same bill of lading to the two other Defendants the Foxes, thereby ordering and directing the master of the said ship to deliver the said 7061 bushels of wheat to those Defendants, with an intent that they, as the agents of the said Claude Scott, should and might on his account receive and take possession of the said 7061 bushels of wheat. That the said ship with the said wheat on board, soon after the making the said bill of lading, sailed from Baltimore, and on the 5th of March 1793, arrived at the port of Waterford in Ireland, the course of the ship towards Cork having been changed on account of her having been chased by a French privateer; and that the said ship with the said wheat on board afterward proceeded from Waterford to Falmouth, by the orders of the said George and Henry Browne, given by them to the said Defendant Heyward in that behalf, at the request of the said Claude Scott, and arrived at Falmouth on the 3d of April 1793. That on the 4th of April in the same year, at Falmouth the Defendant Heyward reported the said ship at the Custom-house there, and made oath that the said wheat was for the said other Defendants the Foxes, and the Foxes on the 5th of April in the same year, made entry of the said wheat at the Custom-house at Falmouth in their names as agents of the said Claude Scott.

(a) [See the cases cited, ante, p. 316, n. (a).]

That 800 bushels of the said wheat were taken out of the said ship, by the Defendants the Foxes, and received and taken into their possession as such agents of the said Claude Scott, and for his account, between the 3d and 8th of April. That the said George and Henry Browne on the 5th of April 1793 became bankrupts, and that they had not at that time, nor at any time since paid the Plaintiffs for the said wheat, and that the said Plaintiffs on the 8th of April 1793, gave notice to the Defendant Heyward not to deliver the residue of the said wheat to the other Defendants the Foxes, and requested the said Heyward to deliver the residue of the said wheat to them the Plaintiffs, and offered to pay him the freight and all other charges due on account of the said cargo, but the said Heyward would not deliver the said residue of the said [506] wheat to the said Plaintiffs, and afterwards, and before the commencement of this action, delivered the same to the said other Defendants, who had converted and disposed thereof to the use of the said Claude Scott. But whether, &c.

On behalf of the Plaintiffs, Le Blanc, Serjt., argued in the following manner. The only question appears to be, whether there be any thing in the finding of the jury, which distinguishes this case from that of *Lickbarrow v. Mason (a)*. That case having been so recently and so fully discussed, it is not now necessary to agitate the question how far a bill of lading is a negotiable instrument; it is sufficient for the Plaintiffs that they appear upon the face of the special verdict entitled to maintain the action. The contract was between the shippers of the goods and the master of the vessel. Suppose the shippers had, before the sailing of the ship, required the master to unload, and give back the cargo to them, could the master have refused, and given at his election a right to another person to receive it? If he could not, neither could he legally deliver the wheat in the present instance to the Foxes, after having had notice from the shippers not to deliver it; he was therefore a wrong-doer, and guilty of a conversion. The cargo is found to have been the property of the Plaintiffs, to be paid for at a future day by the consignees or their assigns, and before the delivery, (for it cannot be contended that a delivery of part of a divisible cargo was a delivery of the whole,) the consignees became bankrupts. The case therefore, at least as far as it relates to the residue of the goods undelivered, comes immediately within the authority of *Lickbarrow v. Mason*, which as it was decided in the Exchequer Chamber, affirms the right of stopping goods in transitu; and that decision was not overset in the House of Lords, where the case went off upon a venire de novo, leaving the material points undetermined. The only difference between the cases is this, that in *Lickbarrow v. Mason* the action was brought by the indorsees of the bill of lading against the assignees of the consignees, but in the present case by the owners against the indorsees.

Marshall, Serjt., contra, stated four questions which he meant to argue. 1. What right passes by the indorsement of a bill of lading? 2. Whether the consignor, after the indorsement of the bill of lading for a valuable consideration, may stop the [507] goods in transitu? 3. What shall be deemed an end of the transitu? 4. Whether, when part of the goods have been delivered to the indorsee of the bill of lading, the master of the ship is justified in delivering the residue, after notice from the consignor not to deliver it? But the Court desired him to confine himself to the two last questions, the case of *Lickbarrow v. Mason* having, in the different stages of it, exhausted all argument on the two first. Marshall accordingly began by laying down this proposition, viz. that the transitu was at an end before the notice was given by the Plaintiffs to the master of the ship not to deliver the goods to the agents of Scott. There must be some period of time when the transitu is ended, and that period is when the goods are absolutely or constructively come to the possession of the consignee. Here it is stated that the ship arrived at Falmouth on the 3d of April 1793, that on the 4th the master reported her at the Custom-house, and there made oath that the wheat was for George and Robert Fox; that on the 5th he entered it in their names as agents of Scott, and that between the 3d and the 8th of that month 800 bushels were taken out of the ship, and received into their possession. Now before any part of the cargo could have been carried out of the ship, the whole must have been delivered on board to the agents of Scott: when bulk is once broken, and any part delivered, it is a delivery of the whole to the consignee, who thereby acquires a constructive possession of the whole. Suppose after this any part of

(a) 2 Term Rep. B. R. 63, ante, vol. i. 357, 6 Term Rep. B. R. 131.

the wheat had been stolen from the ship, the indictment must have laid it as the property of Scott. Suppose any damage done to it, or any part of it taken away, who must have brought the action? The master could not, for he had sworn it to be the property of Scott's agents; the consignors could not, for the master their agent had pronounced it to be the property of others. Suppose the duties unpaid, to whom would government have resorted? Surely to the person whom the master had declared on oath to be the owners. In *Blakey v. Dimsdale*, Cowp. 661, the Court held, that if goods are bought by sample to be delivered at a future day, and earnest paid, a delivery to the vendor's servant to carry to the vendee is a delivery to the vendee, and vests the property in him, and that the unloading part of the goods is an actual, and not merely a constructive delivery.

The last question is, whether the master of the ship was not justified in delivering the 800 bushels to the agents of Scott, [508] and whether Scott by the possession thus obtained did not acquire a perfect title? Little more is necessary for the decision of this question than to examine the form of the bill of lading, which is an acknowledgment by the master that he has received the goods on board, to be delivered according to the consignment, and concluding that any one being accomplished, the others shall be void. Now when the master has delivered the goods according to the tenor and directions of any one of the bills, he has performed his contract, and the rest of the bills are void. But it is stated in the special verdict, that the Plaintiffs on the 8th of April gave notice to the master not to deliver the residue of the wheat to the agents of Scott, and requested him to deliver it to them, and tendered the freight and other charges. But such a notice could not authorize the master to depart from his solemn contract to deliver the goods to the consignee or his assigns. Even if another bill of lading had been presented to him, instead of the notice on the 8th of April, when part of the cargo had been delivered, he would have had his option which of them he should accomplish. This appears from the evidence of the merchants in *Fearon v. Bowers* (ante, vol. i. p. 364), who agreed, "that where there are several bills of lading, the captain may deliver the goods to whom he thinks proper;" and from the direction of Lord Chief Justice Lee, who told the jury, "that the captain was not concerned to examine who had the best right on the different bills of lading. All he had to do, was to deliver the goods upon one of the bills of lading," and therefore directed them to find for the defendant. If then the master were justified in delivering the residue of the goods to the agents of Scott, after the notice from the Plaintiffs, Scott acquired a legal possession as well as a legal title: and it was admitted at the trial, and it is to be inferred from the special verdict, that he had a right to retain all that was legally delivered to him. Supposing therefore that the goods might have been stopped in transitu, the transitu was at an end; all the cargo was, if not actually, at least constructively in the possession of Scott, and he having fairly obtained that possession, his title was complete.

Le Blanc, Serjt., in reply. In all the cases that have occurred respecting the right of stopping in transitu, the question has arisen after the arrival of the ship in port, the transitu therefore cannot be ended by that event, nor indeed by any [509] thing short of an actual delivery of the goods. In the case of *Blakey v. Dimsdale*, the question was not as to the right of stopping the goods in transitu, but whether trespass could be maintained by the vendee after earnest paid and delivery. That case therefore cannot affect the present. A lien, though it originated in equity, is now considered as a legal right, and consequently a court of law will entertain a suit to enforce it. And that right could not be taken away by an entry at the Custom-house in the name of the consignee.

The Court (after some conversation upon the case of *Lickbarrow v. Mason*, which not being material to the point in question, it is not necessary to repeat,) were of opinion that under the circumstances of this particular case the action could not be maintained, for the transitu was ended by the delivery of the 800 bushels of wheat, which must be taken to be a delivery of the whole, there appearing no intention, either previous to or at the time of the delivery, to separate part of the cargo from the rest.

Judgment for the Defendants.

SAUNDERSON AND OTHERS *against* JUDGE. Monday, May 18th, 1795.

A. makes a promissory note payable to B. or order, with a memorandum upon it that it will be paid at the house of C. who is A.'s banker; in the course of business the note is indorsed to C. In an action by C. against the indorser, it is not necessary to prove an actual demand on A.(a).—If a note be made payable at a particular house, a demand of payment at that house is as a demand on the maker (b).—The putting a letter into the post-office to the indorser in proper time, informing him that the maker has not paid a note when due, is sufficient evidence of notice to the indorser (c).

This was an action on a promissory note, made by Sharp, to Wilkinson or order, who indorsed it to Judge, he to Sanders and Co., and Sanders and Co. to Saunderson and Co. bankers in Southwark, to cover acceptances which they had given on account of Sanders and Co. At the foot of the note there was a memorandum by Sharp, that he would pay it at the house of Saunderson and Co. with whom he had a cash account. Some time before the note became due, Sharp had absconded, and on the day when it was due, Saunderson and Co. wrote by the post to Judge, giving him notice of the non-payment, and demanding payment of him, but there was no other evidence of the notice, than the putting the letter into the post-office. They had made no previous [510] demand on Sharp, not knowing where to find him, having directed several letters to him at his usual place of abode, which were returned with the post-mark upon them denoting that no such person was to be found, and believing him to be insolvent, as he had kept an account with them, but had then no effects in their hands. The declaration was in the usual form by the indorsee against the indorser of a promissory note, without stating that it was to be paid at the house of Saunderson and Co. At the trial, the Plaintiffs were nonsuited on the ground that it was incumbent on them to prove an actual demand on the maker of the note. There was also a doubt raised as to the consideration, but nothing turned upon it.

A rule having been granted to shew cause why there should not be a new trial, Le Blanc, Serjt., shewed cause, contending that the nonsuit was proper; first, because the note was not presented to Sharp for payment by the Plaintiffs, and therefore the averment in the declaration that it was so presented, was not proved; and secondly, because it was not proved that the Defendant received the letter which was put into the post-office, advising him of the non-payment by Sharp.

Bond, Serjt., in favour of the rule, said that as by the terms of the note the money was to be paid at the house of Saunderson and Co. it was there that it was to be presented for payment. If Judge, instead of indorsing the note to Saunderson and Co., had there demanded payment of it himself, it would have been sufficient; but as it was indorsed to Saunderson and Co. they could not make a demand upon themselves, and Sharp was nowhere to be found. As to the proof of the averment in the declaration, that the note was presented to Sharp for payment; in all actions on bills of exchange and promissory notes, due diligence used by the holder to obtain payment from the acceptor of the one, and the maker of the other, is evidence to support the averment. With respect to the other objection, the putting the letter to Judge into the post-office the day when the note became due, was clearly evidence of notice to him.

Per Curiam. It was no part of the contract in this case, that the note should be paid at the house of Saunderson and Co., and therefore that was not necessary to be stated in the declaration (a)². But the maker merely appointed the house of his

(a)¹ [See the comments upon this case in *Rowe v. Young*, 2 B. & B. 175.]

(b) [See *Pearse v. Pemberthy*, 3 Campb. N. P. C. 261.]

(c) [Accord. *Kufh v. Weston*, 3 Esp. N. P. C. 54. But the direction of the letter must be sufficiently particular. *Walter v. Haynes*, 1 R. & M. N. P. C. 149. *Mann v. Moors*, 1 R. & M. 249.]

(a)² [But where the particular place of payment is introduced into the body of the note it becomes a part of the contract, *Saunderson v. Bowes*, 14 East, 500. *Dickinson v. Bowes*, 16 East, 110. *Howe v. Bowes*, 11 East, 112. 5 Taunt. 130, S. C. in error. And so where the memorandum of payment was printed at the bottom of the note, Lord Ellenborough held that it formed part of the contract, *Tregothick v. Edwin*, 1 Stark. N. P. C. 468.]

banker, as the place where he was to be called upon for pay-[511]-ment, and where it would be paid. Yet this was both an undertaking that there should be cash there, and also an order to the bankers to pay it. It is not necessary that a demand should be personal; it is sufficient if it be made at the house of the maker of the note; and it is the same thing in effect, if it be made at the place where he appoints it to be made. If Judge had been the holder of the note, it would have been enough for him to have presented it for payment at the house of Saunderson and Co. And as they at whose house it was to be paid were themselves the holders of it, it was a sufficient demand for them to turn to their books, and see the maker's account with them, and a sufficient refusal, to find that he had no effects in their hands. As to the notice to the Defendant, the sending the letter by the post was sufficient evidence of that notice.

Rule absolute.

KEANE against BOYCOTT. Monday, May 18th, 1795.

[Referred to, *Hartley v. Cummings*, 1847, 5 C. B. 258; *Evans v. Walter*, 1867, L. R. 2 C. P. 621; *Walter v. Everard*, [1891] 2 Q. B. 373.]

In an action against A. for seducing the servant of B. from his service, it is sufficient evidence that A. asked the servant to enlist in the army and afterwards gave him money. An infant slave in the West Indies executed an indenture, by which he covenanted to serve B. for a certain term of years as his servant, and B. covenanted to do certain things on his part: B. then came to England with the slave. In an action against A. who had seduced him from the service of B., A. was not permitted to allege that the contract was void, as being made by an infant and a slave, and therefore that the declaration, which stated him to have been retained as a servant for a term of years, was not proved; for the court held that the effect of such a contract might be the manumission of the slave, and consequently that it was for his own benefit, and being for his own benefit, that it was, at most, only voidable by the infant himself (a).

This was an action on the case, for enticing the Plaintiff's servant to leave his service. The first count of the declaration stated that on the 21st of April, 1794, a certain person called Toney was retained to serve the Plaintiff for five years from that day, and then went on to state the service, and enticement, &c. The second count was, that on the same day and year, &c. a certain person called Toney was retained to serve the Plaintiff for a certain term of years which was not yet expired, and that the Defendant well knew the premises, &c. The third was for assaulting the servant and seizing and carrying him away from the service of the Plaintiff &c. per quod, &c.

The facts were, that a negro boy called Toney a slave in the island of St. Vincent about 16 or 17 years old, there executed [512] an indenture, by which he bound himself to serve the plaintiff, who was coming to Europe, as a servant for five years, and the Plaintiff covenanted to find him food, lodging and clothing, and medical assistance in case of sickness. The plaintiff soon after arrived in this country with the boy as his servant, and went to Cheltenham, where the Defendant, who was a captain in the army on a recruiting party, meeting the boy in the street with his livery on, asked him if he would enlist, to which he assented; the Defendant then asked him whether he was an indented servant, to which he answered that he was bound to the Plaintiff for five years. After this the boy went to the Defendant's lodgings, where the Defendant gave him two shillings, and told him to go to Gloucester to the regiment; to which place he accordingly went. Upon this, the Plaintiff procured a warrant from a magistrate, under which the boy was taken and brought back to his service; after which, the Defendant sent two serjeants to take the boy again, and bring him back to the regiment, which they did; but it did not appear that the boy went with them unwillingly or by compulsion.

(a) [As to the contracts of infants being void or voidable, see *Bayliss v. Dineley*, 3 M. & S. 477. *Gibbs v. Merrill*, 3 Taunt. 313. *Burgess v. Merrill*, 4 Taunt. 469. *Thornton v. Illingworth*, 2 B. & C. 826.]

On this evidence, the jury found a general verdict for the Plaintiff. But a rule was obtained by Le Blanc, Serjt., to shew cause why there should not be a new trial, on the ground that the only count to which the evidence was applicable was the last, but as it appeared that the boy was not taken away by the serjeants against his will, or by force, that count was not supported. That with respect to the two other counts there was neither evidence of enticement, nor of the allegation of the boy being retained as a servant for five years, as in the first count, or for a certain term of years then unexpired, as in the second; for as to the enticement, the merely asking a person to enlist, more especially by a recruiting officer whose duty it was to promote the military service, could not be deemed an enticing, and the money was given to the boy after the enlisting was complete, not as an inducement to enlist: and as to the allegation respecting the term of years, the boy being both an infant and a slave when the indenture was entered into, it was clearly void, and therefore the contract was not binding.

Adair, Serjt., was now going to shew cause, when it was suggested by Heath, J., that as slavery was differently modified in different parts of the West Indies, perhaps the effect of the master entering into a contract with his slave might be to en-[513]-franchise him, by analogy to the old law respecting villeins in England, to whom, if the lord entered into an obligation, it operated as a manumission (*a*)¹; and if the effect were an emancipation from slavery, it was evidently a contract for the benefit of the infant, and if not binding on him, at least only voidable by him, and therefore a third person should not be permitted to say that it was void, in order to protect himself from the consequences of his own tortious act. Upon this being thrown out, it was agreed that the case should stand for farther consideration. And on this day, without more argument, the judgment of the court was thus given by

LORD CHIEF JUSTICE EYRE. In this case we were all agreed on the first question, that there was evidence of enticing the servant sufficient to go to the jury. But the question whether the allegation in the declaration, that the servant had contracted to serve the master for a term of years then to come and unexpired, was proved, was more difficult. The servant had in fact executed indentures, by which he contracted to serve the master for five years. But he was both an infant and a slave of his master at the time when he entered into the contract: he was very young and entirely in the power of the master. From these circumstances doubts arose whether the contract would bind him, and if it would not bind him, whether it would avail anything as against the Defendant. My Brother Heath brought this question into the right train, by suggesting that the effect of this contract, by analogy to the law between lord and villein, might be to emancipate the slave (*a*)², and therefore that it

(*a*)¹ Co. Litt. 137 b. 138, 11 State Trials, 342. Hargreave's argument in the case of *Somerset* the negro.

(*a*)² With the greatest deference to the high authority which started, as well as to that which pursued this ingenious conjecture, it is to be observed that it is inconsistent both with the general policy, and local institutions of the British Islands in the West Indies, to suppose that a slave can be manumitted by implication. The histories of those islands and their statute books shew that manumission can only be effected by some act of the master, done expressly for that purpose, and accompanied with the settlement of an annual provision on the slave so manumitted. On this subject the law of the island of St. Vincent is particularly strict. In the edition of the statutes of that island published in 1788, page 46, the 24th clause of the act entitled "An Act for making slaves real estate, and the better government of slaves and negroes" directs "That no person or persons whatsoever shall hereafter manumit or set free any slave or slaves, except he, she, or they, or the representatives of such person or persons, previous to such manumission, pay into the public treasury of this island one hundred pounds current money, for the use of the said island; and the receipt of the treasurer for the time being shall be tacked to the deed of manumission, and be an authority for the same; and the treasurer for the time being is hereby authorized and directed to pay half yearly to any slave so manumitted, out of the public treasury, four pounds current money for the maintenance of such slave, during the natural life of such slave, and the receipt of such slave, or a certificate from a justice of the peace of the payment of such money in his presence, (which every justice is hereby required to give when thereto required or applied to for the purpose) shall be a discharge to

was for the benefit of the infant, which might [514] remove the objection of infancy and slavery. This leads to the consideration of what contracts may be entered into by infants, whether they can contract by deed, whether their contracts are void or only voidable, and if only voidable, who shall take advantage of the infancy to avoid them. In Litt. sect. 259, it is said, "If before such age (i.e. 21) any deed or feoffment, grant, release, confirmation, obligation, or other writing be made by any of them &c., or if any within such age be bailiff or receiver to any, &c., all serves for nothing, and may be avoided." But this is certainly not correct, and Lord Coke's observation on it is, "Here by this, &c. are implied some exceptions out of this generality; as an infant may bind himself to pay for his necessary meat, drink, apparel, necessary physic, and such other necessities, and likewise for his good teaching or instruction, whereby he may profit himself afterwards; but if he bind himself in an obligation, or other writing with a penalty for the payment of any of these, that obligation shall not bind him." And in Cro. Eliz. 920, it was holden, that an obligation from an infant for his necessary meat and drink, in the very sum disbursed on that account, was good, but not in double the sum. The conclusion is, that for those things which the Court can pronounce to be necessary for the infant, he may bind himself even by deed. If this question were between the master and the servant himself, the Court would hardly hesitate to say, that a contract to serve for five years having the effect of emancipation from slavery, was a contract for necessities, in the enlarged sense of the word, as extending to all the cases enumerated in Co. Lit. But it is not necessary to go the whole length of that proposition, as this is not a case between the master and the servant.

[515] We have seen that some contracts of infants, even by deed, shall bind them. Some are merely void, namely, such as the court can pronounce to be to their prejudice. Others, and the most numerous class, of a more uncertain nature as to benefit or prejudice, are voidable only, and it is in the election of the infant to affirm them or not. In Rol. Abr. tit. Enfants (1 Rol. Abr. 728), and Com. Dig. (b) under the same title, instances are put of the three different kinds of good, void, and voidable contracts. Where the contract is by deed, and not apparently to the prejudice of the infant, Comyns states it as a rule, that the infant cannot plead non est factum, but must plead his infancy: it is his deed, but this is a mode of disaffirming it. He indeed states the rule generally, but I limit it to that case, in order to reconcile the doctrine of void and voidable contracts. Upon the distinction between those two species of contracts, we certainly are not warranted to decide, that a contract which may have the effect of emancipation, and which certainly puts the infant in no worse condition than he was in before, is so prejudicial to him as to be merely void. If it be a contract voidable only, the infant may affirm it: and that is sufficient to decide this case. For this is the case of a stranger and a wrong-doer interfering between the master and servant, and now seeking to take advantage of the infant's privilege of avoiding his contracts, a privilege which is personal to the infant, and which no one can exercise for him. Suppose the case of a stranger disseising the feoffee of an infant, the entry tolled, and a writ of right brought by the feoffee, should the tenant be permitted to object the infancy of the feoffor? In *Whittingham's case*, 8 Co. 42 b. it was holden, that a privity in law, not in blood or estate, did not entitle a third person to avoid the act of an infant. That was the case of an escheat, and several other cases are put in our books, where if the infant himself does not take advantage of infancy, no one else shall, and which are cases where the party who would take advantage of the infancy has a direct interest in the subject to which the act done by the infant has relation.

the said treasurer for all such money as he shall from time to time pay to such slave or slaves; and any manumission made in any other manner than aforesaid shall be void." This being so, the foundation of the argument, namely that the effect of the master entering into a contract with the slave might be to enfranchise him in the island of St. Vincent where it was made, evidently fails. The question, whether such would be the effect of the contract in this country, could not arise, because as soon as a slave arrives here, the yoke of slavery is dissolved by operation of law, whether he has previously entered into any contract or not, and whatever may be his situation with respect to the service of his master.

(b) 3 Com. Dig. 619, 8vo. See also 3 Burr. 1794. *Zouch v. Parsons*.

The Defendant in this case had no concern in the relation between the Plaintiff and his servant; he dissolved it officiously, and to speak of his conduct in the mildest terms, he was carried too far by his zeal for the recruiting service. If he had given himself time to reflect upon what his own feelings [516] would have been, if he had been in the situation of the master, I am persuaded that he not only would not have solicited this negro boy to leave his master, but would not have accepted him if he had voluntarily offered to enlist at the drum head. Upon the whole, therefore, we are of opinion that the verdict is right, and that there ought not to be a new trial.

Rule discharged.

GOODTITLE, ON THE SEVERAL DEMISES OF HOLFORD, JERVOISE AND CAVE, BART.
against OTWAY. Friday, May 16th, 1795.

[See *Harwood v. Oglander*, 1801-03, 6 Ves. 219; 8 Ves. 106. Discussed,
Marston v. Roe, 1838, 8 Ad. & E. 58.]

A. by his will devised lands to B., and afterwards, upon his marriage conveyed them by lease and release to trustees to other uses, with the usual limitations in marriage-settlements. Parol evidence was not admissible to shew that A. meant his will to remain in force, unrevoked by the subsequent conveyance (a).

This ejectment which was brought under the direction of the Court of Chancery, and was on this day tried at bar, arose from the following circumstances, which were stated by Le Blanc, Serjt., who led for the Plaintiff, in his opening to the Jury.

The late Sir Thomas Cave, Bart. was seised in fee of the manors and estates of Swinford and South Kilworth in the county of Leicester, subject to a mortgage for 14,500*l.* He was also seised in tail of the manor and estates of Stanford, &c. in the same county, subject to two mortgages for 6000*l.* and 5000*l.* and an annuity of 1400*l.* to his mother Lady Cave, for life. Upon the 13th of December 1790, the following paper was signed by the Earl of Harborough and him, "Heads of an agreement entered into between the Right Honourable the Earl of Harborough and Sir Thomas Cave, Bart. respecting the intended marriage between the said Sir Thomas Cave and Lady Lucy Sherrard, daughter of the said Earl of Harborough." "The said Earl of Harborough agrees that he will make such addition to Lady Lucy Sherrard's present fortune as will make her marriage portion amount to 30,000*l.* and that the same shall be paid and secured as under-mentioned, viz. that he will pay down upon the marriage the sum of 20,000*l.* and will secure upon some adequate part of his real estate the remaining 10,000*l.* to be paid upon the decease of him the said Earl of Harborough." "Sir Thomas Cave agrees on his part to apply a sufficient part of the fortune which he receives upon the marriage in discharging the mortgage debt of 14,500*l.* which is [517] owing to Sir Francis Drake, Bart. upon his estates at South Kilworth and Swinford, and to settle the said estates so as to secure to Lady Lucy Sherrard a jointure thereof of 1400*l.* per annum for her life, to commence from Sir T. Cave's decease, clear of all deductions, and also to secure to Lady Lucy out of his Stanford estate an additional jointure of 600*l.* per annum, to commence from the death of the survivor of Sir T. and Dame Sarah Cave his mother, clear of all deductions; also to make a provision out of the said estate at Stanford, for securing to the younger children of the marriage the under-mentioned portions, viz. if only one, the sum of 15,000*l.* and if two or more the sum of 20,000*l.* in equal shares, and in case Lord Harborough pays down more than 19,000*l.* Sir T. Cave agrees to apply all the over-plus towards discharging the incumbrance which is owing upon his Stanford estate to Robert Gosling, Esq., and also agrees that the remainder of the said 30,000*l.* shall,

(a) [This case came a second time before the consideration of the Court, on the question, whether the will was revoked (or rather annulled) by the deeds of lease and release, when it was held that it was revoked. For the opinions of the Judges, see 3 Ves. 650, 682. 1 Bos. & Pul. 576. This judgment was afterwards affirmed on error in K. B. 7 T. R. 399. For the decree in Chancery, which was afterwards affirmed in the House of Lords, see 2 Ves. jun. 604, n. 3 Ves. 682, and 7 Br. Parl. Cas. title, Wills. See also Mr. Serjt. Williams's note, 1 Saund. 277 a. *Parker v. Biscoe*, 3 B. Moore, 24.]

whenever it is paid, be applied to the like purpose. Sir T. Cave likewise agrees to settle his Stanford estate, subject to the present Lady Cave's jointure, and the reversionary jointure to Lady Lucy, and the portions to younger children as above mentioned, upon his eldest son and his heirs male in strict settlement." In Hilary Term 1791, Sir Thomas suffered a recovery of the Stanford estate to the use of himself and his heirs; and by his will dated the 13th March 1791, in case he should happen to die without leaving any issue of his body living at his decease, he devised all his Stanford estate, and also his Swinford and South Kilworth estates, and all other his real estates, subject nevertheless to such jointure or jointures as he might thereafter make upon any woman he might happen to marry, to trustees for 500 years; and subject thereto to his uncle the Reverend Charles Cave and his issue male in strict settlement, with several remainders over in favour of John Cave Brown and his family, who were enjoined to take the name and arms of Cave, remainder to his own right heirs; and the trusts of the term were to raise 20,000l., 10,000l. thereof to be divided among the aunts of the testator, and the remaining 10,000l. to be placed out in the stocks during the life of his sister Sarah Otway (the wife of the Defendant), in trust to pay the interest and dividends to her for life for her sole use; and after her decease to divide the principal equally among her children then living; and in case of her death without leaving children, to pay the same to the persons entitled [518] under the will to the real estate. By indentures of lease and release of the 25th and 26th of May 1791, reciting that Sir T. Cave was seised of the Stanford estate in fee, subject to an annuity or rent-charge of 1400l. to Lady Cave for life, and to two terms of 200 years and 1000 years for securing the two mortgages for 6000l. and 5000l. and reciting the intended marriage, and that Lady Lucy Sherrard was possessed of 4500l., and that Lord Harborough had agreed upon the treaty of the said marriage to add thereto on or before the said marriage 14,500l. and also to secure the payment of the two several sums of 6000l. and 5000l. within six months next after his decease, to be applied as thereafter mentioned, so as to make Lady Lucy's portion 30,000l., and that upon the said marriage treaty Sir T. Cave did agree in consideration of the said portion to charge certain freehold estates in Swinford and South Kilworth with an annuity of 1400l. to Lady Lucy for life, to commence after his death, and certain parts of his estates at Stanford with a farther annuity of 600l. to her for life, to commence after the death of the survivor of Sir T. Cave and Lady Cave his mother, and that he would settle the Stanford estate to the several uses thereafter expressed, Sir T. Cave in consideration of the intended marriage, and 4500l. paid by Lady Lucy Sherrard, and of 14,500l. paid by Lord Harborough, and of 6000l. and 5000l. covenanted by Lord Harborough to be paid within six months after his decease, conveyed the Stanford estate to trustees to hold to them and their heirs, to the intent that Lady Cave his mother, might receive her annuity of 1400l. for life: and subject thereto and to the two terms of 200 years and 1000 years, to the use of Sir T. Cave and his heirs till the marriage, and after the marriage to the use of trustees for 99 years, and subject thereto to the use of Sir T. Cave for life; remainder to trustees to preserve contingent remainders; remainder as to part to the intent that Lady Lucy, in case she should survive Sir T. Cave and his mother Lady Cave, should receive an annuity for life of 600l. per annum in bar of dower; and as to the premises charged with the said annuity, to the use of trustees for 500 years; and as to all the other premises to the use of trustees for 1000 years, and subject to those terms, as to all the premises to the use of the first and other sons of Sir T. Cave and Lady Lucy Sherrard in tail male; remainder to the use of Sir T. Cave, his heirs and assigns, for ever. The trust of the term of [519] 99 years was to keep down the interest of the mortgages of 6000l. and 5000l., that of the term of 500 years was to secure Lady Lucy's annuity of 600l., and that of the term of 1000 years was to raise portions for younger children; if only one, 15,000l., if more, 20,000l. equally to be divided between them. There was also a proviso enabling Sir T. Cave, in the event of his surviving Lady Lucy, to assign, limit and appoint any part of the lands, hereditaments and premises, comprised in the term of 500 years, to any woman or women he should afterwards marry, by way of jointure, so as not to exceed the yearly value of 500l. By other indentures of lease and release of the same date, with similar recitals, as far as related to the estates of Swinford and South Kilworth, Sir T. Cave conveyed those estates to trustees, to hold to them and their heirs to the use of himself till the marriage; and afterwards

to the intent that Lady Lucy, in case she should survive him, should receive an annuity of 1400l., which together with the said other annuity of 600l. was to be in bar of dower; and as to all the premises charged with the said annuity of 1400l. to the use of trustees for 500 years for better securing the said annuity, and subject thereto to the use of Sir T. Cave, his heirs and assigns. The marriage took place on the 2d of June 1791. Lord Harborough then paid down 20,000l. with which the mortgage of 14,500l. was satisfied; and he soon afterwards paid a further sum, which was applied towards discharging the Stanford estate. On the 15th of January 1792, Sir Thomas Cave died without issue, leaving his sister Sarah Otway, the wife of the Defendant, his heir at law.

Upon these facts Le Blanc stated the only question to be, whether the will of Sir Thomas Cave was revoked by the deeds composing the marriage-settlement, and that he should produce the clearest evidence to shew that it was the intention of Sir Thomas that his will should remain in force, notwithstanding the settlement. For this purpose the attorney who drew the will was called as a witness, who being asked whether he remembered any conversation between him and Sir Thomas Cave respecting the making his will, was proceeding in his answer, when he was interrupted by Adair, Serjt., who objected to any parol evidence of this kind being received, and together with Bond, Serjt., thus argued against its admissibility.

[520] The legal operation of written instruments must be determined by the instruments themselves, and cannot be affected by parol evidence. If such evidence be not adduced to confirm or defeat, vary or explain, the instrument, it is wholly irrelevant, and if it be applied to either of those purposes it is not admissible in law. This as a general proposition is not to be disputed, and with respect to wills it is supported by Plowd. 345. 5 Co. 68 a. *Cheney's case*. 2 Vesey, 217. 2 Vern. 98. 1 Eq. Cas. Abr. 230. 5 Term Rep. B. R. 49. *Lancashire v. Lancashire*. The question in the present case is not whether it was the intention of Sir Thomas Cave to establish his will, but whether he has not actually revoked it by executing the settlement, and if he has so done, no evidence of his intention can be admitted to contradict the effect of his own deed, whether the evidence offered relates to a conversation prior or subsequent to the making the will. The revocation, if it took place, was caused by an alteration in the legal estate of the deviser, it being an ancient and established rule of law, that if there has been a change in the legal estate of the testator, subsequent to the making the will, though he should have in him as large and beneficial an interest as he had before, yet the will can have no operation, but the heir at law shall succeed, 44 Ed. 3, 33. 1 Roll. Abr. 616. 8 Vin. Abr. 137. It is also the same with respect to those conveyances which do not operate by transmutation of possession, as those which do. 1 Eq. Cas. Abr. 112. *Pollen v. Huband*. Nor could any declarations of the testator, either before or after he made the will, have any effect upon it so as, by being coupled with the execution of the settlement, to amount to a republication. 1 Vesey, 440. *Martin v. Savage*.

Le Blanc and Williams, Serjts., contra. All the cases cited of revocations arose from a supposed intention of the testator that the will should be revoked. The mere execution of a deed of conveyance of lands subsequent to the making a will of them, does not of itself produce a revocation. Thus if one tenant in common devises his part, and afterwards by indenture and fine partition is made between him and his companion, this is no revocation, 8 Vin. Abr. 144 (R. 6). The foundation then of the Defendant's claim being a constructive revocation of the will in question, arising from a presumed intention of the testator that it should be revoked, the Plaintiff ought to be at liberty to give [521] evidence to rebut that presumption. And in truth such evidence was received in *Brady v. Cubitt*, Dougl. 31, Svo. In *Lancashire v. Lancashire* the point in question was, whether marriage and the birth of a posthumous child amounted to a revocation of the will, not whether evidence should be admitted.

Adair in reply. There are two kinds of revocations, the one caused by extrinsic circumstances, the other by the legal act of the party himself. Of the first kind was the revocation contended for in *Brady v. Cubitt*, to rebut the presumption of which parol evidence was admitted, and not without reason, for as the marriage and birth of the child must have been proved by that species of evidence, so the conclusion to be drawn from those circumstances, might be repelled in the same manner. But where the party has himself done a solemn act, from which a revocation follows as a

legal consequence by operation of law, no intention of his dehors the deed can prevent that consequence. *Lord Lincoln's case*, 8 Vin. Abr. 145. 3 Atk. 741. *Parsons v. Freeman*, 3 Atk. 798. *Sparrow v. Hardcastle*.

LORD CH. J. EYRE. It was necessary that the question should be put upon its true ground, for it was mere beating the air to argue it upon grounds that did not at all apply to it. There being no doubt in the case about the execution of the will, there could not possibly be any use in debating whether parol evidence should be examined to determine the import of a will, which import was not in dispute. But it was very apparent from the opening, that the true meaning of the examination was to establish that Sir Thomas Cave in all the acts that he did, intended to preserve his will, and not to revoke it; and it was hoped that this evidence might be admitted, in order to repel any presumption that might arise from the execution of those deeds, of an intention to revoke it.

There were before the passing of the Statute of Frauds, and there are since, two species of revocations of wills; the one by operation of law, the other by matter in pais, the one to be pronounced upon by the Court, the other, as I take it, to be examined into before a jury. Since that statute, the distinction remains the same, the difference only is that a great number of cases upon which revocations were pronounced by courts and juries, upon the ground of an intention to revoke, are done away, and the [522] cases in which there shall be a revocation in pais are fixed and reduced to a small number. All those cases, strictly speaking, proceed upon the ground of an intent in the testator to revoke; but I take it there is this difference between the cases of revocation by operation of law and those by matter in pais, that in those of the former kind the law pronounces upon the ground of a *presumptio juris et de jure*, that the party did intend to revoke, and that *presumptio juris* is so violent that it does not admit of circumstances to be set up in evidence to repel it. And this makes it difficult to understand the case in *Douglas* (a), supposing that to be a case of revocation by operation of law, and not within the statute of frauds. With regard to the cases which come under that statute of revocation by matter in pais, the court must always have heard evidence on both sides, and from the result of that evidence the question whether the presumption of fact was to be made or not, must have been for the court and jury to decide. And if this were a case of that sort, we should certainly hear evidence from whence an intention could be collected. But this is not a case within the statute of frauds, but arises on an implied revocation by operation of law, of which the law can only judge, and which must be collected from the circumstances that give birth to the presumption; and the only question is whether they are violent enough to raise that presumption. But there is a third case which I think has been improperly called in all the books a case of revocation. By a very strict and technical exposition of the statute of wills it was holden, that a will could only operate upon that estate which the party had at the time when he made his will, and not upon any new estate which he might afterwards acquire. If he sold his estate after he made his will, of course it could not operate, because the estate was gone; but in neither of those cases was the will, properly speaking, revoked; it remained good, but it lost the object upon which it was to operate. With regard to an estate absolutely disposed of, the rule was clearly just and necessary, but with regard to one newly acquired it was certainly most unreasonably strict: for considering the nature of a will which is ambulatory, [523] and not to take effect till the death of the party, the operation of it should be applied to the circumstances of the testator at the time of his death. But it was doubly strict, and bordering upon something which I hardly know how to express, when they held that if the party changed the form of his title, having the estate in him when he made his will, if he afterwards made some conveyance by which the beneficial interest in the estate was to remain in him precisely as it was before, that it was a new estate, upon which the will could not operate. To call that a revocation appears to me an absurdity. However so it was, and it was carried to that monstrous extent, that though the new conveyance was made for the purpose of confirming the will, yet the court said it was a new estate, and the will could not operate upon it, and therefore the heir at law was let in. This most apparently was a determination which excludes all question of intent,

(a) *Brady v. Cubitt*, Dougl. 31. 8vo. Edit.

because there could be no doubt at all in the strong case I last put, that all considerations of intent must be laid aside; for if intent could have done any thing for the devisee, an instrument purporting to be made to confirm the will manifested an intent that could not be resisted. Yet this objection to the operation of the will is entirely beyond the intent: the only estate upon which the will could operate was gone from him; he had taken a new estate.

That being so, let us see whether this is a case in which any question of intent can be made. I take it to be manifest from the opening that it is intended to be insisted on by the Plaintiffs, that by the necessary operation of the conveyances used Sir Thomas Cave lost his old estate upon which the will operated, and took a new one. If so, the consequence is, that though there be the clearest demonstration that it was his intent that the will should operate upon it, the law says it shall not, and by that law we are bound. If this be a case of that kind, it is a case that will disappoint the will, even admitting the clearest intention that it should not. All evidence therefore of intent seems to me entirely foreign to the question; all such evidence therefore must be rejected, and the question tried upon its true legal grounds.

[His Lordship afterwards said he had most cautiously avoided the committing himself upon the question, whether [524] the deeds did really produce that alteration in the estate, and that he desired to be so understood.]

BULLER, J. We are to consider, in order to determine whether this evidence be or be not admissible, to what it is to be applied. If the question was whether the testator was incapacitated, or the instructions given were duly followed, the evidence would be admissible. But here the end proposed by it is to shew that the deeds shall have a different construction from that which the words import, which cannot be done. There is a great difference between cases which depend on circumstances, and those which depend on the solemn acts done by the party himself, and that distinction supports the case of *Brady v. Cubitt*. There was no act in that case done by the testator importing that he meant to revoke his will, or change it in any respect: but changes having happened in his family by marriage and the birth of a child, there was a presumption of revocation, and therefore it was to answer that presumption that the court received parol evidence. But I cannot find from any one case quoted at the bar, that the court has received parol evidence in the case of a deed executed by the party himself, with a view of altering the construction of the instrument. I think the cases on the other side prove that it cannot be done. The case of *Parsons v. Freeman* (3 Atk. 741) cited by my Brother Adair goes directly to that point, and perhaps is the strongest case that can be put, because it there appears that the intention of the testator was to confirm his will, and not revoke it. It is perfectly clear that a doctrine did at one time prevail in Westminster Hall, that the court might receive evidence, which they thought according to the strict rules of law ought not to be offered to a jury. But evidence which is not to be received as between the parties, to give a construction to a written instrument that is brought in dispute, seems to me to be no more admissible by a court than by a jury. The case cited from 2 Vern. 98, appears to go upon all fours with this, and there the court refused to admit such evidence. Upon this ground it seems to me that the only case that admits of any doubt is that of the partition mentioned by my Brother Le Blanc. The case of a partition and a charge upon a mortgage [525] are both cases which principally happen in courts of equity. But I take it to have been fully established in courts of law, previous to that determination, that a partition was not a revocation of a will. By the partition the party takes no new estate, having precisely the same interest that he had before. When the question comes on in a court of equity, that is the circumstance upon which the Court is to pronounce. There is a partition to be carried into effect by deed, and if the partition itself is not a revocation, the mode in which it is made shall not be so. That case therefore stands upon grounds peculiar to itself, and there is no other which at all contradicts the doctrine laid down in the other cases which have been cited, that in solemn acts done by the party, the deeds must speak for themselves, and cannot be explained by parol evidence; and upon that ground I perfectly concur with my Lord, that this evidence ought not to be received. In *Lord Lincoln's case* (Show. Cas. in Parl. 154, 8 Vin. Abr. 145), the estate was limited to Lord Lincoln in fee till the marriage, and there was no marriage, and the estate was never out of him, yet the execution of the deeds of lease and release was holden to be a revocation. I therefore concur in opinion with my Lord, that this is a presumption

juris et de jure, and that the case must stand or fall by the rule of law, without being explained by parol evidence.

HEATH, J. Here are two instruments, the first of which in point of time is the will. Now a will may be construed according to the intention of the party, not always observing the strict rules of law; but a deed must take effect according to its legal operation, and it is impossible to admit evidence to explain it. The question is here, whether evidence can be admitted to counteract the effect of the deed, and I think most clearly that it cannot. Then another question arises upon the statutes of uses and of wills (27 Hen. 8, c. 10. 32 Hen. 8, c. 1. 34 and 35 Hen. 8, c. 5), whether the alteration of the legal estate be sufficient to revoke a will. One cause of the making the statute of uses was that great confusion had been occasioned in families, and a disturbance of the solemn dispositions made by men in respect of their estates, by their lands being first put in use, and then devised. That statute therefore annexed the possession to the use, and wills could no longer be made. But when by the statute of wills men were once again enabled to dispose of their lands by will, it was ruled that the statute operated upon [526] the legal estate, and therefore when the legal estate was changed, it shewed an intention in the testator to change the estate upon which the will was to operate. And it is impossible now to shake this doctrine. How often has it happened that deeds, wrong upon principles of conveyancing, have been holden to work a revocation! That, it seems to me, must be the course of the Court, and that this evidence ought not to be admitted.

ROOKE J. If this were a question upon the real intention of the testator, I do not think that any evidence could make it clearer than at present it appears, that he did not intend to revoke his will. But the question is whether Sir Thomas Cave by these deeds did or did not revoke it? Which being a question of mere law, I think we ought not to receive any evidence, because it cannot possibly affect the question.

The evidence was accordingly rejected, and by consent a special verdict found, stating the facts which are above set forth. The case on the special verdict was argued in Trinity term 35 Geo. 3, and at the end of Hilary term 36 Geo. 3, remained for a second argument (a)¹.

End of Easter Term.

[527] CASES ARGUED AND DETERMINED IN THE COURTS OF COMMON PLEAS, AND EXCHEQUER CHAMBER, IN TRINITY TERM, IN THE THIRTY-FIFTH YEAR OF THE REIGN OF GEORGE III.

DOVASTON against PAYNE. Wednesday, Jan. 10th, 1795.

[Distinguished, *Fawcett v. York and North Midland Railway*, 1851, 16 Q. B. 617. Applied, *Manchester, Sheffield and Lincolnshire Railway v. Wallis*, 1854, 14 C. B. 224. Referred to, *Dickinson v. London and North Western Railway*, 1866, H. & R. 403. Dictum commented on, *Rangeley v. Midland Railway*, 1868, L. R. 3 Ch. 310. Adopted, *St. Mary, Newington, v. Jacobs*, 1871, L. R. 7 Q. B. 54. Referred to, *Cubitt v. Marse*, 1873, L. R. 8 C. P. 714; *Hawkins v. Rutter*, [1892] 1 Q. B. 673. Considered, *Harrison v. Rutland*, [1893] 1 Q. B. 152. Principle adopted, *Hickman v. Maisey*, [1900] 1 Q. B. 757. Discussed, *Armagh Union v. Bell*, [1900] 2 Ir. R. 381.]

A plea in bar of an avowry for taking cattle damage-feasant, that the cattle escaped from a public highway into the locus in quo, through the defect of fences, must shew that they were passing on the highway when they escaped; it is not sufficient to state that being in the highway they escaped (a)².

Replevin for taking the cattle of the Plaintiff. Avowry, that the Defendant was seised in fee of the locus in quo, and took the cattle damage-feasant. Plea, that the

(a)¹ See *Brydges v. The Duchess of Chandos*, 2 Vezey, junior, 417, the decree in which case was affirmed in the House of Lords, Nov. 23d, 1795, and which will probably be considered as going a great way towards the decision of the present case of *Goodtitle v. Otway*. But see also *Williams v. Owens*, *ibid.* 595.

(a)² [Vide 2 Saund. 206 a., 284 e. (notes), 5th Edit.]

locus in quo "lay contiguous and next adjoining to a certain common and public king's highway, and that the Defendant and all other owners, tenants and occupiers of the said place in which &c. with the appurtenances, for the time being, from time whereof the memory of man is not to the contrary, have repaired and amended, and have been used and accustomed to repair and amend, and of right ought to have repaired and amended, and the said Defendant still of right ought to repair and amend the hedges and fences between the said place [528] in which, &c. and the said highway, when and so often as need or occasion hath been or required, or shall or may be required to prevent cattle being in the said highway from erring and escaping thereout into the said place in which, &c. through the defects and defaults of the said hedges and fences, and doing damage there. And because the said hedges and fences between the said place in which, &c. and the said highway, before and at the time when, &c. were ruinous, broken down, prostrated and in great decay for want of needful and necessary repairing and amending thereof, the said cattle in the said declaration mentioned just before the said time when, &c. being in the said highway erred and escaped thereout, into the said place in which, &c. through the defects and defaults, &c." To this plea there was a special demurrer, "For that it is not shewn in or by the said plea, that the said cattle before the said time when, &c. when they escaped out of the said highway into the said place in which, &c., were passing through and along the said highway, nor that they had any right to be there at all, &c."

In support of the demurrer Williams, Serjt. argued as follows. It is a rule in pleading, that if the Defendant admits the fact complained of he must shew some good reason for or justification of it. If the cattle in this case had escaped from an adjoining close through the default of the Plaintiff's fences, the Defendant must have shewn that he had an interest in that close, or a licence from the owner to put his cattle there, Dyer, 365 a., *Sir F. Leke's case*, recognized Hob. 104. *Digby v. Fitzherbert*, for a man is bound to repair against those who have right, but not against those who have no right. So if cattle escape from a highway, the party justifying a trespass must shew they were lawfully using the highway, that is, were passing and repassing on it, which is material and traversable. It is not sufficient that they were simply in it, the being there is equivocal and not traversable. The owner of the soil may have trespass, if the cattle do anything but merely pass and repass, Bro. Abr. Tresp. pl. 321. And according to this principle the entries state in pleas of this kind, that the cattle were super viam predictam transeuntes, Thomps. Entr. 296, 397, and in Herne's Plead. 822, that they were "driven along the highway."

[529] Heywood, Serjt., contra. The same strictness is not required in a plea in bar to an avowry in replevin, as in a justification in trespass. Here the Plaintiff pleads the plea, and it is sufficient for him to shew that his cattle were wrongfully taken. The passing on the highway is as uncertain as the being there, and as little traversable. But the material issues on the record would be whether the fences were out of repair, and whether the Defendant was bound to repair them. If he were, it is immaterial whether the cattle were passing on the highway or not. In a plea in bar certainty to a common intent is sufficient. It may therefore be intended that the cattle were lawfully in the highway.

LORD CHIEF JUSTICE EYRE. I agree with my Brother Williams as to the general law, that the party who would take advantage of fences being out of repair, as an excuse for his cattle escaping from a way into the land of another, must shew that he was lawfully using the easement when the cattle so escaped (a). This therefore reduces the case to a single point, namely, whether it does not appear on the plea, to a common intent, that the cattle were on the highway using it in such a manner as the owner had a right to do, from the words "being in the said highway." This is a different case from cattle escaping from a close, where it is necessary to shew that the owner had a right to put them there, because a highway being for the use of the public, cattle may be in the highway of common right; I doubt therefore whether it requires a more particular statement. It would certainly have been more formal, to have said that the cattle were passing and repassing, and if the evidence had proved that they were grazing on the way, though the issue would have been literally, it would not have been substantially proved. But I doubt whether the being in the highway might not have been traversed, and if the being in the highway can be con-

strued to be certain to a common intent, the plea may be supported, notwithstanding there is a special demurrer, for a special demurrer does not reach a mere literal expression. The precedents indeed seem to make it necessary to state that the cattle were passing and repassing, but they are but few; yet upon the whole, I rather think the objection a good one, because those forms of pleading are as cited by my Brother Williams.

BULLER, J. This is so plain a case, that it is difficult to make it a ground of argument. But my Brother Heywood [530] says, there is a difference between trespass and replevin in the rules of pleading. In some cases there is certainly a material difference in the pleading in the two actions, though in others they are the same. One of the cases in which they differ, is that if trespass be brought for taking cattle which were distrained damage-feasant, it is sufficient for the Defendant to say that he was possessed of the close, and the cattle were doing damage: but in replevin the avowant must deduce a title to the close. Wherever there is a difference, it is in favour of trespass, and against replevin: for in trespass an excuse in a plea is sufficient, but in an avowry a title must be shewn. This brings me to the question whether the plea on this record be good to a common intent. Now I think that the doctrine of certainty to a common intent will not support it. Certainty in pleading has been stated by Lord Coke (Co. Litt. 303) to be of three sorts, viz. certainty to a common intent, to a certain intent in general, and to a certain intent in every particular. I remember to have heard Mr. Justice Aston treat these distinctions as a jargon of words, without meaning. They have however long been made, and ought not altogether to be departed from. Concerning the two last kinds of certainty, it is not necessary to say any thing at present. But it should be remembered, that the certain intent in every particular applies only to the case of estoppels (Co. Litt. *ibid.*). By a common intent I understand that when words are used, which will bear a natural sense, and also an artificial one, or one to be made out by argument or inference, the natural sense shall prevail: it is simply a rule of construction, and not of addition: common intent cannot add to a sentence words which are omitted. There is also another rule in pleading, which is, that if the meaning of words be equivocal, they shall be taken most strongly against the party pleading them. There can be no doubt that the passing and repassing on the highway was traversable, for the question whether the Plaintiff was a trespasser or not, depends on the fact whether he was passing and repassing and using the road as a highway, or whether his cattle were in the road as trespassers; and that which is the gist of the defence must necessarily be traversable. A most material point therefore is omitted, and I think the plea would be bad on a general de-[531]-murrer. But here there is a special demurrer, and as the words are equivocal they are informal.

HEATH, J. The law is as my Brother Williams stated, that if cattle of one man escape into the land of another, it is no excuse that the fences were out of repair, if they were trespassers in the place from whence they came. If it be a close, the owner of the cattle must shew an interest or a right to put them there. If it be a way, he must shew that he was lawfully using the way; for the property is in the owner of the soil, subject to an easement for the benefit of the public. On this plea it does not appear whether the cattle were passing and repassing, or whether they were trespassing on the highway; the words used are entirely equivocal.

ROOKE, J. Of the same opinion.

Judgment for the Defendant.

SAVILE *against* JARDINE. Monday, June 22d, 1795.

The simply saying to another "you are a swindler," is not actionable. Where in an action for slander, some of the counts in the declaration are for actionable words, and others for words not actionable, and special damage is laid referring to all the counts, and the Plaintiff has a verdict on the whole declaration; though the damages recovered be less than 40s. he is intitled to full costs (a).

In this action for words, the declaration contained five counts. The first, second

(a) [See *Turner v. Horton*, Willes, 438. Also 1 Saund. 246. 2 Saund. 307 a. (notes) 5th edit.]

and fourth were for words spoken of the Plaintiff in his trade or business as an auctioneer, and were clearly actionable. The third and fifth counts without any colloquium of the Plaintiff's trade stated the words to be, "You are a swindler," and special damage was laid by reason of the speaking, which said several words in the declaration, &c. Plea general issue. Verdict for the Plaintiff on the whole declaration with one shilling damages.

A rule having been granted to shew cause why the prothonotary should not tax the Plaintiff his full costs, though the damages were under 40s. Adair, Serjt., shewed cause, insisting that if the words in any one count were in themselves actionable, and the damages were under 40s., the Plaintiff was entitled to no more costs than damages, according to the stat. 21 Jac. 1, c. 16, s. 6, nor would the addition of special damage vary the case, 2 Black. 1062, *Collier v. Gaillard*. Besides, to call a man a swindler, is actionable.

Clayton, Serjt., in favour of the rule, argued that to call another a swindler was not actionable. The word swindler has no definite meaning. In common acceptation it only imports [532] cheating, dishonesty, or fraud. It is indeed libellous if written and published, *Panson v. Stuart*, 1 Term Rep. B. R. 748. But many words are libellous if written that are not actionable if spoken, such for instance as those which tend to make a man ridiculous, or to cause him to be avoided in society as having a noisome disease, 2 Wils. 403, *Villers v. Monsley*. To say to a man "you are a swindler" is no more than saying "you are a cheat, or a dishonest person," and those words, not applied to an office or trade, are not actionable. 2 Salk. 694. *Tamlin v. Hamlin*, 1 Show. 181. S. C. 2 Saund. 307. *Todd v. Hastings*, Stra. 1169. *Davis v. Miller*. The verdict being general, some damages must be intended to be given on each count, and as the words in the third and fifth counts are not actionable, the damages in respect of those counts were given for the special damage.

LORD CHIEF JUSTICE EYRE. If the word swindler be not actionable, my Brother Clayton has established his point. I think it only equivalent to cheat; it cannot be carried farther, and that is not actionable. I cannot well account for the decisions that the calling a man a thief is actionable, but the calling him a cheat is not so, unless it be that thief always implies felony, but cheat not always.

BULLER, J. The word cheat has always been holden not to be actionable, and swindler means no more; when a man is said to be swindled, it means tricked or outwitted.

HEATH, J., and ROOKE, J., of the same opinion.

Rule absolute.

[533] IN THE HOUSE OF LORDS.

HOME *against* EARL CAMDEN AND OTHERS, IN ERROR. Monday, June 22d, 1795.

[6 Br. Parl. Ca. 203; 2 E. R. 1030 (with note), S. C.]

Quære, Whether the misinterpretation of a statute by an inferior court, the consideration of which arises incidentally in the course of a proceeding which is confessed to be within its jurisdiction, be a ground for a prohibition? Whether it be not rather a matter of appeal (a)? But clearly in such a case a prohibition will not lie, unless it be made appear to the superior court, that the party applying for the prohibition, has, in the course of the proceedings in the inferior court, alleged the grounds for a contrary interpretation of the statute on which he applies for the prohibition, and that the inferior court has proceeded notwithstanding such allegation. No right is vested by any of the prize acts in the captors of an enemy's ship and cargo in war, before the ultimate adjudication of the courts of prize. The issuing a monition therefore to the prize agents by the court of commissioners of appeals in prize causes, to bring in the proceeds of a ship and cargo which have been sold after a sentence of condemnation as lawful prize, but from which sentence there is an appeal, (on a subject distinct from the question whether prize or not, which is

(a) [In *Gould v. Gapper*, 5 East, 345, the Court of King's Bench decided, that if a spiritual court misconstrue an Act of Parliament, prohibition lies, ante, vol. i. p. 188.]

not disputed,) is not a ground for a prohibition to that court, for the monition neither interferes with nor defeats any vested rights (*b*).

The judgment of the Court of Common Pleas in this case, (*ante*, vol. i. 487) having been reversed by the Court of King's Bench, (4 Term Rep. B. R. 382,) a writ of error was brought in parliament, and fully argued on grounds in a great measure similar to those taken in the courts below. After which, on the motion of Lord Thurlow, the following question was proposed to the judges, viz.

"Whether the declaration is sufficient in law to bar the Defendants from proceeding against John Pasley, to compel him to bring in the account of the sales of the ship and cargo, together with the proceeds of such parts thereof as may be in his hands, power, or possession?"

In answer to which, the unanimous opinion of the judges was thus delivered, by

LORD CHIEF JUSTICE EYRE. The judges have conferred upon the question which your Lordships have been pleased to propose to them, and are unanimously of opinion that the declaration in this cause is not sufficient in law to bar the Defendants from proceeding against John Pasley, to compel him to bring in the account of the sales of the ship and cargo, together with the proceeds of such parts thereof as may be in his hands, power, or possession. I will open to your Lordships briefly the grounds in law which appear to me to warrant that opinion. A few preliminary observations upon the nature of this proceeding may, in some degree, elucidate the subject. This is an action, in the form of it, to recover damages for proceeding after a writ of prohibition has been obtained, and delivered to the party Defendant. Probably in the early part of our legal history, when the struggle for jurisdiction between the temporal [534] and ecclesiastical courts was violent, and the jealousy of the encroachment of the ecclesiastical jurisdiction upon the temporal was eager, this was a proceeding effective to the whole extent of its form. In modern and in better times this form of proceeding is used for the mere purpose of subjecting the grounds in law, upon which any particular prohibition is sought to be obtained from any temporal court, to a judicial examination in the most solemn manner. How it was moulded to this purpose, will be seen in an instant, if it be considered that in this form of action two things would be necessary to be proved, the first, that the Defendant had proceeded in the court of peculiar jurisdiction after the writ of prohibition had been delivered, the second, that this proceeding was an injury to the Plaintiff. But the Plaintiff would have no ground to complain of the proceeding after a writ of prohibition delivered, as an injury to him, (though it might be a contempt, for which the party might be amenable to the king) unless he could shew that the writ had issued properly, and that he had a just right to claim the benefit of it. This goes at once to all the merits of the prohibition which is supposed to have issued, and makes the legal ground of it the gist of the action.

Such being the nature of this proceeding, it becomes a convenient mode of trying whether a prohibition ought to issue, and it is made practicable by considering all that relates to the contempt, incurred by proceeding after the writ had actually issued, as mere form, and the damages nominal. Accordingly, in modern times, when prohibitions are applied for to the temporal courts, and the parties applying suggest grounds either of fact or law, for obtaining the writ, which appear to the court so doubtful as to be fit to be put in a course of trial, the party applying is directed to declare in prohibition, that is, to institute a feigned action, in the form of that which is now under consideration; in which action, in the shape of a question, whether such a prohibition as is moved for ought to have been granted, the real question, namely, whether such a prohibition ought to be granted, will be solemnly considered and determined, if the parties think fit, as in the present instance, in the dernier resort, by your Lordships. If any man who hears me should think that he observes something of obliquity in this proceeding, let him look to the effect of it, and he will be satisfied. So long as the temporal courts direct parties to de-[535]-clare in prohibition, a prohibition cannot arbitrarily issue, nor upon any but the most solid and substantial grounds, and the balance in which are to be weighed all the different jurisdictions, in which the public justice of the country is administered to the people, will be holden by your Lordships. In the present case the Plaintiff has declared in prohibition, and the question

(b) [See *Willis v. The Commissioners of Appeals in Prize Causes*, 5 East, 22.]

proposed by your Lordships to the Judges goes to the very foundation of his suit; it is tantamount to a question, whether upon the case stated in this declaration, a prohibition to the effect of the prohibition stated in this declaration, ought now to issue to the Lords Commissioners of Prizes, to restrain them from issuing the process of monition, to compel John Pasley to bring in an account of the sale of the ship and cargo mentioned in the proceedings, together with the proceeds of such part thereof, as may be in his hands, power or possession. The ground made by this declaration, for a prohibition to restrain the Prize Court from issuing process to compel the bringing in the account of sales and proceeds of the ship and cargo, is a supposed contravention of the prize acts now in force, particularly the statutes of the 12th and 21st of his present majesty. It is assumed, that if a court of peculiar jurisdiction will proceed contrary to the provision of the statute law of the realm (and that if such a court misinterprets any of those provisions, it does substantially proceed contrary to them), this is a good ground for a prohibition. If it were necessary to the decision of your Lordships' question, that the judges should affirm or deny this proposition in the extent in which I have stated it, we should have found ourselves obliged to request the indulgence of farther time for the examination of the terms of the proposition. It undoubtedly belongs to the king's temporal courts to restrain courts of peculiar jurisdiction from exceeding the bounds prescribed to them; and by far the greater part of the instances in our books, in which prohibitions have issued, are cases of plain excess of jurisdiction. But some of the instances go beyond an excess of jurisdiction, and seem rather to fall under the head of wrong and injustice done to the party, by refusing him, in the course of a proceeding strictly within the jurisdiction, some benefit or advantage to which the common or statute law intitled him, perhaps in opposition to the civil or canon law, by which the general proceedings of those courts [536] are regulated. The case of a lease (a)¹, offered to be proved in an ecclesiastical court by one witness, and rejected because by their law two witnesses are necessary, and the case of a copy of the libel, which by the statute law they are required to give, demanded and refused, are among those instances. On the other hand, it must be admitted that the misinterpretation of either the common or statute law, in a proceeding confessedly within the jurisdiction of those courts, and where they are bound to exercise their judgment upon the one or the other, seems to be rather a matter of error, to be redressed in the course of the appeal which the law has provided, than a ground for a prohibition. The answer to this is, that the king's temporal courts, and your Lordships in the last instance, are, by the constitution of this country, to declare the common and expound the statute law, and that the possibility of two different rules prevailing upon the same law, one in the king's temporal courts, and the other in courts of peculiar jurisdiction, ought not to exist, and is effectually prevented without any unreasonable interference, or breaking in upon the courts of peculiar jurisdiction, by the temporal courts issuing their prohibitions in every such case. But this is no more than saying "proceed to the very extent of your jurisdiction without interruption from us, only remembering that you are always to declare the common law as we declare it, and that when any question arises touching the exposition of the statute law, if the subject is originally of temporal jurisdiction and comes incidentally before you, it is to be expounded by you as we expound it; or if the statute concerns your proceedings only, you are to expound it as we shall say it ought to be expounded, when the question is brought before us in prohibition." I understand the claim of the temporal courts, as it is stated in the famous controversy in the beginning of the reign of James the First (a)², is to issue prohibitions to this extent; and though some of the cases in our books have been ably distinguished at the bar, and made reducible to the head of excess of jurisdiction, yet we find traces of continual claim to issue prohibitions in the instances above mentioned. In the case of [537] *Brymer v. Atkins* (ante, vol. i. 164) in the Court of Common Pleas it is stated broadly and distinctly asserted; and in *Full v. Hutchins* (Cowp. 422), Lord Mansfield, in delivering the opinion of the Court, plainly alluded to it in the following passage: "where matters which are triable at common law, arise incidentally in a cause, and the Ecclesiastical Court has jurisdiction in the principal point, this court will not grant a prohibition to stay trial. For instance, if

(a)¹ 1 Show. 158, 172. *Shatter v. Friend*, 12 Co. 65 b. *Roberts's case*.

(a)² 2 Inst. 601, 602. Art. Cleri. 4 Inst. 99, 100.

the construction of an act of Parliament comes in question, or a release be pleaded, they shall not be prohibited, unless the Court proceed to try contrary to the principles and course of the common law, as if they refuse one witness, &c. ; and this is expressly laid down by Lord Hale, 2 Lev. 64, *Sir W. Juxon v. Lord Byron*." But it must be remembered, that in the argument of this very case in the Court of King's Bench, this doctrine was questioned by one of the learned judges of that court (a), upon the general principle that the misinterpretation of an act of Parliament would be the subject of appeal, and not of prohibition, upon the authority likewise of a passage in Chief Justice Vaughan's argument of one of the cases reported by him, distinguishing between statutes directory to the Ecclesiastical Court and other statutes, and upon other grounds, which will be very fit to be considered, when it shall become necessary to the determination of a case in judgment before a temporal court in prohibition, to lay down the precise rule upon it. It is not necessary so to do in the present case, since we all agree, that allowing the Plaintiff all he has assumed respecting the authority of the Court of Common Pleas to issue a prohibition, he has made no ground for it in the declaration, for he has not shewn that the Prize Court has contravened the prize acts, either directly or by mistaking the sense of them. It is said in the declaration (I state the substance of it), that by the prize acts the property of ships taken by the navy after condemnation vests in the captors. This is true *sub modo*, but in the sense in which it is true, it has no application to the case stated in the declaration. To give it application, they say that the navy were the captors of the ship named in the pleadings, which, if we are to understand them to mean sole captors, in whom the sole property by the [538] prize act would vest, is an averment inadmissible, ill pleaded, and therefore to be rejected as being directly contrary to the sentence of condemnation. They proceed to aver, that by the prize acts the navy agents have the entire disposition of the prize, and that Pasley was the surviving navy agent duly appointed, from whence the infer their gravamen, that a proceeding to take the ship and cargo out of his hands, defeats and disappoints the provisions of the prize acts, and is therefore such a contravention of those acts, as will be a ground for a prohibition. Not to quarrel with the title of Pasley to act as an agent, it is obvious that the third proposition, that the navy agents have the entire disposition of the prize, depends on the second, namely, that the navy were the captors; for if the navy were not the captors, or not the sole captors, in the one case they cannot have the entire disposition of the prize, upon any reasonable construction of the prize act, and in the other they would have nothing to do with it. But if it were admitted that they had made out every one of these propositions, still their conclusion would fail; for in order to maintain that the Prize Court had contravened the prize acts, by proceeding to take the ship and cargo out of the hands of the navy agent, it ought to have been stated in the declaration, that it had been pleaded and alleged in the Prize Court, that Pasley was the agent of the navy duly appointed, and therefore that the Court ought not to proceed to take the ship and cargo out of his hands. Upon a view of the precedents in Rastall (Rast. Entr. tit. Prohibition, 445) and Coke (Coke's Entr. tit. Prohibition, 448), it appears to me to have been a constant form of declaring, that the Court proceeded in the course objected to, notwithstanding the party had pleaded and alleged the statutes of which he claimed the benefit, and the facts which were necessary to bring his case within those statutes. And it seems to be a substantial defect in this case, because apparently it would be the duty of the Court, after it had pronounced such a sentence as would vest the property in the captors, in order to execute that sentence, to take all the necessary steps for delivering the ship and cargo into the hands of such persons as should be made appear to the Court to be the agents for the captors duly appointed. It was indeed thrown out in the argument at the Bar, that the judge of the Prize Court is to be considered after sentence as *functus officio*, and consequently that his monition, or any other pro-[539]-ceeding, would be an excess of jurisdiction. This, if it could be maintained, would reduce the case to a short point, and would be a very clear and distinct ground for a prohibition. But we find no ground for this argument in the acts of Parliament, or in the common law, and if we were to suppose that such a monition had not been strictly warranted by their own course of proceeding in the Prize Courts, your Lordships, who cannot look beyond this record, cannot take cognizance of an

(a) See the opinion of Buller, J., 4 Term Rep. B. R. 327.

irregularity of this nature. But in truth there is no ground for this argument. In the nature of things, the proceeds of ships and goods taken as prize, must often find their way to the hands of those who have no right to retain them; it is therefore essential to the prize jurisdiction, that the Prize Courts should have power to call for them, for the benefit of the captors. Several cases have been stated to your Lordships, where such monitions have in fact issued, and where the captors conceived that it would be for their benefit that they should issue. It was admitted by the counsel at the bar, that such monitions may issue; it is therefore untrue, as a general proposition, that after sentence the Prize Court is *functus officio*, and cannot issue such a monition; and if it were true, it would be but an irregularity in their proceedings according to their own law, of which your Lordships could not take cognizance, and which therefore you could not pronounce to be an excess of jurisdiction.

I return to the examination of the propositions stated in the declaration, with reference to the prize acts. By the prize act 19 Geo. 3, c. 67, and I observe no variation of phrase in the 21 Geo. 3, c. 15, "the flag officers, commanders, and other officers, seamen, marines, and soldiers, on board every ship and vessel of war in his majesty's pay, shall have the sole interest and property, of and in all and every the ship, vessel, goods and merchandizes, which they shall take, after the same shall have been finally adjudged lawful prize to his majesty, in any of his majesty's Courts of Admiralty in Great Britain, or in the plantations, or elsewhere, to be divided in such proportions, and in such manner, as his majesty by his proclamation had ordered, or should order by proclamations to be issued." It seems to have been agreed throughout the discussion of this case, that this is a grant by the king in parliament to the captors, of his interest in captures made by the navy. The language of these prize acts is, that the navy shall have the sole interest and property in [540] the ships and goods which shall be captured; the word *vest* is not used, yet we heard a great deal in the argument respecting the vesting of this sole interest and property. But it was not very distinctly stated at what time this sole interest and property should vest; the statutes say, after the same shall have been finally adjudged lawful prize to his majesty. They who are at all conversant with the proceedings in prize causes, know that there is nothing definite in these words, considered as the description of a point of time when this property shall vest, within the whole interval, between the original sentence of condemnation in the court of prize in which the ship is first libelled, and final sentence of condemnation in the court of appeal in prize causes. What happens in this case happens in many others. The judge condemns the ship and cargo as prize, reserving the consideration of the question, who were the captors. It is agreed on all hands, that since the passing of the prize acts the prize court has jurisdiction to determine who are the captors, a question often litigated in the first instance. If there be no doubt but that the ship is good prize, but perhaps great doubt who will ultimately turn out to be the captors, the judge pronounces by his interlocutory sentence that the ship is lawful prize, and thereupon makes many convenient arrangements for the benefit of those who shall eventually turn out to be the captors, reserving the question who are the captors for future consideration. It also often happens, that there are no parties litigating that question until after the definitive sentence has been pronounced in the court below. The strongest of two or more joint captors takes possession of the prize at sea, carries her into a port in the plantations, and procures her to be condemned there to himself as sole captor. The joint captor does not arrive till after the sentence; he may then interpose his claim, and may appeal, and have the benefit of his claim upon the hearing of the appeal. The effect of the appeal is to suspend the force of the sentence, not always indeed to the extent of staying the execution, for in certain cases the execution of the sentence is directed not to be suspended. But from the moment of the appeal being interposed, the sentence is no longer final; on the contrary, it is liable to be reversed in part, or in the whole. At what period then shall we say, that the sole interest and property of ships or goods captured by the navy shall vest in the captors? This point was but indistinctly [541] argued at the bar. It was rather insinuated than argued, that in this case the interest and property vested as soon as the judge below pronounced his interlocutory decree, that the ship was good prize, reserving the question who were the captors. But it is a construction of the statute too absurd to be seriously maintained, that the property which by the express words of the statute is not to be had

by the captors, till after the ship shall have been finally adjudged lawful prize to his majesty, should vest in persons of a certain description before it is known who shall answer that description. Does this interest and property vest as soon as by possibility it could vest, by the effect of a definitive sentence adjudging the ship to be prize, and who were the captors? If there be no appeal, it may then vest. But suppose an appeal interposed by the express words of the prize act, it cannot vest until after the final adjudication. And the effect of an appeal being such as I have stated it to be, can there be said to have been a final adjudication, while an appeal is depending? Shall the interest and property vest only to be divested if the event of the appeal should be against the persons first adjudged to be the captors? Such a construction is not necessary to effectuate any of the purposes of the act, and is not simply unnecessary, but it would break in upon the general course of proceeding in the prize court, and frustrate some of the provisions of the prize acts made in aid of the authority of that court; at least, it is entirely inconsistent with them. It is not necessary to secure the prize to the captors; for I take it to be clear, and it was so stated by the civilians and agreed by the Court in the case of *Smart v. Wolff* (3 Term Rep. B. R. 323), that pending the suit in the prize court, the ship and goods are in the custody of the Court. The interests therefore of all those who are concerned in the capture, are under the protection of the Court. We do not want to be intimately acquainted with the course of proceeding in those courts, to see how beneficial this principle is to all the parties concerned in interest. We need only turn to the prize acts to see the use of it to preserve the ship and cargo, or the value of it, to those who shall ultimately be found to have the interest and property in it. It cannot therefore be necessary in order to give effect to the prize [542] acts, that the property should be vested in any person before the final adjudication. And when I refer your Lordships to the 27th section of the 19 Geo. 3, c. 67, which provided that in certain cases, even after sentence, the ship and cargo may be delivered up to the claimant, or sold by the authority of the Court at the request of the claimant, your Lordships will see how perfectly inconsistent with the plan of the prize act this notion of the interest and property vesting in the captors, at any time before the final adjudication in the court of appeal, will be found to be. In truth, so far from the interest and property vesting at an earlier period, the legislature by the words "until, &c." seems to have cautiously guarded against its being so understood.

The allegations contained in this declaration respecting the appointment of the agents directed by the prize acts to be appointed for selling prizes and distributing the proceeds among the captors, their powers, proceedings, and the conclusion against the authority of the commissioners of prizes to interfere with them, are so connected with this question respecting the vesting of the interest and property in the captors, that I shall consider them in the next place. Those allegations are, "that Edward Taylor since deceased, and John Pasley, were duly appointed agents by the officers and crews of the several ship companies of the said squadron, and did soon after the said decree of the said 4th day of September 1782, as such agents, cause the said ship called the 'Hoogskarpel,' together with the unclaimed goods, wares, and merchandizes, taken in and on board the same to be sold, and did receive divers large sums of money, being the produce of the same, part of which said sums of money was distributed by the said Edward Taylor and John Pasley among the officers and crews of the said squadron under the command of the said George Johnstone, and the residue thereof now remains in the hands of the said John Pasley, and by him ought to be distributed to the captors aforesaid in payment of their several shares, in pursuance of the said statute, and of the said proclamation of our said lord the king. And whereas the said Rodham did, in Easter term, in the twenty-eighth year of the reign of our lord the now king, in the court of our lord the king of the Bench here at Westminster, implead the said John Pasley in a certain plea of trespass on the case, on promises, [543] for the purpose of recovering from the said John Pasley his damages by him sustained, by reason of the said John Pasley having neglected and refused to pay to him his share of the produce of the said ship, and of the goods and merchandizes so as aforesaid taken in and on board the same, and so as aforesaid condemned as lawful prize to our said lord the king, and which said plea is still depending in the said court of the Bench here at Westminster: and whereas, the said commissioners of appeal in matters of prize have not, by the law of this realm, any power or authority to take out of the hands and possession of any agent or agents so constituted as aforesaid, the money

arising from the sale or sales of any ship, vessel, goods, wares, or merchandizes, taken from the said States General of the United Provinces, or their subjects during the said hostilities, by any ship or vessel of war in his majesty's pay, which have been finally adjudged lawful prize to his majesty in any of his said courts of Admiralty in Great Britain, or to compel them to bring in the same, &c."

I shall not quarrel with Pasley's title to be an agent, however informally it may appear to be stated, nor do I think it a substantial objection, that he may have been appointed before any interest or property vested in the persons who appointed him; but if it be the true construction of the prize acts, that no interest or property vested in the navy until after the final adjudication by the commissioners of appeals, it follows that his proceeding to sell and to distribute part of the proceeds soon after the sentence in the admiralty court, must be without colour of authority. In this stage of the proceedings, the agents could only act under the authority of the prize court, and in the manner in which such agents usually do act; for I take it to be clear, in point of fact, that agents are frequently appointed before sentence, and that the captured ships and goods are left under their care and management, by common assent.

Acting under the authority of the prize court, they would be to account to the prize court; acting without the authority of the prize court, they would be in the condition of mere strangers, who had possessed themselves of the proceeds of a prize, to whom, it is admitted, a monition might, and ought to be issued, to compel them to bring in those proceeds. The allegations therefore, which respect the appointment of agents and their proceedings, are insufficient in law to warrant the conclusion [544] which is the main ground of this prohibition, that the commissioners of prize appeals had no power to take the proceeds of this ship and cargo out of their hands. I might add, they prove the direct contrary. The case here is the stronger against the authority of these agents, inasmuch as upon the interposing of the appeal, there was no direction that the execution of the sentence should not be suspended; so that the whole effect of the first sentence of adjudication became inoperative to any purpose whatsoever, and there was no pretence for the agents assuming to act by virtue of it. If we turn once more to the prize acts, and take a view of those sections which respect the appointment, powers and duties of these navy agents, we shall find, that though perhaps, as I have before observed, they may be appointed before the final adjudication of the prize, they have nothing to do until after the final adjudication has taken place; that the provisions of the prize act are in perfect conformity to the powers and authorities vested in the prize court up to that period, and that they are consistent with the opinion which I have now delivered respecting the interest and property of their principals, I refer to the 31st and subsequent sections. By the 31st section, all appraisements and sales of ships or goods taken by the navy are to be made by the agents, which must be appraisements and sales after final adjudication; for all appraisements and sales to be made at any time prior to the final adjudication, are to be made under the order of a judge of the admiralty court, and under the direction of persons to be appointed by claimants as well as captors. By the 33d section, they are directed to register their powers of attorney in that court in which the prize shall be condemned; and by the 34th section, the entry is to contain, among other things, the date of the condemnation. I will not fatigue your Lordships by going through the different sections which give powers, or impose duties upon these agents; I shall content myself with stating the result, viz. that they all respect sales in order to distribution, and the interests of Greenwich Hospital arising out of those sales. The result of these observations upon those parts of the declaration which respect the interest and property of the navy as captors, and the powers and authorities of their agents, is, that this whole case rests upon two fundamental errors; the first, that an interest and property vested in the navy as captors, long before it could by any possibility vest; the second, that the navy agents had authority [545] under the prize acts, to take upon themselves the management and disposition of the prize long before such authority could be derived to them. When this is distinctly seen, the whole falls to the ground. Hitherto, I have treated the case as if the navy were to be considered, as they are stated in this declaration to have been, the sole captors. But the contrary is, or at least must be taken to be upon these pleadings, the fact. It is from the sentence only that we can collect who were the captors. Your Lordships cannot take cognizance of it as a matter of fact to be averred in pleading; it is a matter of

adjudication by a court of exclusive jurisdiction. You must have it under the sanction of the judicial authority of that court, or no notice at all can be taken of it. The averment in the declaration is therefore impertinent and must be rejected, and we must look at the sentence. Looking at the sentence, and not having the assistance of the libel and the rest of the proceedings in the cause which might have explained it, but which the Plaintiff has not thought fit to introduce into his declaration, and in the character in which I now address your Lordships, I dare not undertake to say what this sentence is, but I can venture to say what it is not. It is not an adjudication, that the navy were the sole captors of this Dutch ship. The Plaintiff, therefore, has failed altogether to maintain that proposition. If it could be of use to him, he might possibly succeed in an attempt to prove that this sentence does adjudge that the navy were joint captors. But this would be of no use to him in this cause. It is not the case which he makes by his declaration, and if it were, the conclusion in favour of the jurisdiction of the prize court with respect to the issuing the monition, would be irresistible. The prize acts would then be quite out of the case, which would rest entirely upon the ordinary jurisdiction of the prize courts. As joint captors, the navy can never have the sole interest and property in the prize: the navy agents cannot have the sole management and disposition of it. The prize acts have not provided for the case of joint captors. The prize courts may have extended the benefit of the statutes to the case of some joint captures, by an equitable arrangement and distribution which has been submitted to: but it appears to me to be perfectly impossible to found a right to the sole agency, upon a joint capture: and indeed I do not apprehend, that under the prize acts a joint agency could be [546] framed, which would be effectual. The consequence of all this is, that of necessity this monition must issue in order to execute the sentence, if we understand the sentence to have adjudged that the navy were joint captors. I might here conclude what I have to offer to your Lordships, but as it was very apparent to those who watched the course of the argument at the bar, that in truth it is the sentence of the commissioners of prize appeals, and not the monition which is the real ground of complaint, it may be necessary for me to take some further notice of it, in order to shew your Lordships that every complaint against the sentence must be laid out of the case. You are sitting here in a court of error, but your jurisdiction is now confined to the inquiry, whether the ground stated in this declaration for issuing such a prohibition as that which is described in these pleadings, is or is not sufficient in law. The sentence is before your Lordships as part of that ground, and the effect of it in that view, I have already stated. But it is before your Lordships as a sentence unimpeached. The complaint made to the temporal court is not that the sentence is wrong, which indeed the temporal court had no jurisdiction to correct if it were wrong, nor is the complaint that the sentence was an excess of jurisdiction, or in any other respect a ground for prohibiting the prize court to carry it into execution. The case in the declaration is, that upon the authority of the sentence coupled with the other matters of fact and law stated in the declaration, the Plaintiff is intitled to ask, that the proceeds should not be taken out of the hands of the navy agents; and the Plaintiff cannot now desert that ground when he finds it untenable, and take up an objection to the sentence. Your Lordships are not a court of original jurisdiction to grant prohibitions; and indeed, the cause and the parties would be placed in a very singular situation, and if there could now be a prohibition issued to prevent the carrying this sentence into execution; for the sentence of the court below is undoubtedly reversed, and if the commissioners of prize appeals were to be prohibited from carrying into execution the sentence of reversal, there would in effect be no sentence at all, and the crown, the navy, and the army, as far as I see, would be without remedy. In the course in which the commissioners of prizes are proceeding, regular or irregular, the proceeds of this prize will be collected; and if the object of their proceedings be, as probably it is, to place the fund in the hands of the crown, the [547] honor and justice of the crown will be an unfailing resource to the parties.

The judgment of the Court of King's Bench, reversing that of the Court of Common Pleas, was accordingly affirmed.

EVANS *against* BRANDER AND ANOTHER. Monday, June 22d, 1795.

In an action on the case against the sheriff for taking insufficient pledges in replevin he is liable in damages to the extent of double the value of the goods distrained, but no farther (a).

This was an action on the case against the sheriff of Middlesex, and the declaration stated, that the Plaintiff distrained certain goods of one John Hardwicke for arrears of rent amounting to 13l. 18s. 3d. that they were replevied, and a plaint levied in the county court which was removed by re. fa. lo. into this court, and that Hardwicke had found pledges to prosecute and also for a return of the goods, if a return should be adjudged, to wit, William Chapman and George Grove: the proceedings were then set forth, and that there was judgment for the avowant (the now Plaintiff), for a return of the goods and 58l. costs. The writ de retorno habendo was then stated, with a return of elongata. And the Plaintiff averred that the Defendants not regarding the statute in such case made, nor the duty of their office, &c. &c. did not, before the replevying and delivering the said goods and chattels to the said John Hardwicke, take from him pledges sufficient, as well for the said goods and chattels being returned, if return thereof should be adjudged, as for the said John Hardwicke prosecuting his said plaint, which according to the form of the statute, &c. they ought to have done; and that the said William Chapman and George Grove at the time of their becoming pledges, &c. were not, nor was either of them sufficient to answer for the goods being returned, nor for the value of them, &c. &c. Whereby the Plaintiff lost the benefit of the distress, &c. &c.

At the trial it appeared that the rent in arrear was 13l. 18s. 3d., the value of the goods distrained 17l. 5s. 3d., the costs of the replevin suit 58l. 10s., of the return. habend. 4l. 1s. 10d., and the penalty of the bond 80l.; and the damages given by the jury were 76l. 0s. 1d. which were obviously made up of the costs of the replevin, of the return. habend. and the rent.

[548] A rule having been granted to shew cause why the damages should not be reduced to the amount of the rent in arrear, Bond, Serjt., shewed cause. The Plaintiff is intitled to recover a satisfaction to the extent of the damages found. The remedy by distress was originally substituted in lieu of the forfeiture of the land, which in the strictness of the old feudal law was occasioned by the non-performance of the services. Gilb. Law of Distr. 2. As this remedy was less powerful than the forfeiture, the lord was intitled to keep the thing distrained till the tenant offered gages and pledges for the payment of the rent, or the performance of the services. But notwithstanding the offer of gages and pledges if the lord persisted in detaining the distress, the tenant was obliged to resort to the writ of replevin, in which he complained that the Defendant had taken and unjustly detained the goods "against gages and pledges;" the form of which is still preserved in declarations in replevin. But in this case the lord might wage his law, as to the sufficiency of the gages and pledges. Gilb. Law of Distr. 90. 1 Reeve's Hist. 47. In the earliest times therefore, the law was careful to make the remedy by distress as beneficial to the lord as possible. But it frequently happened, that by allowing the tenant to replevy the goods distrained, the lord was deprived of the benefit of the distress, for if the tenant sold them pending the suit and became insolvent, the lord had no advantage from the judgment for a return: for the pledges to prosecute were like pledges in other actions, and liable only for the amercement to the king pro falso clamore. In consequence of this, the stat. West. 2, 13 Ed. 1, c. 2, enacted, that the sheriff should not only take pledges to prosecute, but also to return the cattle if a return should be adjudged. If there was judgment for a return the writ de retorno habendo issued, to which if the sheriff returned elongata, the avowant might have a scire facias against the pledges, and if they shewed no good cause, a special writ to take their cattle in the room of those that were eloiued. If there was a return of nihil to the writ against the pledges, a scire facias lay against the sheriff to recover tot averia. 2 Inst. 340. Gilb. Repl. 126. By degrees an auxiliary remedy against the sheriff was introduced, that of an action on the case for taking insufficient pledges, which was resorted to in lieu of the scire facias. In this action, which sounds entirely in damages, the avowant was intitled

(a) [Vide ante, p. 36, note (a).]

to recover the same satisfaction as he would have had, [549] if the cattle had been returned to him irreplevisable, in which case the owner could not have them delivered back to him without tendering, not only the arrearages of rent, &c. 2 Inst. 341 (which &c. may include damages,) but "all that was due upon the judgment in the avowry," *ibid.* 107. And when there is judgment for the avowant, damages and costs are due to him by the provisions of the stat. 21 Hen. 8, c. 19. However therefore on a scire facias, the responsibility of the sheriff might be limited by the price of the beasts, or the tot averia mentioned in the stat. West. 2, c. 2, yet a greater latitude might be allowed in an action on the case, from the nature of that species of remedy. It is by a liberal construction of the statute adopted in later times, that an action upon the case is holden to lie. 16 Vin. Abr. 400, *Prowse v. Pattison* (a), Bull. N. P. 60, ante, 39, S. C. where it appears, that upon searching the record the damages were made of the rent in arrear and the costs of the replevin. So also in *Gibson v. Burnell*, C. B. 30 Geo. 3 (cited 4 Term Rep. B. R. 434), Gould, J. before whom the action was tried, held that the Plaintiff might recover the costs of the replevin suit as well as the rent in arrear. So too in *Concanen v. Lethbridge*, ante, 36, this Court held, that the action being against a public officer for a neglect of the duties of his office, the Plaintiff was intitled to recover the whole damages sustained, which case being subsequent in point of time to *Yea v. Lethbridge*, 4 Term Rep. B. R. 433, must be taken to have over-ruled it. Upon the same principle likewise in *Richards v. Acton*, 2 Black. 1220, the Court upon motion held that the high sheriff, under-sheriff and replevin clerk, were all answerable for the sufficiency of the pledges, and ordered them to pay the rent in arrear together with the damages and costs.

[Lord Ch. J. As the bond was not taken in double the value of the goods distrained according to the directions of the statute 11 Geo. 2, c. 19, was it good?]

It was good as against the sheriff. Besides, this is an action for taking insufficient pledges on the stat. West. 2, c. 2, not insufficient sureties(c) on the 11 Geo. 2, c. 19, and there is no particular limitation of the sum in which those pledges shall be bound. The bond therefore may be considered as taken [550] on the stat. West. 2, 12 Mod. 380, *The Duke of Ormond v. Brierley*, 1 Lord Raym. 278, *Blackett v. Crissop*.

[Lord Ch. J. The sureties under the stat. 11 Geo. 2, c. 19, seem to have been substituted in lieu of the pledges under the stat. West. 2.]

Bond was going on with his argument, when the Court interfered and said, that notwithstanding the late determinations on the subject, the good sense and justice of the case seemed to be, that the sheriff should be liable no farther than the sureties would have been, if he had done his duty and taken a bond under the stat. 11 Geo. 2, c. 19, and they had been sufficient; that their responsibility was limited by that statute to double the value of the goods distrained, which sum ought to be the measure of damages against the sheriff. The Court therefore recommended to the counsel on both sides to agree to reduce the sum found by the jury to that level; in which they seemed to acquiesce. The rule therefore to reduce the damages to the

(a) There called *Rous v. Patterson*.

(c) Though this distinction may seem at first sight to be warranted by the form of the declaration in this case, especially if compared with that in *Concanen v. Lethbridge*, ante, 36, which followed the words of the stat. 11 Geo. 2, c. 19, yet it is in reality without foundation. Before the passing the stat. 11 Geo. 2, c. 19, the constant usage was to take a bond from the pledges in replevin, on the stat. West. 2, c. 2, the word *plegii* being holden to be synonymous with sureties, according to Holt and Treby Ch. J. 1 Lord Raym. 278. See also Lutw. 687. Dalton, Sher. 438, ch. 113. But the sum in which the bond should be taken, appears not to have been defined. To make the security more effectual by fixing the responsibility of the pledges, and allowing the bond to be assigned with a view to prevent vexatious replevins, was the object of the 23d section of the stat. 11 Geo. 2, c. 19, which has rather modified and improved the former security than created a new one. The pledges therefore required by the stat. West. 2, c. 2, and the sureties by the 11 Geo. 2, c. 19, are in effect the same; and in practice no more than one bond is ever taken. It seems then highly reasonable, though the stat. West. 2, c. 2, directs that the sheriff shall be answerable for the price of the beasts if the pledges are insufficient, yet since the stat. 11 Geo. 2, c. 19, s. 23, made in *pari materia* has enlarged the security to a given extent, that he should be liable to the same extent in an action on the case.

rent in arrear was discharged, and another rule to reduce them to the amount of double the value of the goods distrained, was

Made absolute.

End of Trinity Term.

[In the last Edition of these Reports, the rules of Hilary Term, 35 Geo. III. which will be found at 441, ante, were inserted in this place.]

[551] CASES ARGUED AND DETERMINED IN THE COURT OF COMMON PLEAS, IN MICHAELMAS TERM, IN THE THIRTY-SIXTH YEAR OF THE REIGN OF GEORGE III.

D'EGUINO *against* BEWICKE. Saturday, Nov. 7th, 1795.

A policy of insurance is effected on a ship, on a voyage from A. to C. warranted to depart with convoy for the voyage. The convoy appointed is to B. a port in the course and near to C. This is a compliance with the warranty, and the underwriters are liable, the ship being captured in the passage from B. to C. The term convoy, in a policy, means such a convoy as shall be appointed by government (a)¹.

This was an action on a policy of insurance, the facts of which were the following:—The policy was effected September 10th 1793, on goods on board the ship “Little Betsey,” on a voyage at and from London to St. Sebastian in Spain, warranted to depart with convoy for the voyage. No convoy was appointed directly to St. Sebastian, but on the 7th of November the ship sailed from Spithead, under convoy of a squadron of frigates, the commander of which had orders from the admiralty, “to take with him the ‘Dido’ frigate and ‘Weazle’ sloop of war, and proceed to Gibraltar, and to take with him the trade bound to Gibraltar, and also such ships as should be at Spithead bound to Bilboa, and to detach the ‘Weazle’ with the latter, with orders to see them safe to Bilboa, and after so doing, to return to England, taking under his convoy such vessels as he should find at Bilboa bound for England.” On the 29th of November the commodore made a signal for the “Weazle” to part company, and take with her such ships as were bound to Bilboa and St. Sebastian, the captain [552] of the “Weazle” having had previous instructions from the commodore “to take, when the signal to part company should be made, the vessels bound to Bilboa and St. Sebastian under his convoy, and see them in safely off Bilboa, there to inquire if there were any vessels bound to England, and to take any such under his convoy to Spithead.” The “Weazle” accordingly left the rest of the fleet, taking the “Little Betsey” and other ships under convoy for Bilboa and Sebastian, but soon after parted from them in chase of a strange ship, and did not afterwards join them. The “Little Betsey” arrived in safety off Bilboa, which was in her course to St. Sebastian, but was taken by the French in her passage between the former port and the latter.

At the trial, it was objected that the warranty had not been complied with, the convoy being only to Bilboa; but the Lord Chief Justice left it to the Jury to determine whether there was not a sufficient convoy within the meaning of the policy, and a verdict was found for the Plaintiff.

A new trial was now moved for by Le Blanc, Serjt., who contended that warranties were to be strictly construed, that there was a non-compliance with the warranty in this case, and the Plaintiff was therefore not entitled to recover: that however near the port of St. Sebastian might be to Bilboa (a)², the principle was the same, and a convoy to Bilboa could no more be construed to be a convoy to St. Sebastian, than a convoy to the Cape of Good Hope would be a convoy to the East Indies: and he cited the case of *Hibbert v. Pigou*, Parke’s Insurance, 339.

BULLER, J. The case of *Hibbert v. Pigou* is not applicable to this, for there a convoy was appointed and actually sailed from Jamaica to England. As to my Brother Le

(a)¹ [Vide *De Garay v. Clagget*, Park. Ins. 455, 6th edit. *Aulley v. Duff*, 2 Bos. & Pull. 111.]

(a)² From the nearness of St. Sebastian to Bilboa, it seems that if the “Weazle” had continued in company with the convoy, she would have afforded protection to ships going to both ports.

Blanc's instance of a convoy to the Cape of Good Hope, I entirely differ from him in that point, for if Government thought a convoy to the Cape was a sufficient protection to the East India trade, and the usage were for the East India ships to sail with a convoy only to the Cape, and to consider that as the East India convoy, and no other convoy was appointed to the East Indies, I should hold that the warranty was complied with; though I agree, that if there were another convoy to the East Indies, it would be otherwise. The [553] captain of a merchant ship has nothing to do with, nor can he know the instructions from the Admiralty to the King's officers, but must take such convoy as he finds. I am therefore of opinion that there is no ground at all for this motion.

HEATH, J., of the same opinion. The owner of a ship, when he makes an insurance, cannot know the orders of the Admiralty respecting convoys.

ROOKE, J. The ground stated by my Brother Le Blanc seems to me to be more fit for the Jury than the Court, and the Jury have found that the convoy was sufficient.

LORD CH. J. EYRE. I am satisfied with the finding of the Jury.

Rule refused.

QUIN, Executrix of Quin, against KEEFE. Thursday, Nov. 19th, 1795.

The Court will not discharge a Defendant, who is holden to bail for a debt contracted in this country, out of custody, on a common appearance, on an affidavit of his having become a bankrupt in Ireland, and there obtained his certificate, but will put him to plead. But a general plea of bankruptcy in Ireland, referring to an Irish act of parliament, and concluding to the country (in a mode similar to that given by stat. 5 G. 2, c. 30, s. 7, to bankrupts in England) is clearly bad (a).

The testator and the Defendant both being resident in this country, the Defendant contracted a debt to the testator for work and labour, for which the executrix held him to bail. Upon this a rule was obtained to shew cause why he should not be discharged on entering a common appearance, on the ground that he had become a bankrupt in Ireland, and there obtained a certificate.

Le Blanc shewed cause. Ireland is clearly a foreign country, and there is no instance of a certificate or any thing analogous to it, in a foreign country, being allowed to be a bar to the recovery of a debt contracted here; for, according to the opinion of Lord Talbot, a certificate here would be no bar to such recovery in the Plantations. Beawe's *Lex Merc.* 531, last edit. If the debt had arisen in Ireland, and the party had obtained his certificate in that country, the courts here, by the courtesy of nations, would give effect to it, if the Plaintiff were to attempt to enforce the contract here. But it is totally a different thing when the debt is contracted in this country, and the debtor attempts to evade the payment of it, by withdrawing himself to a foreign country, there becoming a bankrupt, and then setting up the bankrupt laws of that country as a defence. But at all events the Court will not interfere in a summary way, but will put the defendant to plead.

Adair, Serjt., contra. The operation of bankrupt laws in foreign countries is

(a) [Where a debt is contracted in a foreign country, a discharge according to the law of that country is a bar to an action brought in our own courts, *Bullantine v. Golding*, Co. B. L. 347, 1st edit. *Potter v. Brown*, 5 East, 124. But not where by the foreign law the remedy only is barred, *Williams v. Jones*, 13 East, 439; and a foreign bankruptcy and certificate is no bar to a demand for a debt contracted in England, *Smith v. Buchanan*, 1 East, 6. *Lewis v. Owen*, 4 B. & A. 654. But on the construction of the statute 54 G. 3, c. 137, it has been held, that a debt contracted in England by a trader residing in Scotland, is barred by a discharge under a sequestration issued in conformity to that statute, in like manner as debts contracted in Scotland, *Sedaway v. Hay*, 2 B. & C. 12. See also *Odwin v. Forbes*, 1 Buck, 57, and the judgment in the same case, reported by J. Henry, Esq. *The Royal Bank of Scotland v. Cuthbert*, 1 Rose, 462. That the Court will not discharge the Defendant upon motion, on the ground of a foreign certificate, but will put him to plead his discharge, see *Philpotts v. Reed*, 1 Brod. & Bing. 13. *Bamfield v. Anderson*, 5 B. Moore, 331. *Whittingham v. De la Rieu*, 2 Chitty's Rep. 53. *Earlier v. Languishe*, id. 55.]

allowed, to many purposes, to have effect here, [554] and the bankrupt laws of England are adopted in Ireland. Upon this principle, in a case of *Lynch v. M'Kenny*, where the Defendant, having contracted a debt in Ireland, came to London, there entered into partnership with one Kay, and afterwards became a bankrupt and obtained his certificate, but an Irish creditor, having discovered his residence in England, came here and held him to bail, Mr. Justice Aston made an order, dated August 21, 1776, to discharge him on filing common bail, on an affidavit that the debt became due previous to the issuing the commission, and his obtaining his certificate.

LORD CHIEF JUSTICE. The ground ought to be perfectly plain where the Court is called upon to interfere in a summary way. If there is the least doubt, the party must put the matter upon record by pleading. I agree with the distinction made by my Brother Le Blanc, between the cases of a debt contracted in a foreign country and here, for by changing the forum the parties do not change the nature of the thing. But we cannot decide the question on this application.

BULLER, J. It is enough to say against this motion, that the point is new in this court. It is not new in the King's Bench, though I do not know that there is any case in print on the effect of a certificate in Ireland upon a debt contracted here. As to the order which Mr. J. Aston is stated to have made, in that case the Defendant carried on trade, and became a bankrupt here, and the debt might have been proved under the commission here.

Rule discharged.

In consequence of the refusal of the Court to interfere, the Defendant pleaded "For a general plea in this behalf, according to the form of the statute in such case made and provided (being the act of parliament after mentioned), that he the said Defendant after the 24th day of June 1772, mentioned in a certain act of parliament, intitled 'An Act to Prevent Frauds committed by Bankrupts,' passed in a certain parliament of our lord the now king of this kingdom of Ireland, holden at Dublin in the said kingdom of Ireland, in the 11th and 12th years of the reign, &c. to which said parliament the right and authority of making laws in this behalf in the said kingdom of Ireland belonged, and before the suing out the original writ of the Plaintiff, to wit, on the 26th of July 1793, at Dublin [555] aforesaid, became a bankrupt, within the intent and meaning of the said statute, and of other the laws then and now in force in the kingdom of Ireland concerning bankrupts, to wit, at London, &c. and that the said several causes of action aforesaid did accrue before such time as the Defendant so became a bankrupt as aforesaid," and concluded to the country.

At the trial at Guildhall a case was reserved, stating the facts above mentioned, which Le Blanc was now going to argue, when the Court observed that in the form in which the plea stood upon the record, it was clearly bad, and therefore the Plaintiff was entitled to judgment without entering further into the question.

Postea to the Plaintiff.

WILKES against ELLIS. Thursday, Nov. 19th, 1795.

Qu. Whether the selling goods by auction within the city of London, by an auctioneer who has paid the duty of 20s. for a licence required by the stat. 17 Geo. 3, c. 50, but who has not been admitted as a broker, by the Court of Mayor and Aldermen, makes him liable to the penalty of the 6 Ann. c. 16, for acting as a broker without being so admitted? Semble that it does not.

This was an action of debt brought by the Chamberlain of London, on the stat. 6 Anne, c. 16, to recover the penalty given by that statute against the Defendant, for acting as a broker within the city, not having been admitted as such by the Court of the Mayor and Aldermen; the offence being laid in the declaration to be, that "he took upon himself to act as a broker, and as a broker for a certain reward to him to be therefore given, sold by auction for one John Bailey, certain goods and chattels, &c."

The evidence at the trial was, that the Defendant, who was a freeman and liveryman of London, and had paid the duty of 20s. required by 17 Geo. 3, c. 50, as a licensed auctioneer, had sold the goods mentioned in the declaration by public auction for Bailey who was the owner of them, and on a case reserved, the question was,

whether the Plaintiff was entitled to recover, i.e. whether the selling goods by public auction was acting as a broker, within the meaning of the statute?

This case was twice argued: the first time by Rose, Serjt., Recorder of London, for the Plaintiff, and Cockell, Serjt., for the Defendant; the second, by Adair, Serjt., for the Plaintiff, and Le Blanc, Serjt., for the Defendant. On the part of the Plaintiff the arguments were the following:—

The Defendant having sold goods by auction, without being previously admitted as a broker by the Court of Mayor and Aldermen, has incurred the penalty of 25l. given by the statute [556] 6 Anne, c. 16, the words of which are, "That all persons that shall act as brokers within the city of London and liberties thereof, shall from time to time be admitted so to do by the Court of Mayor and Aldermen of the said city for the time being, under such restrictions and limitations for their honest and good behaviour, as that court shall think fit and reasonable." Now a broker is a person, who for a reward makes a transfer of property, whether the transfer be by private contract or public sale. There is nothing in the mode of selling by auction that exempts the auctioneer from the capacity and situation of a broker, which arises out of the nature of a sale. Thus the word *auctio* in classical language means a sale by a broker, and *auctionem vendere* (a) is used in that sense by Cicero in oratione pro P. Quintio. Ainsw. Dict. Thus too in legal phraseology the term *auxionarii* is interpreted to mean "brokers." Blount's Law Dict. And in Spelman's Glossary, *auctionarii* are described to be "qui publicis subhastationibus præsuunt," "*propolæ, quos Anglicè brokers dicimus.*"

In Jacob's Law Dict. the word brokers is rendered "*brocarii et auctionarii,*" and *auctionarii* "sellers or retailers, but more properly brokers."

And in the several acts of parliament to regulate the business of brokers, they are described to be persons who make bargains and contracts between other persons, concerning their goods and merchandize. 1 Jac. 1, c. 21. 8 & 9 W. 3, c. 20, s. 60. 8 & 9 W. 3, c. 32. 10 Anne, c. 19, s. 121. 6 Geo. 1, c. 18, s. 21. 3 Geo. 2, c. 31. 7 Geo. 2, c. 8, s. 8. Which description clearly comprehends an auctioneer, who is an agent both for the buyer and seller. Upon this principle, that broker is a generic term, including all persons who make bargains for the sale of property, many cases have been decided. Thus in *Bosworth v. Machado*, cor. Lee, Ch. J. (at Guildhall, Sittings after Trinity Term 1745), it was holden that a person who sold South Sea stock, was a broker within the meaning of the statute 6 Anne, c. 16. So also was the case of *Janson v. Green*, 4 Burr. 2103. If it should be said, that the stat. 17 Geo. 3, c. 50, imposes upon [557] auctioneers in London and Westminster, an annual duty of 20s. for a licence, unless they are also authorized by the Mayor and Aldermen of London, to act as brokers within the city, in which case the duty is only 5s., and therefore that the two characters are distinct and independent of each other, or at least that an auctioneer who has paid the duty of 20s. is not obliged to pay a farther duty to the City of London, it is to be observed, that this statute is merely a revenue act, the sole object of which is the raising a tax for Government; that it did not mean to infringe the rights of the city, nor can it alter, in whatever manner it may be worded, the nature of the business of auctioneer and broker, and make things different, which are substantially the same. So general indeed has been the conviction that auctioneers were within the meaning of the stat. 6 Anne, c. 16, that the constant usage in the city has been, for them to be admitted as brokers by the court of Mayor and Aldermen.

On the part of the Defendant the arguments were the following. The true definition of a broker is, that of a person who makes a private bargain between other persons,

(a) The Latinity of this phrase *auctionem vendere* is so very doubtful, that the commentators on Tully, with great reason, conjecture that the text in this place is imperfect. But however that may be, it is manifest in many other parts of the oration, that the sale alluded to was a public sale by auction, and not such a one as would answer to the modern description of a sale by a broker. Thus in a preceding page it is said, "*Auctionem in Galliâ P. hic Quintius Narbone se facturum esse pro-scribit earum rerum, quæ ipsius erant privatæ. Ibi tum vir optimus Sextus Nævius hominem multis verbis deterret, ne auctionetur; eum non ita commodè posse eo tempore, quæ proscriptisset, vendere.*" And after a few sentences, "*auctionem velle facere desistit.*"

but not a public one, Cowel's Interpr. In the stat. 1 Jac. 1, c. 21, he is described to be a person who makes bargains between merchant and merchant. A broker also both buys and sells, but an auctioneer only sells. A broker therefore is essentially different from an auctioneer. Brokers too are subject to the bankrupt laws by the provision of the stat. 5 Geo. 2, c. 30, s. 39. But auctioneers are not included in that provision. With respect to the definitions given in the several dictionaries, as they all differ from each other, perhaps there is little reliance to be placed on any.

By a charter of Ed. 3, no persons were to be brokers, but such as were chosen by the merchants belonging to the mysteries in which they were to act, which corresponds with the recital of the stat. 1 Jac. 1, c. 21, but which never could be extended to auctioneers. By a charter also of Hen. 7, confirmed by Car. 1, the business of selling by auction was confined to an officer called an Outroper (a)¹, and all other persons were prohibited from selling goods or merchandize by public claim or outcry. But long before, and at that time, brokers exercised their trade in the manner described in the stat. 1 Jac. [558] 1, c. 21. The two characters were therefore different at that time, and the difference between them is most evidently recognized by the stat. 17 Geo. 3, c. 50, which varies the duty to be paid for a licence, according to the circumstance of the auctioneer being admitted a broker or not, and therefore implies that it is not necessary for him to be so admitted, unless he acts as a broker, as distinguished from an auctioneer.

The Court seemed disposed to be of opinion in favour of the Defendant, but they intimated a wish for some precise information, whether before the passing the stat. 17 Geo. 3, c. 50, auctioneers were liable to be called upon to be admitted as brokers, and whether in fact the usage was for them to be so admitted.

However, on a subsequent day, before any farther steps were taken, Adair, after stating that he had consulted his clients on the subject, moved to discontinue the action, evidently from an apprehension that the judgment of the Court would be against him, and a precedent established unfavourable to the revenues of the corporation of London.

Leave to discontinue was accordingly granted, upon an undertaking not to bring any fresh action against the Defendant.

DA COSTA *against* LEDSTONE. Thursday, Nov. 19th, 1795.

Judgment as in case of a nonsuit for not proceeding to trial, cannot be moved for till the third term after that in which issue is joined; where the affidavit is general, that issue was joined in that term (a)².

Clayton, Serjt., shewed cause against a rule for judgment as in case of a nonsuit for not proceeding to trial in due time after issue joined. The issue was joined in Trinity term, the application therefore he said was premature, and ought not to be made till the third term. *Baker v. Newman*, ante, vol. i. 123. *Woulfe v. Sholls*, ibid. 282. In some instances indeed, the Court had relaxed the rule, where it appeared that there was time enough for the plaintiff to have proceeded to trial in the same term in which issue was joined. *Frampton v. Payne*, ibid. 65. But here the affidavit was general, that issue was joined in Trinity term. Though the plaintiff was too late to give notice of trial in the present term, yet the Court would not anticipate a default which they had refused to do, on a similar application, last term, in another case.

Le Blanc, Serjt., in support of the rule, relied on the practice, which he contended to be that this motion might be made in the second term. But

[559] The Court, without laying any stress on the affidavit being general (b), said that the practice was now settled, that the Defendant could not apply for judgment as in case of a nonsuit before the third term, and though the Plaintiff was too late to try in this term, they would not punish a default, before it was actually committed.

Rule discharged.

(a)¹ This was suggested by the Chief Justice, on the first argument.

[(a)² Vide ante, vol. i. p. 65, note (a).]

(b) Qu. therefore, whether the former practice of giving judgment as in case of a nonsuit in the second term, where it appeared that issue was joined early enough in a term to have gone to trial in the same term, be done away by this decision?

TURNER AND ANOTHER against BAYNES. Saturday, Nov. 21st, 1795.

[Referred to, *Wilkinson v. Verity*, 1871, L. R. 6 C. P. 208.]

Churchwardens de facto may maintain an action against a former churchwarden, for money received by him for the use of the parish, though the validity of the election of the Plaintiffs to the office be doubtful, and though they be not the immediate successors of the Defendant.

Assumpsit by the churchwardens of the parish of Stow Market in Suffolk, against a former churchwarden. The usage of the parish had been, for the vicar to choose one churchwarden, and the parishioners the other. But disputes having arisen, both the Plaintiffs were chosen by the parishioners at Easter 1794, and continued in office until Easter 1795; during which time, viz. in Hilary term 1795, the action was brought against the Defendant, who had been churchwarden from Easter 1790, to Easter 1791, and who had admitted a sum of money to be in his hands, on the balance of his accounts at Easter 1791, when he went out of office.

The first count of the declaration was, for money had and received to the use of the Plaintiffs as churchwardens, and the promise to them as churchwardens. The second for money had and received to the use of the inhabitants of the said parish of Stow Market, and the promise to the Plaintiffs as churchwardens. The third on an account stated with the Plaintiffs as churchwardens, of money owing from the Defendant to them as churchwardens, and the promise accordingly. The fourth on an account stated with the Plaintiffs as churchwardens, of money owing from the Defendant to the inhabitants of the said parish, and the promise to the Plaintiffs as churchwardens, and the breach was laid to the damage of the inhabitants of the said parish (a).

At the trial before Mr. Justice Ashurst at the last Suffolk assizes, the Plaintiffs were nonsuited, chiefly on two grounds, 1st, That they were not duly appointed churchwardens, and [560] 2ndly, That they were not the immediate successors of the Defendant in the office.

A rule having been granted to shew cause why the nonsuit should not be set aside, and a new trial granted, Bond, Serjt., shewed cause.

It is not sufficient to maintain this action, that the Plaintiffs were churchwardens de facto, but they ought to be so de jure. Thus it is laid down 4 Vin. Abr. 527, *Andrews v. Eagle*, that if there be a churchwarden de jure and one de facto in the same parish, the latter cannot justify the laying out or receiving money, but he is accountable to the former: he is no more than another man, and he that is de jure may bring an indebitatus assumpsit against the other. Here the custom of the parish being for the vicar to choose one churchwarden, and the parishioners the other, the election of both by the parishioners was clearly illegal, and therefore the Plaintiffs were only churchwardens de facto. By the 118th Canon the office of all churchwardens and sidesmen shall be reputed to continue until the new churchwardens who shall succeed them shall be sworn, that is who shall lawfully succeed them. But whether they were duly or unduly elected, they are not entitled to bring the action, not being the immediate successors of the Defendant. It appears from 4 Vin. Abr. 530, and 1 Burn's Ecclesiastical Law, 381, that the next succeeding churchwardens are to have an action of account against their predecessors. There is no privity except between the predecessors and the immediate successors, and the law will not imply an assumpsit, after a party has been so long out of office that several sets of successors have intervened.

Le Blanc, Serjt., on the other side was stopped by the Court, who were very clearly of opinion that the action was maintainable by the Plaintiffs, on both the grounds taken in the argument; that being admitted, and sworn into the office, and acting as churchwardens, the Defendant, who was a wrong-doer in withholding the money, should not be permitted to deny their right to bring the action; and that churchwardens being a corporation for the purpose of taking care of the goods of the church, the right to sue for money withholden from the parish passed from one set to

(a) See Cro. Eliz. 145 and 179. *Hadman v. Ringwood*, 4 Vin. Abr. 525 (M.s.), *Whitmore v. Bridges*.

the other, it being perfectly immaterial whether the immediate or any other successors of the Defendant brought an action which was not founded in privity between them.

Rule absolute.

[561] KINDER AND ANOTHER *against* PARIS. Tuesday, Nov. 24th, 1795.

To an action brought by the assignees of an insolvent debtor, to recover money owing to him before his insolvency, in which the Plaintiffs declare, that in consideration of the money being due to the insolvent, the Defendant promised to pay it to them as assignees, it is a bad plea to say "that the cause of action first accrued to the insolvent before the Plaintiffs became assignees, and that six years had elapsed after the cause of action first accrued to the insolvent, and before the suing out the writ of the Plaintiffs." Qu. Whether in such case the Defendant might plead, that the money was first due to the insolvent more than six years before the action was brought, and that he had made no express promise to the Plaintiffs within six years (a)¹?—Qu. also, Whether in such an action the Plaintiffs must not prove an express promise?—After a party has once amended on a demurrer, the Court will not give him leave to amend again on a second demurrer.

This was an action brought under the stat. 33 Geo. 3, c. 5, by the assignees of Arthur Miller an insolvent debtor discharged out of the Fleet prison, as indorsee of a bill of exchange against the drawer. The first count of the declaration stated the drawing of the bill, the acceptance by the drawee, the indorsement by the payee to Arthur Miller before the Plaintiffs became such assignees, the refusal of payment by the acceptor, and the protest for non-payment by Miller, of all which premises the Defendant afterwards and before the Plaintiffs became such assignees, had notice. By reason whereof he became liable to pay to the said Arthur Miller, &c., and being so liable, and the said sum of money afterwards and when the said Arthur Miller was so discharged as aforesaid, and the said Plaintiffs became such assignees as aforesaid, being due and unpaid, the Defendant, in consideration thereof, afterwards and after the Plaintiffs became such assignees as aforesaid, promised to pay them the said sum of money, &c. There was also a count stating that the Defendant was indebted to the Plaintiffs as assignees, for money paid, before the Plaintiffs became assignees, by Arthur Miller to the use of the Defendant, in consideration of which the Defendant promised to pay to the Plaintiffs as assignees, &c.; and a similar count stating the debt to the assignees for money had and received by the Defendant, before the Plaintiffs became assignees, to the use of Arthur Miller, and a promise to pay to the Plaintiffs as assignees; and the breach was the non-payment to the Plaintiffs as assignees, &c.

Plea after the general issue. "That the said several causes of action in the said declaration mentioned, and each and every of them first accrued to the said Arthur Miller before the Plaintiffs became such assignees as in the said declaration is mentioned, to wit, at London, &c., and the said Defendant further saith, that six years did elapse after the time when the said several causes of action, and each and every of them first accrued to the said Arthur Miller, and before the day of suing out of the [562] original writ of the said Plaintiffs against the said Defendant, and this," &c.

To which plea there was a general demurrer (a)².

(a)¹ [The proper plea in this case appears to be that which was first pleaded by the Defendant, post, p. 562, note (a), and upon issue joined on that plea, the Plaintiffs might give evidence of an acknowledgment to themselves, within six years.]

(a)² As the pleadings originally stood, the plea was "that the Defendant did not undertake and promise in manner and form as the Plaintiffs complained against him, at any time within six years next before the day of suing out the original writ of the said Plaintiffs," &c.

Replication. "That at the said several times when the said several causes of action in the said declaration mentioned, accrued to the said Plaintiffs, the said Defendant was in foreign parts beyond the seas, to wit, at Grenada in the West Indies, and there altogether lived and resided, and continually from thenceforth until he the said Defendant afterwards, to wit, on the 1st day of June 1792, returned from beyond the seas unto this kingdom of England, to wit, at London aforesaid, &c. And the Plaintiffs further said, that within six years next after the return of the said Defendant from

In support of the demurrer Heywood, Serjt., argued that the plea was no answer to the declaration.

In all the counts the promise is stated to have been made to the Plaintiffs, and as a breach of promise is the cause of action in assumpsit, no cause of action at all could have accrued to the insolvent. Non assumpsit *infra sex annos* to a bankrupt, is no plea to assumpsit by the assignees, 6 Mod. 131, *Parkins v. Woollaston*. 2 Stra. 919, *Skinner v. Rebow*. But if the original debt to the insolvent be taken as the cause of action mentioned in the plea, yet there might have been an express promise to the Plaintiff, as stated in the declaration, to which allegation there is no answer in the plea.

Le Blanc, Serjt., *contra*, contended that the demurrer admitted that the cause of action accrued to the insolvent, and more than six years before the action brought; an express promise therefore ought not now to be insisted on, when if the parties had gone to trial, they would have had nothing to rest on but an implied promise, raised on a consideration which is admitted to be within the statute of limitations. If it were allowed the Plaintiffs now to insist on an express promise, they would succeed on demurrer, by supposing an express promise, and at the trial by supposing an implied one, when in fact there was neither, and the Defendant clearly entitled to [563] the benefit of the statute. Instead of demurring, they ought to have replied an express (a) promise within six years, on which fact the parties might have gone to trial.

Lord Chief Justice Eyre suggested that the Defendant might have pleaded that the debt was first due to the insolvent more than six years before the action was brought, and that he had made no express promise to the Plaintiffs, within six years.

Buller, J., seemed to think the Plaintiffs must prove an express promise at the trial (b).

Le Blanc then prayed to amend, which, as the Defendant had amended once already, was refused.

Judgment for the Plaintiffs.

beyond the seas as aforesaid, to wit, on the 1st day of duly 1794, they the said Plaintiffs did sue out their original writ in this behalf, against the said Defendant," &c.

Rejoinder, "That the said several causes of action above mentioned, and each of them first accrued to the said Arthur Miller, before the said Plaintiffs became such assignees as aforesaid, to wit, at London aforesaid. And the Defendant further said, that six years did elapse after the time when the said several causes of action, and each and every of them, first accrued to the said Arthur Miller and before the day of the suing out of the original writ of the said Plaintiffs."

Special demurrer, "Because the rejoinder was a departure from the plea, which it clearly was holden to be, and the Defendant had leave to amend."

(a) But Qu. Whether this notion of replying that there was an express promise, can be reconciled with the technical precision required in framing the language of a record? Every executory agreement is in itself a promise. *Slade's case*, 4 Co. 92 b. Plowd. 182. Yelv. 20. Moore, 667. And when it is said, that in a general indebitatus assumpsit the law raises the promise, the true meaning of the phrase is, that from the antecedent debt or duty the law presumes that the Defendant did in fact promise to pay, which presumption he can only repel by shewing something in his defence which negatives the duty. That this presumed promise is in contemplation of law a matter of fact, appears from the averment in the declaration, "that being so indebted, &c. he promised to pay," and also from the form of the general issue non assumpsit: and according to Lord Holt, "there is no such thing as a promise in law," 6 Mod. 131. If this be so, with what propriety can the record make a distinction between a promise in fact and a promise express? After stating in the declaration that the Defendant promised, would it not be tautology to say in the replication that he expressly promised?

(b) [According to the modern cases, an acknowledgment of the debt would be sufficient, and would be evidence of a promise. *Hurst v. Parker*, 1 B. & A. 92. *Pittam v. Foster*, 1 B. & C. 256. *Ward v. Hunter*, 6 Taunt. 211, 2 Saund. 64 a. (notes), 5th edit.]

ROULSTON *against* CLARKE AND ANOTHER. Wednesday, Nov. 25th, 1795.

An avowry for an increased rent, on a demise, for every acre of the land which should be converted into tillage, is supported by the evidence of a lease for a term of years, with a covenant to pay the increased rent for every acre which should be so converted, during a part of the term, ex gr. for the last three years, by the Stat. 11 Geo. 2, c. 19.

Replevin for taking the goods of the Plaintiff on the 2d of December 1794. 1. Avowry for a distress for rent arrear, for half a year ending at Michaelmas 1794, under a demise at the annual rent of 130l. payable half-yearly. 2. Avowry stated the holding to be under a demise, at the yearly rent of 130l. payable, &c. "and also for every acre of the said demised lands and premises in which, &c. which should be ploughed, dug, broke up or converted into tillage, or sown with any corn, grain, clover, or seed or seeds whatsoever, above or more than one third part thereof, the sum of 3l. as an increase of rent payable, &c., over and besides the yearly rent aforesaid, and so proportionably for every greater or lesser quantity than an acre;" and because the Plaintiff had dug up and converted into tillage, &c. thirty-two acres, more than one-third part, &c., by reason whereof 48l. of the said increased rent, being at the rate of 3l. for each of the said thirty-two acres, became due and payable and were in arrear, avows the taking, &c., for a distress, &c. 3. Avowry was for both rents.

[564] Pleas in bar to the 1st avowry, *riens arriere*; to the 2d the same; and for further plea, that the Plaintiff did not hold by virtue of any such demise, &c.; and for further plea that he did not break up and convert into tillage more than one-third, &c.

To the 3d avowry, *riens arriere*, and for further plea, that he did not hold, &c. On which pleas issues were joined.

At the trial, which came on at the last assizes at Warwick, before Mr. Baron Hotham, a lease was given in evidence, dated May 1st 1776, for twenty-one years, reserving a rent of 130l. with a covenant to pay for every acre above one-third of the whole which should be ploughed or converted into tillage, during the three last years of the said term, 3l. as an increase of rent yearly during such three last years, &c., by equal portions, over and besides the yearly rent before reserved, and so proportionably for every greater or less quantity than an acre.—The learned Judge being of opinion, that there was a fatal variance between the avowries and the lease in evidence, with respect to the last three years of the term, a verdict was found, under his direction, for the Plaintiff.

A rule having been granted to shew cause why the verdict should not be set aside and a new trial granted,

Le Blanc, Serjt., shewed cause, and contended that the avowry ought either to have been general under the statute 11 Geo. 2, c. 19, or special, as it must have been at common law; for, prior to the statute, the avowant in replevin was bound to an exact statement of his title in omnibus. But in the present case it was neither one nor the other.

But the Court, without hearing the other side, held clearly that the avowries were good, and the variance immaterial, it being sufficient under the statute, which was made to prevent the necessity of setting out strictly a title or demise, to state the general effect and operation of it.

Rule absolute.

[565] MUILMAN AND ANOTHER *against* D'EGUINO. Wednesday, Nov. 25th, 1795.

[Followed, *Goupy v. Harden*, 1816, 7 Taunt. 162.]

The purchaser of a foreign bill of exchange payable at a certain time after sight, which is publicly offered for negotiation, is not bound to send it by the earliest opportunity to the place of its destination. There is no fixed time when a bill drawn payable at sight or a certain time after, shall be presented to the drawee. But it must be presented within a reasonable time. What is a reasonable time, is a question for the jury to decide, from the circumstances of the case. But semble that if the holder of a bill so payable, neither presents it nor puts it in circulation, he is guilty of

laches, and cannot recover upon it (a). It is sufficient, if notice of a bill drawn in England on a person in the East Indies, being dishonoured, is sent to England by the first direct and regular mode of conveyance, whether it be by an English or a foreign ship: the holder is not bound to send such notice by the accidental, though earlier conveyance of a foreign ship not destined to this country.

Debt on bond, the condition of which, after reciting that Chamberlain Goodwin, had on the 5th of March 1793 in London, drawn five sets of bills of exchange, four in each set, on Major William Palmer, at the house of Messrs. Palmer and Tucker at Calcutta, payable to the Defendant or order sixty days after sight, and by him indorsed to the Plaintiffs, was, that if the said five sets of bills of exchange, or any one bill of any or either set, should be returned and come back to England, duly protested for non-payment, no one bill of that set having been paid, and if the said Chamberlain Goodwin, or the Defendant, or either of them, their or either of their executors, &c. should and did within thirty days next after the said five sets of bills or any one bill of any or either set so returned protested for non-payment should be produced with a regular protest for non-payment to the said Chamberlain Goodwin and the Defendant or either of them, their executors, &c., or notice thereof in writing left at their or either of their usual place of abode, pay to the Plaintiffs the full amount of such bill or bills of exchange as should be so returned with protest, &c., then the obligation to be void, &c., which being read, &c., the Defendant pleaded;

1. That not any one bill of exchange of any or either of the said five set of bills had been returned and come back to England, duly protested, within the true intent and meaning of the condition.

2. That the Defendant had well and truly paid to the Plaintiffs within the time in the condition mentioned, the full amount of such of the said bills as had been returned with protests for non-payment, &c.

3. That by reason of the neglect and default of the Plaintiffs, not any one bill of any of the said five sets was presented or shewn to the said Major William Palmer at the house of Messrs. Palmer and Tucker at Calcutta, or at any other place, within a reasonable time next after the drawing and indorsing of the same respectively.

4. The same in the former part as the 3d, with the addition, [566] that by reason of the premises, the Defendant had not notice so soon as he otherwise would and ought to have had, that the said Major William Palmer would not accept or pay the said bills or any of them.

5. That all the bills of the said five sets, which were returned and came back to England protested for non-payment, were so returned, and so came back through the default of the Plaintiffs.

Replication. 1. That one bill of each of the five sets, had been returned and come back to England, duly protested for non-payment, within the true intent and meaning of the condition, concluding to the country.

2. That the Defendant had not paid to the Plaintiffs within the time in the condition mentioned, the full amount of such of the bills as had been returned with protests, &c., with the same conclusion.

3. That one bill of each set was presented to Major William Palmer at the house of Palmer and Tucker at Calcutta, within a reasonable time after the drawing and indorsing, &c. with the same conclusion.

4. That one bill of each set was presented to the said Major William Palmer, at the house of Palmer and Tucker at Calcutta, within a reasonable time after the drawing and indorsing, without any default of the Plaintiff, with the same conclusion.

5. That all the bills of the five sets which were returned and did come back to England protested for non-payment, were not so returned, and did not so come back to England, through the neglect or default of the Plaintiffs, with the same conclusion.

On these issues a verdict was found at Guildhall for the Plaintiffs, the following being the facts of the case. On the 5th of March 1793, the bills were drawn by Goodwin on Palmer in Calcutta, in favour of the Defendant, and on the same day indorsed by him for their full value, in a course of negotiation on the Royal Exchange,

(a) [*Goupy v. Harden*, 7 Taunt. 159, 2 Marsh. 454, S. C. *Fry v. Hill*, 7 Taunt. 397.]

to the Plaintiffs, who had previously received directions from Biderman and Co. of Paris, with whom they had a correspondence, to procure bills on India. The Plaintiffs then sent advice to Biderman and Co. of their having procured the bills, and at the same time drew on Biderman and Co. for the amount of them, by way of indemnifying themselves, and requested further orders as to the persons to whom the bills in question should be indorsed. On the 17th of March in the same year, Goodwin wrote general letters of [567] advice to the drawee, which were sent on board an East India ship, which sailed with several others from Spithead on the 5th of April, and arrived at Calcutta early in September. On the 19th of April, Goodwin stopped payment. On the 30th of April, four of the bills were indorsed by the Plaintiffs (by the direction of Biderman and Co. from whom they had heard in the mean time, and who had paid the bills which the Plaintiffs had drawn on them as an indemnity,) to the order of Deverin of Calcutta, and the fifth to the order of Pelon of the same place, for value in account with Biderman and Co. On the 22d of May the bills were sent to India, by another fleet of Indiamen, which sailed on that day, and arrived in the Huguely river on the 3d of October. On the 5th of October the holder of the bills wrote to the drawee, who was not then at Calcutta, informing him of the arrival of the bills, and requesting his acceptance of them, which by letter of the 17th of October he refused. In consequence of which four of the bills were protested for non-acceptance on the 29th of October, and the fifth on the 18th of November 1793. Four were protested for non-payment on the 1st of December 1793, and the fifth on the 3d of January 1794, and were all returned by the first English ships which sailed from India on the 23d of February, and arrived in England in July 1794. But it also appeared, that the Plaintiffs had received, by the accidental conveyance of a foreign ship not bound to England, a letter from their agents at Calcutta (with whom the holders of the bills had a constant communication) dated 11th December 1793, respecting some other bills, but which was totally silent as to the bills in question.

A rule having been granted to shew cause why there should not be a new trial, the Lord Chief Justice reported the evidence as above stated, and said, that at the trial, the material questions he had left to the consideration of the jury were, whether the bills were presented to the drawee in reasonable time, which included the question whether they were sent from England in reasonable time, and also whether proper notice had been given to the Defendant of their non-payment. That his Lordship was of opinion that there was no rule of law to fix the time when foreign bills should be sent to the place of their destination, and that the Jury were to determine what was reasonable time for that purpose. That under the particular circumstances of this case, he thought the bills had been transmitted in reasonable time to India, having been originally put [568] up on the Exchange for negotiation, and therefore liable to be delayed here, and purchased by the plaintiffs as the agents of Biderman and Co., who were to give their orders for the disposal of them. As to the time of their being presented in India after their arrival in that country, there was no evidence to shew that they were not presented in reasonable time, and it must be always in the discretion of the holder of bills drawn payable at sight, or a certain time after, at what time they should be presented. That with respect to the notice of the bills being dishonoured, it appeared that due notice of that circumstance had been given to the Defendant in this case; for it would be too strict a rule to lay it down that the party in India should be bound to send notice to England, by the chance conveyance of a foreign ship, and that in this instance notice had been sent by the first regular ships which sailed from Bengal to this country.

Le Blanc, Serjt., in shewing cause, repeated in substance the observations of his Lordship to the Jury.

Adair and Heywood, Serjts., on the other hand contended, that due diligence had not been used (which it was necessary in all cases for the holders of bills of exchange to use) either in sending the bills to India by the first ships which sailed from England after the indorsement to the Plaintiffs, and which delay was occasioned by their seeking an indemnity for themselves from Biderman and Co.; or in presenting the bills in India for acceptance, which might and ought to have been done by the holders, without waiting for the drawee's letter of the 17th of October, as his residence was known, though he was absent from Calcutta; or in returning them as soon as possible to England, with due notice of their non-payment, for it was evident that the Plaintiff's agents or the holders of the bills in India did not avail themselves of the same

opportunity which the foreign ship offered of sending the letter of 11th of December, also to send the bills protested for non-payment.

LORD CHIEF JUSTICE EYRE. The course of the argument in this case does not call upon the Court to lay down any new rule as to bills of exchange payable at sight, or a given time after; if it did, and it were necessary, I should feel great anxiety not to clog the negotiation of bills circumstanced like the present. It would be a very serious and difficult thing to say, that a person buying a foreign bill, in the way that these bills were bought, should be obliged to transmit it by the first opportunity to the place of its destination. There would also be a great difficulty in saying at what time such a bill should be presented for acceptance. The Courts have been very cautious in fixing any time for an inland bill payable at a certain period after sight, to be presented for acceptance, and it seems to me more necessary to be cautious, with respect to a foreign bill payable in that manner. If instead of drawing their foreign bills payable at usances, in the old way, merchants choose for their own convenience to draw them in this manner, and to make the time commence when the holder pleases, I do not see how the courts can lay down any precise rule on the subject. I think indeed that the holder is bound to present the bill in reasonable time, in order that the period may commence from which the payment is to take place. The question, what is reasonable time, must depend on the particular circumstances of the case; and it must always be for the jury to determine, whether any laches is imputable to the Plaintiff. With respect to point of notice of the non-payment being delayed, I think there is no colour for that part of the argument, for I hold that it is sufficient for the party in India to send notice by the first regular ships going to England, and that he is not bound to accept the uncertain conveyance of a foreign ship.

But upon the whole, my opinion proceeds on the facts of this particular case; I am satisfied with the finding of the Jury; the question whether there had been any laches was left to them, which it was for them to decide, and they have found that no blame was to be imputed to the Plaintiffs.

BULLER, J. This case may be decided on the facts peculiar to itself, without infringing any rule of law. The only rule that I know of, which can be applied to all cases of bills of exchange is, that due diligence must be used. Due diligence is the only thing to be looked at, whether the bill be a foreign or an inland one, and whether it be payable at sight, at so many days after, or in any other manner. And the learning on this point is well laid down by Lord Mansfield in *Heylin v. Adamson*, 2 Burr. 669. Then the question is, whether due diligence was used by the Plaintiffs in this case? Upon all the facts, the Jury have found that there was no laches in the Plaintiffs, and there is nothing in the state of those facts, as they appear upon the evidence, to warrant the Court to say that the verdict is against law. But here I must observe, that I think a rule may thus far be laid down as to laches, with regard to bills payable [570] at sight or a certain time after sight, namely, that they ought to be put in circulation. If they are circulated, the parties are known to the world and their credit is looked to; and if a bill drawn at three days sight were kept out in that way for a year, I cannot say there would be laches. But if instead of putting it in circulation, the holder were to lock it up for any length of time, I should say that he was guilty of laches. But further than this no rule can be laid down. With respect to the notice, it was clearly sufficient to send it by the ordinary mode of conveyance. I do not say that the party was bound to send the protest by an English ship, but it was enough to do so by the first ship, whether English or foreign, that was going to England in the regular course of conveyance.

HEATH, J., of the same opinion. No rule can be laid down as to the time for presenting bills drawn payable at sight, or a given time after. In the French Ordinances of 1673, Postlethwaite's Dict. tit. Bills of Exchange, it is said, that a bill payable at sight or at will is the same thing: and this agrees with Marius.

ROOKE, J., of the same opinion.

Rule discharged.

ROLFE against CASLON. Thursday, Nov. 26th, 1795.

[Referred to, *In re London, Bombay, and Mediterranean Bank*, 1874, 22 W. R. 472.]

A. draws a bill of exchange on B., payable to the order of A., which B. accepts, and B. draws a bill on A., payable to the order of B., which A. accepts, for their mutual

accommodation. Both bills are payable at the same time, have the same dates, and contain the same sums. One is a good consideration for the other, and neither is an indemnity; so that if either party becomes a bankrupt, the bill accepted by him may be proved under his commission, and consequently, to an action brought on it his bankruptcy may be pleaded (a).

This was an action brought by the drawer of a bill of exchange for 450l. payable to his own order, against the acceptor, with the common counts, to which there was the general plea of bankruptcy. A verdict was found for the Plaintiff, with leave to set it aside, if the Court should be of opinion, that under the circumstances of the case the plea could be supported. Those circumstances were, that the Plaintiff and Defendant being desirous to accommodate each other, the Plaintiff drew a bill on the Defendant, payable to his own order, which the Defendant accepted, and the Defendant drew a bill on the Plaintiff payable to his own order, which the Plaintiff accepted, the two bills being precisely alike, in the dates, sums of money contained in them, and times of payment, and neither party having effects of the other in his hands.

The Defendant indorsed the bill which the Plaintiff had accepted, to one Nichols, in part satisfaction of a debt of 1400l., and twenty days before the bills were due, became a bankrupt. [571] Nichols received a dividend upon his whole debt under the commission, and was paid by the Plaintiff the money due on his acceptance, after deducting the amount of the dividend on 450l., the sum for which the bill was drawn. And the only question was, whether the acceptance of the Defendant created a debt, which the Plaintiff could have proved under the commission, that being, of course, the criterion by which the validity of the plea was to be determined.

On behalf of the Plaintiff, Cockell and Marshall, Serjts., argued in the following manner. It will probably be contended, that the Defendant's acceptance might have been proved under the commission, by virtue of the stat. 7 Geo. 1, c. 31. But to bring a bill of exchange within that statute, the credit must appear to have been given upon a good and valuable consideration, *bonâ fide*, for money due at the time of the bankruptcy, payable in futuro at all events, and upon which a discount could be allowed for the time it had to run. Now the Plaintiff in this case could not have proved the Defendant's acceptance under the commission, it being given merely as a counter security; he could not have sworn that a debt was due to him upon that acceptance, till he had paid his own. If it could have been proved, it must have been a debt payable in futuro at all events. But suppose no bankruptcy had happened, and the Plaintiff had sued the Defendant upon this acceptance without having paid his own, the Defendant might have shewn that it was an accommodation bill, for which he had no consideration, and this would have been a good defence. So if the Defendant had taken up the bill accepted by the Plaintiff, the action would fail. If then there could be any case, in which the Plaintiff could not have recovered against the Defendant on this acceptance, the consequence is, that it could not be proved under the commission. Now it is evident, that the Plaintiff's claim depended upon the contingency of his being called upon to pay his acceptance, on the failure of the Defendant to take it up. But it is clear law, that a contingent debt cannot be proved under a commission, 2 Black. 840, *Young v. Hockley*. 3 Wils. 13, *Chilton v. Whiffin*. 3 Wils. 528, *Fanderheyden v. De Paiba*. Dougl. 165, *Heskuyson v. Woodbridge*. The case *ex parte Maydwell*, Cooke's Bankr. Law 204, is not fully stated, for it appears from the affidavit of the petitioner, that Prior, being about to enter into partnership with Thomas Stevens, applied to Maydwell to lend him 298l. 15s., [572] to which Maydwell agreed on having two sureties. Benjamin and Thomas Stevens agreed to become such sureties. On the 8th of November 1784, Maydwell, Prior, Benjamin and Thomas Stevens met, no other person being present. Prior and the two Stevenses gave a promissory note to Maydwell, by which they promised to pay 203l. on the 22d of January, and 95l. 15s. on the 18th of the same month; but no value was expressed to have been received. Maydwell then accepted two bills drawn by Prior, the one dated the 16th October preceding, for 95l. 15s. at three months, the other the 29th of October, at three months, for 203l., so that both those bills became due

(a) [Accord. *Cowley v. Dunlop*, 7 T. R. 565. *Buckler v. Buttivant*, 3 East, 72. But the bills do not create such a debt as will support a commission of bankrupt, *Sarratt v. Austin*, 4 Taunt. 200.]

subsequent to the joint note. Separate commissions issued against Prior and Thomas Stevens. Maydwell paid both his acceptances, and then proved 600*l.* under Prior's commission, including the two acceptances, and was admitted a creditor for that sum. But when he applied to prove the joint note under Thomas Stevens's commission, the commissioners would not permit him to do it, on the ground that Thomas Stevens had received no consideration, and that the acceptances, though for the same sums, did not bear the same date, nor become due at the same time, and therefore did not seem to be applicable to the same transaction. To remove the ground of the commissioners' refusal, the affidavit stated that the petitioner had been informed and believed that Prior and Thomas Stevens had agreed to become partners in the trade of glovers; and to enable them to carry on their business, Prior had procured the acceptances to be discounted, and advanced Stevens the money. It does not appear, whether any answer was made to this application, or that any of the facts stated in the affidavit were denied. It is probable they were not, because the Chancellor made an order that Maydwell might be permitted to prove the note under Thomas Stevens's commission. It seems evident that the question never arose, whether the debt was a contingent one, but that the point was, whether Stevens had received any consideration for the note.

Le Blanc, Serjt., on the other side, was stopped by the Court, who were very clearly of opinion that the two bills were mutual engagements, constituting on each part a debt, the one being a consideration for the other: that the bill in question was not given as an indemnity, which was in its nature conditional, but created an absolute debt from the beginning, which was capable of being proved under the commission, and being so provable was necessarily barred by the certificate.

Rule absolute to set aside the verdict.

[573] ADAM *against* RICHARDS. Friday, Nov. 27th, 1795.

[Discussed, *Heilbutt v. Hickson*, 1872, L. R. 7 C. P. 452.]

Though on the sale of a horse there is an express warranty by the seller that the horse is sound, free from vice, &c., yet if it is accompanied with an undertaking on the part of the seller to take the horse again, and pay back the purchase-money, if on trial he shall be found to have any of the defects mentioned in the warranty, the buyer must return the horse as soon as he discovers any of those defects, in order to maintain an action on the warranty, unless he has been induced to prolong the trial by any subsequent misrepresentation of the seller. In such case the term trial means a reasonable trial (*a*).

This was an action on the warranty of a pair of coach-horses, "that they were perfectly sound, free from blemish, and in no manner vicious, and that if on trial the said geldings should have any of the before-mentioned faults, the Defendant would take them again, and allow the Plaintiff his purchase-money."

At the time of the sale the Defendant gave the Plaintiff a receipt in the following words:—

"London, 6th December 1794.

"Received of John William Adam, Esq. ninety guineas for a pair of brown bay coach geldings, which I warrant perfectly sound, free from blemish, and in no manner vicious; and if on trial they should have any of the before-mentioned faults, I agree to take these horses again, and allow Mr. Adam his purchase-money.

"JOHN RICHARDS."

Soon after the sale, it was discovered that one of the horses was vicious and restive in harness, and there was evidence that he was so at the time of the sale: of this the Plaintiff informed the Defendant, but continued to keep the vicious horse for several months, partly at the persuasion of the Defendant, and partly from his own supposition that the horse would improve, and go better as he was more used. The Plaintiff afterwards turned the horse out to grass for some weeks, and then sent him to the Defendant, who supplied another for a temporary purpose, till a better could be procured to match the remaining one of the pair. After this, the Plaintiff took the

(*a*) [Vide ante, vol. i. p. 17, note (*a*).]

restive horse again from the Defendant, and returned him the borrowed one, the Defendant saying that the restive horse would then go very well: and it was not till some days after this, namely, on the 23d of July 1795, that the Plaintiff finally returned the pair to the Defendant, and demanded back the purchase-money.

On this evidence a verdict having been found for the Defendant, Bond, Serjt., now moved for a new trial, relying on the case of *Fielder v. Starkin*, ante, vol. i. 17, to shew that as there was an express warranty, and as the horse appeared to have been restive at the time of the sale, it was not necessary that [574] he should be returned, to make the Defendant liable to an action on the warranty. But the Court said, that though they fully assented to the doctrine laid down in *Fielder v. Starkin*, yet where there was an agreement to take a horse back, if on trial he should be found faulty, though it were accompanied with an express warranty, it was incumbent on the purchaser to return the horse as soon as the faults were discovered, unless the seller by any subsequent misrepresentation induced the purchaser to prolong the trial. That a trial meant a reasonable trial, but here six months had elapsed, after the horse was known to be restive, and before the return. The verdict therefore was proper, and ought not to be set aside.

Rule refused.

WOOD AND OTHERS, Assignees of Lockyer and Bream, Bankrupts, *against*
WORSLEY. Saturday, Nov. 28th, 1795.

[Reversed, 6 T. R. 710; 101 E. R. 785 (with note).]

A policy of insurance against fire under seal, refers to certain proposals distinct from the deed which declare that all persons insured sustaining any loss by fire, shall among other things produce a certificate under the hands of the minister and churchwardens, and some respectable householders of the parish, importing that they are acquainted with the character and circumstances of the persons insured, and know or verily believe that the loss really happened by misfortune, without any fraud or evil practice.—Qu. Whether the production of a certificate, so signed, be a condition precedent to a recovery against the insurers on the policy? Or whether it be not sufficient to shew that a certificate was produced and signed by many reputable householders of the parish, and that the minister and churchwardens being applied to, without any reasonable or probable cause wrongfully and unjustly refused to sign it (a)?

This was an action of covenant, and the declaration stated that by a certain deed-poll, commonly called a policy of insurance, [which had been burnt by fire, or otherwise destroyed, and therefore could not be produced, &c.,] it was witnessed that Lockyer and Bream, before their bankruptcy, had paid a certain sum of money to the Phoenix Assurance Company, for the insurance of certain houses and goods, which were specified, from fire, &c., according to the tenor of certain printed proposals delivered with the policy. Those proposals were then set forth, the tenth article of which declared, "That the Company would not be accountable for any loss or damage arising from fire, caused by foreign invasion, or civil commotion by any military or usurping power, and also that all persons assured by the said Company, sustaining any loss or damage by fire, should forthwith give notice to the Company at their office in Lombard-street, as soon as possible after, and deliver in as particular an account of their loss or damage as the nature of the case would admit, and make proof of the same by their oath or affirmation, and by their books of accounts, or other proper vouchers, as should reasonably be required, and should produce a certificate [575] under the hands of the minister and churchwardens, and of some respectable householders of the parish, not concerned in such loss, importing that they were acquainted with the character and circumstances of the person or persons insured, and knew or verily believed that he, she or they really and by misfortune without any kind of fraud or evil practice, had sustained by such fire the loss and damage therein

(a) [On Error in K. B. the judgment in this case was reversed, that Court holding the production of the certificate to be a condition precedent, and that it was immaterial that the minister, &c. wrongfully refused to sign the certificate, 6 T. R. 710.]

mentioned, and in case any difference should arise between the insured and the Company, touching any loss or damages, such difference should be submitted to the judgment and determination of arbitrators indifferently chosen, &c." It then went on to aver the interest of the bankrupt in the things insured, that the house and goods were consumed by fire, together with the books of accounts of the bankrupt, that they gave notice forthwith to the Assurance Company at their office, and also as particular an account of the loss as the nature of the case did admit, and were also ready and willing to make, and did tender and offer to make proof of the said loss and damage by their oath, and to produce such vouchers as could be reasonably required in that behalf, and that he did as soon as possible after their loss procure and deliver to the said Company at their office a certificate under the hands of divers reputable householders, &c. of the parish [naming them] importing that the said householders were acquainted with the character and circumstances of the bankrupts, and verily believed, that they really by misfortune and without any fraud or evil practice had sustained the loss, &c., and did as soon as possible after the loss apply to and request the minister and churchwardens of the parish [naming them] to sign such certificates of the loss as were required by the printed proposals, that they might deliver such certificates to the Company, but the said minister and churchwardens without any reasonable or probable cause whatsoever, did wrongfully and unjustly refuse to sign any such certificate as aforesaid, whereof the Company had notice. And although a difference arose between the bankrupts and the Company after the loss happened, and before the bankruptcy, touching the said loss, and although the bankrupts always after the happening of the said loss, until they became bankrupts, and the Plaintiffs since that time had been ready and willing to submit, and the Plaintiffs since they became assignees had tendered and offered to the said Company to submit the said difference to the judgment and determination of arbitrators, &c. yet the said Company had not paid or satis[576]fied the loss, &c., nor had they submitted the said difference to the judgment and determination of the arbitrators, &c.

The second count was similar to the first, except that it omitted the request to the minister and churchwardens to sign the certificate, and their refusal.

Pleas to the first count. 1. That the bankrupts had no interest in the house and goods consumed, concluding to the country. 2. That the loss happened by fraud and evil practice, concluding to the court. 3. That the minister and churchwardens did not refuse wrongfully, injuriously and without any reasonable and probable cause to sign the certificate, concluding to the country. To the second count there were similar pleas, as to the interest in the things consumed, and as to the loss happening by fraud and evil practice. And farther that the said dwelling-house was situate in the parish of St. Paul, Covent Garden, and that neither the bankrupts nor the Plaintiffs had procured any such certificate under the hands of the minister and churchwardens and any reputable inhabitants of the said parish not concerned in the said supposed loss, as is mentioned and required in that behalf, in and by the said printed proposals, &c.

Replication. Issue joined on the five first pleas: and as to the not procuring the certificate, that Lockyer and Bream did procure and deliver to the said Company, at their said office, such certificate as was mentioned and required by the printed proposals under the hands of divers reputable householders of the said parish, [naming them]; but that the minister and churchwardens wrongfully refused to sign any such certificate without any reasonable or probable cause, &c. concluding to the Court. Rejoinder, denying the last plea. Surrejoinder, joining issue thereon.

A verdict having been found for the Plaintiffs, a rule was granted to shew cause why the judgment should not be arrested; against which, in Hilary Term last, Le Blanc and Marshall, Serjts., shewed cause.

On the true construction of the policy, the point to be considered is, whether the production of a certificate signed by the minister and churchwardens was a condition precedent, the performance of which was necessary to enable the Plaintiffs to recover against the insurance office. The question, what words were necessary to make a condition precedent in a contract, was formerly the subject of many nice and subtle distinctions; but it now seems agreed that no technical words are required, [577] and whether any particular set of words make a condition precedent or not, depends on the intent of the parties appearing on the whole of the contract. *Kingston v. Preston*, cited Dougl. 688, 8vo. Now it is apparent from the words of the tenth article of the

printed proposals, that the framers of it designed to make a distinction between the clause which relates to losses occasioned by foreign invasion or civil commotion, and that which directs the sufferer to produce the certificate. In the former case, they declare the company not liable for the loss in the event there described, in the latter, they begin a new sentence, and without any words of reference to the former clause, merely direct the sufferer to produce the certificate. It is not said that the money shall be payable on producing the certificate, or that until the certificate be produced, it shall not be payable, as is the case in the proposals of the Sun Fire-Office, from which those in question of the Phoenix Office are evidently taken, except in what relates to the certificate; it seems therefore probable, that the Phoenix Office purposely omitted to make the production of the certificate a strict condition to be performed prior to the recovery of the money, in order to encourage persons to resort to that office in preference to the other. If this were necessary, all the other terms were so likewise, as for instance, notice to the Company at the office in Lombard Street, as soon as possible after the loss; but suppose notice not to be given as early as possible, it could not be endured that the office should evade payment merely from that circumstance. In the cases of *Oldman v. Bewicke (a)* and [578] *Routledge v. Burrell*

(a) *Oldman and Another, Assignees of Ingram a Bankrupt, v. Bewicke and Others.*
In C. B. Michaelmas, 26 Geo. 3.

This was an action against the Directors of the Sun Fire Office, upon a policy of insurance against fire: the declaration among other things stated the 10th proposal to have been as follows: viz. "Persons sustaining any loss or damage by fire, are forthwith to give notice thereof at the office, and as soon as possible afterwards, to deliver in as particular an account of their loss and damage as the nature of the case will admit of, and make proof of the same by their oath or affirmation, (according to the form practised in the said office,) and by their books of account, and such other proper vouchers, as shall be reasonably required, and procure a certificate under the hands of the minister and churchwardens, together with some other reputable inhabitants of the parish not concerned in such loss, importing that they were well acquainted with the character and circumstances of the person or persons insured, and do know or verily believe that he, she or they really and by misfortune, without any fraud or evil practice, have sustained by such fire the loss and damage as his, her or their loss, to the value therein mentioned, but till such affidavit and certificate of such insured's loss shall be made and produced, the loss money shall not be payable; and if there appears any fraud or false swearing, such sufferers shall be excluded from all benefit by their policies, &c." It then stated, that the bankrupt did forthwith give notice of his loss to the society, at their said office, and as soon as possible afterwards did there deliver in as particular an account of his said loss and damage as the nature of the case would admit of, and did make proof of the same by his oath or affidavit in writing, according to the form practised in the said office, and by such other proper vouchers, as were reasonably required; and further, that the minister of the parish of Portsea, in which, &c., long before, and at the time of the loss dwelt and resided at a distance from and out of the said parish, and was wholly unacquainted with the character and circumstances of the said Ingram, and wholly unable to make such certificate, as by the said policy was required. But that the said Ingram (afterwards, &c.,) did procure and deliver to the said office, a certificate under the hands of William Thomas, &c. then and at the time of the said loss being reputable inhabitants of the said parish, who were not concerned in the said loss, importing, &c. The Defendants pleaded, First, That the premises were wilfully set on fire, and burnt down by the bankrupt. Secondly, That at the time of the supposed loss the bankrupt had no interest in the premises, but no notice was taken of the certificate required, or the want of it, in any of the pleadings, except in the declaration as above set forth. But issues being joined upon both pleas the cause went in that state to trial, and the jury found a verdict for Plaintiffs, damages 300l. the demand being for 1500l. the amount of the insurance.

A rule having been granted to shew cause why the judgment should not be arrested, on the ground that the title of the Plaintiffs to recover was not set forth in the declaration, inasmuch as it did not thereby appear that the certificate required had been procured and produced, on shewing cause the arguments were as follow:

Against the rule it was said that the motion was grounded either on the title being

(ante, vol. i. p. 254), which arose on actions against the Sun Fire-Office, it was expressly provided that the money should [579] not be paid till the certificate was produced, which makes those cases essentially different from the present. It appears therefore that the production of the certificate in this case was merely directory, and not a condition precedent; it was rather a matter of fairness between the parties, than of legal obligation. If then this were not a condition precedent, no averment of performance was necessary in the declaration, and when no such averment is necessary, a defective averment of performance, and consequently a defective excuse for non-performance, will not vitiate. 1 Lev. 293, *Beany v. Turner*.

But supposing the Court should be of opinion that it was a condition precedent, the defect is cured, either by the excuse alleged for the non-performance of it, by the subsequent pleadings, or by the verdict. If it be a condition precedent, it is not that sort of condition, the performance of which makes the very consideration of the contract, but only a matter subsequent, the non-performance of which is to defeat an inchoate right of action, which vests in the insured by the loss happening. The non-performance therefore of such a condition is matter of defence to the action. 1 Term Rep. B. R. 638, *Hotham v. The East India Company*. But every ground of defence set up by the Defendant has failed. He has denied in his plea the truth of the facts alleged as an excuse for not procuring the certificate, which is an admission of the

defective, or defectively set forth. The latter objection was cured by the verdict, and the former waived by the defence set up in the pleas. It is stated in the declaration that the minister lived at a distance out of the parish, and though nothing is said about the churchwardens not signing the certificate, yet it appears that many of the principal and respectable inhabitants have signed it. This is not an absolute preliminary title. Many places are not parishes; and livings may be vacant when fires happen. Here the Plaintiffs have done as much as they could; it is not denied that the persons who signed were respectable inhabitants. Matter may be supplied by intendment after verdict, Sir T. Raym. 487. Sir T. Jones, 232. So a defect in the declaration may be waived by pleading, as in Stra. 925, *The Bishop of London v. The Mercers' Company*, in quare impedit the Plaintiffs had not shewn sufficiently that the next turn belonged to them, there the Defendant might have taken advantage of the defect, but it was cured by pleading over. If a party takes material issues, and they are found against him, he shall not, after putting the Plaintiff to great expense, arrest the judgment. Any person may waive a benefit introduced for himself. Here material issues are taken; first, that the house was wilfully set on fire by the bankrupt; secondly, that he had no interest. The objection now made would justify the office in refusing to pay in all cases. The Plaintiff has shewn that he has conformed in all things as far as he was able, and the verdict of the jury has ascertained all that was to be expected from the certificate.

In support of the rule, it was argued, that the issues admitted only what was well and specially averred. Neither of them have a reference to the certificate.

Nor is the objection of the defective title waived by the pleas. It could not be taken by a traverse of any averment in the declaration. It must have been by pleading it specially; but this was unnecessary if the declaration be radically defective.

Lord Loughborough.—Though I am satisfied the verdict was right, that the fire was accidental, and that the certificate could not have been procured, because the bankrupt had not sustained all the loss he claimed, yet the rule of intendment after verdict cannot be applied where there is an absolute defect of title, as there is in this case. As to the pleas, they are wholly collateral to the title.

Gould, J. Till the affidavit is made, and the certificate procured, the money is not to be payable: the time of payment therefore is not yet come. Though a person were a bonâ fide sufferer, still he is not entitled without a certificate. The stipulation is a condition precedent, that there shall be a certificate that there is no kind of fraud. Nothing is said about the churchwardens: and the excuse of the minister living at a distance is frivolous.

Nares, J.—I have had no doubt since the case was first mentioned to the Court. The stipulation is, that the office will in no case be liable, unless such certificate be produced. The Plaintiff therefore ought to aver the performance of the stipulation. There is no pretence to say that this objection is waived by the pleas.

Judgment arrested.

goodness of the excuse, supposing the facts to be true ; and after the Jury have found them to be true, he shall not be permitted to say that they are no excuse. It appears upon the record, that the minister and [580] churchwardens wrongfully and unjustly, without any reasonable or probable cause, refused to sign the certificate. But in a court of law nothing can be deemed wrongful or unjust but that which is so in a legal sense. Now suppose that the minister and churchwardens had said "this certificate may be true or false for any thing we know ; but be that as it may, we are no parties to your contract, we are not bound to inquire into the truth or falsehood of your certificate, therefore we will have nothing to do with it ;" this would be neither wrongful nor unjust, nor would it be a good excuse for the not procuring the certificate. It must therefore be understood after verdict that the refusal was wrongful and unjust in the sense that makes it a good excuse for not procuring the certificate, namely, by the interference of the Defendant : and in no other sense can it now be understood to be wrongful and unjust. But a title defectively set forth is helped by a verdict, and upon the same principle, an excuse for the non-performance of a condition precedent defectively stated is also helped by a verdict. If therefore the excuse in the present instance be ambiguous as to the import of the terms wrongful and unjust, it is cured by the finding of the jury : and every thing doubtful is construed so as to support a verdict. 1 Salk. 29, *Roe v. Haugh* ; 2 Burr. 899, *Collins v. Gibbs* ; 2 Ld. Raym. 810, *East v. Essington* ; 1 Wils. 115, *Alcorn v. Westbrooke*.

Adair, Bond, and Cockell, Serjts. contrâ. The production of the certificate according to the printed articles, was a condition precedent, and therefore necessary to be performed to entitle the Plaintiffs to recover. This was decided in *Oldham v. Bewicke*, and *Routledge v. Burrel*, in which cases the Court did not lay any particular stress on the insertion of the words that "till the certificate should be produced, the loss money should not be payable." Though those words are omitted in the present policy, the law will imply that condition. The articles can have no effect, except as conditions precedent. It is declared, that the Company shall only be liable according to the printed proposals. They cannot therefore be rejected ; and if they are admitted, they can be nothing but conditions precedent. If the Plaintiffs can recover without the certificate, they may also recover without an affidavit or notice, and without doing any other thing which the proposals required to be done. If then it were a condition precedent, nothing can excuse the non-per-[581]-formance of it, but some act of the party for whose benefit it was designed. Co. Litt. 206 b. It is expressly stated on the record that the condition was not performed, and the reason is given for the non-performance. There is no room therefore for intendment ; the title is itself defective, and not merely defectively set forth, and therefore it is not cured by the verdict. 4 Term Rep. B. R. 470, *Bishop v. Hayward*. In *Hotham v. The East India Company*, the non-performance of the condition was owing to the Defendants themselves, their factors and agents, which makes that case materially different from this. But the case of *Davis v. Mure* there cited p. 642, and in which the inquiry by a court-martial was a condition precedent, is an express authority in favour of the Defendant. "The dependence or independence of covenants," (to use Lord Mansfield's words in *Kingston v. Preston*,) "is to be collected from the evident sense and meaning of the parties, and however transposed they might be in the deed, their precedency must depend on the order of time in which the intent of the transaction requires their performance." And this doctrine is confirmed by Ashburst, J., in *Hotham v. The East India Company*. As to *Collins v. Gibbs*, that case shews that performance of what the Plaintiff was to do on his part, must be averred. The performance of a condition precedent is traversable, and therefore material to be alleged. Noy, 75. Cro. Eliz. 889. 9 Co. 9 b. *Ughtred's case*. And he who undertakes for the act of another, undertakes that it shall be done at all events. 5 Co. 23 b. *Lamb's case*. 1 Roll. Abr. 452.

From what passed after the argument upon the bench, it seemed as if the Chief Justice, Mr. J. Buller, and Mr. J. Rooke thought, that supposing the printed proposals to be conditions precedent, there had been a performance *cy pres*, but that in truth the policy being a commercial contract was to be construed liberally, and the true question was, Whether the loss had fairly been incurred ? If it had, (and it appeared on the record to have so happened,) the refusal of the minister and churchwardens was without good cause, and therefore the Plaintiffs were intitled to maintain their action. But Mr. J. Heath appeared to differ from the rest of the Court, and time was taken to consider.

And on this day, the cause having stood over from last Hilary term, the Lord Chief Justice said, that as a difference in opinion prevailed among the Judges, and as they were informed that a writ of error would be brought at all events, whichever way the [582] judgment was given, they thought it unnecessary to discuss the question any farther. Judgment therefore was ordered to be entered for the Plaintiff, *pro formâ*, merely that the writ of error might proceed.

MARSH, KNT. AND OTHERS *against* FAWCETT, Clerk. Saturday, Nov. 28th, 1795.

Though a *levari facias de bonis ecclesiasticis* is a continuing execution, and a levy may be made under it from time to time after it is returnable till the sum indorsed be satisfied, yet if it be actually returned, the authority of the Bishop is at an end. Therefore where such a writ remained in the hands of the Bishop long after it was returnable, who sequestered the profits of a vicarage accruing as well before the return day as after, and being ruled to return the writ, returned only the amount of the sum levied up to the return day, the court would not order the writ and return to be taken off the file, but would only permit the return to be amended by inserting the sum levied, up to the time when the writ was actually returned (*a*). [The proper way to proceed is to rule the Bishop from time to time to know what he has levied.]

In August 1794, a *levari facias de bonis ecclesiasticis* issued to the Bishop of Winchester, at the suit of the Plaintiffs, against the Defendant, returnable in fifteen days of St. Martin, and indorsed to levy 125*l.* (being the arrears of two annuities, to secure which judgment had been entered on a bond), on which a sequestration issued. On the 25th of April following, the Bishop was called upon by rule of Court to return the writ, which he accordingly did, stating "that the Defendant was a beneficed clerk and vicar of the parish and parish church of Milford in his diocese, that he had caused to be levied of the fruits, tithes, &c., which had arisen or accrued thereupon since the delivery of the writ, the sum of 14*l.* 18*s.* 10½*d.*, of which he had retained 4*l.* 19*s.* 3¾*d.* for tenths and land-tax, and 3*l.* 6*s.* for the costs of the levy, and had caused the residue to be paid to the Plaintiff's attorney in satisfaction of their debt and damages: and certified that since the delivery of the writ to him there had not been, arisen, or accrued any further fruits, tithes, profits, &c., from the said parish or parish church of Milford, nor had the Defendant any other ecclesiastical goods within his diocese, whereof he could cause the residue of the said debt and damages, or any part thereof, to be levied."

Between the 25th of November the return day of the writ, and the 25th of April, the sequestrator had received a much larger sum from the profits of the living, which after certain deductions remained in his hands, and which, together with the sum before levied, amounted nearly to 125*l.* the sum indorsed, and several other writs of *levari facias* had been delivered to the Bishop at the suit of other Plaintiffs against the Defendant, some before the return day of the first writ, and some after.

A rule having been granted to shew cause why the Bishop and his sequestrator should not proceed to levy the Plaintiff's debt out of the growing profits of the vicarage, and why the writ and return should not be taken off the file, and the writ be [583] amended by indorsing on it to be levied, the sum of money then actually due to the Plaintiffs,

Adair, Le Blanc, and Cockell, Serjts., shewed cause, on the part of the Bishop and the other creditors, contending, that after the writ was actually returned, the Bishop's authority to levy, and consequently that of the sequestrator, was at an end, and therefore that as to the growing profits of the vicarage, the Plaintiffs had lost their priority, and must now be postponed to the other creditors who had sued out their writs.

Bond, Serjt., in support of the rule. The writ of *levari facias* is a continuing execution, and the officer of the Bishop must take care that all the profits of the living sequestered be applied to satisfy the sum due to the Plaintiff in the writ first delivered to him, in preference to any other. If the sequestration issues, and is published before the writ is returnable, it is sufficient, and the Plaintiff is intitled to the growing profits

(a) [Vide *Arbuckle v. Cowtan*, 3 Bos. & Pul. 327.]

from time to time, though long after it is returnable, until he is satisfied. *Legassiecke, Executor of Adams, v. The Bishop of Exeter*, 1 Crompt. Pract. 359 (a).

Per Cur. This is certainly in its nature a continuing execution (b), unless the Plaintiff takes away the authority under which the sequestration issues, by calling generally for a return of the writ. The mistake here was in calling for that return. The proper way would have been to have ruled the Bishop from time to time, to know what he had levied. All that can be done now is, to amend the return, by inserting the amount of the whole sum received under the sequestration, up to the 25th April.

The rule was made absolute, not to take the writ off the file, but for the Bishop to amend the return by stating the amount of the sum levied up to the time when the return was actually made.

Le Blanc referred to Rast. Entr. 37, for the form of a *levari facias de bonis ecclesiasticis* to levy the arrears of an annuity on a writ of annuity, and the Bishop's return.

[584] DILLON *against* LEMAN AND ANOTHER. Saturday, Nov. 28th, 1795.

A. seised in fee of lands dies leaving B. his heir, a feme-covert. Upon his death a stranger makes a tortious entry on the lands, continues in possession, and levies a fine sur cognizance de droit come ceo with proclamations. B. afterwards dies under coverture, no entry having been made, on her behalf to avoid the fine, leaving C. her heir of the age of twenty-one, of sound mind, out of prison, and within the realm. The fine is a bar to the right of C., unless he make his claim within five years after the death of B.

This case, which was sent from the Court of Chancery for the opinion of this court, stated that William Naunton, being in his lifetime seised in fee-simple of the lands in question in the said cause, died so seised thereof in the month of August 1758, leaving Mary Dillon mother of the said Plaintiff John Talbot Dillon, then the wife of Francis Dillon, his heir. Upon the death of the said William Naunton, William Lemman entered into the said lands, and became tortiously seised thereof, and being so seised, in Hilary Term 1765 levied a fine sur cognizance de droit come ceo of the said lands, whereupon proclamations were duly had, according to the form of the statute in such case provided, the said Mary Dillon being under coverture with the said Francis Dillon, at the time of the levying such fine. On the 20th of February 1765, the said Mary Dillon died under coverture of the said Francis Dillon, as aforesaid, leaving the said John Talbot Dillon then of the age of twenty-one years, of sound mind, out of prison, and within this realm, her son and heir. No entry or claim was made on or to the said lands by or on behalf of the said Francis Dillon or Mary Dillon in her lifetime, nor at any time afterwards by the said Francis Dillon, nor by the said John Talbot Dillon until the year 1787, when he made an entry to avoid the said fine. And the question was, Whether on the above case, the said John Talbot Dillon was barred by the said fine from recovering the said lands?

This was first argued in Hilary Term 34 Geo. 3, by Le Blanc, Serjt., on the negative, and Lawrence, Serjt. on the affirmative, and a second time in Trinity Term following by Bond, Serjt., on the negative, and Adair, Serjt., on the affirmative.

On the negative side of the question, the arguments were in substance the following. The Plaintiff John Talbot Dillon was not barred by the fine, being the heir of Mary

(a) See also 3 Burn. Eccl. Law, 322, 8vo.

(b) If the writ was not returned, the execution would undoubtedly continue until the sum indorsed was satisfied. But Qu. whether the Plaintiff could, after that sum was levied, preserve his priority, with regard to the future arrears of the annuity, over another judgment creditor, who might have delivered another writ to the bishop, in the interval after the sum indorsed on the former writ was levied, and before the time of the next periodical payment arrived? The equitable interposition of the Court seems hitherto to have extended no further, in cases of judgments entered on bonds to secure annuities, than to permit the judgment to stand as a security for the future payments, and fresh executions to be taken out as those payments became due, without a suggestion or *scire facias* under the stat. 8 & 9 W. 3, c. 11. *Howell v. Hanforth*, 2 Black. 843, 1016. *Ogilvie v. Foley*, ib. 1111. *Scott v. Whalley*, ante, vol. i. p. 297.

Dillon, who was under the disability of coverture at the time when it was levied, and died under that disability. This is not a case within the stat. 4 Hen. 7, c. 24. Persons under disabilities are by express words excepted out of the body of the statute, which works the bar, and are not brought within it by any subsequent clause, except in case of the removal of the disability: the case of dying under a disability is not provided for. The statute enacts, that a fine with proclamations duly made shall "conclude as well privies as strangers to the same, except women covert (other than be parties to the said fine) and every person then being within the age of twenty-one years in prison, or out of this realm, or not of whole mind at the time of the said fine levied, not parties to such fine." Then follow the savings, which are, 1st, of rights, &c. which exist at the time of the fine engrossed to all persons not parties to the fine, if they pursue their claim within five years: 2d, of those which may accrue after the fine engrossed and proclamations made, by virtue of any gift, &c. made before the fine levied, with the same limitation as to the five years: 3d, of those which accrue to persons under disabilities at the time of their accruing, provided they pursue their rights within five years after their disabilities are removed. The fourth saving ordains, that all persons not parties to the fine, who are under the disabilities specified at the time of the fine engrossed and proclamations made, and before excepted in the act, having right, title or cause of action to the lands, &c. and their heirs shall take their said actions or lawful entry within five years after the disabilities are removed: and that if they do not take their action and entry as is aforesaid, they and their heirs shall be for ever concluded in the same manner as parties and privies. Now it is obvious that the word heirs in this clause means the heirs of persons who die after the removal of their disabilities, when the five years have begun to run, and not the heirs of those who die under disabilities, as in the present case. It is plain therefore that Mary Dillon, the mother of the Plaintiff, who was a feme-covert at the time of the fine levied, and neither a party nor privy to it, was within the exception of the statute, and having died during coverture, that she was never in a situation capable of being brought within the operation of the statute. A condition subsequent becoming impossible by the act of God, is void. Co. Litt. 260 a. And this omission in the statute to limit the heir of a person dying under a disability to any period in which he shall bring his action, must be taken to have been designed by the legislature. That statute was the result of long experience. The stat. 18 Ed. 1, st. 4, declares that by the common law a fine concluded not only parties and privies, but all other persons being of full age, out of prison, of good memory, and within the four seas, if they made not their claim within a year and a day, leaving those who were under the disabilities alluded to an [586] indefinite time to make their claim in, after the disabilities were removed. The 34 Ed. 3, c. 16, simply took away the doctrine of non-claim, which was restored by 1 Ric. 3, c. 7, and that statute was followed by 4 Hen. 7, c. 14, which at length was passed to settle the law upon the subject. In other statutes of limitation, the death of the disabled person is mentioned. Thus by the 21 Jac. 1, c. 16, s. 1, the time for bringing a formedon is limited to twenty years after the title accrues, with a saving in the second section of the rights of persons under the age of twenty-one, feme-coverts, insane, imprisoned, or beyond seas, provided they or their heirs shall within ten years after their full age, discoverture, coming of sound mind, enlargement out of prison, or coming within this realm, or death, take benefit of and set forth the same. So also by 10 & 11 W. 3, c. 14, the time for bringing a writ of error to reverse a fine or recovery, is confined to twenty years, with a similar provision that a person under the disabilities mentioned, shall bring his writ of error within five years after the removal of those disabilities, and his heirs, executors, and administrators within the same period after his death. But independent of these arguments from comparison and analogy, the authority of Lord Coke commenting on the stat. 4 Hen. 7, is positive, that the heir of a person whose disability is not removed, may enforce his claim at any time, notwithstanding the fine; for it is laid down in *Cotton's case*, *Sunie v. Howes*, 2 Inst. 519. "For that persons out of the realm at the time of the fine levied, amongst others, having a present right, are excepted out of the body of the act which worketh the bar; therefore he that is beyond sea at the time of the fine levied, and never returns, is within the exception out of the body of the act, and he and his heirs may enter and take his action at any time; but in case he doth return, he and his heirs must enter and take his action within five years after his return: and so it is of an infant being party to the fine and having a present

right, if he dieth during his infancy, he or his heirs may enter or take his action at any time : and so it is of a person that is non compos mentis by the act of God, if he die while he is non compos mentis ; or a man in prison, which is by act in law, if he die in prison ; or a feme-covert, which is by her own act, if she die while she is covert, being no parties to the fine." And the same doctrine is to be found in *Beverley's case*, 4 Co. 125 b. Jenk. 4 Cent. 192. 13 Vin. Abr. 286. If the opinion of Anderson, as it appears in the report of *Cotton's case*, 1 Leon. 211, be cited [587] on the other side, it is to be observed that it was merely thrown out by the way, and not called for by the facts of the case then before the Court.

On the part of the Defendants the result of the arguments was, that as a fine was an assurance to secure the title and peaceable possession of lands to the owner, and as the object of the stat. 4 Hen. 7, was to confirm the revival of the doctrine of non-claim, that statute ought to be construed according to the intention of the makers of it, which evidently was, that a fine should be a complete bar to all rights, which were not pursued within five years after they had accrued. That the word heirs in the sixth section, must be taken to include heirs of persons dying under disabilities according to the true scope and meaning of the statute, and that this interpretation was agreeable to the rules and principles of construction laid down by Brooke, J., Plowd. 178, *Hill v. Grange* ; Plowd. 366, *Stowel v. Lord Zouch* ; Cro. Car. 200, *Hulm v. Heylock* ; 1 Leon. 211, *Cotton's case*. That if the contrary construction were to prevail, the heir must have an indefinite time to claim in, and consequently the security of property would be materially affected.

On this day, the Lord Ch. J. declared shortly the opinion of the Court, that the exception in the first branch of the statute 4 Hen. 7, and the proviso at the end of it were to be taken together ; that being so taken, they did not amount so much to an exception as a saving, the true meaning of which was, that the rights of those persons who were under disabilities and of their heirs, were saved as long as the disabilities continued, and five years after, but no longer ; therefore that the heir not being himself disabled, was barred unless he pursued his right within the five years after it accrued by the death of his ancestor dying under a disability ; and consequently, that the Plaintiff in this case was prevented by the fine from recovering the lands in question (see *Cruise on Fines*, 231, 2d edit.). And to this effect was the certificate sent to the Court of Chancery.

DENNIE against ELLIOTT, HILL AND ANOTHER. Saturday, Nov. 28th, 1795.

The Court will allow the costs recovered by A. against B. in one action, to be set off and deducted from the damages and costs recovered by B. against A., C., and E. in another action, notwithstanding the attorney of B. swears that he believes B. to be insolvent, and that there is no fund out of which the attorney's costs can be paid, but the damages and costs so recovered by B.(a).

In this case a rule was granted to shew cause why execution for the damages and costs recovered by the Plaintiff in this cause, amounting to the sum of 52l., should not be stayed, the Defendant [588] Hill undertaking to stay all proceedings on the judgment by him obtained in another action brought by the Plaintiff, wherein Hill had his costs taxed at the sum of 43l. 19s. 3d. and also undertaking to pay to the Plaintiff or his attorney the sum of 8l. 9d., being the balance due to the Plaintiff after setting off the costs so due to the Defendant Hill from the Plaintiff, on an affidavit by Hill, that the Plaintiff appeared to be insolvent, that his goods were all distrained for rent, and that he himself was not to be met with.

In opposition to the rule, Le Blanc, Serjt., produced an affidavit of the Plaintiff, stating that Hill had told him that Elliott, one of the other Defendants, was to indemnify Hill, as having acted under his orders, and that the Plaintiff had offered not to take out execution against Hill. The attorney for the Plaintiff also made an affidavit that he had no security for his costs, which the Plaintiff was unable to pay, and which he verily believed he should lose, if the set-off were allowed, as he had no chance of recovering them, but out of the damages and costs to be received under the judgment for the Plaintiff.

(a) [Vide ante, vol. i. p. 23, n. (b).]

Le Blanc also relied on the practice of the Court of King's Bench, and cited *Mitchell v. Oldfield*, 4 Term Rep. B. R. 123, and *Randle v. Fuller*, 6 Term Rep. B. R. 456.

In support of the rule Bond, Serjt., insisted on the known practice in this Court, that the attorney's lien for his costs was subject to the equitable claims of the parties in the cause, which he said was settled in the cases of *Schoole v. Noble*, ante, vol. i. 23, *Nunes v. Modigliani*, 217, *O'Connor v. Murphy*, 657, and *Vaughan v. Davies*, vol. 2, 440.

The Court held the practice here to be clearly established by those cases, whatever might be the rule in the King's Bench, and therefore that it was not now to be disputed.

Rule absolute.

End of Michaelmas Term.

[589] CASES ARGUED AND DETERMINED IN THE COURTS OF COMMON PLEAS AND EXCHEQUER CHAMBER, IN HILARY TERM, IN THE THIRTY-SIXTH YEAR OF THE REIGN OF GEORGE III.

FORD, ONE, &C. against MAXWELL, ONE, &C.(a)¹. Monday, Feb. 1st, 1796.

To maintain an action by one attorney against another, for business done by the Plaintiff for the Defendant before the Defendant became an attorney, it is not necessary for the Plaintiff to leave his bill signed with the Defendant, according to the directions of 2 Geo. 2, c. 23, s. 23, the 12 Geo. 2, c. 13, applying to the case of both parties being attorneys when the action is brought.

In this action, which was brought by one attorney against another for his fees, the Plaintiff recovered a verdict, though it was objected at the trial that he had not left his bill signed by him with the Defendant, pursuant to the stat. 2 Geo. 2, c. 23, s. 23, which, it was contended, he ought to have done, notwithstanding the Defendant was himself an attorney at the time of the action brought, all the business having been done by the Plaintiff before the Defendant was admitted as an attorney, and the stat. 12 Geo. 2, c. 13, s. 6, extending, as it was said, only to the case of both parties being attorneys or solicitors at the time when the debt was contracted; the words of that section being, that the 2 Geo. 2, c. 23, "shall not extend to any bill of fees, charges and disbursements, that are now, or shall hereafter become due from any attorney or solicitor to any other attorney or solicitor, &c." And now Cockell, Serjt., moved for a new trial, repeating the objection which had been over-ruled at the trial.

But the Court held, that though the literal construction of the stat. 12 Geo. 2, c. 13, might be as the Defendant alleged, yet the [590] object and spirit of it was, that the restrictions of the 2 Geo. 2, c. 23, should not be applied where both parties were attorneys when the action was brought, for in such case the Defendant must be taken to be fully competent to understand the nature of the charges in the bill, and to resist them if exorbitant or improper.

Rule refused.

BENJAMIN against PORTEUS. Monday, Feb. 1st, 1796.

[Referred to, *Pott v. Eylon*, 1846, 3 C. B. 40. Distinguished, *Ex parte White*, 1871, L. R. 6 Ch. 404.]

A person who is employed to sell goods, and is to have for himself whatever money he can procure for them beyond a stated sum, is a competent witness to prove the contract between the seller and the buyer (a)².

In this action for goods bargained and sold, brought to recover the price of a quantity of indigo, which was sold for three shillings a pound weight, one Bennett, the broker who was employed by the Plaintiff was called as a witness to prove the contract, and

(a)¹ [1 Esp. N. P. C. 420, S. C. Tidd, 333, 8th ed.]

(a)² [See the cases cited in note (a), ante, p. 225.]

being examined on the voir dire, stated that by his agreement with the Plaintiff he was to have for his own profit whatever sum he could get for the indigo above half-a-crown for the pound, which price the Plaintiff had fixed for himself, but not an allowance of so much per cent. on the sale by way of commission in the usual way. The Lord Chief Justice at the trial thought this was an objection to the competence of the witness on the score of interest, and that as he did not come within the description of a broker or factor, the exception to the general rule made in favour of their testimony being admissible to prove contracts made by them was not applicable to him, and as he refused to release, the Plaintiff was in consequence nonsuited.

Cockell, Serjt., now shewed cause against a new trial. The evidence of Bennett was properly rejected, as he was to have a profit on the sale, not as a broker, but as a partner: for whatever sum the goods might be sold above half-a-crown for a pound, he was to have the whole, independent of his employer. He had therefore a direct interest in establishing the contract, and is not included in any of the excepted cases of interested witnesses. In *Dixon v. Cooper*, 3 Wils. 40, the factor was merely an agent for both parties, and was to receive a certain sum at whatever price the goods might sell; but here the witness had a separate interest of his own, and was only agent for the Plaintiff, and that no farther than to a given extent. In *Baker v. Bent*, 3 Term Rep. B. R. 27, the broker discharged his duty as agent for both parties before he underwrote the policy, which, it was properly holden in that case, should not [591] deprive the parties of the benefit of his testimony. The true line is there marked, which is whether the witness is to gain or lose by the event of the cause.

Adair, Serjt., for the rule. The witness was nothing like a partner, as there was no communion of profit and loss between him and his employer; but he was most indisputably a broker, who may be defined to be a person who makes a bargain between two or more other persons. There is no other definition of the term broker, unless it be where the law appoints brokers for special purposes. Now every broker and factor is authorised to establish the contract he makes, as well as to increase the price, for the value of his commission will be increased in proportion. But exceptions to the rule which excludes the testimony of interested witnesses, are admitted in the case of a factor or broker; the broker therefore in the present case was clearly intitled to the benefit of the exception. In a question of competence, the quantity of interest makes no difference. Therefore as a direct interest is no objection to the competence of a factor or broker, the quantity of it goes to his credit with the jury. In *Baker v. Bent* the broker who had underwritten the policy, was directly interested in the event of the cause; it was a consolidated action, and he was also a party to a bill in equity, and so eventually liable to the costs of that suit, but yet he was a competent witness.

LORD CHIEF JUSTICE EYRE. The inclination of my opinion is, that this evidence ought to have been rejected. The principle is admitted, that where a witness has a direct interest in the event of a cause, his testimony cannot be received. But from necessity an exception has been introduced in the case of factors and brokers, because from the nature of the transactions in which they are engaged, the contracts they make for other persons cannot be proved without them. It is true indeed, there is no magic in the term factor or broker, and that every man who makes a contract for another comes, in some sort, within the description. But here it was not simply a contract that Bennett made for another, but for another and himself. He was to have all the profit which could be made upon the sale of the indigo, above 2s. 6d. on every pound weight, the stated sum that was to be paid to his principal. His profit therefore was not to arise from the profit of the principal, but was collateral to and beyond it. He cannot wrong the principal, but he may wrong the person with whom he deals, by screwing him up beyond the real value of the goods, for the sake of his own [592] profit, and therefore he has a separate interest to establish a particular contract which he comes to prove. It is true that an ordinary broker has an interest, but it is not such as to outweigh the necessity of his testimony being received. If he is to have 5l. per cent. commission on the sale, where he gets one shilling for himself he gets nineteen for his employer, and his gain arises out of the gain of his employer. But here the agent takes a profit in fact as a principal, with only 2s. 6d. for his employer. A regular broker must take care of his employer's interest as well as his own, and has not such a temptation to raise the price of the commodity to the buyer. Besides, I think the employing persons to transact business upon such terms as these is neither necessary nor convenient, but on the contrary is extremely mischievous in

commerce, and not to be encouraged. Brokers are men acting in a known established character, of known description and responsibility, and therefore more fit to be trusted and employed in commercial transactions.

HEATH, J. With great respect for my Lord Chief Justice, I think this witness was admissible. I cannot distinguish him from a broker: he must, I think, be considered as a broker, and not as a principal; he is only paid for his trouble in a particular manner. The reason for admitting him is the necessity of the thing, for it is often for the benefit of trade that bargains of this kind shall be kept secret. It appears to me to be equally the interest of a broker, who is to have a per centage to screw up the price, as it was of this person. It is indeed his duty to screw up the buyer; he must tell the whole truth respecting the commodity, but having done that, it is his duty to ask the highest possible price. I cannot consider a broker as the agent for both parties; he appears to me to be solely the agent of the vendor.

ROOKE, J. I agree with my Brother Heath in thinking this evidence ought to have been admitted. I see no difference in point of interest, between a person who sells upon commission, and one who is to have a share of the profit (a)¹: nor can I make a distinction between this witness and a common broker. He is an agent who makes a bargain between two others, and whose evidence is admissible from necessity, which is a necessity created by the parties themselves.

LORD CHIEF JUSTICE. My Brothers have stated it as a principle, upon which they rest their opinions, that there is no difference between an agent taking to himself a part of the price [593] for which he bargains, and taking a commission from his employer upon that price. If this principle can be supported, I agree that the evidence ought to have been received. Let there be a new trial.

Rule absolute.

MICHEL against PARESKI. Thursday, Feb. 4th, 1796.

After the Defendant has agreed to take short notice of trial, the Court will not compel the Plaintiff a foreigner and resident abroad, to give security for costs (a)².

Adair, Serjt., shewed cause against a rule calling upon the Plaintiff, who was a foreigner and resident at Dantzick, to give security for costs, in an action on a policy of insurance. Though he admitted the general rule that a foreigner so situated was compellable to give such security, yet in the present instance he contended that the Plaintiff was exempted from the rule, as the Defendant had obtained time to plead, and had agreed to take short notice of trial, for the last sittings in the term: the application therefore came too late, as it must evidently delay the Plaintiff.

The Court were very clearly of this opinion, saying that as the Defendant had agreed to take short notice of trial, he had waived his opportunity of making this application, which must necessarily delay the Plaintiff.

Rule discharged.

LARDNER against BASSAGE. Thursday, Feb. 4th, 1796.

Bail must render the principal before the rising of the Court, in order to discharge themselves from an action of debt on the recognizance (a)³.

Cockell, Serjt., shewed cause against a rule to stay proceedings in an action of debt against bail on their recognizance, on the ground that they had not rendered the principal [which was done at a judge's chambers] till after the rising of the Court on the quarto die post of the return of the writ. This he contended was irregular, it being the settled practice of the Court to require the render to be made *sedente curiâ*. Barnes, 82. 1 Wils. 270. Impey Pract. 3d Edit. 502, that probably the reason of this regulation was, that the principal was originally rendered in court, and when from the increase of business, the practice of rendering at a Judge's chambers was introduced, it was thought necessary to limit the same time for the render to be made in, as the bail would have been confined to if it had been made in court,

(a)¹ [Sed vide ante, 225, n. (1).]

(a)² [Vide ante, p. 118, note (a).]

(a)³ [Tidd's Prac. 287, 8th edit.]

that no advantage might be gained by merely changing the place where it was made: and he also cited *Fletcher v. Aingell*, ante, 117, and the note there annexed.

[594] Clayton, Serjt., in support of the rule, argued that according to the case in *Barnes* it was not necessary in debt on the recognizance that the Court should be sitting at the time of the render, though it was in a scire facias, and that this point was not before the Court in *Fletcher v. Aingell*; that the reason of the thing was in his favour, there being no reason why a render, if within the number of days required, should not be as well after as before the rising of the Court; and that since the render had ceased to be in court, cessante ratione, cessat et ipsa lex.

Upon a reference to the officers, they all agreed that the practice was as stated in the note in *Fletcher v. Aingell*, and therefore the

Rule was discharged.

The writ was returnable on the 27th of January, and the render on the 30th, which was clearly holden to be right, both days being inclusive.

OWEN against SMYTH. Friday, Feb. 5th, 1796.

[Considered, *Lucas v. Brandreth*, 1860, 28 Beav. 280.]

A limitation in a deed, to the use of A. for life, with remainder to the first son of the body of A. lawfully issuing, and for default of such issue, to the second, third, and other sons of A. and of the several heirs male of the body and bodies of all and every such son and sons respectively issuing, gives an estate in tail male to the first son of A.(a).

This case, which was sent by the Lord Chancellor for the opinion of this Court, stated, that in the year 1769, George Smyth the elder had four children, viz. George Smyth his eldest son then married, Nicholas his second son then married, John his third son then unmarried, and Sally his only daughter then the wife of Samuel Sandys.

That by indenture of feoffment of the 18th of July 1769, certain lands were conveyed by George Smyth the father and George Smyth the son to feoffees, to hold to them and their heirs upon such trusts as the said George Smyth the father and George Smyth the son should appoint, and in default of such appointment as to part of the premises, to the use of George Smyth the father for life, and as to the residue, to the use of the trustees for a term of 60 years, and after the death of George Smyth the father and subject to the term, as to all the lands to use of George Smyth the son for life, remainder to trustees to preserve contingent remainders, remainder to other trustees for a term of 500 years, and subject to that term to the use of the first son of the body of the said George Smyth the son, on the body of any wife which he should thereafter marry, to be begotten, and of the heirs male of the body of such son lawfully issuing, and for default of such issue, to the use of the 2d, 3d, 4th, 5th, [595] 6th, 7th, 8th, 9th, 10th, and all and every other the son and sons of the body of the same George Smyth, on the body of such wife to be begotten, and of the several heirs male of the body or bodies of all and every such son and sons respectively issuing, &c., and for default of such issue, to the use of trustees for a term of 600 years, and subject to that term, to the use of Nicholas Smyth the second son of George Smyth the father for life, remainder to trustees to preserve contingent remainders, remainder to trustees for a term of 700 years, and subject thereto to the use and behoof of the first son of the body of Nicholas Smyth lawfully issuing, and for default of such issue, to the use and behoof of the 2d, 3d, 4th, 5th, 6th, 7th, 8th, 9th, 10th, and of all and every other son and sons of Nicholas Smyth, lawfully issuing, whether born in his lifetime, or after his death, severally and successively in remainder one after another, as they and every of them shall happen to be in priority of birth, and seniority of age, and of the several heirs male of the body and bodies of all and every such son and sons respectively issuing, so that the elder of such sons and the heirs male of his and their bodies shall be always preferred, and take before the younger of the same sons, and the heirs male of his and their body and bodies lawfully issuing, and for default of such issue to trustees for a term of 800 years, and subject thereto

(a) [Vide *Galley v. Barrington*, 2 Bing. 387.]

to John Smyth the third son for life, and to his first and other sons in tail male, remainder to the daughter Sally Sandys for life, and to her first and other sons in tail, remainder to the right heirs of the survivor of George Smyth the father and George Smyth the son.

There were also jointuring powers given to George Nicholas, and John, the sons of George Smyth the father, the words of the power, as it related to John Smyth, being, "It shall and may be lawful to and for the said John Smyth, in case he shall survive both the said George Smyth the son, and the said Nicholas Smyth, and they both shall depart this life without leaving any issue male of any of their bodies lawfully begotten, by any deed or deeds, &c."

The trusts of the term of 800 years were, if the said George Smyth the son should depart this life without leaving any issue of his body lawfully begotten as aforesaid, and the said Nicholas Smyth shall happen to have no issue male of his body lawfully begotten, born in his lifetime or after his decease, or there being such issue male, all of them should happen to die without issue male of any of their bodies, before any of them should attain the age of twenty-one years, and there should be issue one or more daughter or daughters of the body of the said Nicholas Smyth [596] lawfully issuing, then the trustees of the term, after failure of issue male of Nicholas Smyth, and after his decease, should raise portions, &c.

By the same deed, a rectory holden for lives of the Dean of Lincoln was limited to trustees, to permit and suffer George Smyth the father to take the rents during his life, and after his decease to permit George Smyth the son to take the profits during his life, and after the decease of the survivor of the said George Smyth the father, and George Smyth the son, in trust for the issue male of the body of the said George Smyth the son. "And in case there should be no such son or sons, or there being such, he and they shall die before any of them shall attain the age of twenty-one years, and without issue male, then in trust to permit and suffer the said Nicholas Smyth and his assigns to receive and take the rents, issues and profits of the same premises for and during his natural life, in case the same lease shall so long continue, to and for his and their own proper use and benefit, and from and immediately after the death of the said Nicholas Smyth, then in trust for the eldest or only son for the time being of the body of the said Nicholas Smyth lawfully begotten, until such only son or some one such son shall first attain the age of twenty-one years, or die leaving issue male of his body, and then in trust for such son so attaining twenty-one or dying leaving issue male of his body, and for such issue male, &c. and a lease of tithes from the Dean and Chapter of Christ Church Oxford, was also limited in the same manner."

George Smyth the father and George Smyth the son both died, the latter without issue, and they made no joint appointment.

Nicholas Smyth the second son died, leaving the Plaintiff(a) his only son and heir at law. And the question for the opinion of the Court was,

What estate the Plaintiff took in the premises in question?

On the part of the Plaintiff Williams, Serjt., argued as follows. It is clear upon the face of the deed, that the intention of the parties to it was that the first son of Nicholas Smyth should take an estate-tail. This is evident from the jointuring power given to John Smyth the next brother to Nicholas, which is that "it shall be lawful to and for the said John Smyth, in case he shall survive both the said George Smyth the son, and the said Nicholas Smyth, and they both shall depart this life without leaving any issue male of their bodies lawfully begotten, [597] by any deed or deeds, &c." So also the trusts of the term of 800 years are to take effect for the raising of portions for daughters, "if the said George Smyth the son should depart this life, without leaving any issue of his body lawfully begotten, and the said Nicholas Smyth shall happen to have no issue male of his body, lawfully begotten, born in the lifetime or after his decease, or there being such issue male, all of them should happen to die without issue male of any of their bodies, before any of them should attain the age of twenty-one, &c." Thus likewise the leases of the rectory and the tithes are limited to trustees, in trust for "Nicholas Smyth for his life, and after his death, in trust for the eldest or only son for the time being, of the body of the said Nicholas Smyth lawfully begotten, until such only son or some one such son shall first attain the

(a) Who had taken the name of Owen.

age of twenty-one years, or die leaving issue male of his body, and then in trust for such son so attaining twenty-one, or dying leaving issue male of his body, and for such issue male," &c.

The intention then of the parties appearing upon the deed itself, it remains to be considered, whether the words used in former part of the deed in the limitation to the first son of the body of Nicholas Smyth lawfully issuing are not proper to give an estate-tail? Now there are words of inheritance fully sufficient for that purpose; it is not necessary to add any others, but by an easy transposition, the limitation to the several heirs male of the body and bodies of all and every such son and sons respectively issuing, may be applied to the first son of Nicholas Smyth, as well as to any other. The only difficulty there is, arises from the words "for default of such issue," which follow the limitation to the first son of the body of Nicholas Smyth lawfully issuing. But those words may be construed to mean the want of issue of the first son of the body of Nicholas Smyth, and then such first son would take an estate-tail: for the same construction was put on the words "for want of such issue," following a limitation to every son and sons of A. which should be begotten on the body of his wife, in *Evans v. Astley*, 3 Burr. 1570: and though that was a case on the construction of a will, yet where the intent of the parties to a deed to uses can be clearly collected from the deed itself, the deed shall be so construed as to effectuate that intent according to the doctrine laid down, *Lisle v. Gray*, 2 Lev. 225. *Leigh v. Bruce*, Carth. 343. *Doe, on dem. of Watt, v. Wainewright*, 5 Term Rep. B. R. 427. And accordingly in *Doe, on dem. of Willis, v. Martin*, 4 Term Rep. B. R. 39, where the intention was plain, and the limitation was, in default of an appointment, "to the use of all and every the child [598] or children equally share and share alike, to hold the same as tenants in common and not as joint-tenants, and if but one child, then to such only child, his or her heirs or assigns for ever," the Court supplied the words "their heirs," from the words "his or her heirs," and annexed them to the limitation, to all and every the children as tenants in common," so as to give all the children vested remainders in fee.

Bond, Serjt., contra. No latitude of construction, nor any conjecture as to the intention of the parties can be allowed in a voluntary feoffment, beyond the precise meaning which the particular words used in the limitation import. Now as the limitation in the deed is to the first son of the body of Nicholas Smyth lawfully issuing, without any other words superadded, such first son could only take an estate for life, notwithstanding the intent might have been to have given him an estate-tail: this is a complete sentence, and then the deed goes on, "and for default of such issue, to the use and behoof of the second, third and other sons in succession, and of the several heirs male of the body and bodies of all and every such son and sons respectively issuing, and the heirs male of his and their bodies respectively issuing." Now the words "for default of such issue" begin a new and distinct sentence; and though they appear to mark the event in which the limitation to the other sons successively in tail male is to take effect, for the words "such son and sons" clearly relate to the second, third and other succeeding sons, yet whatever implication may be made in a will, in favour of the intention of the testator, as in *Evans v. Astley*, the Court will not give an estate-tail by implication in a deed. In *Doe v. Martin* the construction was made without any violence, merely by pointing the sentence, and coupling the two branches of it together, and referring the word "heirs" to both. But the deed in that case was totally different from the present. As to the argument attempted to be drawn from the limitation of the leasehold property in the other parts of the deed, the true conclusion from thence is, that as the parties intended by the terms there used, that the first son of Nicholas Smyth should take something more than an estate for life in that species of property, so where other terms are used in the former part of the deed, they intended that he should have but an estate for life in the other property.

LORD CH. J. EYRE. I think this is one of the clearest cases I ever saw: there is demonstration plain on the face of the feoffment, that it was the intent of the parties that an estate-tail [599] should be limited to the eldest son of Nicholas Smyth. The argument on the part of the Defendant has occasionally shifted, sometimes admitting the intent, but contending that the words used were not sufficient to effectuate that intent, which I thought was the true way of considering the question, and sometimes denying the intent itself. But no man can read this deed without seeing the intent I have mentioned, though by some strange blunder the usual words

are omitted. If indeed it had stopped at the limitation to the first son of Nicholas, I should have agreed with the counsel for the Defendant; for it certainly does not follow, that because one can see an intent on the face of a deed, therefore that the words used are sufficient to effectuate that intent. But the intent here does not rest on the first expressions, but the other parts of the deed respecting the trusts and other limitations, which were ably discussed by my Brother Williams, refer to an estate-tail in the first son of Nicholas Smyth. The intent then being plain, the question is, whether we can find sufficient words? I, for one, adhere to the rule which forbids the raising estates by implication in deeds, and think that we ought not to grant the same indulgence to inaccuracy in the construction of deeds as we do in wills. But here it is not necessary to resort to implication, or to inquire whether the same latitude is to be allowed to conveyances to uses as to wills. For here there are strict technical words capable of being applied to the limitation to the first son of the body of Nicholas Smyth, so as to give him an estate-tail. The limitation is to the first son, and for default of such issue the whole line of sons is taken in without any particular limitation to them and the heirs of their bodies nominatim, but it is "to the several heirs male of the body and bodies of all and every such son and sons respectively issuing." Fortunately it is not said "to the heirs male of the body and bodies of such second, third and other sons, &c.;" if it had been so, perhaps it could not have been got over. But the limitation is to the heirs male of the body and bodies of "every such son." Now the case of *Doe v. Martin* is an authority to warrant the application of those words to the limitation to the first son of Nicholas Smyth, as well as to the others. But this case is stronger than *Doe v. Martin*, for it does not even require the assistance of punctuation. Upon the whole therefore it is clear that the Plaintiff took an estate-tail under the limitation in the deed to the first son of the body of Nicholas Smyth.

HEATH J., of the same opinion.

ROOKE, J., of the same opinion.

[600] The certificate accordingly stated, that the Plaintiff took an estate in tail male in the lands in question.

LA GRUE, QUI TAM, against PENNY. Saturday, Feb. 6th, 1796.

A Plaintiff may sue in his own name, without an attorney, and subscribe the process with his name as attorney for the Plaintiff, in any action.

Marshall, Serjt., obtained a rule to shew cause why the proceedings in this action should not be set aside, on the ground that the Plaintiff, who was not an attorney, sued in his own right on a penal statute, without any attorney, and yet subscribed the notice upon the process, "John La Grue, attorney for the Plaintiff."

Le Blanc shewed cause, observing that the parties were obliged to appear in person at common law, and that it was not till the stat. West. 2, c. 10, was passed, that liberty was given to sue or defend by attorney (a). But still it continued optional either to sue in person or by attorney.

Marshall in support of the rule, insisted that whatever might have been the antient practice, the usage of many ages and the several statutes imposing duties on attorneys, warrants to sue, and the like, had rendered that which was permitted only by the stat. West. 2, now indispensable: that it would be of mischievous consequence, if persons such as the Plaintiff, who was described in the affidavit to be in low and indigent circumstances, were permitted to practice and bring actions on penal statutes in their own names, on whom notices, &c. could not be served, without an attorney, who being an officer of the Court, was liable to be punished for any misconduct. Besides, the peril of costs was a restraint on bringing frivolous actions; but if the Plaintiff should not have an attorney of his own to pay, it would lessen that restraint very considerably. But

The Court clearly held, that the right of parties to sue or defend in their own

(a) At common law, the king, by virtue of his prerogative, might empower either the Plaintiff or Defendant to appoint an attorney, by the writ of *dedimus potestatem de attorney faciendo*. F. N. B. 59. So also the party being present might name a *responsalis* to be appointed by the justices. Co. Litt. 121 a. 2 Inst. 249.

name (*b*) still remained the same as at common law; that a penal action was the same as any other in that respect; and as to the Plaintiff calling himself the Plaintiff's attorney in the notice on the process, it was only a compliance with the directions of the statute (2 Geo. 2, c. 23, s. 22) as nearly as the case would admit.

Rule discharged.

[601] KING, QUI TAM, *against* PACEY. Saturday, Feb. 6th, 1796.

In an action for the penalties of the Lottery Act, 27 Geo. 3, c. 1, s. 2, it is sufficient if the process state the sum to which they amount, as the debt, without describing it as arising from penalties, or specifying the offence, provided there be an affidavit for that purpose; and it is also a sufficient compliance with the stat. 33 Geo. 3, c. 62, s. 38, to state in the process that the Plaintiff "is appointed by the commissioners of his majesty's stamp duties to prosecute."

In this action of debt for the penalties of the Lottery Act, 27 Geo. 3, c. 1, which was commenced by bill in the King's Bench, and removed into this court by habeas corpus, and in which the Defendant was holden to bail for 500*l.*, a rule was obtained to shew cause why the proceedings should not be set aside for irregularity, on two grounds, first, that the writ did not state the amount of the penalties sued for, or the cause of action; and secondly, that it did not state the Plaintiff to be an officer appointed by the commissioners of stamp duties. The first objection was founded on the 27 Geo. 3, c. 1; the second, on the 33 Geo. 3, c. 62. The former statute, s. 2, after giving the action, goes on to say, "and upon every such action, bill, plaint, suit or information, a *capias* or other writ shall and may issue, the first process specifying therein the amount of the penalty or penalties sued for, whereof an affidavit shall be first duly made and filed," &c. The latter statute, s. 38, enacts that no action shall be commenced on any of the laws touching and concerning lotteries, unless the same be commenced and prosecuted "in the name of his Majesty's Attorney-General, or in the name or names of some officer or officers appointed by the said commissioners of the stamp duties."

The *pluribus* bill of Middlesex, on which the Defendant was holden to bail, was as follows:—"Middlesex to wit. The sheriff is commanded, as often as he hath been commanded, to take William Pacey and John Doe, if they be found in his bailiwick, and that he keep them safely, so that he may have their bodies before the lord the king at Westminster, on Friday next after the Morrow of All Souls, to answer to Richard King, who is appointed by the commissioners of his majesty's stamp duties, to prosecute in this behalf, as well for himself as for his said majesty, in a plea of trespass; and also to a bill of the said Richard to be exhibited against the said William for 500*l.* debt, according to the custom of the court of the said lord the king, before the king himself, and that he then have there this precept. By bill.

"MANSFIELD AND WAY."

The affidavit of the informer was, "That during the drawing of the last English lottery, the above-named Defendant incurred divers pecuniary penalties to the amount of 500*l.* by [602] insuring, by himself, his clerks or agents, divers tickets in the said lottery, contrary to the form of the statute in that case made and provided."

In support of the first objection, Adair, Serjt., argued, that as the statute 27 Geo. 3 required the first process to specify the amount of the penalty, it ought to state that the debt was incurred by a penalty, and cited the case of *King v. Horne*, 4 Term Rep. B. R. 349; and to shew that the application was not too late, after bail was put in, *Goodwin v. Perry*, 4 Term Rep. B. R. 577. With regard to the second objection, he said it did not appear to be the meaning of the Legislature, to authorize the commissioners of stamps to appoint whom they pleased to bring the action, but the Plaintiff must be some known officer, for the same reason that made it necessary to specify the amount of the penalties in the first process, namely, that the king might not be defrauded of his share of the penalties, by a compromise between the Plaintiff and Defendant. But to maintain this objection no case was cited; and indeed when the rule was moved for, the Court were clearly of opinion that the objection was ground-

(*b*) Vide Sayer's Rep. 217, *Uppendale v. Lightfoot*.

less; it was difficult, they said, to define what an officer was, as mentioned in the statute, but that a person authorized by the commissioners of the stamp duties, was for this purpose an officer.

Le Blanc and Williams, Serjts., on the other side, contended that as the cause of action and the penalties were specified in the affidavit, the statute was complied with, and it was not necessary to repeat them in the process: it was sufficient therefore that the act in the bill of Middlesex was for 500l. debt, which was the amount of the penalties. And they observed that the bill of Middlesex in *King v. Horne*, which they produced in court, was simply "in a plea of debt" without specifying the amount of the penalties, which was evidently contrary to the statute.

LORD CH. JUST. EYRE. We all think that we are not concluded by the case of *The King v. Horne*, and that on a mere view of the statute, it is sufficient to state in the writ the sum which is sued for as the debt. If we go farther, and hold that it is necessary to describe this sum as being the amount of certain penalties, we must go on, and require the statute to be particularly set forth. But it cannot be supposed, that if this had been the intent of the Legislature, it would have expressed itself so loosely in the statute. It would therefore be wrong to put that construction upon it, unless we were forced to do so by [603] the words of it. There is no hardship in the contrary construction, for where the party has notice by the affidavit to hold him to bail for what he is sued, he is not misled or taken by surprise, and the Court, being informed of the cause of action, is enabled to take care of the king's share of the penalties.

HEATH, J., and ROOKE, J., of the same opinion.

Rule discharged.

GIENAR *against* MEYER. Wednesday, Feb. 10th, 1796.

Foreign seamen at a foreign port enter into articles with the master, who is also a foreigner, for a voyage on board a foreign ship, and thereby agree amongst other things, not to institute any suit against the master in foreign countries, or cite him before any judge or magistrate, but that they will abide by the maritime code of their own country and the adjudication of their own courts. Having made this agreement in their own country, they cannot maintain an action in England against the master for wages, though the ship and cargo be confiscated in an English port, and the voyage thereby ended (a).

This was an action brought by a Dutch seaman against the master of a Dutch ship for wages. The Plaintiff entered on board the ship at Rotterdam, on a voyage from thence to Barcelona, and back again from Barcelona to Rotterdam. In August 1793, the ship sailed from Rotterdam for Barcelona, where she delivered her outward bound cargo, and took in another, with which she sailed for Rotterdam, but on her return was stopped by an English ship of war, brought into port, there detained a considerable time, and afterwards sold. On that occasion, the commissioners appointed under the act 35 Geo. 3, c. 80, to regulate Dutch property, called on the Defendant to deliver in accounts of the wages due to the mariners, in order that they might be paid out of the proceeds of the sale. The Defendant accordingly made out a certificate of the wages due to the Plaintiff, but calculated them as due only for the voyage from Barcelona to London in consequence of general directions from the commissioners to the masters of all Dutch ships detained, not to reckon them upon the whole time from the sailing of the ship from the first port, but from the port where the cargo which was on board at the time of the detention was taken in. The ship had been out from Rotterdam twenty-four months and seven days, eighteen months and seven days of which time were allowed for by the commissioners, and this action was brought to recover the wages due for the remaining six months for the voyage from Barcelona to Rotterdam, the freight for which the Defendant admitted he had received, but insisted that he was not liable to be sued in this country, and that the Plaintiff ought to resort to the courts of Holland for his remedy. This

(a) [Accord. *Johnson v. Machielsne*, 3 Campb. N. P. C. 44. See also Abbott on Shipping, 454, 5th ed.]

objection was grounded on the [604] ship's articles, which, as translated from the Dutch, were in the following terms:

"We the underwritten officers and mariners acknowledge to have hired ourselves in the service of the ship 'Catharina Quirina,' commanded by Captain Hendrick Meyer, now lying at Rotterdam, and destined to Barcelona and all such places, bays, and sea-ports as the captain may deem most expedient to his owner's interest, for the monthly wages agreed on and hereunder specified, and to sail with convoy the full month commencing from the day of the date hereof, and the voyage to end and be completed when we shall have returned with our said ship to this city or in any sea-port of this country, and that the cargo on board be unladen, and we duly discharged by our said captain. But in case that one or more complete voyages be made out of the country, the captain shall at every second place of delivery secure to us two thirds of our wages, by an order on his purser or correspondent resident here, and the remaining third on the discharging and paying off the crew. But if the captain shall be obliged to touch at different places and shall there load or unload some goods, it is not to be considered as the performance of perfect voyages."

There then followed some regulations respecting the discipline of the ship, and afterwards the following article:

"None of us shall institute any suit against the master of the ship in foreign countries, or cite him before any judge or magistrate, but shall from thenceforth be bound to abide by the ordinances of the maritime code of this city, and the adjudication of the noble Court of Holland. Lastly, we the underwritten respectively, and each for himself acknowledge, that we have bound ourselves under the hereinbefore specified conditions, and that we have now received one month in advance of our stipulated wages, and have subscribed these with our usual signatures; done at Rotterdam, the 29th of August 1793."

The Chief Justice was of opinion at the trial, that as the Plaintiff had agreed by the articles not to sue the master in any foreign country, the action could not be maintained; his Lordship therefore directed a nonsuit, subject to the opinion of the Court, on the facts above stated.

A rule having been granted to shew cause why the nonsuit should not be set aside, and a verdict entered for the Plaintiff,

[605] Adair, Serjt., shewed cause. By the terms of the articles, though Barcelona was a destined port, yet the master was at liberty to go to any other port he might think expedient. It was therefore in the contemplation of the parties that the ship might go to any other foreign country. With this in view, they enter into a solemn engagement not to institute any suit against the master in any foreign country, but to abide by the maritime code of Rotterdam, and the adjudication of the Court of Holland: and having so done, they cannot be permitted to sue in the courts of this country in direct violation of their engagement. It is not necessary to resort to the laws of Holland to ascertain the validity of this contract, for if it had been executed in England, it would be binding. It is a just and reasonable contract, as it would be productive of great hardship and inconvenience to the master, if he were to be sued in a foreign country where he had no funds to answer the demand. If a ship is taken or lost before any complete voyage is performed, the mariners are not entitled to any wages at all, though by a construction favourable to them, one voyage is divided into two, namely, the outward and homeward bound voyage; it would therefore be very doubtful whether the Plaintiff could have recovered any part of his wages for the former eighteen months, if it had not been given him by the bounty of the crown.

Le Blanc, Serjt., contra. As the Defendant received freight for the outward-bound voyage, and as freight is the mother of wages, the last argument used on the part of the Defendant falls to the ground. The only question is, Whether the articles will prevent the Plaintiff from bringing an action in this country? It is not a deed under seal, but merely a written agreement, which may be construed according to the circumstances of the case, and the nature of the voyage performed. The meaning of the latter clause is, that the mariners will not sue before the end of the voyage, not that they will not sue at the place where the voyage is ended. It is true, that the articles consider the voyage as to be ended in Holland, but they do not provide for the case which has really happened, that of the voyage being ended in another country. Suppose the master had discharged the men here, and remained here himself, without

their having the means of returning to Holland, they could not in that case have been obliged to sue in Holland where neither he nor they were resident. Or suppose the ship to be so damaged in a foreign port, as to make it necessary to [606] sell her and the cargo, and the master had received the money, surely the mariners might have sued at that place. And it was holden in *Chandler v. Grieves* (a), in this Court, that where a seaman was prevented by an accident from performing the whole voyage, he was still intitled to his wages for the whole. The ship in the present case was neither taken in battle nor lost, but the voyage was ended, and if the seamen can sue nowhere but in Holland, the captain must provide some means of conveying them to that country. But being a stranger in this country, he cannot do that when his ship is taken from him.

LORD CH. J. Although no persons in this country can by an agreement between themselves exclude themselves from the jurisdiction of the king's courts, and though it must be ad-[607]-mitted that contracts are transitory, and that a personal action follows the person, and that the contract in question is of such a nature as to be agreeable to our laws, yet when the parties, who are foreigners, bind themselves in

(a) *Chandler v. Grieves*, in C. B. Hil. 32 Geo. 3.

A seaman belonging to a merchant ship which is articulated for a certain voyage, is prevented from performing the whole voyage by being disabled by an accident happening in the course of his duty: he is intitled to wages for the whole voyage (a).

This was an action of assumpsit for a seaman's wages. The facts of the case were, that the Plaintiff was a seaman on board a ship which was articulated for and sailed upon a voyage from London to Honduras, from thence to Philadelphia in North America, and from thence back again to England. The articles were drawn in the usual form. While the ship was in the Bay of Honduras, the Plaintiff received so violent a blow from a piece of timber accidentally falling upon him while he was on board, that he was entirely disabled from doing any duty whatever. On the arrival of the ship at Philadelphia, he was put on shore and there left, and his wages paid up to that time, but this action was brought for the whole wages, including the remainder of the voyage, viz. from Philadelphia to England.

Lord Loughborough was of opinion at the trial, that as the Plaintiff had not performed the whole voyage though without any default on his part, he was not intitled to wages for the whole. The jury took a middle course, and gave a verdict for the amount of the wages up to the time when the ship left Philadelphia.

In Michaelmas Term, 32 Geo. 3, a rule was granted to shew cause why the verdict should not be set aside and a new trial granted, and now Bond, Serjt., shewed cause, contending that the Plaintiff was intitled to wages for the whole voyage, on two grounds; first, that in general by the common law, no contract for wages was apportionable; secondly, that in particular by the law marine and usage of the sea, contracts for seamen's wages could not be apportioned. To establish the first point, he cited Bro. Abr. tit. Apportionment, pl. 13, id. tit. Labourers, pl. 48, id. tit. Contract, pl. 31, 3 Vin. Abr. 8 & 9 Burr. Sett. Cases, 675, *Rex v. the Inhabitants of Moultington*. In support of the second, 15 Vin. Abr. tit. Mariners, 234, Miegé's Laws of Oleron, p. 5, s. 7, p. 8, s. 19, Malyne's Lex Merc. 103, c. 22; and he observed, that the laws of Oleron were received by all nations in Europe, 1 Black. Comment. 419, 4 Black. Comment. 423, and ought to prevail in the present case.

The Court said, that clearly the law marine ought to be followed in the construction of the contract, and they directed an inquiry to be made in the Courts of Admiralty whether, according to the usage there adopted, a disabled seaman in similar circumstances would be intitled to wages for the whole voyage, or only up to the time when he was so disabled?

On this day, the counsel for the Defendant stated, that in pursuance of the direction of the Court, an inquiry had been made as to the usage of the Admiralty, and that in every instance there to be found, a seaman disabled in the course of his duty was holden to be intitled to wages for the whole voyage, though he had not performed the whole. In consequence of which

The rule was discharged.

(a) [Accord. *Paul v. Eden*, cited Abbott on Shipping, 444 (n), 5th ed.]

their own country not to sue in any other, and when by suing here they put the Defendant under an intolerable hardship, I think we ought to look into the contract, in order to see what effect it would have, and how it could be enforced in the country where it was made, that we may not do any thing here unjust or contrary to the laws of that country. Now it appears to me to be good according to my apprehension of those laws, or at least as there is no evidence to shew that it is not good, we must presume it to be so. Then the first thing that stares us in the face is, an agreement that they will not resort to our laws. There is nothing unreasonable in this; the parties are domiciled in Holland, the contract is to perform the whole voyage ending in Holland, and to seek their remedy in their own courts of justice. As a maritime contract, it is clearly a beneficial one, as it creates an additional tie on the seamen not to leave the ship in any part of the voyage. Then if the contract be agreeable to the laws of Holland, what are the particular circumstances of the case? The ship and cargo are seized, but the men are not made prisoners, but are at liberty to return to their own country. Now it is obvious that the master would be placed in a very cruel situation, if after the ship and cargo were confiscated, he was to be sued in a foreign country for wages for a voyage, the proceeds of which might be either remitted, or on board the ship so confiscated: the effect of it might be to cause him to lie in a foreign gaol, perhaps for life. It seems therefore to me more reasonable to send the parties to their own country, there to pursue their remedy.

HEATH, J., of the same opinion.

ROOKE, J. There is no doubt of the right of the Plaintiff to the wages, the only question is, whether the Defendant is liable to be sued here? Now the words of the articles are positive, that the mariners will not institute any suit in foreign countries, but will be bound to abide by the ordinances of the maritime code of Rotterdam, and the Court of Holland. If so, the construction contended for by my Brother Le Blanc, with respect to the voyage being ended in another country, is unfounded. There is nothing to prevent the parties from going to Holland: and as to the supposed case of the captain not being there, if the law of Holland is like that of our own country, which we [608] must for this purpose take it to be, the owners would be liable to the seamen, though the master were absent. The hardship thrown on the master by a contrary construction, would be grievous in the extreme. I therefore think that the nonsuit was right.

Rule discharged.

PARROTT, ONE, &c. *against* SPRAGGON AND ANOTHER. Thursday, Feb. 11th, 1796.

[In the Exchequer Chamber. In Error.]

Though it appears on the return to a certiorari that no bill was filed in the King's Bench against the Defendant, (in a suit there by bill) in the term of which the declaration is intitled, but that a bill was filed against him by the Plaintiff in the following vacation, it is not erroneous if it also appear that the bill was filed of the preceding term (*a*).

In an action by bill as of Trinity Term, 34 Geo. 3, against an attorney in the King's Bench as acceptor of a bill of exchange, a judgment went by default, and a writ of error being brought, the error assigned was, that there was no bill filed between the parties in Trinity Term 34 Geo. 3, to warrant the declaration and judgment, upon which a certiorari issued, reciting the error assigned, and requiring the Chief Justice of the King's Bench to certify whether there was any such bill between the parties filed of record in that Court in Trinity Term 34 Geo. 3. The return to the certiorari stated, "that it did not appear that any bill was filed of record between the parties in the said Trinity Term in the 34th year of Geo. 3. But by the said file of bills of Trinity Term aforesaid, it appeared that a bill was filed of the aforesaid Trinity Term between the parties, in the vacation of the aforesaid Trinity Term, to wit, on the 11th day of October, in the said 34th year of his said majesty's reign, as by the said bill, &c. would appear."

Wood for the Plaintiff in error. By law, no bill can be filed in a court of common

(*a*) [See *French v. Cook*, 1 Taunt. 126, 2 Saund. 101, s. (*n*), 5th ed.]

law in vacation ; but it must be in term. This appears from the form of it, which states the Defendant as being present in court, which cannot be in the vacation, when the court does not sit. If a bill therefore be filed in the vacation stating the Defendant as being then present in court, there is a contradiction on the record, which is the case here. It is necessary that the bill should be filed, to warrant the proceedings. Thus the statute 4 Anne, c. 16, s. 2, extends the statutes of Jeofails "to judgments by default, provided there be an original writ or bill duly filed," and in contemplation of law, that must be in term. It is true, in practice, bills are often filed in vacation as of the preceding term, and that the same practice prevails *nunc pro tunc* with respect to the declaration and other parts of the pleadings, but a court of error cannot take notice [609] of that practice unless it were certified on the record ; they can only look to the record ; and upon this record it appears as a fact by the return to the certiorari, that the bill was not filed in term, but in vacation. If the return had been only, that a bill was filed of Trinity Term, the Court would not have inquired whether it was really filed in term or not : but they cannot reject any part of the return as it now stands. If it appeared on record that a declaration or plea, &c. were delivered or filed in vacation, it would be clearly erroneous, as it would tend to invert the whole judicial arrangement of the country. All proceedings at law must appear to be in term, when the courts of law are open, and not in vacation, when they are shut. Another objection to the record is, that the return does not state whether such a bill was filed as would warrant the declaration and judgment, the bill ought to have been set out verbatim to shew to the court that there was no variance, but that such a bill had really been filed as would justify the entry on the record ; but the return merely is, that a bill was filed.

The counsel who was going to argue on the other side was stopped by the Court.

LORD CHIEF JUSTICE EYRE. The argument for the Plaintiff in error is an ingenious one ; as it is admitted to be the practice of the Court of King's Bench to file bills in vacation as of the preceding term, and the return to the certiorari shews that there is a bill filed of the term preceding, it is not necessary to inquire into the precise time when it was filed. The real question is, whether there is a bill on the file of that term, and if there is, this Court will not inquire how it came there. As to the other objection, if the certiorari had been to certify whether there were any defect in the bill itself upon the record, such a return would have been imperfect, but as the case stands, it is wholly immaterial.

Judgment affirmed.

NICHOLSON *against* GOUTHIT. Thursday, Feb. 11th, 1796.

A. being in insolvent circumstances, B. undertakes to be a security for a debt owing from A. to C., by indorsing a promissory note made by A. payable to B. at the house of D. The note is accordingly so made and indorsed with the knowledge of all parties.—Just before it becomes due B. being informed that D. has no effects of A. in his hands, desires D. to send the note to him B., and says he will pay it. [B. having then a fund in his hands for that purpose, it is not presented at D.'s house till three days after it is due.]—C. cannot maintain an action against B., on the note, without having used due diligence in presenting the note as soon as it was due to D., for payment, and in giving immediate notice to B. of the non-payment by D. : for B. has a right to insist on the strict rule of law respecting the indorser of a note, notwithstanding the particular circumstances of the case (*a*).

Assumpsit by the indorsee against the indorser of a promissory note, which was made on the 3d of March 1793, by William and Samuel Green for 50l. payable to the Defendant at eighteen [610] months, at the house of Drury and Co. ; the Defendant indorsed it to Burton, and he to the Plaintiff. The facts of the case were, that the Greens being considerably indebted to various creditors, and among the rest to the Plaintiff, it was agreed that their debts should be paid by instalments, the last of which Burton and the Defendant undertook to guarantee, for which purpose the note in question was indorsed (with others to other creditors) by them as a security for the debt due to the Plaintiff. A little time before the note became due, the Defendant

(*a*) [Vide ante, p. 336, note (*a*).]

knowing that Drury and Co. had no effects in their hands of the Greens, directed them to refer the persons who should present the notes at their house for payment, to him, and he would pay them. Many of the notes were accordingly brought to the Defendant when they were due, and were paid. But the note in question, though due on the 3d of October 1794, was not demanded at the house of Drury and Co., till the sixth of that month, on which day it was presented to the Defendant, though the parties all lived near each other. If it had been presented to him when due, it would have been paid, as Burton had lodged a sufficient sum of money in his hands for that purpose, but which he paid away, when he found the note did not come to him as he expected.

At the trial it was objected, that the Plaintiff had been guilty of laches, as he had neither demanded payment of the note at the place where it was payable, in due time, nor given notice to the Defendant of non-payment by Drury and Co., and therefore could not recover.

But the Chief Justice was of opinion that under the particular circumstances of the case the strict rule of law might be dispensed with, for as the Defendant knew from the beginning of the transaction, that Drury and Co., at whose house the note was payable had no effects of the Greens in their hands, as he had undertaken to guarantee the payment of a debt by means of the note, and had provided money for that purpose, he could not be injured by the delay of the Plaintiff, from the third to the sixth of October; and with respect to the want of notice, his Lordship thought, that as the Defendant had himself desired Drury and Co. to send the notes to him for payment, he had either waived the necessity of notice, or at least must be considered as having had notice by anticipation; and a verdict was found for the Plaintiff.

A rule having been obtained to shew cause why the verdict should not be set aside, and a nonsuit entered, Bond, Serjt., in [611] shewing cause rested on the opinion of his Lordship at Nisi Prius, which is above stated.

In favour of the rule Cockell and Heywood, Serjts., argued that the rule of law which required both a demand as soon as the note became due, and immediate notice in case of non-payment, could not be dispensed with, and in the present instance there had been neither. Unless such demand be made on the maker, and notice given to the indorser as early as possible, no period can be fixed when the liability of the party shall cease. It is true that where the drawee of a bill of exchange has no effects of the drawer in his hands, notice of non-acceptance or non-payment need not be given to the drawer; yet the rule with respect to an indorsee is totally different, to whom notice of the default of the drawee must in all cases be given, in order that he may seek his remedy against the drawer or any prior indorser. Thus, though it is not necessary to present a bill for acceptance before the day of payment, yet if it be presented for acceptance before that day, and the drawee refuses to accept it, immediate notice of such refusal must be given to the indorser, to make him responsible, 5 Burr. 2670, *Blesard v. Hirst*, 1 Term Rep. B. R. 712, *Goolall v. Dolley*. But in truth there is no analogy between bills of exchange and promissory notes, in their nature or original creation. A bill of exchange is a transfer by A. of a debt due to him from B. to C.; a promissory note is an acknowledgement by A. of a debt due from him to B., and a promise to pay it. The resemblance between the two instruments begins only when the note is indorsed: "for then," (to use the words of Lord Mansfield in *Heylin v. Adamson*, 2 Burr. 676) "it is an order by the indorser upon the maker of the note to pay to the indorsee. The indorser only undertakes, in case the maker of the note does not pay: the indorsee is bound to apply to the maker of the note; he takes it upon that condition, and if after the note becomes payable, he is guilty of a neglect, and the maker becomes insolvent, he loses the money, and cannot come upon the indorser at all." As to the particular circumstances of the case, when it was agreed that the Defendant should become a surety for the Greens by indorsing a promissory note, it must have been understood by the parties that as he stood in the character of an indorser, he had a right to insist that the holder of the note should use due diligence before he should be sued: for it is a clear rule that the mere knowledge of the indorser [612] that a bill or note has been or will be dishonoured, will not be equivalent to, nor does it dispense with notice to him from the holder.

LORD CHIEF JUSTICE. That the justice of this case is with the Plaintiff, there can be no doubt. The Defendant agreed to guarantee the payment of a debt by instalments; it was clear that the Greens were insolvent, and the meaning of the

parties was, that in that event the debt should be paid by the Defendant. The difficulty arises from the mode which they have chosen in which the guarantee shall take place, by the indorsement of a note. The question then is, whether, when the guarantee is taken in this shape, all the legal consequences do not follow so as to limit its generality? Upon consideration, I cannot say that they do not follow, and they require a demand on the maker, and notice to the indorser within a reasonable time. Now though there were both in this case, yet neither was in reasonable time. The rule of law therefore must prevail, and that will discharge the Defendant. When he applies to Drury and Co., and is apprised that there are no effects in their hands, he says, "send the notes to me, and I will pay them." Now this seems to be the same as saying "If the notes are presented to you for payment, I will pay them." But this must be construed to mean, that if they were duly presented he would pay them. There is nothing to shew that he meant to pay them at whatever time they should be presented. The conversation between these parties seems to have been nothing more than an acknowledgement by Gouthit, that he was indorsee, and that if the notes were sent to him in the regular course, they would be paid. If we could go beyond this, we might reach the justice of the case. But perhaps it is better to adhere to a rule, however strict, than relax it. It sounds harsh that a known bankruptcy should not be equivalent to a demand or notice, but the rule is too strong to be dispensed with.

HEATH, J., of the same opinion.

ROOKE, J., of the same opinion.

Rule absolute.

[613] OXLEY *against* YOUNG AND ANOTHER. Friday, Feb. 12th, 1796.

A. having sent an order to B., for certain goods, C. undertakes to guarantee payment to B., upon an undertaking of D. to indemnify C. B. accordingly informs C. that the goods are preparing, and afterwards ships them for A., without giving notice to C. that they are shipped. Afterwards D. desires to recall his indemnity, upon which C. writes to B. to know whether he had executed the order, to which no answer is given by B., for a considerable time, he having gone abroad in the interim. Upon this C., supposing from the silence of B. that the order was not executed, gives up his indemnity to D. C. still remains liable to B., on his guarantee (a).

In this action of assumpsit the declaration stated that before the promise and undertaking of the Defendants, one Andrew Sheron Bystrom of Gottenburgh had ordered from the Plaintiff certain goods of the value of 260l. to be sent to him by the Plaintiff, and therefore in consideration that the Plaintiff at the request of the Defendants would execute the said order, the Defendants undertook to pay him 130l. on being drawn upon at the expiration of nine months from the date of the invoice of the Plaintiff, in a bill at three months. It was then averred that the Plaintiff executed the order, and sent the goods to Bystrom, and drew upon the Defendants, at the expiration of nine months from the date of the invoice, a bill of exchange for 130l. at three months; but the Defendants neither accepted the bill nor paid the money, &c. There were also other counts, but not materially different from the first. The general issue being pleaded, a verdict was found for the Plaintiff on the following facts. On the 6th of February 1793, the Plaintiff wrote to the Defendants informing them that he had received an order from Bystrom of Gottenburgh, for certain goods, with directions to draw on the Defendants for half the amount of them, and requesting to know whether he could rely on their acceptance of his bill. To which on the 9th of February the Defendants answered, that they had received a letter from Bystrom desiring them to accept the Plaintiff's bill for 130l., but as Bystrom was a stranger to them, and his letter was not accompanied with the guarantee which he mentioned would be sent with it, they declined entering into any engagement for him. But this guarantee having soon after arrived, the Defendants on the 12th of February wrote again to the Plaintiff, signifying, that having received the guarantee they were ready to undertake for the 130l. to be drawn upon in the manner stated in the declaration. The guarantee was contained in a letter from

(a) [Vide *Nares v. Rowles*, 14 East, 510.]

Echmans and Co., the Defendants' correspondent at Gottenburgh, which stated that it was written to confirm the credit of Bystrom, and as a guarantee to the Defendants for any business they might transact for him as far as 600*l.*, and that as an indemnity to the Defendants, Bystrom had promised to provide them proper remittances. To this letter the Defendants answered that they had ordered the goods for Bystrom [614] from the country. On the 18th of February the Plaintiff returned an answer to the Defendants' letter of the 12th, saying that in consequence of that letter he proposed putting the order in hand for Bystrom.

On the 25th of March the Defendants stopped payment, which was soon after known to the Plaintiff, and did not resume their payments till after the goods were shipped, which was done by the Plaintiff in June following according to the direction of Bystrom, the invoice being dated June 22, 1793. On the 6th of September following, the Defendants received from Echmans and Co. a letter, the purport of which was, that they recalled their guarantee for Bystrom, as he had not made any use of it, nor would in future, and desiring the Defendants not to send him any goods on the faith of it. To this the Defendants immediately answered, that as they were advised that Bystrom had made use of the credit given him, they must inquire whether the persons who had executed Bystrom's orders would release them (the Defendants) from their obligations, before they could consent to Echmans and Co. recalling their guarantee. On the same 6th of September they wrote to the Plaintiff, to know whether he had executed any order for Bystrom in consequence of their letter of the 12th of May, presuming he had not, as he had not advised them of it. Not receiving any answer from the Plaintiff to this for some days, on the 10th of September the Defendants gave up to Echmans and Co. their guarantee, by writing another letter to them, stating that one house at Halifax had shipped some goods for Bystrom on their credit, and requesting Echmans and Co. to see that a remittance was sent for the amount of those goods, but that this appeared to be the only part of the credit, which Bystrom had used.

On the 1st of October the Defendants received a letter from the Plaintiff dated Groningen, September 21st, in which he said, that being from home upon business, a letter was sent to him from the Defendants (meaning their letter of the 6th of September), but not having his papers to refer to, he could only say that he had sent a parcel of goods to Bystrom. In answer to this the Defendants wrote to the Plaintiff, observing that the goods which he had shipped for Bystrom could not be on their guarantee; otherwise he ought to have advised them at the time they were sent, and that he had been so long in answering their letter of the 6th of September, that in the mean time they had written to Echmans and Co. giving an account of all the goods [615] that had been shipped for Bystrom on their credit. After this, the Defendant wrote again to Echmans and Co. stating that since their letter of the 10th of September, the Plaintiff had applied to them for the payment of 130*l.* for goods shipped for Bystrom, and as there was a probability of a dispute, requesting Echmans and Co. to retain the funds or securities of Bystrom, if they still had any, for that sum: to which Echmans and Co. replied, that they had then no funds in their hands for the payment of that sum.

In March 1794 (at the end of nine months from the date of the invoice of the goods sent by the Plaintiff to Bystrom), the Plaintiff drew a bill of exchange on the Defendants for 130*l.* at three months, which being neither accepted nor paid by them, this action was brought.

A verdict having been found at Guildhall for the Plaintiff, a rule was obtained to shew cause why there should not be a new trial, on two grounds, first, that the Plaintiff ought to have given notice to the Defendants of his having shipped the goods for Bystrom; and secondly, that the Defendants were intitled to an immediate answer to their letter of the 6th of September, and that the Plaintiff ought to have left some confidential person at his house in his absence, with authority to open and answer letters, instead of sending them to him upon the Continent.

Le Blanc, Serjt., shewed cause. The Defendants having undertaken expressly to secure to the Plaintiff the payment of the value of the goods which Bystrom had ordered, by a bill drawn at a stipulated time, cannot recede from their engagement. They were hasty in returning their guarantee to Echmans and Co., and cannot make that a ground for discharging themselves from their responsibility to the Plaintiff. There is no pretence to say that notice was necessary to be given to them when the

goods were actually shipped, there being no stipulation for such notice. They had sufficient notice by the Plaintiff informing them that he should put the order in hand, and by the bill being drawn upon them. And with respect to the delay in the answer to their letter of the 6th of September, there is no rule of law which requires a merchant, who is going abroad to transact his necessary business, to leave a person behind him to answer his letters.

Adair and Cockell, Serjts., for the rule. Though there was no express stipulation that notice should be given of the goods being shipped, yet the Plaintiff was bound in this, as in all other commercial transactions, to use due diligence, and therefore he [616] ought to have given such notice: and still more ought he to have taken care that an immediate answer was sent to any letters of the Defendants which might be addressed to him in his absence, as he knew that their guarantee to him was to be given, not on the credit of Bystrom, but of third persons, viz. Echmans and Co. A person carrying on trade at a particular place, is answerable for any loss which might happen by his neglect in not having a proper agent on the spot to answer letters, and transact his business, during an occasional absence. The question is not, whether the answer to the Defendant's letter of the 6th of September came in reasonable time from Groningen, but from Norwich where he lived.

LORD CH. J. EYRE. I did not encourage this motion when it was made, and I am now convinced, after hearing the argument, that the verdict was properly found. The right to sue on the guarantee attached, when the order was put in a train for execution, subject to its being actually executed. Then the question is, whether any thing happened to divest that right? Now the right could not be divested, even by a wilful neglect of Oxley, though perhaps he might be liable to an action on the case at the suit of Young and Co., if any such neglect could be shewn, contrary to all good faith, and by which a loss had been incurred. But still this could not discharge Young and Co. from their engagement. They have been unfortunate in concluding too hastily from not receiving an answer from Oxley, that the order was not executed.

HEATH, J., of the same opinion. The counsel have contended, that a merchant when he goes abroad is obliged to leave a confidential clerk behind him to manage his concerns. This is true where he undertakes to do any act, such as to accept bills, or pay money; but he is clearly not bound so to do, for any other purpose.

ROOKE, J., of the same opinion.

Rule discharged.

MESURE against BRITTEN. Friday, Feb. 12th, 1796.

Though a rule to plead expires on a dies non juridicus, ex gr. the Purification, the Defendant is bound to plead on or before that day, and if he does not, judgment may be signed on the next day.

Le Blanc, Serjt., shewed cause against a rule to set aside a judgment signed for want of a plea, on the following circumstances:—The rule to plead was given on the 30th of January, which expired on the 2d of February being a four day rule, and both the [617] first and last days being reckoned inclusively. Judgment was signed on the 3d of February at the opening of the office in the afternoon.

The ground of the objection on the other side, on which the rule was obtained, was, that the 2d of February being the Purification, and therefore a dies non juridicus, the Defendant could not plead on that day, but had the whole of the next day for that purpose. But Le Blanc observed, that though the courts did not sit on the Purification, yet the offices were open, and therefore the Defendant might have pleaded on that day; and he relied on the case of *Baddley v. Adams*, 5 Term Rep. B. R. 170.

Clayton, Serjt., in support of the rule, contended that when a dies non juridicus was the last of the four, it was considered as a Sunday, for which he cited *Impey Pract. C. P.* 281, and therefore that the rule was not out till the end of the day following. That as to the case of *Baddley v. Adams*, the question there was, whether bail could be put in on a dies non, and the Court determined it on the ground that on such a day business might be done at a judge's chambers; but when a party pleads he is supposed to be in court, which could not be on a day when the Court does not sit.

Upon a reference to the officers, they all agreed that the practice was to plead on the Purification, the offices being always open on that day.

LORD CH J. The meaning of a Defendant being allowed a certain time to plead in is, that he may have a reasonable time to consider of his defence. It is absurd therefore now to refer to the old mode, when the proceedings were *ore tenus*. The reason of Sunday not being a day of business, is the decent observance of the Sabbath, but as the offices are open on these other dies non juridici, the party may certainly then plead.

Rule discharged.

[618] HOWARD AND ANOTHER *against* BAILLIE, Executrix of Baillie.
Friday, Feb. 12th, 1796.

Seemle that a letter of attorney given by an executor to A. enabling him to transact the affairs of the testator in the name of the executor as executor, and to pay, discharge and satisfy all debts due from the testator, conveys a sufficient authority to A. to accept a bill of exchange, in the name of the executor, drawn by a creditor for the amount of a debt due from the testator, so as to make the executor personally liable. But clearly if the executor admits that such a bill, which has been so accepted by A. with the knowledge of the executor, is for a just debt, and that it ought to be paid, it affords sufficient evidence of an authority given by him to A. to accept that particular bill, without resorting to the letter of attorney (a).

The facts of this case, and such of the arguments as were material, are stated in the following judgment, which was thus delivered in the name of the Court by the Lord Chief Justice.

A new trial has been moved for in this cause, in which the Plaintiffs, being the drawers of a bill of exchange upon the Defendant dated 10 January 1794, for 290l. 18s. 3d. value in account with James Baillie (whose executrix the Defendant is), payable upon the 1st of September 1795, to their own order, and which bill of exchange was accepted by the Defendant by Edmund Thornton her procurator, having recovered a verdict for 330l. damages. The ground made for this application is, that upon the case in evidence Mr. Thornton was not the procurator of the Defendant duly authorized to accept this bill for her. The case was shortly this, Mrs. Colin Baillie being the sole acting executrix of James Baillie, who died possessed of a large West India and other property, and largely indebted to many persons, and among others to the Plaintiffs in the sum of 290l. 18s. 3d., executed a power of attorney to George Baillie and Edmund Thornton jointly and severally to act for her in collecting and getting in the estate of the deceased, and paying his debts. These two persons acted under the power. The business respecting the estate was transacted by one or other of them at the counting house where James Baillie's business was carried on in his life-time, and where the business of a new firm, at the head of which was George Baillie, was also carried on after the death of James Baillie. At this counting house the bill in question was accepted, in the name of the Defendant, by Edmund Thornton, one of the attornies, as her procurator, in payment of a debt due from the estate of James Baillie; and this was a mode adopted by the attornies [whether with or without the privity of Mrs. Baillie at present I do not stay to inquire], for the payment of the tradesmen's bills due from the estate. For the Defendant it is insisted, that the attornies had no authority to provide for the payment of the testator's debts in this manner, that they were to administer the assets for the executrix, but that they could do no act whereby she should become chargeable with the debts in her own right, and particu- [619]-larly that they were not authorized to give a security for the payment of any debts in her name. This makes it necessary to look into the power of attorney, to view and to consider the general scope of it, and to examine the different parts of

(a) [See *Gardner v. Baillie*, 6 T. R. 591, in which, upon an action being brought upon another bill accepted by A. in the name of the executor, the Court held, that the Plaintiff was not entitled to recover, and stated that the judges of this court concurred in that resolution. It seems therefore that the present case must be considered as having been determined on the admission of the executor. See also, *Hay v. Goldsmidt*, cited 1 Taunt. 349.]

which it consists, as far as they may seem to bear upon the present question. The general scope of it is to put the whole estate into the hands of the attornies, to commit the collecting of it, and the disposition of it entirely to them, to delegate to them all the authority that the executrix possessed, and to constitute them, as far as it was possible to constitute them, executors in her name. The first part of the instrument respects more particularly the collecting of the estate; and powers more ample could not be devised, nor confidence more unlimited be reposed and expressed. The authority to pay, discharge and satisfy debts is described in few words, and more general terms, and with a qualification properly applicable to this branch of the power, "agreeably to the due order and course of law, to pay, discharge and satisfy," which I consider as tantamount to saying in a course of administration. Then follows a general authority to do such further lawful and reasonable acts, for the better performing the powers and authorities intended to be given, as to them should seem meet, the executrix professing to give to them her full and whole power and authority to do and act touching and concerning all or any of the premises, as fully and effectually to all intents, constructions and purposes, as she as executrix could do if personally present, and undertaking to ratify all that the attornies should lawfully do in and about the premises. There is also power to appoint attornies to act in the name of the executrix. The authority to pay debts, upon the first view of it, seems to be more confined and specified than the authority to collect the effects; but if we consider it more attentively, we shall find that the effect of this part of the instrument is to commit the application of the personal estate in payment of debts to those attornies absolutely and exclusively; and it will also be found, without the assistance of general words, that an authority of this nature necessarily includes medium powers, which are not expressed. By medium powers, I mean all the means necessary to be used, in order to attain the accomplishment of the object of the principal power, which in this case is the paying, satisfying and discharging the testator's debts. It must occur to every man who reflects upon the nature of this trust, that numberless arrangements would be to be made by those who were to execute it, accounts to be settled, [620] disputed claims to be adjusted, unjust ones to be resisted, suits at law and in equity to be instituted and defended, payments to be postponed or installed, according to the state of the fund, and perhaps if the estate should be discovered to be insolvent, a distribution to be made among the creditors in equal degree, *pari passu*. These and many other subordinate powers, though not expressly given, as in the former part of the instrument, must be understood to be included in this power to pay debts; and I take it to be clear that in the construction of such powers they are included. Our books say that these kind of authorities are to be pursued strictly; they instance that an authority given to three cannot be executed by a less number than the whole, and the stat. of 21 H. 8, c. 4, was thought necessary to be made, to remedy the inconvenience arising from it in the case of executors, where some have declined to act. But our books also say, that they are to be so construed as to include all the necessary means of executing them with effect. Thus an authority to receive and recover debts includes a power to arrest. In such a case as the present, which is not that of mere ministerial authority capable of being defined and executed strictly, but a case where the whole care of the administration is delegated by the executrix to the attornies, and all the means of executing the office of executrix put into their hands, I am of opinion that both the particular provisions and the general words ought to receive the most liberal construction, which construction should, as far as possible, place the attornies where the executrix intended to place them, in her room and stead, invested with all her authority and with all her discretion. Assuming then that this authority to pay debts is larger and more comprehensive in its nature, than the words construed very strictly would import, and that it implies authority to make all necessary arrangements which the executrix herself might make, in order to the payment of the debts, I ask, among the arrangements which it may be necessary for an executrix, or for those to whom she has delegated all her authority touching the payment of the testator's debts, to make, is there one more likely to occur, more useful, in many cases more necessary, than that they should ask and obtain from the creditors of the estate time for payment of the debts, when the time given may prevent all the vexation and expence of a struggle for priority? That an executrix herself might make this arrangement, no one can doubt: that it is also necessary that they who are to have all the funds in their hands, who know, and are the only persons who can know within what time those

[621] funds can be got in, and who have the whole application of them entrusted to their care, who represent the executrix, and in effect are themselves the executors, should have it in their power to make it, is equally clear. The consequence of such an arrangement in either case, and indeed in every one of the instances which I before put, would be, that the executrix might by possibility become personally and in her own right chargeable with debts, as she might become chargeable in a variety of other cases expressly within the power of attorney. But upon whatever ground, and by whatever medium, in the instance of postponed debts, this personal charge is produced, the debt still remains a debt due from the estate, and payable out of the assets. Such an arrangement amounts to an admission, that at the expiration of the credit given, there will be assets sufficient to pay the debt, which still remains a charge upon the executrix as executrix, and only becoming eventually a charge upon her in her own right, if it should turn out that by some unforeseen event there should be a failure of assets, or by misconduct a devastavit incurred. If we are to argue from the intent of the instrument, to be collected from the particular wording of it, I ask, can it be reasonably doubted, whether this executrix, who trusted the whole of this large estate in the hands and to the care of these attornies, under her personal responsibility for every shilling of the amount of it, if they should fail in the collection or application of it, would have hesitated to commit to their discretion, upon their view of the state of the property, and of the time within which it could be realized, the asking and obtaining from the creditors twenty months further time for the payment of their respective debts? I ask whether the executrix did not mean to throw all the burden of the administration of the effects upon the attornies, and whether there was not a convenient and necessary discretion to be intrusted to them? When it is objected that the authority given is restrained to an authority to pay in her stead as executrix, and "agreeably to the due order and course of law," I answer, that taking these words to amount to a direction to the attornies to pay in a course of administration, they were not meant to controul, nor can they controul the authority of the attornies in any thing necessary to that payment, in a course of administration. It is perfectly clear, notwithstanding this direction, that they might take time for the payment of the debts having assets to pay them when the time came, for then they would pay in a course of administration, and there can be nothing repugnant to that direction in asking for [622] the time, even though the assets should afterwards fail, because it is a step taken upon a conviction that there will be assets to be administered in a due course of law, and to the end that they may be administered. Where the executrix has entrusted all to the care of her attornies, with a responsibility in herself to the extent of all the property, it is a small circumstance to be observed upon, that though the payment of a debt, not in a course of administration, is within the authority as between the creditor and the executrix, yet that she might be obliged to answer to other creditors as for a devastavit in respect of it. In truth, this direction to pay in a course of administration may operate as between her and her attornies, but as against creditors receiving payment of their debts it seems to me that it can have no operation. Much stress was laid in the argument on there being no express power given to the attornies to sign acceptances for the executrix, but the objection proves too much. As well might it be argued, that if the cash of the estate was kept at a banker's, the attornies should not draw for it in her name. The true question appears to me to be, whether the attornies under this power have a discretion to agree with creditors for the forbearance of the debts; and that the rest of the difficulty has more of form than substance in it. If the foundation is well laid, the application of the argument to the particular case in question seems obvious and decisive. The acceptance of this bill of exchange is called a security, but is in substance merely a mode of taking twenty months further time for payment of a debt, due from the testator to these Plaintiffs, and payable out of the assets. Had the twenty months credit been taken by a mere agreement to forbear, and she had been sued as executrix after the expiration of the time given, she could not have pleaded *plenè administravit*, because by taking the credit she admitted assets. There is a formal difference only between that case and the present, the acceptance appears upon the face of the bill to be an acceptance by her as executrix, and the consideration of it is value in account with testator. If she is sued in her own name, and not as executrix, she is so sued upon the same principle upon which assignees of a bankrupt are sued for what they do after they become assignees, for the estate, and at the expense

of the estate. The debt is still substantially the debt of the testator, which when paid by her will be carried to the account of the testator's estate. I think she might have been sued as executrix upon this acceptance; but as she could not in that [623] case have availed herself of a plea of *plene administravit*, it was not necessary so to sue her. In neither case could any defence be made against the demand, and in truth no defence ought to be made, for the creditor who accepts this kind of payment purchases the benefit of it, the estate has had its advantage, and this Defendant as executrix has had her advantage of the forbearance. I have hitherto avoided any mention of the particular circumstances of this case, which very strongly imply the knowledge of the Defendant and her approbation of the making these acceptances (*a*), but here they ought to have their weight, by way of answer to the suggestion of possible inconvenience which the suffering this verdict to stand might produce. I confess that they appeared to me upon the trial, and do now upon the best consideration that I can give to the case, appear to me to be strong enough to raise an implication of a special procuration, if that were thought necessary, from the executrix to her attorneys, to authorize these acceptances, and that the defence now made upon the strict law is against conscience and good faith. I have already taken an opportunity of observing on the case depending in the Court of King's Bench, and what I supposed would be the decision of that Court. I will only now repeat, that we understand that it did not appear in that case, that the acceptance was given for the payment of a debt due from the testator (*b*), the payment of which had been agreed to be postponed, or indeed that it did in any manner touch or concern the execution of this trust, which is the great and distinguishing feature between that case and the present. We agree that this power cannot authorize the giving acceptances in the name of Mrs. Baillie, which are neither expressed nor proved to be in pay-[624]-ment of the testator's debts. The case now in judgment in this court rests on its own particular circumstances, upon which we decide.

Rule discharged.

The letter of attorney, after reciting the death of the testator, the making his will and appointment of executors together with the Defendant, who had alone proved the will, and taken upon herself the execution of it, and that the testator as trading under the firm of James Baillie and Co. and otherwise, was at the time of his death possessed of and entitled to very considerable sums of money owing to him upon mortgage bond and other specialties, bills, notes, unsettled accounts and otherwise, from persons residing in the islands of Grenada, St. Christopher, St. Vincent, and other islands in the West Indies, as also at Demerary in America, and in Great Britain and elsewhere, and was also possessed of and entitled to divers quantities of sugar, rum, cotton, coffee and other merchandize and effects in the said islands and places or some of them or elsewhere, went on as follows: "now know ye, that I the said Colin Baillie, for divers good causes and considerations me hereunto moving, have made, ordained,

(*a*) There was evidence to show that the Defendant knew that Thornton had accepted the bill in question in her name, in payment of the Plaintiff's debt; and when the officer served her with process, she acknowledged the justness of the debt, saying that the Plaintiff had behaved handsomely, and should be paid. Perhaps therefore the case may rest with greater safety on the ground of a special authority given to accept the particular bill in question, than on the construction of an instrument, which demonstrates on the face of it the intention of the parties, that the power delegated to the procurator should not be extended to make the Defendant personally liable.

(*b*) In the course of the argument, it was stated that a similar question on the construction of the same letter of attorney, was then depending in the Court of King's Bench: and a few days afterwards the Chief Justice said that he had been informed, that the question in the case in that court was, whether the attorneys were authorized to give or accept bills generally in the name of the Defendant, not being in payment of the debts of the testator? This his lordship was clearly of opinion they could not do, under the letter of attorney, in which he apprehended the Court of King's Bench would concur.

That case is since reported, 6 Term Rep. B. R. 591. *Gardner v. Baillie*, but it is there stated that the bill on which that case arose was drawn and accepted for a debt due to the Plaintiff from the testator. Qu. therefore, how that fact really was?

authorized, constituted and appointed, and by these premises do make, ordain, authorize, constitute and appoint George Baillie late of the island of St. Vincent aforesaid, esquire, now about to engage in business in London, as a merchant, and Edmund Thornton, late of the island of Grenada, aforesaid, Esquire, now also about to settle and reside in London, my true and lawful attorney and attornies jointly, and each of them severally, for me and in my name, place and stead, and to and for my use and benefit as executrix as aforesaid, to ask, demand, sue for, recover and receive of and from all and every or any person or persons whomsoever, all and every sum and sums of money, debts, dues, claims, demands, goods, chattels and effects whatsoever, which at the time of the death of the said James Baillie were due, owing or belonging to him, either as trading under the said firm of James Baillie and Co. or otherwise howsoever, and which now are or at any time or times hereafter shall or may be due, owing or payable to me, as executrix as aforesaid, or which were or are part of or belonging to the personal estate of the said testator, other than and except such part or parts thereof respectively as are specifically given and bequeathed in and by the said will, and also for me, and in my name, place and stead as executrix as aforesaid, to state, adjust, liquidate, settle and finally agree to all and [625] every and any account and accounts, sum and sums of money, debts, dues, claims, demands, controversies, differences and disputes whatsoever, wherein the said James Baillie at the time of his decease was, or wherein I the said Colin Baillie as executrix as aforesaid, now am, or at any time or times hereafter, shall or may be in anywise interested or concerned. And also to refer or submit to arbitration the same, or any of them, or any part thereof, in all cases wherein my said attornies jointly, or either of them severally, shall find it necessary or expedient so to do, and for that purpose for and in my name and as and for my act and deed or acts and deeds as executrix as aforesaid, to enter into, sign, seal, deliver and execute such bond or bonds of arbitration, agreement or agreements, or other instrument or instruments in writing, as my said attornies jointly or either of them severally shall think proper, and upon payment or receipt of all or any such sum or sums of money, debts, dues, claims, demands, goods, chattels and effects, or other satisfaction to be had, taken, or received for the same or any part thereof, for me and in my name and as for my act and deed as executrix as aforesaid, to enter into and execute, make and give all and every or any such deeds, transfers or assignments of mortgage, counterparts of mortgage, release, receipts, acquittances and discharges for the same respectively, as shall be necessary or proper; and in case of the non-payment or non-delivery thereof, or any part thereof respectively, for me the said Colin Baillie, and in my name, place and stead as executrix as aforesaid, either jointly with and in the names of the said Renè Payne, Archibald Hamilton, Walter Farquhar, Alexander Baillie and Evan Baillie, (the co-executors) in all cases wherein for conformity it may be necessary or proper to use their names, or separately in my own name, as the case may be or require, to appear, and the person of me their said constituent to represent, in all courts and before all ministers and magistrates of law and in equity, as well in the kingdom of Great Britain and the said islands of Grenada, St. Christopher and St. Vincent aforesaid, as in all or any other islands in the West Indies and at Demerary aforesaid, or elsewhere as by my said attornies jointly or either of them severally shall be thought advisable and proper: and to use, arrest, attach, distrain, seize, sequester, prosecute to judgment and execution, and also to imprison and condemn, and out of prison again to release and discharge all and every or any person or persons whom it doth, shall, or may concern, his, her, their or any of their lands and tenements, negroes, slaves, [626] cattle, stock, goods, chattels, and effects: and also for me and in my name, place and stead, as executrix as aforesaid, and agreeably to the due order and course of law, to pay, discharge and satisfy all and every or any sum or sums of money, debts, dues, claims and demands whatsoever, which at the time of the death of the said James Baillie, were due and payable by him, either as trading under the said firm of James Baillie and Co. or otherwise, and which now are or at any time or times hereafter shall or may become due and payable by me as executrix as aforesaid, whether upon mortgage, bond, bill, note or otherwise however, and to take such receipt or receipts or other sufficient discharge or discharges for the same monies respectively as shall be necessary or proper, and generally for me the said Colin Baillie as executrix as aforesaid, to make, do and execute all and every such further and other lawful and reasonable acts, deeds, matters and things whatsoever for

the better recovering, collecting, getting in, receiving and remitting all and singular the personal estate and effects of the said testator, and executing, performing and discharging all and every other the powers and authorities hereby given or intended to be given, as to my said attornies jointly or either of them severally shall seem meet, I the said Colin Baillie giving, and by these presents granting unto my said attornies jointly and each of them severally, my full and whole power and authority to do and act touching or concerning all or any of the premises aforesaid, as fully and effectually to all intents, constructions and purposes whatsoever, as I the said Colin Baillie as executrix as aforesaid, might or could do if personally present: and one or more attorney or attornies substitute or substitutes under them the said George Baillie and Edmund Thornton, or either of them, for all or any of the purposes aforesaid, to make, and at their or either of their pleasure to revoke, and another or others again to appoint, I the said Colin Baillie hereby ratifying, allowing and confirming, and by these presents agreeing to ratify, allow and confirm, all and whatsoever my said attornies jointly or severally, their or either of their substitute or substitutes shall lawfully do or cause to be done in or about all or any of the premises aforesaid, by virtue of these presents. In witness whereof," &c.

End of Hilary Term.

REPORTS of CASES ARGUED and DETERMINED
in the COURTS of COMMON PLEAS and EX-
CHEQUER CHAMBER, and in the HOUSE of
LORDS; from Easter Term, 36 GEO. III. 1796,
to Trinity Term, 39 GEO. III. 1799, both inclusive.
By JOHN BERNARD BOSANQUET, of Lin-
coln's Inn, Esq. Barrister at Law; and CHRIS-
TOPHER PULLER, of the Inner Temple, Esq.
Barrister at Law. The Third Edition, corrected,
with Additional REFERENCES. In Three
Volumes. Vol. I. London: 1826.

- [1] CASES ARGUED AND DETERMINED IN THE COURTS OF COMMON PLEAS AND EXCHEQUER CHAMBER, IN EASTER TERM, IN THE THIRTY-SEVENTH YEAR OF THE REIGN OF GEORGE III.

PIETERS AND ANOTHER *v.* LUYTJES. May 3d, 1797.

The Court will not discharge a Defendant on a common appearance under the 34 G. 3, c. 9, s. 7, on the ground of the Plaintiff's residence in Holland. An affidavit to hold to bail made by a third person need not state a connection between the deponent and the Plaintiff*.

Le Blanc Serjt. moved for a rule to shew cause why the Defendant in this action should not be discharged on entering a common appearance, and all further proceedings be stayed.

The cause of action arose on an instrument dated the 5th Nov. 1794, executed by the Defendant before a notary at Amsterdam in Holland; whereby he "declared that he was well and truly indebted to the Plaintiffs merchants of that place, in a sum of 9190 guilders and 3 stuivers, Holland's current money, arising from and out of sundry merchandizes sold and delivered to him on the 30th October 1794, agreeably to the invoice delivered." The affidavit of debt which was made by a third person, stated that the Plaintiff at the time when the said affidavit was made, was resident at Amsterdam.

By 34 Geo. 3, c. 9, s. 1, it is enacted, that if any person residing or being in Great Britain, shall after the 1st day of March [2] 1794, and during the war, knowingly and wilfully pay, send, supply, or deliver, or cause to be paid, sent, supplied, or delivered, either in Great Britain or France, or in any other country either by payment or remittance of any bill of exchange, note, draft, obligation, or order for money, or in any other manner whatsoever, any money to or for the use of the persons exercising or who shall exercise the powers of government in France, or to or for the

* S. P. *Andrioni v. Morgan*, 4 Taunt. 231.

use of any persons or person who on the 1st day of January 1794 were or was or at any time since have or has been, or who at the time of such act done shall be within any of the dominions of France, or any county, territory, or place, which was on the said 1st day of January 1794, or which shall be, during the said war and at the time of such act done, under the government of the persons exercising or who shall hereafter exercise the powers of government in France, every person so offending, being thereof lawfully convicted or attainted, shall be deemed, declared, and adjudged to be a traitor, and shall suffer pains of death, and shall also lose and forfeit as in cases of high treason.

And by section 7th, it is further enacted, that if any action or suit, either in law or equity, shall be commenced or prosecuted for the recovery of any debt or demand, contrary to the provisions of this act, it shall and may be lawful for the Court in which such action or suit shall be commenced, in term time, or any one or more of the judges of such court, out of term, in a summary way to discharge the Defendant or Defendants arrested on mesne process, and to stay all further proceedings in such action or suit, upon such terms as to such Court or Judge respectively shall appear necessary to enforce the provisions of this act.

It was insisted on the part of the Defendant, that Amsterdam at the time of the arrest was under the dominion of the persons exercising the powers of government in France, and that the Plaintiff being resident there, this was a demand contrary to the provisions of the above act.

Per Curiam. Can we take notice that Amsterdam is under the dominion of France? The Court will hardly receive evidence of the influence of France over Holland: actual possession, as of Flanders, might bring a case of this kind within the meaning of the act. But in Holland there is a government *de facto*, however that government may be influenced by French councils (*a*).—There is no ground for the application.

[3] Le Blanc then objected to the affidavit on which the Defendant was arrested, because it did not state any connection between the deponent and the parties to the suit.

Sed per Curiam. It is not necessary for the connection to appear on the face of the affidavit. The deponent swears positively to the debt, and that is sufficient.

Rule refused.

TENANT v. ELLIOTT. May 5th, 1797.

[Distinguished, *Spikes v. Beaton*, 1879, 11 Ch. D. 194. Approved, *Bridger v. Savage*, 1885, 15 Q. B. D. 366. Referred to, *Gordon v. Chief Commissioner of Metropolitan Police*, [1910] 2 K. B. 1092.]

A. having received money to the use of B. on an illegal contract between B. and C., shall not be allowed to set up the illegality of the contract as a defence, in an action brought by B. for money had and received*.

Assumpsit for money had and received. Verdict for the Plaintiff.

The Defendant being a broker, effected an insurance for the Plaintiff, a British subject, on goods from Ostend to the East Indies, on board the "Koenitz," an Imperial ship. The ship being lost, the underwriters paid the amount of the insurance to the Defendant, who, without any intimation from them to retain the money, refused to pay it over to the Plaintiff.

Shepherd Serjt. now moved for a rule to shew cause why the verdict in this case should not be set aside and a non-suit entered. By 7 Geo. 1, stat. 1, c. 21, s. 2. It is enacted "That all contracts and agreements whatsoever made or entered into by any of His Majesty's subjects, or any person or persons in trust for them, for or upon the loan of any monies by way of bottomry on any ship or ships in the service of foreigners, and bound or designed to trade in the East Indies, or parts in the said act before mentioned: and all contracts and agreements whatsoever made by any of His

(a) See the opinion of Blackstone J. in *Rafael v. Verelot*, 2 Bl. 985.

* *Vine Hawson v. Hunebeck*, 8 T. R. 575. *Cambden v. Anderson*, post, 272. *Farmer v. Russell*, post, 296. *Wobb v. Brooke*, 3 Taunt. 6. *Davis v. Edgar*, 4 Taunt. 63. *Bensley v. Bignold*, 5 B. & A. 333. *Fiedling v. Kymer*, 2 B. & B. 639.

Majesty's subjects, or any person or persons in trust for them, for the loading or supplying any such ship or ships with a cargo or lading of any sort of goods, merchandize, treasure, or effects, or with any provisions, stores, or necessities, shall be and are hereby declared to be void." Now the goods on board the "Koenitz" being the property of the Plaintiff, a subject of Great Britain, and the "Koenitz" being a foreign ship, bring this transaction within the provisions of the above act. In *Camden v. Anderson*, 6 Term Rep. 730, it was determined, that a policy effected in contravention of an act of parliament, made for the purpose of protecting the monopoly granted to the East India Company, was void. The voyage being illegal, makes the policy illegal also. If then the Plaintiff could not have succeeded in an [4] action against the underwriters, neither can he recover against the present Defendant. The Defendant is in the nature of a stakeholder: and the Plaintiff's right of action being grounded on his claim against the underwriters, he must now stand precisely in the same situation as if he had immediately sued them.

BULLER J. Is the man who has paid over money to another's use to dispute the legality of the original consideration? Having once waived the legality, the money shall never come back into his hands again. Can the Defendant then in conscience keep the money so paid? For what purpose should he retain it? To whom is he to pay it over, who is entitled to it but the Plaintiff?

EYRE Ch. J. The Defendant is not like a stakeholder. The question is, Whether he who has received money to another's use on an illegal contract, can be allowed to retain it, and that not even at the desire of those who paid it to him? I think he cannot.

The Defendant took nothing by his motion (a)¹.

DYSON v. BIRCH, ONE, &C. May 5th, 1797.

An attorney shall not be allowed his privilege, unless he shew that he has practised within the space of a year.—Qu. If he should not also state that he has had a certificate within that time?

Le Blanc Serjt. moved for a rule to shew cause why the Defendant in this action, who was an attorney of this court, should not be discharged on entering a common appearance.

The Defendant's affidavit stated, that some time before the arrest he purchased a stamp with a view to obtain his certificate, under the 25 Geo. 3, c. 80, but that from particular circumstances (therein mentioned) he was prevented from actually obtaining it till after the arrest.

Le Blanc. The Defendant did every thing that lay within his power, and was entitled to his privilege (if that be affected by the act at all) from the time of paying for the stamp. But in truth the privilege of an attorney does not depend on his certificate: the act in question is a mere regulation of revenue: those who offend against its provisions are subjected to the penalties which it contains; but there is no clause which makes obedience a condition of privilege.

EYRE Ch. J. An application was made to me out of court, which I rejected, because it then appeared, that the Defendant had not practised as an attorney for three years, but that when his [5] circumstances became embarrassed, he took out a certificate to protect himself.

BULLER J. My Lord very properly rejected this application. There is a rule of court of Michaelmas Term 1654 (a)², that an attorney shall not be allowed his privilege if he has not attended his business for a year. The Defendant therefore should have stated in his affidavit, that he had practised within a year previous to the arrest.

The Court desired that this circumstance might be inquired into, and inserted in an affidavit.

(a)¹ Vid. *Sullivan v. Greaves*. Park. Ins. 8, but there the Plaintiff could not make out his title without shewing the illegal contract. *Farmer v. Russell*, post, 296.

(a)² Cook's Rules and Orders in C. B.

BULLER J. The Defendant may as well also inform the Court, whether he has had a certificate within the year; if not, it will be a strong presumption against him. This case was never mentioned again (b).

WEBB v. THOMSON. May 6th, 1797.

Sailing orders are necessary to the performance of a warranty to depart with convoy unless particular circumstances exempt the insured from the general rule*.

This was an action on a policy of insurance, tried before Eyre Ch. J. at Guildhall, Sittings after Hilary Term.

The policy was effected on a ship called The "Golden Grove," Captain Hodser, bound from London to the West Indies, and warranted to depart with convoy. She sailed from Spithead, the place of rendezvous, in company with a convoy under Sir Hugh Cloberry Christian, and was afterwards wrecked on the coast of Dorsetshire.

At the trial it was proved that the captain, and a passenger on board, who was supposed to have seen the sailing orders, were drowned at the time of the ship being wrecked. The second mate being examined, as to his knowledge respecting sailing orders, stated that the captain left the ship for the purpose of obtaining them from the Admiral; and that afterwards on a signal for sailing, the captain being asked in what manner it should be answered, gave the necessary directions. But the [6] testimony of the mate being shaken by Admiral Christian's evidence, a verdict was found for the Defendant.

Adair Serjt. now moved for a rule nisi for a new trial.

This case involves two questions. 1st, whether, in point of fact, Captain Hodser ever received sailing orders; and 2dly, whether, in point of law, the actual receipt of them be necessary to the performance of a warranty to depart with convoy. All the evidence of which the nature of the case admitted was given at the trial. The captain, whose testimony was most necessary to establish the receipt of orders, and the only other person supposed to have seen them, were drowned. Under these circumstances I submit that the Court will presume the receipt of sailing orders. The point of law has never been expressly decided. Mr. Justice Buller seems to have questioned the necessity of sailing orders in all cases in *Hibbert v. Pigou*, Park on Insurances, p. 341, where that point had been incidentally touched upon by Lord Mansfield. So in *Victorin v. Cleve*, 2 Str. 1250, Lee Ch. Just. and the Jury were both of opinion, that as the captain had done every thing in his power, it was a departing with convoy, and that those agreements were never confined to the precise words, and the Plaintiff recovered.

BULLER J. (absente Eyre Ch. J.) Had not my Lord mentioned that the verdict was entirely to his satisfaction, I should not decide upon this application in the first instance. The case is here brought to a question of law. In point of law then, the general proposition is, that sailing instructions are necessary. I have never decided this point myself, but it has often been determined at Guildhall. I do not say that there may not be cases in which they may be dispensed with. In *Hibbert v. Pigou* my expression is, "It is not necessary to say whether sailing orders are essential or not; as at present advised, I do not say that they are absolutely necessary." And the case of *Victorin v. Cleve* goes no further. If the captain from any misfortune,

(b) In *Routh & Uxor v. Weddell*, C. B. Hil. 2 Ann. Lutwyche, (the last case in the Appendix), where an attorney pleaded his privilege, it was urged, that in the precedents in Rastal, where attorneys of C. B. brought habeas corpus, to discharge themselves from arrest by process out of inferior courts, their privilege was recited to be *dum aliqua negotia in eodem banco prosequantur et defendant*; and that it was agreeable to reason that it should be so, for otherwise many persons who never intended to practice would be made attorneys, in order to entitle themselves to privilege. But it was answered by the Court, that as long as the Defendant was an attorney on record, he ought to have the privilege of an attorney, and that if he was not qualified to be an attorney, the Court might be moved for a rule to strike him off the roll. *Cont. Broke v. Bryant*, in K. B. 7 T. R. 25.

* And see *Anderson v. Pitcher*, 2 B. & P. 164. *D'Aquilar v. Tobin*, Holt. Ni. Pri. 185.

from stress of weather, or other circumstances, be absolutely prevented from obtaining his instructions, still it is a departure with convoy : but then he must take the earliest opportunity to obtain them. Generally speaking, unless sailing instructions are obtained, the warranty is not complied with : the captain cannot answer signals ; he does not know the place of rendezvous in case of a storm ; he does not in effect put himself under the protection of the convoy, and therefore the underwriters are not benefited.

The other Judges concurring,

The Plaintiff took nothing by his motion.

[7] In a note, inserted in the last edition of Park on Insurances, p. 341, the following case is mentioned, which seems to agree in principle with the above decision. It was the case of *Veeton v. Wilnot*, at Guildhall, 1744, in the time of Lord Chief Justice Lee, where the ship insured had departed from London, and arrived at the Downs 22d August where the "Grafton" and "Lenox" (the convoy) were under sail, and the captain sent one of his men on board for sailing orders, which were refused ; but the Commodore said, "Keep on, and I will take care of you ;" and the ship being lost that night by striking on the shore, the question was, if the ship was put under convoy, having no sailing orders ? and it was held she was, and the Plaintiff had a verdict.

BAPTISTE v. COBBOLD. May 8th, 1797.

Declaration for 52l. 10s. for run-money ; evidence, note for 52l. 10s. for run-money, with an additional stipulation written after signature of the note, for a pint of rum per day, and held no variance.

The plaintiff in this action was a sailor, and declared on a contract for 52l. 10s. for run-money, against the Defendant, being captain of a ship bound from the West Indies to London.

At the trial, before Eyre Chief Justice, at Guildhall, Sittings after Hilary Term, a note was given in evidence, by which the Defendant agreed to allow the Plaintiff the above sum ; together with a pint of rum per day ; the latter part of the agreement, however, appeared to have been added to the note after signature. Verdict for the Plaintiff.

Cockell Serjt. now moved for a rule nisi, to enter a nonsuit. He relied on a variance between the declaration and the evidence ; the former describing a contract for 52l. 10s. only, and the latter proving the additional stipulation for a pint of rum per day. He contended that the contract, being entire, could not be separated ; he cited *Sands and Tash v. Ledger*, *Ld. Raym.* 793, and *Bristow v. Wright*, *Dougl.* 640, and said that this case fell within the principle of a variety of others.

BULLER J. The agreement given in evidence corresponded with the declaration, as far as the declaration went. The case in Lord Raymond turned upon the description of a written agreement, which, if described at all, must tally with the description ; here no written agreement was described. It is true that the agreement given in evidence contained something more than was stated in the declaration, but not material to it.

EYRE Ch. J. At the trial, I was inclined to consider the latter promise as no part of the agreement ; it was totally different from the main body, which was so executory, that nothing was to arise upon it till the voyage was complete ; whereas this part was to be put in force from day to day, and determined before this cause of action arose. Besides, the addition was made after sig-[8]-nature and seemed to be inserted merely to ascertain what quantity of rum should be distributed to the crew.

The Defendant took nothing by his motion.

DE GAILLON v. VICTORIE HAREL L'AIGLE. May 9th, 1797.

[See S. C. 1 Bos. & P. 357, 368.]

A Frenchwoman and her husband, came over to England. The husband gives her a power of attorney, to transact his business, and goes to Hamburgh. She cohabits with another man, and trades on her own account with the Plaintiff, by whom she is arrested. Under these circumstances, the Court will not discharge her on a

common appearance, on the ground of her coverture, although the Plaintiff appear to have been acquainted with it*.

Shepherd Serjt. having obtained a rule to shew cause, why on the Defendant in this action entering a common appearance, the bail-bond should not be set aside, and all further proceedings against the sheriff of Middlesex be stayed, it came on this day.

In November 1792, the Plaintiff M. De Gaillon, a M. L'Aigle and the Defendant Madame L'Aigle his wife, came over together as emigrants from France to England. In July 1795, M. L'Aigle left England for Hamburg, and then gave a power of attorney to the Defendant to manage his affairs. In pursuance of which she drew and accepted bills for him. Since the husband's residence in Hamburg, he had carried on business with the house of Dubois and son in London, and the Defendant had cohabited with another person of the name of Montelun, who called himself Piccardy, by whom she had a child, and with whom she had been carrying on trade. In June 1796, the Plaintiff wrote the following letter to the Defendant: "Will you, or can you procure me merchandize for 700l. as soon as possible; I will send you immediately 300l. on account, and I will send your husband goods to the amount of 600l. to Hamburg; and in return he will send me French goods to that amount, such as brandy, hollands, or what he may think most advantageous to me." Soon after this the Plaintiff deposited 300l. in the hands of the Defendant, for which she gave him a receipt in her own name. The Plaintiff having obtained no goods, pressed the Defendant to repay the 300l. which he had advanced, upon which the following arrangement took place. The Defendant gave the Plaintiff 100l. in goods, and four bills on her husband, for 50l. each: the bills were in form as follows:

"One month after date, please to pay to the order of M. De Gaillon, 50l. sterling, value received.
(Signed) "Wife HAREL L'AIGLE, by virtue of power of attorney."

[9] M. L'Aigle accepted the bills, but on their becoming due refused to pay; on which they were returned to England protested, and the Defendant was arrested for the sum of 180l., being the balance due to the Plaintiff on the whole transaction.

The Defendant stated in an affidavit the Plaintiff's knowledge of her coverture at the time of her coming over to England: the Plaintiff, on the contrary, denied in his affidavit any intimate acquaintance with M. L'Aigle, and declared that he had reason to suppose from the Defendant's conduct in England, that in fact she was not married to him.

Le Blanc Serjt. shewed cause. Where it has been known for certain that the Defendant was a married woman, the Courts have discharged her (a); but where it has been doubtful, or collusion has appeared, they have put her to her plea of coverture, and let the question be tried; and this I apprehend they will do, where the money is advanced to her on her own account. She has not stated in her affidavit that her husband is likely at present, or ever, to return to England. The letter of attorney from M. L'Aigle was only colourable.

Shepherd Serjt. in reply. Had this been a separate trade by the Defendant, I could not have argued the question. The Plaintiff's affidavit consists of inferences only, which are contradicted by his own acts, and letter. He cannot say that he did not suppose the Defendant married, as his own expression in the letter "I will send to your husband" would refute that assertion. He therefore dealt with her rather as an agent than as a separate trader. The Defendant did not draw the bills as a feme sole, but signed them "Wife H. L'Aigle," and the plaintiff received them, and never brought this action till the bills were returned protested from Hamburg. If the party has passed herself upon the world as a single woman, the Court will give her no relief; but if she was known to be married, it is otherwise. *Pearson v. Meadon*, 2 Bl. Rep. 903. So in *Waters v. Smith*, 6 Term Rep. 452, the Court said, "Though when a married woman imposes on a trader, and contracts on her own credit, we will not relieve her in a summary way; yet where it has clearly appeared that the Defen-

* S. C. post, 357. And see *Wilkins v. Wetherill*, 3 B. & P. 221. *Burfield v. Duchess de Piennr*, 2 N. R. 380. *Luden v. Justice*, 1 Bing. 344.

(a) *Partridge v. Clarke*, 5 T. R. 194.

dant was a feme covert, and there has been no contrariety of evidence about that fact, the Court has discharged her out of custody on filing common bail." Here the Plaintiff knew that she was married, and employed her to transact business with her husband. Therefore it is her husband's, and not her debt.

[10] EYRE Ch. J. In my apprehension you mistake the evidence. The letter contains two distinct transactions. In the first part, the Plaintiff desires the Defendant to supply him with goods to the amount of 700l., for which he promises to advance 300l. immediately; and this has no connection with the husband. Then in the second part, he states his intention of sending goods to the husband at Hamburgh, for which he expects an adequate return. The Plaintiff obtained 100l. from the Defendant in goods, and bills for 200l., making in the whole 300l.; the sum in which she, as acting for herself, was indebted to him. To whom then was the Plaintiff creditor? He was creditor to the husband in one case, for 600l. which he had sent to Hamburgh, and for which the husband was to return 600l., and as I understand, he did so. To the wife, the Plaintiff had advanced 300l., and not receiving the goods which he had desired, to the amount of 700l., required security. She gave him 100l., and bills; and on the bills being protested, he arrested her. This last transaction was with her, not with the husband; the Plaintiff having advanced the money on that trade which she was carrying on in England. I cannot but consider that these parties came from France, where it is not unusual for the wife to deal separately from the husband. In this case the husband resided at Hamburgh, she lived with another man, and he made no objection. She must therefore be responsible for her own trading, and should not be allowed to shelter herself under the name of her husband, who is in a foreign country.

BULLER J. We are not called upon to decide whether the Defendant be married or not. It may happen that her coverture may be a good defence. These cases afford no general rule. They turn on nice circumstances. If the 300l. had been advanced on the husband's account, I should have wished the Court to interpose; but she took it for her own use. The husband had no connection with her trading. The observation of my Lord, that these parties are French, is very material. In France married women have many rights, which are allowed to none but single women in this country. If she received the 300l. on her own account, she is entitled to no favour. A discharge is a favour; and the question now is, Whether we are to grant a favour or not? If she can prove a marriage at the trial, it may be a defence at law. Let her put her coverture on the record.

HEATH J. The Plaintiff took the bills from the Defendant, drawn by procuration, as the only security which he could [11] obtain for his debt. But the money was originally advanced to her as a feme sole.

ROOKE J. On the opening of this question I wished for further discussion, but on discussion am entirely satisfied. Let her plead her coverture.

Rule discharged.

In *Pritchett qui tam v. Rachael Cross*, 2 H. Bl. 18, where a rule for discharging a feme covert, who resided apart from her husband, was made absolute, Gould J. seemed to disapprove of the summary proceeding by motion, and of taking the fact of coverture from the Defendant's affidavit. He mentioned the case of *Mrs. Baddeley*, 2 Bl. 1079, where the Court were not satisfied with an affidavit, but put her to plead her coverture; and he said he had always understood that such was the course both in K. B. and C. B.

P. Holt J. a married woman is to be discharged upon Common Bail of course; but if it be doubtful whether she be married or not, she shall be held to Special Bail, if the cause require Special Bail. 7 Mod. 10.

KEYAY AND ANOTHER, Assignees of Taylor, a Bankrupt, v. RIGG. May 19th, 1797.

The Court will not refuse leave to enter a suggestion under the 22 G. 2, c. 47, on the ground that a Court of Conscience has no authority to try a question of bankruptcy*.

Shepherd Serjt. on a former day obtained a rule to shew cause why the Defendant

* Vide *Parker v. Vaughan*, 2 B. & P. 30. *Ward v. Abrahams*, 1 B. & A. 367.

in this case should not be at liberty to enter a suggestion on record, pursuant to the 22 G. 2, c. 47, of his being an inhabitant and resident within the parish of St. Mary. Lambeth, and liable to be summoned for the debt for which this action was brought before the Court of Requests for the Town and Borough of Southwark in the County of Surry, and that the damages recovered in this action did not amount to the sum of 40s.; and why the Plaintiffs should not lose their costs in this action, and pay to the Defendant his costs in this action, and also of this application.

The Plaintiffs declared as assignees for tailors' work done by the bankrupt, and the cause was tried before Rooke J. at the sittings at Guildhall after last Hilary Term. The original demand (which has never been objected to till the action was brought) was 2l. 1s.; but the jury found a verdict for 1l. 16s. only.

Adair Serjt. now shewed cause. My objection is singly this, that the Court of Requests has no authority to try a question of bankruptcy. There is no decision, I believe, upon the point; I must therefore submit it to the Court on the nature and reason of the case. The words of the statute which gives the jurisdiction are cautious; they are "touching such debts." The intricacy attending questions of bankruptcy is well known, and how unfit the courts erected by this and similar statutes are to try them. It [12] would be dangerous to those commercial cities in which courts of this nature are established, if it were in the power of every one to draw questions of bankruptcy before such tribunals, by laying the damages under 40s. I contend therefore that the words of the statute do not bind the Court to an inconvenient construction, and that the silence of an act should not (as is sometimes the case) be carried too far.

Shepherd contra. The Plaintiffs in this case are personal representatives: now though an executor Defendant cannot be sued in these courts, *Ailway v. Burrows*, Doug. 263, yet a Plaintiff administrator is bound to sue in them, *Wase v. Wyburd*, Doug. 246. In the Court of Conscience act for Middlesex, 23 G. 2, c. 33, s. 19, if the damages are less than 40s. the Plaintiff can have no costs, unless the judge certify that the bankruptcy, or title to the freehold, came principally in question; the Legislature therefore considers bankruptcy within the cognizance of these courts, and unless excepted by the statute establishing the court in question, it falls of course within its jurisdiction.

EYRE Ch. J. It might have been prudent in the Legislature to have made the exception contended for. But if a general jurisdiction be given, the trial of bankruptcy is incidental to it. The Plaintiff must make out this claim before these tribunals, however that claim may be constituted; though bankruptcy, or any other question, should happen to be connected with it. Many intricate points may be incidental to a defence, in which case these courts must do as well as they can: the present objection is only quarrelling with the jurisdiction of the court.

The words "touching the debts" are very extensive. The jurisdiction is general, and it is incumbent on the Plaintiff to shew an exception. My brother Adair complains of the silence of an act being carried too far, but here he wants to insert an exception not warranted by the act itself: that is making the act speak. The case is not of that importance which has been stated: questions of bankruptcy seldom lie in so narrow a compass as 40s.; nor are they in general very intricate. It would be cruel to make such small debts arise on bakers' bill, and milk scores, the subjects of litigation in the superior courts, because a question of bankruptcy is involved.

BULLER J. seemed to think that there were authorities on the subject, and wished them to be looked into. He said that if an action would not lie in these courts for a debt arising in consequence of a judgment of a court of law, perhaps it might not for a debt [13] arising in consequence of the decision of the commissioners of bankrupt, who have an equitable jurisdiction.

Leave was given to enter the suggestion, unless any authorities should be produced.

On the 19th, Adair again mentioned the case of *Ailway v. Burrows*, as containing a principle which would support his argument. There Lord Mansfield held, that although there were no express exception, yet if one were implied from the nature and reason of the thing, it was sufficient. If that were so, the instance cited of acts containing express exceptions furnished an argument to prove that such a jurisdiction was against the reason of the thing. Taking all the acts together they appeared to form one code of legislation, and questions of bankruptcy being excepted by 23 Geo. 2, c. 33, s. 19, they were excepted in all.

ROOKE J. In that act, bankruptcy is not excepted, unless the judge certify that it came principally in question, and no certificate could be expected in the present case.

EYRE Ch. J. Even under that act the local courts have jurisdiction over the excepted matters, if the parties think proper to apply to them, but if they apply to the superior courts, they shall be protected; provided a certificate be made, that those matters came principally in question; for the object is not to withdraw any jurisdiction from the local courts. It would be much better that debts under 40s. should be given up, than that they should be sued for in the superior courts.

Leave given to enter the suggestion.

IN THE EXCHEQUER CHAMBER.

KIRBY AND ANOTHER v. SADGROVE, IN ERROR. May 10th, 1797.

If the lord of the manor plant trees on a common, a commoner has no right to abate them*.

Error from the Court of King's Bench. The declaration there was in trespass, for cutting down the trees of the Plaintiff below, growing in the parish of South Moreton in the county of Berks. Plea: That the trees grew in a certain common field in the said parish, and that one F. K. was seised in his demesne as of fee, in a certain farm in the said parish, and prescribed for a common of pasture for his sheep, levant and couchant, throughout the said common field, in respect of such estate for himself, [14] his tenants, &c. every year when the common field should be sown with corn, from the cutting down and carrying away the same, until the said common field should be re-sown with corn. It then stated a demise of the said estate from F. K. to Kirby the Defendant below, in right of which he entered upon the same, and because the said trees at the time when, &c. had been wrongfully planted, and were wrongfully growing upon the said common field, incumbering the same, and damaging, &c. so that Kirby, the Defendant below, could not without cutting down the same, enjoy his common of pasture in so ample and beneficial a manner as he otherwise might and ought to have done; he in his own right, and the other defendant below, as his servant, and by his command, cut down the said trees, &c. Replication: That the said common field whereon the trees were growing, was parcel of the contiguous manors of Sandeville and Bray in the county of Berks, and of the wastes thereof, and that the Plaintiff below was Lord of the manors, and that he planted the said trees, &c. To which there was a general demurrer and joinder: and judgment for the Plaintiff below. For the former arguments in this case see 6 Term Rep. 483.

Shepherd Serjeant for the Plaintiff in error. The replication does not deny the allegation that the trees were an interruption to the enjoyment of a commoner's right, in as ample a manner as he was entitled to exercise it; and is bad because it does not state that the lord left a sufficiency of common, which question ought to have been put in issue and tried. I mean to contend, that when the lord does an act by which the right of the commoner is not totally destroyed but only partially interrupted, he may equally take his remedy by abating the nuisance, and is not confined to his action for damages, as argued on the other side. A right to common without a sufficiency would be a nugatory right. The Statute of Merton, 20 Hen. 3, c. 4. Statute of Westminster 2. 13 Ed. 1, c. 46, and 3 & 4 Ed. 6, c. 3, establish three rights; ingress, egress, and sufficiency of common when on the common; and these are described as three things which the lord shall not infringe. The words of the Statute of Merton are, "Whenever such feoffees do bring an assize of novel disseisin for their common of pasture, and it is acknowledged before the justices that they have as much pasture as sufficeth to their tenements, and that they have free egress and regress from their tenement unto the pasture, then let them be contented therewith." Sufficiency of common is the right, and ingress and egress are the means of enjoying it. The [15] distinction of the other side admits that the commoner has a right to assert by his own act ingress and egress, but not the actual enjoyment of a sufficiency of common. For it is allowed that if the lord plant a hedge, or build a wall,

* S. C. 6 T. R. 483. 3 Anstr. 892.

so as totally to exclude a commoner from the exercise of his right, he may abate the nuisance. The reason is given by Lord Mansfield in *Cooper v. Marshall*, Burr. 265. "Because every such obstruction is directly contrary to the terms of the grant: a hedge, a gate, or a wall to keep the commoner's cattle out, is inconsistent with the grant which gives them a right to come in." On the same principle I contend, that when the lord erects any thing, whether hedge, gate, house, or tree, which destroys either of the commoner's three rights, he may abate it. In every other case of nuisance, whether totally or partially destroying the parties' right, he may abate, as in 5 Co. 101 b. *Penruddock's case*, 9 Co. 55, *Batten's case*; and this is a general proposition, relating not only to property in possession, but to rights. As in the case of a water-mill, the owner of the mill having a right to the water of a water-course, may, if the water be stopped in another's lands, enter those lands and remove the dam. So if a way be stopped, he who has the right of way may abate the stoppage, whether it be total or partial. (Eyre Ch. J. said there was a distinction taken in Fitz. N. B. p. 183, in the note. "If a way be so stopped, that the party can pass but narrowly, an action on the case lies; but if it be wholly stopped, an assize, 14 H. 4, 31.") A distinction has been attempted between an act illegal in itself and an excess; but this would make trespass almost essential to constitute a nuisance, which it is not; the term nuisance is not applicable to the mode of doing the thing, but to the thing done, and to its effect on another. If the lights of a house be obstructed, so that the possessor is prevented from enjoying in tam amplo modo, he may abate what causes the obstruction. See Sir William Jones 222; thus in *Ree v. Pappineau*, 1 Str. 688, which was an indictment for a nuisance, Lord Raymond said, "Regularly the judgment ought to be to abate so much of the thing as makes it a nuisance; if a house be built too high, so much of it as is too high shall only be abated." In *Penruddock's case* the nuisance was clearly only partial, and it was held that the party might abate. If there can be no abatement in this case, the lord may inclose almost all the common, not perhaps leaving enough for an hundred sheep, or even for one, or he might build a town on the common, and yet there could be no abatement. In Bro. Abr. title Common, Pl. 9, it is said, "Where I have common [16] in another's land, and the owner makes a hedge on the land where the common is, I may break down the whole hedge; but if he incloses the whole land in which the common is, by making a hedge on other land which surrounds the land in which the common is, I may not break down the whole hedge, but only part, so as to have a way to the land where the common is, and this is the diversity." So Co. 2 Inst. p. 88. "If the lord doth inclose any part, and leave not sufficient common in the residue, the commoner may break down the whole inclosure, because it standeth on the ground which is his common." See also 29 Ed. 3, 6. Now this proves that the commoner may abate a nuisance on the common, as well as one obstructing his way to the common, only confining his abatement to the extent of his injury. The facts of this case do not vary the principle. Upon the record it must stand confessed that the lord infringes the right of common tam amplo modo. He does not say, I did this act as lord, and left a sufficiency, which he ought to do, for otherwise he does not shew, that he has planted legally. In *Mason v. Cesar*, 2 Mod. 66, the commoner did not state that he was deprived of his enjoyment altogether but only in eâ parte where the hedges stood, and so justified pulling them down; and the issue was, whether he could enjoy tam amplo modo, &c. and judgment was given for the commoner. This warrants my argument; for it is the same thing whether a hedge or a tree be planted on the common. (Buller J. Are you aware that *Mason v. Cesar* was decided on the point that the hedge was no part of the soil.) Meddling with the soil or not does not decide the question; if it did, it would equally apply where the obstruction was total as where it was partial. For in both cases the lord is equally entitled to the soil, and in the latter the commoner's right to abate has been acknowledged. As in 29 Ed. 3, 6, where the defendants justified cutting down trees, because they were planted in a hedge which deprived them of ingress to the common. It is true that there are several cases (a) to shew that a commoner has no right to destroy the beasts or coney-burrows of the lord, though they do not leave him a sufficiency of common; and the reason why abatement is not there allowed, is because the beasts and comes are only in the nature of a surcharge.

(a) *Cope v. Marshall*, 2 Wils. 51. *Cooper v. Marshall*, Burr. 259, & the cases there cited.

A free warren is compatible with a right of common : but the right exercised here is incompatible. An erection [17] by the lord is no enjoyment of the common quâ common, but is rather a subtraction of the common itself. In the case of free warren the commoner may not redress himself : for though his right and that of the lord are not of the same nature, the modes of enjoyment are. A surcharge is not a continued nuisance, but an erection is : to confine the party therefore to an action, would be to give him a perpetual right of action. Suppose the commoner were to bring an assize of nuisance, he would then have a right to abate after recovery : then why should he not as well abate before ? for the reason for abatement given in the books is to prevent a multiplicity of actions. There is no distinction in principle, between destroying the enjoyment of a right and preventing the enjoyment tam ampo modo. There are cases where total and partial obstructions of rights have been considered as equally abateable ; and I have found none the other way but those relating to free warren.

Williams Serjt. for the Defendant was stopped by the Court.

EYRE Ch. J. This case is governed by that of *Cooper v. Marshall* unless a good distinction can be stated between them. A tree is not an erection on the soil ; it is the very fruit and produce of the soil, it is part of the soil and freehold itself, and does it not pass as such ? In public ways you might abate a tree, because it would necessarily be a nuisance. But in cases like the present, it will be a nuisance or not, according as it injures the easement or not. This case has been argued as if it were a case of approvement under the Statute of Merton ; but in fact it is no such thing. The right here exercised by the lord is an original right in the soil, prior to that of common, which is only concurrent with it. But where there is a right of common the lord's right must be so exercised as not to injure the commoner. If the lord so use it as to destroy the easement, such an act would be considered as a nuisance, and abateable. If the easement be injured to a certain degree only, or if it may be a question whether injured or not, in the nature of things it cannot be a subject of abatement. The easement in question is a right of pasture over the whole soil, consistent with a free warren in the lord, and, as I think, with a right to plant. If the easement be injured, the commoner may bring his action and have satisfaction in damages. Even where the right of common is totally destroyed, and the commoner may, generally speaking, abate the nuisance ; yet if he cannot abate it without interfering with the right of soil in the lord, he must not pursue that remedy. We cannot overturn the case of *Cooper v. [18] Marshall*. Indeed we ought to adhere to it, not only as founded in principles of law, between the commoner, and his lord, but also in principles of general convenience. Abatement ought to be allowed in very few cases ; for the abator is judge in his own cause. The just measure of damages sustained will be best found by an action. Unless the clearest analogies compel us to pronounce in favour of abatement, there can be no reason to strain a point in order to give that remedy. It is a remedy in addition to that given by action, and ought to be allowed but sparingly. I think the case of *Cooper v. Marshall* decisive.

Judgment affirmed.

CROWDER v. WAGSTAFF. May 11, 1797.

The Court will not give leave to compound in a penal action, after verdict, unless the Defendant can shew circumstances which entitle him to such an indulgence.

Le Blanc Serjt. moved for leave to compound in a qui tam action after verdict on the usual affidavit, saying that the same had been done by consent in the King's Bench (a).

Shepherd Serjt. on the part of the Plaintiff consented.

Sed per EYRE Ch. J. What case do you make for such indulgence ? We cannot pay attention to the consent of the Plaintiff after verdict. I do not know that the Court can do this without the consent of the Attorney General. It is no longer compounding ; the debt is ascertained, the suit is at an end, and the Crown may intervene. Here the affidavit states no circumstances to entitle you to this indulgence, if we are

(a) The case alluded to by Le Blanc probably was *Maughan v. Walker*, 5 T. R. 98, but there favorable circumstances were stated on the part of the Defendant.

at liberty to grant it; at least you ought to state a case of favour. You must pay the whole money into Court (b).

[19] SPENCER v. SCOTT. May 11th, 1797.

Quare clausum fregit against two, and a declaration against one, held regular *1.

Shepherd Serjt. shewed cause against a rule obtained by Runnington Serjt. on a former day, to set aside the proceedings in this action for irregularity, with costs.

The Plaintiff had sued out a quare clausum fregit against Walter Scott and Richard Shaw, and had declared against Scott only.

Shepherd. When on the face of the writ, the action appears to be founded on a contract, and two persons are there mentioned, the declaration must be against both; but where the writ does not import a contract, it is otherwise. Almost all writs are against two, the name of John Doe, being generally inserted with that of the real Defendant, and the Court will not now for the purposes of this rule, take notice that Richard Shaw is not a fictitious person.

Runnington in support of the rule. I know of no such distinction, as has been stated; if the declaration be against one, and the writ against two, the proceedings are irregular and even upon the above distinction, it may be observed here, that though the writ was a quare clausum fregit, the notice of declaration was debt on contract.

TYKE Ch. J. My brother Shepherd states it to be the practice to put any names into the writ, as John Doe; which is very intelligible; the writ here is only the process by which this Defendant was brought into Court, and the notice of declaration given afterwards is right. If John Doe be ever joined in the writ with the real Defendant, it follows that proceedings are not to be stayed because two names appear in the writ, and one only in the declaration; for John Doe is never inserted in the declaration.

Rule discharged without costs.

[20] EVANS v. WEAVER. May 12th, 1797.

In an action on a promissory note, the Court will not change the venue from London to the county where it was made, on the Defendant's stating that all his witnesses live there: but if his affidavit shew the number of his witnesses, and that a serious inconvenience would arise from bringing them up, it will *2.

This was an action on a promissory note for 40l. in which kind of action the general rule is, that the Defendant cannot change the venue.

Williams Serjt. having obtained a rule to shew cause why the venue should not be changed from London to Shropshire, on an affidavit that the Defendant had a good defence at Ludlow in Shropshire, and that all his witnesses lived there, as well as the usual affidavit.

Clayton Serjt. for the Plaintiff. All the allegations in the Defendant's affidavit may be true, and yet there may be no ground for the present application. For perhaps he may have only one witness at Ludlow, and then it may be more inconvenient for the Plaintiff to carry down his witnesses than for the Defendant to bring up his.

Williams for the Defendant. It is not the first time (a) that an application has been made on the ground of the Defendant's witnesses living at a distance. The only

(b) In *Bradshaw v. Mottram*, 1 Str. 167, the Plaintiff obtained the leave of the Court, to compound with the Defendant who was then in execution, on an affidavit of his poverty. But in *Brery qui tam v. Levy*, 1 Black. Rep. 443, which was a popular indictment on the coal act, the Court refused leave to compound after verdict, saying that the King's moiety was vested.

*1 Vide *Stables v. Ashley*, post, 49. *Chapman v. Eland*, 2 N. R. 82. *Kervel v. Fossett*, 7 Taunt. 458.

*2 Vide *Greenway v. Carrington*, 7 Price, 564.

(a) See *Foster v. Taylor*, 1 T. R. 781, where the venue was changed under similar circumstances; e contra, *Beris administratrix v. Moore*; *Poole v. Horobin*, and *Flecke v. Godfrey*, in a note to the above case.

question is, whether the Court shall deviate from the usual practice, and I submit that where the affidavit discloses circumstances singular or extraordinary it will.

Per Curiam. The Defendant only swears that he has a good defence, and that all his witnesses live at Ludlow; but he does not state what are the grounds of his defence, nor whether he has one, two, or three witnesses, or how many. If he had a number of witnesses all living there, and he were to state that on his affidavit, and shew that a serious inconvenience would arise from bringing them up, it might induce the Court to deviate from the general rule. But if the Defendant should have one witness only, the Court would hardly change the venue on account of that one. It might be more expensive to the Plaintiff to carry down his witnesses to Ludlow, than for the Defendant to bring up his to London. It will be easy to state the circumstances on an affidavit.

On the 19th Williams produced a supplemental affidavit, stating that the defence on which the Defendant intended to rely, was a [21] set-off for money paid, lent, had, and received, and account stated: that he had three witnesses living at Ludlow, all of whom were essential to establish his defence; that it would be necessary to prove a judgment for 4l. 5s. in the town-court of Ludlow, (which however the Plaintiff offered to admit,) and that this application was not made for the purpose of delay.

On which the rule was made absolute, the Defendant consenting to allow judgment to be entered up as of Trinity term, in case of a verdict for the Plaintiff at the assizes.

NEAT v. ALLEN. May 15, 1797.

It is no objection to bail that they are indemnified.

The bail in this action being brought up to justify, Shepherd Serjt. asked one of them, how long he had known the Defendant? But the Court thought the question improper. And on Shepherd's suggesting that the bail had not been acquainted with the Defendant above three or four days, and that he was indemnified by the Sheriff's officer,

Per Curiam. The sufficiency of the bail is the object of which the Court are to take care: there is no impropriety in their being indemnified: it is a very common practice.

Bail allowed.

TAYLOR v. SHUM AND OTHERS. May 16th, 1797.

[Referred to, *Hopkinson v. Lovering*, 1883, 11 Q. B. D. 97.]

There is no fraud in the assignee of a term assigning over his interest, to whom he pleases, with a view to get rid of a lease, although such person neither takes actual possession, nor receives the lease*. *Qu.* If the replication *per fraudem* by the lessor to a plea of assignment in such a case, can ever be good? Certainly not, where the party assigning derives no benefit from the premises.

Debt for rent against the assignees of a term.

Pleas. First, that the term estate and interest in the premises did not come to the Defendants by assignment: and issue thereon. Second, That the Defendants did not by virtue of any such assignment, enter into and become possessed of the premises: and issue thereon. Third, That before the rent demanded, or any part of it became due and payable, the Defendants assigned to one William Bishop.

Replication. That the said supposed assignment to the said William Bishop in the third plea mentioned, was had and made by the said Defendants, by the fraud and covin of the said Defendants, with intent to defraud the said Plaintiff of her said debt: and issue joined thereon.

[22] The premises in question were demised in the year 1788 by the Plaintiff to one Hannah Adams, for twenty-one years, and afterwards came by several mesue assignments to one Sibley; in the year 1792 Sibley mortgaged the lease to the Defendants, who on his becoming insolvent, and abandoning the premises, took possession,

* *Vide Odell v. Wake*, 3 Campb. 394. *Copeland v. Stephens*, 1 B. & A. 593.

and paid the rent up to Christmas 1795; at which time they offered to surrender the premises to the Plaintiff, and on his refusal to accept, assigned over to William Bishop: since that time the Defendants had neither enjoyed the premises nor paid any rent: nor had Bishop taken possession, or received the lease.

This cause came on to be tried at the sittings after last Hilary term in London, before Eyre Ch. J., when a verdict was found for the Plaintiff, with leave for the Defendants to move to set it aside and enter a nonsuit.

Accordingly Le Blanc Serjt., having on a former day obtained a rule to shew cause, and cited the case of *Le Keue v. Nash*, Str. 1221, where an assignment to a prisoner in the Fleet was held good,

Shepherd Serjt. for the Plaintiff now produced an affidavit, stating that the Defendants had informed the Plaintiff that William Bishop the assignee lived in Harp Lane; but that although upon inquiry one or two persons of that name were found there, yet they had no knowledge of the assignment. He admitted that the Defendants might select a pauper for the purpose of assigning over to him, but insisted that there must be a good and valid assignment, so as to give the same remedy against the pauper as might have been had against the Defendants, otherwise the execution would be fraudulent. That if this were not the case they might have assigned to a non-entity. (Buller J. If they execute to a non-entity it is no assignment.) He contended that the Defendants had not legally divested themselves, for they had not made such an assignment as would bind the assignee, he never having had possession of the premises, or delivery of the lease. He cited *Philpot v. Hoare*, Amb. 485, where an improper description of the residence of the assignee was one of the grounds on which the assignment was held fraudulent.

Le Blanc contrâ was stopped by the Court.

EYRE Ch. J. It was no part of the case at the trial that there was no such person in existence as the person described in the assignment; the assignment was admitted on the pleadings. The real question is, whether the Defendants could assign to whom [23] they pleased, so as to destroy their own liability. If you have no remedy against the assignee, you must lose your rent, and get possession of the premises as soon as you can. The only case in which a question of fraud could arise, is, where the assignor has kept possession of the premises, of which he makes a profit, and has made an assignment to prevent responsibility. But even there, if the possession be profitable, there will always be something on the premises for the landlord to distrain; so that I doubt whether there can ever be such a thing as a fraudulent assignment, and whether an issue on such a point can ever be well taken. It is clear that there is no fraud in assigning to a beggar (a), or to a person leaving the kingdom, provided the assignment be executed before his departure. The Defendants had a right to divest themselves of the interest, by the mere form of an assignment, which drives the Plaintiff to take possession.

BULLER J. An assignee is only liable while he continues to be legal assignee; that is, while he is in possession under the assignment (b). I will first consider the case as it stood at the trial, and next as it stands upon the facts of the affidavit. What was to be tried? not whether an assignment had been made or not: that was taken ex concessis; it was admitted on the record. Where the assignor continues in possession, is the only case where the replication per fraudem can be good; here the Defendants were clearly not in possession, and had no use of the premises; then what becomes of the issue? Secondly, has any thing appeared since the trial to shew that justice has not been done? the very reverse. Was the Plaintiff taken by surprise? It is true, that he has found a person of the name of Bishop, respecting whom there is some doubt, if he be the person mentioned at the trial; but the Defendants have received no benefit: they offered to give up the premises, which offer was refused. The Plaintiff adhered to the strict point of law against the justice of the case; the law is against him, and therefore he shall have no indulgence.

HEATH J. This action is founded on the privity of estate (c); but here there is none, therefore the Plaintiff is not entitled to recover. So far from fraud appearing,

(a) *Pitche v. Tovey*, Salk. 81. 4 Mod. 71, S. C.

(b) Vide *Walker v. Reeves*, Doug. 461, in the note, and Buller's N. P. 159.

(c) Carth. 177.

the Defendants declared their [24] desire of surrendering before they assigned, but the Plaintiff refused to accept.

ROOKE J. Of the same opinion.

Rule absolute (a).

BENTON v. SUTTON. May 16th, 1797.

If a sheriff's officer having taken a prisoner in execution, permit him to go about with a follower of his before he takes him to prison, it is an escape *. Qu. Whether it would not have been an escape also, if the officer himself had accompanied him.

Debt against the Defendant as sheriff of Surry, for an escape of a prisoner in execution. This case came on to be tried before Runnington Serjeant, sitting for Hotham Baron, at Kingston Spring Assizes 1797.

In a suit, in which Benton was the Plaintiff, and one Evans the Defendant, a writ of *capias ad satisfaciendum*, returnable on the 3d of November, was sued out on the 1st of June against Evans, and delivered at the sheriff's office, and a warrant made out thereon to Donolly and Benton (the Plaintiff's father). Soon after a similar writ issued against Evans at the suit of one Tibbits, returnable on the 7th of November, and a warrant was made out thereon to one Purkiss the sheriff's officer: by virtue of which last writ Evans was arrested on the 27th of September, and carried to a lock-up house belonging to the officer. On the 2d of October he was permitted by Purkiss to go in company with one of his followers of the name of Isaacs, to his own house, for the purpose of settling his affairs, and on the 3d was seen riding in St. George's Fields, in a chaise-cart, attended by the same person. On these facts Runnington Serjeant being of opinion that no escape had been made out, directed a nonsuit.

Shepherd Serjt. on this day shewed cause against a rule obtained by Le Blanc Serjt., for setting aside the nonsuit and granting a new trial.

Shepherd. Evans was not arrested under the writ at the suit of the Plaintiff, but under that at the suit of Tibbits: a warrant was made out on the Plaintiff's writ, and put into the hands of Benton his father, with an injunction not to enforce it at that time; this last fact came out upon the cross-examination. Though therefore the Plaintiff's *capias ad satisfaciendum* was lodged in the sheriff's office in the month of June, and Evans might consequently be considered in execution at the suit of both, and so the present Plaintiff might maintain an action for an escape, yet the fact to [25] which I have alluded would be a sufficient answer, and though not mentioned in Mr. Serjt. Runnington's notes, might perhaps save expence, if allowed to be proved now.

EYRE Ch. J. I see no great force in that fact. When the Plaintiff first took out the warrant, he might not intend it to be executed; but on Evans being arrested at the suit of another, he might then intend it to be enforced. Evans being once in execution under other process, it would be very difficult to discharge him from any writ in the office.

Shepherd. The law acknowledges but two kinds of custody. Custody of the gaol, and custody of the officer. When Evans was arrested he was taken to the house of the officer, not to the county gaol: and the supposed escape was his going with the servant of the officer to his own house, for about an hour. Now the cases on this point are, where the party had once been in gaol: as *Balden v. Temple*, Hob. 202. *Platt v. Lock*, Plowd. 35. So the case of *Sir Miles Hobart and William Stroud*, Cro. Car. 209, was decided on the ground of their having once been within the limits of the Gate-house Prison. For if a party has once been in gaol, he can never quit it without an escape in the sheriff. I admit that if Evans had ever been at large, this would have been an escape: but the question is, whether he can be considered as ever having been at large, when attended by a bailiff's servant. I contend that the bailiff had him always (if I may use the expression) in his manual possession. It has never been held that an officer is bound to take a party to prison before the return of the

(a) Vide Peake's N. P. *Bourdillon v. Dalton and Others*.

* Vide *Houlditch v. Birch*, 4 Taunt. 608. *Stevens v. Jackson*, 6 Taunt. 106. *Goodman v. Chase*, 1 B. & A. 297.

writ; but he must keep him in safe custody: while he is with the officer he is in safe custody, whether he be in the house, the street, or elsewhere. This is not like the case of *Hawkins v. Plomer*, 2 Black. 1048. For there the prisoner was stated to be at large, and that means out of the custody of the officer, not merely out of the officer's house. Here there was no escape from gaol, for the prisoner was never there: and no escape from the officer, for the prisoner was as much in his custody at the time of the supposed escape, as when he was in his house.

Le Blanc contra. It is admitted that if Evans had gone alone, it would have been an escape; therefore it is admitted that an escape may as well take place before the return of the writ as afterwards. Put the case thus: May a sheriff's officer allow a prisoner to be at any time in any place, before the return of the writ, provided there be some person appointed by the officer with him? If the [26] Court allow this, they must say, that if the sheriff were to send the prisoner's father, or brother, or any other person, with him, that would be *arcta custodia*. The distinction is between execution, and *mesne process* (a). On the latter, the sheriff may let the prisoner go upon his honour or promise, and is not liable to be punished, provided he have him at the return of the writ. But with respect to the former, it is different; there if the bailiff voluntarily permit the prisoner to go at large, though only for a minute, he cannot afterwards retake him. *Atkinson v. Mattison*, 2 T. R. 176. The writ of *capias ad satisfaciendum* having a return day as well as *mesne process*, the only distinction between them would be destroyed, if a continued custody of the prisoner were not enforced, for the purpose of making satisfaction to the Plaintiff by the duress of imprisonment. The confinement of the Defendant's person is the only means of compelling payment of the debt; it is not therefore a sufficient custody, if the prisoner be permitted to go about with the officer, *Hob.* 202 (b) much less with a servant of the officer, *Plowd* 35. If the duress of imprisonment be relaxed more than is necessary to carry the writ into execution in a convenient time and manner, I contend that it is an escape. In *Bl.* 1048, the prisoner was never committed to gaol; and the principal question was, whether there could be an escape out of execution before the return of the writ; and it was held there might. The house of the officer is the gaol, so long as he keeps the prisoner there. For whatever place is necessary to secure the prisoner, is for that purpose a gaol. In process of execution the sheriff is liable in case of rescue, even before the prisoner is carried to gaol. For it is said in *Sir Thomas Jones*, 197, "that the custody of the bailiff is the custody of the sheriff; and if a prisoner be rescued out of the custody of the bailiff, the sheriff should return it as a rescue out of his own custody." So that the only question is, whether Evans was at large or not, when the servant of the officer, having the warrant in his possession, was with him. But the bailiff cannot give authority under the warrant to his servant; for the warrant is directed to a particular person. Either caption or recaption must be in the legal presence of the bailiff. It has been determined in several cases, and the rule of law is perfectly clear, that he may allow another to lay hold of a party in his presence, but not out of it. For there is no such thing as an absolute delegation of his authority to a third person. Here then Evans was not in legal custody; and if he had attempted an escape, the follower could not legally have resisted him. One who [27] has no authority to arrest a person in the first instance, can have no authority to detain him in custody.

EYRE Ch. J. The cases go no further than to say, that it is an escape in the sheriff where the prisoner is at large; what shall be deemed being at large, and therefore an escape, may be difficult to ascertain; and whether in this particular case the indulgence shewn to the prisoner will be an escape, may admit of considerable doubt. But one part of the argument struck me as very difficult to be answered, namely, that Evans was in no custody at all, under the circumstances of this case. The custody of the follower, after the writ once executed, amounted to nothing; he could have no power to detain the prisoner if he had chosen to escape, and the warrant would have been no justification to him, if any mischief had happened; which reduces the case to this point, that the prisoner was found absolutely at large. On this narrow ground, I am prepared to say that the *non suit* was wrong. On the general one, I think it would require some consideration. Undoubtedly the effect of process of execution is to

(a) *Plank v. Anderson and Another*, 5 T. R. 37.

(b) *Vid. etiam Boyton's case*, 3 Co. 44 a.

operate immediately by the duress of imprisonment; and cases may be put, where, if the officer attempted to justify any length of indulgence, under colour of the prisoner being always in his presence, the Court would say that it was an escape. Suppose the officer wore the livery of the prisoner, and rode with him to a horse-race, this would be contrary to the exigency of the writ. Whether any distinction can be safely drawn between this last strong case, and the laudable and compassionate one, of accompanying the prisoner to his house, for the purpose of enabling him to examine his books, and settle the means of discharging his debt, I should have considerable doubt. On the narrow ground, however, it is clear that the prisoner was not in legal custody.

BULLER J. I am perfectly satisfied that the nonsuit was wrong. What my Lord has dropped is extremely correct, and I agree in the instance which he has put, that if the prisoner had gone to a horse-race attended by a bailiff, it would have been an escape; and I think that no distinction can be made between such a case as this, and one which originates in more laudable motives. Wherever the prisoner in execution is in a different custody from that which is likely to enforce payment of the debt, it is an escape. It has been asked whether an action on the case would lie for not arresting on the earliest opportunity. I have no doubt but that it would; but the damages must depend on the particular circumstances. Let [28] us put a case. The last day of last Trinity term was the 15th of June. Suppose a *capias ad satisfaciendum* to have issued on that day, and proof that the officer to whom the warrant was directed was in company with the person named in the writ on the 16th, and that he omitted to arrest him: on the 4th of November he does arrest him, and on the 6th brings the body into court: if on the 16th of June, when the officer was in company with the prisoner, he was in good circumstances, and between that day and the 4th of November he has become a bankrupt, the Plaintiff may say to the officer, I have lost my debt by your not putting the party in restraint sooner, I have sustained damages, and am entitled to recover them by an action. When a prisoner is removed by *habeas corpus*, if the officer carry him out of the direct road, it is an escape. The case in Blackstone's Reports pretty well establishes the proposition, that there may equally be an escape, whether the party has been committed to gaol or not. In this case what was done by the follower or officer (if an officer he can be called) was not done in execution of the writ. He took the prisoner from the bailiff's house to his own, and for what purpose signifies nothing; he might as well have carried him to a horse race.

HEATH J. What is said in Hobart, 202 (a) is very material. The rule seems to be that a party must be taken to prison in a convenient time. What is convenient is a question for the determination of the judge, who will admit of all reasonable delay: but if that be made use of by the officer, as a means of giving more liberty than he ought, he will be liable for an escape (b).

ROOKE J. I think the nonsuit wrong, on the ground which my Lord has stated, that the prisoner was not in legal custody. I shall give no opinion on the general ground: I have no doubt, however, that where a party has been really injured by the sheriff's neglecting to arrest on the earliest opportunity, an action will lie for the injury sustained.

Rule absolute (c).

(a) In *Balden v. Temple* Lord Hobart says, "Let keepers of prisons beware when they receive an *habeas corpus* from Chancery, or any other court, bearing teste in the end of a term, to have the body of one in execution in the court the next term, that they do not, by colour of such writs, suffer the party to go at large all the mean time (as it is sometimes practised); for the writ warrants no more, but that he be brought out of prison only for that purpose, and only for so much time as in judgment of law shall be convenient and necessary for the execution of the writ, and no more: which in *privilegiis adversis* must ever be strict."

(b) Vide *Cro. Car.* 14.

(c) Vide *Rose v. Green*, 1 Burr. 437.

[29] IN THE EXCHEQUER CHAMBER.

SYKES v. HARRISON, IN ERROR. May 17th, 1797.

The Court of Exchequer Chamber will allow interest to a Defendant in error, under the 3 H. 7, c. 10, on a judgment of non-pros as well as on a judgment of affirmance. Note; For the future, the interest allowed will be 5l. per cent. instead of 4l.

Error on a judgment in the King's Bench in an action of covenant, for liquidated damages. The Plaintiff in error was non-prossed.

On a former day Dampier moved "that it should be referred to the clerk of the errors, to calculate the amount of the interest upon the final judgment recovered in this cause, in His Majesty's Court of King's Bench, from the time of the allowance of the writ of error, until the signing of the non-pros in this Court, and that such interest might be added to the damages, for which such final judgment was entered up." But the Court seeming to think that there might be some difference between this and the case of an affirmance of judgment, only granted a rule to shew cause.

Giles now shewed cause, and said that he would not contend for a distinction between a judgment of non-pros, and a judgment of affirmance, as he found no cases to warrant it, and the 3 H. 7, c. 10, did not appear to allow such a distinction. But on the authority of *Shepherd v. Mackreth*, 2 H. Bl. 284, submitted that as it was a matter intirely in the discretion of the Court, to allow interest in the shape of damages or not, they would not give it, where the delay was not imputable to the Plaintiff in error, for in such case the Defendant was entitled to no indulgence. He stated that final judgment in the King's Bench was signed on the 6th of July 1795, soon after which the writ of error was brought; that in the Michaelmas Term following, the Plaintiff in error filed a bill in the Exchequer, and obtained an injunction; that the answer was not put in till the 11th of February 1796, to which exceptions were taken and allowed; than an order was then made to amend the bill, which was accordingly done, and that a further answer was not put in till the 27th June 1796, and the injunction was not finally dissolved till the 15th December following. He contended, that notwithstanding the injunction, the Defendant might have proceeded to non-pros the writ of error, by a motion of course in the Exchequer; 1 Fowler's Practice in the Exchequer, 330, and that consequently the delay was on his side. He could not complain of the Plaintiff's depriving him of the fruit of his judgment, when in fact he was only tied up by an injunction. [30] At all events the delay was imputable to him since the 10th of December, as the injunction remained in force till that time only.

EYRE Ch. J. We certainly have no jurisdiction to inquire into the proceedings in equity. But the Plaintiff having proceeded there without just ground, as the event has shewn, is a strong reason to induce us to go as far as we can against him.

Dampier then suggested, that as money was now so much risen in value, if the Court should not allow the Defendant in error 5l. per cent. although 4l. had been the usual sum, it would be enabling the Plaintiff in error to fight the Defendant with his own money.

Giles contrâ, relied on the cases of *Shepherd v. Mackreth*, and *Lord Lonsdale v. Littledale*, 2 H. Bl. 287, where the Court allowed 4l. per cent. only.

Per Curiam. The better way will be to allow 4l. per cent. only, in the present instance, and to give notice that 5l. per cent. will be allowed in future.

Rule absolute.

IN THE EXCHEQUER CHAMBER.

DENN EX DEM. MELLOR v. MOORE IN ERROR. May 17th, 1797.

[See S. C. 1 Bos. & P. 558; 2 Bos. & P. 247.]

Where judgment for the Defendant on a special verdict, is reversed in the Exchequer Chamber, that Court on motion will give a final judgment for the Plaintiff.*

Judgment on a special verdict in ejectment having been given for the Defendant in the King's Bench, and reversed in this Court,

* S. C. 5 T. R. 558. 3 Anstr. 781. And see *Gildart v. Gladstone*, 12 East. 668. *Doe d. Briscoe v. Clarke*, 2 N. R. 343, 348.

Chambre now moved that it might be added to the judgment, that the Plaintiff do recover his term, damages and costs. He cited *Philips v. Bury*, Lord Raym. 10. Carth. 181, 319, and Skinn. 514, where Holt Ch. J. said "There would be a difference where judgment was given upon demurrer, and where upon a special verdict: where it is upon a demurrer, the Courts above ought to give a judgment for the Plaintiff (if they reverse that for the Defendant), and then it is sent down, and a writ of inquiry goes, and upon that the Court below gives a final judgment (a)¹; but where it is upon a verdict, there, if they reverse a judgment they ought to give the same judgment that ought to have been given at first, and that judgment ought to be sent to the Court below" (b).

[31] The Court seemed at first to doubt whether they should grant this in the first instance, or only give a rule to shew cause, but on consideration, thinking the point decided, said: that the Plaintiff must enter up his judgment at his own peril, for if he entered it wrong, he subjected himself to another writ of error, and reversal in another court.

Accordingly leave was given, in the first instance, to enter up judgment of reversal, and that the Plaintiff should recover his term, damages and costs.

ANDERSON v. NOAH. May 18th, 1797.

Misnomer in the bail-piece amended.

The Defendant in this action having been arrested by the name of Noah, and put in bail by the name of Noel: It was objected by Le Blanc Serjt. at the time of justification, that there was no bail in the action before the Court: but the Court gave leave to amend the bail-piece.

LANG Demandant, LEE, GENT. Tenant, AND WOODHOUSE AND OTHERS Vouchees.
May 18th, 1797.

It is no objection to the passing a common recovery, that the order of the names of the vouchees in the præcipe at bar, and the dedimus varies. Nor that the warrants of attorney of the several vouchees are on separate pieces of parchment.

On this day Runnington Serjt. desired the opinion of the Court, on two objections, suggested by one of the officers, to the passing a common recovery.

The first objection was, that at the foot of the præcipe at bar, it was stated that, "the tenant in person voucheth to warrant John Chappel Woodhouse, clerk, Ann Monpesson, spinster, and Mary Woodhouse, widow," whereas the dedimus was, "the tenant in person voucheth to warrant Mary Woodhouse, widow, John Chappel Woodhouse, clerk, and Ann Monpesson, spinster;" transposing the names.

The second and more material objection, originated in the warrants of attorney, taken by virtue of the commission. For here being three vouchees, two of them had given one joint warrant of attorney, and the other had given his on a separate piece of parchment, when in strictness the warrant ought to have been joint, that is, all on one piece of parchment.

He said, that it was the wish of the officer, that this matter should be mentioned to the Court; though both the warrants of attorney being annexed to the dedimus, could not be construed [32] to relate to any other premises than those contained therein. He added that all the parties were desirous that the recovery should pass.

The Court (absente Eyre) Ch. J. thought that there was nothing material in either of the objections (a)².

And Heath J. said, that the warrants would be good even in a real suit.

(a)¹ *Winchcomb v. Shepherd*, Cro. Eliz. 746. *Fuldow v. Ridge*, Cro. Jac. 206. Yelv. 75, S. C.

(b) *Mulcahy v. Eyres*, Cro. Car. 511. *Omuleonrie v. Ayres*, Roll. Abr. 774. See also 2 Saund. 237, 256.

(a)² In Hil. term 1799 in C. B. where Thomas Gent. was demandant, Dobey Gent. tenant, and Robert Leaper Percy and Grace his wife, and Edmond William Percy and Mary his wife, sister and co-parcener with Grace, vouchees, the same objection as the last in the above case was taken and overruled, after a reference to this case.

HOLWARD v. ANDRE. May 18th, 1797.

[Overruled, *R. v. Sheriff of Middlesex*, 1807, 1 Taunt. 57.]

Where bail are opposed, and rejected, and the Defendant is surrendered on the next day, he may justify new bail without paying the costs of the former opposition ^{*1}.

Bail in this action were opposed and rejected on a former day, and the Defendant surrendered on the next; fresh bail being now brought up for justification.

Cockell Serjt. insisted, that the Defendant not having been a prisoner at the time of the former opposition, the Plaintiff was entitled to the costs of that opposition, before the new bail could be suffered to justify.

Sed Per Curiam. The Court will not insist on the costs of a former opposition being paid to the Plaintiff, where the Defendant is surrendered on the next day. It has lately been determined otherwise.

GARDNER v. BAILLIE. May 19th, 1797.

A bill of exceptions being no part of the record in the court below, is not to be included in the taxation of costs there.

Le Blanc Serjt. moved that the prothonotary might review his taxation in this case, and allow the costs of a bill of exceptions.

Per Curiam. The bill of exceptions is no part of the record, till after judgment; if it were, the Court ought to take it into consideration before judgment; which is never done (a). The cause proceeds, and judgment is given here, as if there were no bill of exceptions; this may be accounted for, by the practice which formerly prevailed, of trying all causes in bank. The bill [33] of exceptions is carried into a Court of Error, and there annexed to the record; if it had been part of the record here, there would be no occasion to send for the judge to acknowledge his seal; when that is acknowledged, it is then, for the first time, annexed to the record. Being for the benefit of the party who tenders it, and remaining in his possession, it is in his breast to employ it or not. Regularly it ought to be tendered at the time of the trial, and sealed by the Judge in Court; and though the practice is to allow the counsel to tender it afterwards, and some expence may arise to the parties before it is settled, yet this is not in a regular course of proceedings, upon which costs can be incurred. If the record be lengthened by the bill of exceptions, costs will be allowed for copying, fees to counsel, &c. by the Court of Error. But there can be no costs in the Court below.

Le Blanc Serjt. took nothing by his motion.

SAUNDERS v. PITTMAN. May 20th, 1797.

The Court will not put off a trial at the instance of the Defendant, on account of the absence of a material witness, if he has conducted himself unfairly, or been the cause of any improper delay ^{*2}.

A rule having been obtained by Rummington Serjt. to shew cause why the trial in this case should not be put off till next Hilary term, on an affidavit stating that a

^{*1} Vide *Rex v. Sheriff of Middlesex*, 1 Taunt. 57.

(a) In 27 H. 8, 24, 25, in the King's Bench, Fitzjames, C.J. said "Ex rigore juris a party shall not take advantage of a bill of exceptions in arrest of judgment, but shall be put to his writ of error, and this is good to be observed in C. B. for the party may have a writ of error here; but from this court he has only his writ of error to Parliament, which would be a great delay, and cost to him; wherefore it is prudent that we should examine the matter before judgment." See also *Engfield v. Hills*, 2 Lev. 236, and Buller's N. P. 316.

^{*2} Vide *Almgill v. Pierson*, post, 103.

master of a vessel employed in the Southern Whale Fishery was a material witness in the cause, and that he was expected to return about Christmas next,

Shepherd Serjt. shewed for cause an affidavit, stating that this action was brought on articles of agreement in the possession of the Defendant; that the Defendant had delayed the cause, and prevented the plaintiff from going to trial, while the Defendant's witness was in England, by withholding from the Plaintiff a copy of the articles, till he had moved the Court; when the Plaintiff found himself obliged to amend. He added that after the amendment, the rule to plead happened by mistake to be in the original cause, instead of the amended one, and that the Defendant refused to waive that advantage, which produced a further delay.

Runnington contra.

Per Curiam. The Court will not in all cases be content with a common affidavit to put off a trial. It must be satisfied that injustice would be done, if such an application were refused. Here a poor Plaintiff claims a debt; he wants to amend his proceedings by the articles of agreement, and the Defendant delays shewing them till he is obliged so to do; and in the mean time his witness [34] leaves England. He has therefore brought himself into this difficulty, by endeavouring to take an unfair advantage, and the Court will not consider itself obliged to put off the trial of a cause for the accommodation of the Defendant, if the Defendant has not conducted himself fairly and candidly, and if he might have had his witness.

Rule discharged.

BRADLEY v. TUNSTOW. May 20th, 1797.

The general term costs in a rule of reference, does not include the costs of that reference*.

By an order of the Chief Justice, made with the consent of the parties, for referring this cause to arbitration, it was ordered, "That the debt for which this action is brought, be referred to F. C. Esq. to settle and determine how much, or if any and what sum is due to the Plaintiff from the Defendant, and that for what sum he shall find due, the Plaintiff shall be at liberty to enter up his judgment, and sue out execution for such sum so found due, together with his costs, provided the said debt so to be settled and ascertained amount to 40s.

The arbitrator awarded 40l. 14s. for the debt, and costs to be taxed by the prothonotary. His taxation amounted to a certain sum including the costs of the reference; on which allocatur judgment being entered up by the Plaintiff, the Defendant applied to the prothonotary to strike out the costs of the reference; who, on reconsidering the matter, disallowed them accordingly.

Le Blanc Serjt. on a former day having obtained a *rule nisi* to set aside the judgment for this irregularity.

Shepherd Serjt. for the Plaintiff, contended, that where a cause was referred to arbitration, and the Court directed the costs of the cause, to abide the event of the arbitration, and nothing was said in the rule about the costs of the reference, the costs of the reference became part of the costs of the cause, and so he understood the practice to be in the King's Bench.

Le Blanc contra, said, That under the rule the costs at law (*a*) only, followed the event of the award; and if the costs of the reference were intended to be included, the arbitrator ought to have awarded them, which he had not done; that as the reference was matter of mutual accommodation, the costs ought to be paid by both parties equally, unless otherwise directed by the rule.

[35] EYRE Ch. J. It is impossible to say that the judgment in this case is irregular, for it follows the allocatur of the prothonotary. The question therefore is not properly brought forward, but as it is before us, we may as well decide it. The whole difficulty arises from the supposed practice of the King's Bench. If that Court has sanctioned the practice of including the costs of reference under a condition in the rule, relating to costs generally, I do not feel myself at liberty to speculate upon the point. It appears however to me, that a reference being made for the convenience of

* Vide *Wood v. O'Kelly*, 9 East, 436. *Strutt v. Rogers*, 7 Taunt. 213.

(a) Cowp. 127, 2 Black. 953. *Tidd's Practice in K. B.* 545, 546.

both parties, the expences ought to be sustained by both. A provision for the costs of reference being generally made in the rules, but omitted in the present instance, is a strong argument to shew that they were not here intended to abide the event of the arbitration.

BULLER J. The general practice in drawing up these rules, is to distinguish between the costs of the reference, and the costs of the cause; the latter usually abide the event of the arbitration, the former not. Here that distinction is omitted, it is referred to the arbitrator to determine the sum due between the parties, and the costs are to follow the event of his award. I am inclined to think the practice of the King's Bench, as suggested, to be right. Does not the term costs mean all costs? I do not see how to distinguish between the costs of the cause, and those which arise in the progress of the cause. All costs which arise between the writ and the judgment, unless otherwise provided for as the cause goes on, must be considered as the costs of the cause. But as we have seen these costs of reference amount sometimes to very hard sums, it might not perhaps be foreign to suppose, that they were purposely omitted in this rule to avoid the possibility of such expence. If there are any authorities on the subject, I think we must be bound by them.

HEATH J. I wish an uniformity of practice to prevail in the two Courts.

ROOKE J. If there be any case in the King's Bench to that effect, I think the costs of the reference should abide the event of the arbitration; otherwise I should be of opinion with my Lord, that they ought not to be included.

The prothonotary having been desired to inquire concerning the practice of the King's Bench, on this day reported that he had been informed by the Master, that though no case had occurred within his knowledge, where this question had arisen under the order of a Judge; yet that it was generally understood that [36] an arbitrator had no power to give the costs of the award, unless under a provision inserted in the order of nisi prius.

Per Curiam. As we find the practice of the King's Bench does not warrant the idea of including the costs of the reference under the general term costs, the Plaintiff must now move to reform his judgment by consent, and reduce it to the proper amount. But as the judgment was, strictly speaking, regular, and the Plaintiff was under the necessity of opposing this motion, we shall not allow the costs of this application (*a*).

HOLLIS v. BRANDON. May 23d, 1797.

If an affidavit to hold to bail be entitled "Plaintiff and Defendant," it is bad *.

Clayton Serjt. moved for a rule to shew cause, why the Defendant should not be discharged out of the custody of the Warden of the Fleet, on entering a common appearance, on the ground of an irregularity in the affidavit, by which he was held to bail.

The affidavit was entitled "Edward Hollis Plaintiff, and William Brandon Defendant," and proceeded to state "that William Brandon, the Defendant in this cause, is justly indebted to this deponent in the sum of £— for work done and performed by this deponent and his servants in and about the business of the said Defendant, and for the said Defendant; and for divers materials found and provided in and about the said work; and for money lent and advanced to the said Defendant at his special instance and request."

The Defendant had been arrested on a bill of Middlesex and bailed, and afterwards surrendered himself to the King's Bench Prison, from whence he was removed to the Fleet by *habeas corpus* before declaration delivered.

On these facts the Court granted a rule to shew cause, but suggested to the Plaintiff that he might file a supplemental affidavit.

On the 16th, Shepherd Serjt. shewed cause against the rule, and contended that there was no necessity for a supplemental affidavit, as the original one was sufficiently positive.

(a) An award of "Costs sustained in the action," does not include costs of the reference. *Browne v. Marsden and others*, 1 H. Bl. 223.

* Vide *Green v. Redshaw*, post, 227.

Clayton Serjt. in support of the rule. The affidavit was here intitled Edward Hollis Plaintiff and William Brandon Defendant, at a time when no cause in fact existed. An order was actually made in this very case, by one of the justices of the King's Bench, for the discharge of the Defendant, but he having been removed [37] to the Fleet, the warden could not obey that order, and therefore the question is brought before this Court. In *King v. Cole*, 6 T. R. 640, the affidavit being intitled, "*R. King qui tam v. T. Coles*," the Defendant was discharged on common bail. Also in a case of *Sir John Call Bart. v. —* before Ashhurst J. the Defendant was discharged on the same ground, and no objection made. This case is still stronger, as the affidavit was not only intitled with the names of the parties, but had the addition of Plaintiff and Defendant. It is a general rule, that a Defendant shall not be deprived of his liberty, unless the Plaintiff can be indicted for perjury if his affidavit be false. It must therefore be positive. There being a doubt in the present instance, whether an indictment for perjury could be maintained or not, the Court has given the Plaintiff an opportunity to file a supplemental affidavit, which he has not done. On the above grounds therefore I submit that the rule must be made absolute.

Shepherd Serjt. contra. This case may be distinguished from that of *King v. Cole*. There, the name of T. Cole was not added to the word Defendant in the body of the affidavit, whereas here the Plaintiff speaks of William Brandon the Defendant. Besides, the word "Defendant" may be rejected as surplusage, for it is positively sworn that William Brandon was indebted.

EYRE Ch. J. The idea of a supplemental affidavit proceeded on a collateral ground: it was suggested with a view to ascertain who was meant by the person called Defendant. The Court understood that the affidavit was intitled, but that no name was added to the word "Defendant" in the body of it. If there be no other description of the person indebted, the word "Defendant" is loose and uncertain, and ought to be supplied; but when the affidavit says, "William Brandon Defendant," I should much doubt whether it would be bad, merely because it was intitled "Edward Hollis Plaintiff and William Brandon Defendant," before the commencement of the cause. Since the statute for suing out bailable writs, it may be a question whether an affidavit to hold to bail be not in fact a commencement of the cause. Why is a writ considered as the commencement of the cause before the parties are in Court? and yet it always is so. This way of considering it will not break in upon what has been said, that in an indictment for perjury, if the indictment state the perjury to have been committed "in an affidavit in a cause," and there be no cause, the party cannot be [38] convicted: but here I doubt whether the affidavit be not a commencement of the suit.

BULLER J. It has been said that if the Plaintiff was indicted for perjury there might be a doubt whether he could be convicted on a supplemental affidavit. Have not the Court jurisdiction? An application is made to them to discharge the Defendant in the regular exercise of their jurisdiction: they require a second affidavit to ascertain the debt: there can be no difficulty then in the assignment of perjury.

The Court having taken time to inquire, Eyre Ch. J. this day said: We have considered this question, and have found, upon inquiry, that it is the settled practice of the King's Bench, that in a motion for an information, if an affidavit be intitled in a cause, it is rejected. We think the rule should be universal, for the only ground on which it is founded is, that it would be difficult if not impossible to indict for perjury upon such an affidavit. We think also that the practice of both Courts should be uniform.

Rule absolute without costs (a).

(a) Subsequent to this, in the case of *Clarke v. Caithorne*, Tr. T. 1797, the Court of K. B. considered the practice of intitling affidavits to hold to bail too common to be deemed erroneous: and accordingly in two other cases then before them, discharged similar rules to the present: but at the same time determined to make a rule of Court ordering that such affidavits should not be intitled for the future. Vide 7 T. R. 321.

JOLLIFFE v. MORRIS. May 26th, 1797.

The Court of C. B. will make the payment of costs for not proceeding to trial, a term of discharging a rule for judgment as in case of a nonsuit.

Shepherd Serjt. on a former day obtained a rule to shew cause, why judgment as in case of a nonsuit should not be entered up in this case, for not proceeding to trial according to the Plaintiff's undertaking.

The Court now inclining against him, on an affidavit of merits shewn by Runnington Serjt., and a pre-emptory undertaking to try at the next assizes offered;

Shepherd desired that payment of costs for not proceeding to trial might be made a term of discharging the rule.

The Court seemed at first to doubt whether, if a party elected to move for judgment, as in case of a nonsuit, he did not thereby waive the costs of not proceeding to trial; and if intitled to them, whether it was not necessary to apply by a separate motion; but [39] having read a note (a) from the book of one of the officers, by which it appeared that the practice of this Court differed from that of the King's Bench in this respect, they said that costs for not proceeding to trial might be given on the motion for judgment as in case of a nonsuit, and accordingly with that condition.

Discharged the rule.

RICE v. BROWN. May 27th, 1797.

[Discussed, *Carson v. Pickersgill*, 1885, 14 Q. B. D. 863.]

A pauper, as such, can never pay costs. Semb. That he may receive them for the defaults of his opponents*.

The Plaintiff in this case sued as a pauper: and the cause standing in the paper for trial, on the first sitting in Easter Term, was on that day made a remanet, until the second sitting in the same term, by an order of nisi prius at the instance of the Defendant, he undertaking to pay the costs of the day, and also of that application. The order was made a rule of this Court, and the costs allowed by the prothonotary; but the Defendant refused to pay them: in consequence of which, Runnington Serjt. on a former day moved for an attachment.

When this was first mentioned, the Court seemed to entertain strong doubts whether a pauper could be allowed costs; and Runnington was desired to look into the matter.

On this day he contended, that it was regular for a pauper to recover costs, and that it was the practice to allow them, where, had he not been a pauper, he would by the verdict have been entitled to them. He cited 3 Bl. Com. 401, where it is said, "a pauper may recover costs, though he pays none;" and *Scatchmer v. Foulcard*, 1 Eq. Ca. Ab. 125, where Lord Somers, after much inquiry, ordered costs to a pauper; "for though he were at no costs, or at small costs, yet the counsel and clerks did not give their labour to the Defendant, but to the pauper." He said in *Walker v. Packer*, Cook's Cases of Practice in C. P. 47, the Court ordered costs to be taxed against a pauper for not proceeding to trial, and declared that a pauper should pay costs for all defaults, as an executor or administrator should for their own defaults (b). If then a pauper was liable to pay costs for his own defaults, why [40] should he not receive them for those of his opponent. He urged that in this case, it was hardly within the discretion of the Court to refuse them, since the application was founded on consent, and a voluntary undertaking to pay the costs which had been made a rule of Court.

Cockell Serjt. contra, said, (and it was allowed on the other side,) that the pauper had not the smallest merits on the trial.

(a) The name of the case mentioned in the above note, where the Court of K. B. refused to give such costs, unless on a separate motion, was *Triandis v. Goldsmith and Another*.

* Vide *Doe d. Leppingwell v. Trussell*, 6 East, 505.

(b) See also 1 Str. 420.

Per Curiam. The case that has been cited respecting the payment of costs by a pauper, is not law. The mode of proceeding by the Court is this: where a pauper misbehaves himself, he is dispaupered in consequence (a) and so becomes liable to costs. In this case, however, the attachment must issue.

MAYOR AND BURGESSES OF STAFFORD v. BOLTON. May 27th, 1797.

Plaintiffs were incorporated by the name of "the Mayor and Burgesses of the borough of Stafford in the county of Stafford," and sued by the name of "the Mayor and Burgesses of the borough of Stafford." This is in abatement, and not in bar*.

This was an action on the case for tolls.

The declaration began, "That whereas the town of Stafford in the county of Stafford is, and from time immemorial hath been, an antient borough; and the burgesses of the said borough from time immemorial have been a body politic and corporate in deed, fact, and name, and have been confirmed by divers letters patent, of divers late kings and queens of England, at divers times, by divers names of incorporation, and for divers, to wit, fifty years last past, have been such body politic and corporate, by the name of the Mayor and Burgesses of the borough of Stafford." It then went on to state that, "the said mayor and burgesses had been accustomed to repair the pavements of the said borough, for the more convenient bringing of corn and grain into the said borough, and by reason thereof had been accustomed to receive a reasonable toll for all corn or grain brought into the said borough, to be sold or delivered to any person within the said borough; that one E. H. brought into the said borough, within the same to be delivered, and within the same actually delivered to the Defendant, divers, to wit, forty bushels of oats: that thereupon the said mayor and burgesses demanded of the Defendant half a bushel of oats as and for the said toll; [41] that the said Defendant refused to deliver the same to the said mayor and burgesses," &c.

Plea not guilty, and issue joined thereon.

This came on to be tried before Thomson Baron, at Stafford Spring Assizes 1797.

The Plaintiffs produced in evidence a charter of 12 Jac. 1, which after reciting, "That whereas our borough of Stafford in the county of Stafford is an antient and populous borough, and the burgesses of that borough from time whereof, &c. have had, used, and enjoyed divers liberties, &c. as well by our charters, as those of divers of our progenitors and predecessors, late kings and queens of England, to them and their predecessors, sometimes by the name of burgesses of Stafford, and sometimes by the name of burgesses of the borough of Stafford, and sometimes by the name of bailiffs and burgesses of the town of Stafford, and sometimes by the name of the bailiffs and burgesses of the borough of Stafford in the county of Stafford, and by other names heretofore made, granted, or confirmed, as also by reason of divers prescriptions, usages and customs in the said borough, used and accustomed," &c. and also reciting letters patent of 3 Jac. 1, by which the burgesses and inhabitants of the borough aforesaid, "by whatever name or names they had been theretofore incorporated, or whether they had been lawfully incorporated or not, for the future for ever, without any doubt or ambiguity thereof, were incorporated by the name of bailiffs and burgesses of the borough of Stafford in the county of Stafford," &c. proceeded: "We will, ordain, constitute, and grant, that the said borough of Stafford in the aforesaid county, in future, may and shall be a free borough of itself, and that the bailiffs and burgesses of that borough, and also all and singular the burgesses and inhabitants of the same borough, by whatsoever name or names they or their predecessors have heretofore been incorporated, and whether they have been heretofore incorporated or not, and

(a) 2 Str. 1122. 2 Salk. 506. 3 Wils. 24, and the cases cited therein. In *Butler v. Innes & Ur*, 2 Str. 891, a pauper having been nonsuited in a first action, and having recovered in a second, the Court refused to deduct out of the recovery in the second action the costs of the first.

* Vide *Boughton v. Frere*, 3 Campb. 29. *Don d. Mablon v. Miller*, 1 B. & A. 699. *Longridge v. Brewer*, 1 Bing. 143.

their successors in future, for ever may and shall be by force of these presents one body corporate and politic, in deed, effect, and name, by the name of the Mayor and Burgesses of the Borough of Stafford in the county of Stafford; and them by the name of the Mayor and Burgesses of the borough of Stafford in the county of Stafford, one body corporate and politic, in deed, effect, and name, really and to the full for us, our heirs and successors, we do erect, ordain, constitute, and declare by these presents, and that by the same name they shall have perpetual succession, &c. and that by the same name of mayor and burgesses of the borough of Stafford in the county of Stafford, they may plead and be impleaded, answer and be answered unto, defend and be defended, in any courts and places, and before any judges and justices, &c. in all and singular actions, &c. in the same manner and form as any other our liege subjects of this kingdom of England, persons able and capable in law, or any other body corporate and politic within our kingdom of England, are able to plead and be impleaded, answer and be answered unto, defend and be defended," &c.

On this evidence, the Defendant's counsel objected that there was a variance between the name of the corporation in the charter and that in the declaration; and after some argument, the learned Judge nonsuited the Plaintiffs.

On the 1st day of this term Williams Serjt. obtained a rule to shew cause why the nonsuit should not be set aside, and a new trial be had. He cited Bro. Abr. Misnomer, 73. Briefe, 398, and 10 Co. 122.

Le Blanc Serjt. now shewed cause. This is a corporation by prescription and charter; the charter contains a recital of the various names by which the Plaintiffs have been known, but makes no mention of that by which they have declared: it gives them a particular name by which they may sue and be sued, and to which therefore they are bound to adhere. A corporation by charter can have no other name than that which it receives from the Crown, and whenever any subsequent charter is accepted by a particular name, all former names are done away. The questions are; Whether the mayor and burgesses of the borough of Stafford be the same as the mayor and burgesses of the borough of Stafford in the county of Stafford! and whether the variance could be taken advantage of on the trial, or ought to have been pleaded in abatement! Suppose an action for toll brought by A. B. C., and it appeared that the right was in A. C. D. could they have recovered? Suppose the Plaintiffs had called themselves the mayor and burgesses of the borough of Stratford, they would not have shewn themselves to be the persons entitled to the toll. If you admit a variance of locality, you may admit a variance of person: by first taking away one part and then another, though each separate variation be of small importance, the name will be completely altered. There are cases where variances in the names of corporations have been passed over; as in *King's Lyne*, 10 Co. 123, but all those were cases of leases or other securities; [43] and it is laid down in the Books that "there is a sound difference betwixt writs and grants," 10 Co. 125 b. So in *Gibb. C. B. 234*, "there is a difference between writs, declarations, &c. and obligations and leases; for if the name of a corporation be mistaken in a writ, a new writ may be purchased of common right, but it were fatal if mistaken in leases and obligations, and the benefits of them would be wholly lost; and therefore one ought to be supported, and not the other. John Abbot of W. granted common of pasture to I. S. by the name of William Abbot of W.; this is good enough *causâ quâ supra*; but if this name had been thus mistaken in a writ, it had been fatal." As for the case of *King's Lyne*, it was an attempt by the Defendant to avoid his own deed; besides the verdict had found that the obligor had made the bond to the Plaintiffs, by the name in the declaration. If that name be altered in the description of a corporation which is given to it by charter, it ceases to be a corporation. It is laid down every where, that locality is of the essence of a corporation; if so, leaving that uncertain, or giving it a wrong description, is completely changing the name. The Court can draw no line in variances of this kind. It is true, that in the 25 Ed. 3, 48, where a *præcipe quod reddat* against the prior of Worcester, was *præcipe priori Wigornie*, and the prior pleaded that in Worcester there were two priories, viz. the priory of Friars Preachers, and the priory of Our Lady, and that it ought to have been, *Priori Ecclesie S. Marie Wigornie de Wigornia*; the writ was abated. But there it was the Defendant who was misnamed; he knows his proper title, and may abate the writ, and give a new one. But here, unless the Plaintiffs demand the toll in the name

given them by the Crown, they shew no title (a) for although a Plaintiff may reply that a Defendant is known as well by the one name as the other, he cannot reply that of his own name.

Shepherd Serjt. on the same side.

Williams contrà was stopped by the Court.

EYRE Ch. J. If it cannot be denied that this variance might have been pleaded in abatement, it decides the question. The arguments on the part of the Defendant go to shew that it ought to be in bar. A corporation is a mere creature of the Crown, having no essence but what is derived from its name. On strict reasoning therefore I should be inclined to think, that if a corporation sued by a name which did not belong to it, it would be as [44] nothing. In the case of a mistake in the name or description of an existing person having a right to sue, it may be pleaded in abatement. But the case in Brooke, Misnomer 73, seems to put a corporation in the same situation with a natural person as to pleas in abatement: where it is said in an action by a corporation or a natural body, misnomer of one or the other goes only to the writ; but to say that there is no such person in rerum naturâ, or no such body politic, this is in bar, for if he be misnamed, he may have a new writ by the right name; but if there be no such body politic or such person, then he cannot have an action. 22 Ed. 4, 34. Here there was a corporation of nearly the same name, and I think therefore on authorities, that the nonsuit was wrong.

BULLER J. The argument of locality will not here decide the question; the name in the declaration imports locality, as the Plaintiffs state themselves to be the mayor and burgesses of the borough of Stafford, only omitting the county of Stafford. This brings the case within the distinction laid down in *King's Lynne*; for there is a difference in omitting matter of substance, and mere matter of addition. If the variance can be pleaded in abatement, it cannot in bar. To make it pleadable in bar, it must appear that there is no such corporation. The Year Books are decisive.

HEATH J. I am of the same opinion. In 22 Ed. 4, 34, which was an assize by the Master, and brethren of the fraternity of the Nine Orders of Angels in B., and the Defendant pleaded, that they were incorporated by the name of the Master and Brethren of the Fraternity of All Saints, and the Nine Orders of Angels in B.; the writ was abated, which shews that a misnomer may be pleaded in abatement, where the Plaintiff misnames himself.

ROOKE J. I think we ought not to be more strict than they were in the days of the Year Books.

Rule absolute.

FOWLER v. DOWN. May 26th, 1797.

If an order for the delivery of goods in the hands of a third person be given to an uncertificated bankrupt in payment of a debt accrued subsequent to his bankruptcy, he may maintain trover for them*.

This was an action of trover brought by an uncertificated bankrupt.

The Plaintiff had carried on business for some time, and in a considerable way since his bankruptcy, and had advanced several [45] sums of money to one Davidson, in part payment of which Davidson gave an order for delivering to the Plaintiff fifty barrels of beef belonging to him, and then in the hands of the Defendant. The Defendant on demand refused to deliver up the beef so assigned by Davidson to the Plaintiff, on which this action was brought; and the cause being tried before Eyre Ch. J. at Guildhall at the Sittings in this term, a verdict was found for the Plaintiff with liberty to the Defendant to move to set it aside and enter a nonsuit.

Shepherd Serjt. having previously obtained a rule nisi for the above purpose, was this day called upon by the Court to begin in support of it.

(a) *Patrick & Pepper's case*, at O. B. Session, February 1783, before Buller J. Leach, 244.

* Vid- *Webb v. Fox*, 7 T. R. 391. *Eckhardt v. Wilson*, 8 T. R. 140. *Kitchen v. Bartsch*, 7 East, 53-60. *Kinnear v. Tarrant*, 15 East, 622, 629. *Carpenter v. Marnell*, 3 B. & P. 40. *Clark v. Calvert*, 8 Taunt. 742. *Hull v. Pickersgill*, 1 B. & B. 282. *Sampson v. Burton*, 2 B. & B. 89. *Drayton v. Dale*, 2 B. & C. 293. *Card v. Hope*, 2 B. & C. 661, 667.

Shepherd. The inference to be drawn from *Evans v. Mann*, Cowp. 569, and *Martyn v. O'Hara*, Cowp. 823, is, that property acquired by a bankrupt after the assignment becomes the property of his assignees: for in those cases there was no new assignment. In the first of them it was decided, that if a bankrupt sell goods previous to his bankruptcy, the assignees must sue the vendees as assignees: but where the goods are acquired and sold subsequent to the bankruptcy, they may sue in their own names. Though 13 Eliz. c. 7, s. 11, speaking of personal as well as real property coming to the bankrupt, at any time before payment of his debts, directs, that "they shall be bargained, sold, extended, delivered, and used for and towards the payment of the said creditors;" yet the words "bargained and sold," can only apply to such property as does not usually pass without conveyance: and accordingly it is said by Lord Hardwicke, 1 Atk. 253, *ex parte Proudfoot*, "All the future personal estate is affected by the assignment, and every new acquisition will vest in the assignees; but as to future real estates, there must be a new bargain and sale." The 1 J. 1, c. 15, s. 13, which is the next statute empowering commissioners to assign, operates only on debts due to the bankrupt. The case of *Chippendale v. Tomlinson*, B. R. T. 25 G. 3, Cooke's Bankrupt Laws, 260, was an action for work and labour done. Plea that the Plaintiff was a bankrupt. Replication, work done after the commissioner's assignment for the necessary support of the Plaintiff and his family: rejoinder, no certificate: and demurrer thereupon. Lord Mansfield said, "The assignees cannot let out the bankrupt and contract for his labour." But there, if the bankrupt had recovered and reduced the damages into property, that property would have belonged to the assignees, as passing by the previous assignment. In order to support trover, there must [46] be right of property and right of possession: as to the latter, the Plaintiff never can have had it, for the goods have always been in the hands of a third person: and as to the former, the assignees have a right paramount. Neither can he be said to have had special property, for there is no case of special property, but where there has once been possession, as in the cases of a carrier or a bailee. Suppose the assignees were to sue us for the goods, could we plead a judgment recovered? The case of *La Roche Bart. and Others v. Wakeman and Others*, Peake's N. P. 140, is against us. But that went upon the same principle as *Ashley v. Kell*, 2 Str. 1207, where it was held that an uncertificated bankrupt had such a property in future effects, as enabled him to transact and sell to a bona fide purchaser: which principle was questioned within these few days in the King's Bench (a), when the Court seemed to doubt whether an uncertificated bankrupt could give a title or maintain an action for any thing but the earnings of his labour. So in *Silk v. Osborne*, Espinasse's N. P. R. 1 vol. 140, where the action was for work and labour and materials found, Lord Kenyon said that the work and labour and materials were so blended together, as to become one joint cause of action: evidently confining it to the mere case of personal labour. If any claim by the assignees were necessary to prevent the bankrupt from maintaining his action, the distinction laid down between the produce of personal labour and other property would be nugatory: for the bankrupt might equally maintain an action in all cases, until a claim were made by the assignees.

Runnington Serjt. for the Plaintiff. In answer to the arguments on the other side I shall only advert to the cases on the subject. In *Chippendale v. Tomlinson*, an uncertificated bankrupt was held intitled to recover for work and labour done. In *Silk v. Osborne*, which was an action for work and labour and materials found, Lord Kenyon said, "that however the question might be between the bankrupt and his assignees, it did not lie in the mouth of third persons to set up the Plaintiff's bankruptcy as a defence." In *Evans v. Brown*, Espinasse's N. P. R. vol. 1, p. 170, the same principle was extended to the case of money lent and advanced, where it was held that the loan being subsequent to the bankruptcy, the money might have been earned by the bankrupt after his bankruptcy; and that if the law allowed him to maintain an action to recover what was due to him for labour, he was equally intitled to [47] maintain one for the money so earned by his manual labour, which he might have lent to a third person. This would go the whole length of the present case, except as to the form of action. But it has been since expressly decided, that trover will lie by an uncertificated bankrupt, and that a defence of this nature does not lie in the mouth of a stranger. *La Roche Bart. and Others v. Wakeman and Another*.

(a) See *Webb v. Ward and Another*, 7 T. R. 296.

EYRE Ch. J. What shall be done between the bankrupt and the assignees or creditors is one thing, and what between him and a stranger is another. This narrow ground, that the bankrupt has a right against every body but the assignees, which is maintained by authorities, is sufficient to support the verdict. It is not true, that in cases of special property the party must once have had possession in order to maintain trover; for a factor to whom goods have been consigned, and who has never received them, may maintain such an action. But this is not a case of special property, it is a stronger case; it is entire property, though defeasible, or to speak more correctly, liable to be divested. It is not competent to a third person to dispute the bankrupt's title to recover, who, supposing his creditors had no claims upon him, would be intitled to his action, because whether they have such claims or not is nothing to the stranger. I confess the theory of the case inclines me to go further. The bankrupt laws principally and most directly relate to that estate which the bankrupt had at the time of the assignment; there are provisions for taking the account and ascertaining the estate of the bankrupt at the time of the assignment; I recollect no such provision for the future effects; nor was it necessary, for where future effects are spoken of, they are supposed to be specific effects to be specifically conveyed by subsequent assignment, as was done in the case of *Tudway v. Bourn*, 2 Burr. 716. It is true, that unless the bankrupt's estate is sufficient to pay twenty shillings in the pound, the creditor will be intitled to a satisfaction for his debt out of effects acquired subsequent to the first assignment. But it cannot therefore be said that the property is not his own until such assignment, or that it is not his own because he is uncertificated. The operation of a certificate is simply to discharge the bankrupt from the old debts. A certificate is not like a pardon; it is not necessary to make him a new man. In my apprehension it could not be enough for a creditor or an assignee to say that he is uncertificated; even to intitle them to an assignment of future effects under the statute, they must shew that they have debts un-[48]-paid; à fortiori a stranger ought not to take advantage of his being uncertificated, which affords but a presumption at most that there are debts unpaid. The bankrupt who has not obtained his certificate (which is all that is meant by the word uncertificated) stands on the footing of the 13 Eliz. c. 7; by which, if the effects at the time of the bankruptcy are insufficient to satisfy the creditors, his future effects are made liable to be assigned. That is but in the nature of an execution and is reasonable, and the Court will give effect to the demands of the assignees or creditors, as long as any debts are due, in the mode pointed out by the statute, but I think not otherwise. The hardship and inconvenience, nay, the injustice, as it seems to me, of this disabling doctrine, is enough to condemn it.

BULLER J. This is clearly a case of property acquired subsequent to the bankruptcy. *Evans v. Mann* and *Martyn v. O'Hara* were questions between the bankrupts and the assignees; all the other cases agree very well with *Ashley v. Kell*. There the Court thought that the bankrupt had a property in goods acquired after the bankruptcy, and might assign to a bonâ fide purchaser. But the assignees may claim, and if they do, they shall succeed. So in *La Roche v. Wokeman*, Lord Kenyon said, "If the assignees take any steps to disaffirm the title, they may do so; but if they do not, the bankrupt being the ostensible owner, may convey a title, and it is not competent to third persons to object." Allowing that the assignees might demand the money, still it would be no bar to this action. Why? because a third person has treated with the bankrupt as capable of receiving credit. All the authorities go this length.

HEATH J. The 13 Eliz. c. 7, s. 11, directs that the future property of a bankrupt shall be "bargained, sold, extended, delivered, and used for and towards the payment of the creditors." The antient practice was, for the commissioners to assign specific parts of the bankrupt's property to each particular creditor: and the 5 G. 2 is the first statute which directs the choice of assignees for the benefit of all the creditors. When it became the practice to make over all the property to the assignees, the general assignment was held sufficient to pass the future effects. But the question here is not whether the bankrupt can sell, but whether a stranger having purchased of him can dispute his title. He has a defeasible property, which none but the assignees can defeat. He is like an alien who may purchase lands and maintain an action for them, [49] unless the crown interpose. The assignees may allow the bankrupt to trade, and will have a right to recover the fruit of his contracts.

ROOKE J. I am of the same opinion. If a stranger is under any difficulty about defending himself against the assignees in a subsequent action, he has only to give them notice of the first, and inquire whether they choose to defend it, and thereby he would be secured.

Rule discharged (a).

LOVERIDGE v. BOTHAM. May 27th, 1797.

Delivery of an attorney's bill is conclusive evidence against an increase of charge in a subsequent bill on any of the items contained in it: and strong presumptive evidence against any additional items (c).

Le Blanc Serjt. having moved for the prothonotary's report in this case, it appeared that the Plaintiff had delivered a bill to the Defendant in 1793, for attorney's business done, previous to that time; in 1795 another bill was delivered for business done during the same period, into which many new items were introduced, and some of the former charges raised in amount. The prothonotary wished to be informed how far he was to consider the Plaintiff as concluded by the delivery of his first bill.

The Court said that the delivery of the former bill was conclusive evidence against an increase of charge on any of the items contained in it, and strong presumptive evidence against any additional items; but that if errors or real omissions in the former bill could be proved, they ought to be allowed for: and directed the prothonotary to review on this line of distinction (b).

STABLES AND ANOTHER v. ASHLEY AND OTHERS. May 29th, 1797.

In process not bailable, if the writ be joint and the declaration several, it is regular. Secus in bailable process (e).

A rule was obtained by Shepherd Serjt. on a former day, to shew cause why the proceedings in this action should not be set aside for irregularity. A *quare clausum fregit* having been sued out by the Plaintiffs against Ashley, Frost, and Grignon, and Ashley's attorney served with a copy of the process, he searched the Filazer's Book, and found a memorandum (d) of a warrant of attorney in the action against all three, and accordingly on the 3d of May entered one joint appearance for them, though he had authority from Ashley only; on the 4th of May he was served with a [50] notice of declaration; on the 5th he took it out of the office, and found that Ashley was the only one of the three declared against.

Le Blanc Serjt. for the Plaintiffs contended, 1st, That as it was not a bailable process, the proceedings were regular, and cited *Yardley v. Burgess*, 4 T. R. 697, in the note, and *Spencer v. Scott* decided in this term (*suprà*, page 19); 2dly, That if there were any irregularity, it had been waived by the Defendants' taking the declaration out of the office; and 3dly, That the Defendants' attorney was equally irregular with the Plaintiffs, having entered a joint appearance for all three, when authorised by one only.

Shepherd contra insisted that the writ and appearance being joint, and the declaration several, there was no process to warrant it; that the case of *Spencer v. Scott* went upon the possibility of the additional Defendant's being a fictitious person like John Doe, but here the service included all three; that taking a declaration out of the office is a waiver of irregularity in the process, because the Defendant is acquainted with that before he goes to the office, but not of irregularity in the declaration, for he must

(a) This case was afterwards confirmed by a similar decision in the K. B. See *Webb v. Fox and Another*, 7 T. R. 391.

(c) *Anderson v. May*, 2 B. & P. 237.

(b) *Knox v. Whalley*, Esp. Cas. N. P. 159.

(e) S. P. in K. B. *Levin v. Smith*, 4 East, 589. *Kerral v. Fossett*, 7 Taunt. 458. *Chapman v. Eland*, 2 N. R. 82. *Thompson v. Cotter*, 1 M. & S. 55.

(d) 25 Geo. 3, c. 80.

take out that before he can ascertain whether it be irregular or not: he added, that by the present mode of proceeding the revenue would be defrauded.

Per Curiam. The attorney has taken upon himself to enter an appearance for three, having an authority from one only; the Court therefore, if necessary, might cure the whole irregularity by setting aside the appearance as to two of the Defendants, and letting it stand for Ashley only. Unless we found ourselves bound by the strictest authorities, we would not countenance such an objection as this; but the practice seems against this objection; the distinction (c) is between process bailable and not bailable; in the latter a declaration may be delivered against one, though any number be mentioned in the writ, and no inconvenience can result from it; we will not distinguish between John Doe and a real Defendant, in order to raise an objection.

Rule discharged without costs.

[51] CASES ARGUED AND DETERMINED IN THE COURT OF COMMON PLEAS, IN TRINITY TERM, IN THE THIRTY-SEVENTH YEAR OF THE REIGN OF GEORGE III.

NORTH QUI TAM v. SMART. June 19th, 1797.

In compounding a penal action on the post-horse-act, (which gives costs to the prosecutor,) the prosecutor was allowed to receive the deficient duties (not amounting to 40s.) and full costs of suit, though together exceeding the 40s. paid to the Crown.

A qui tam action having been brought on the 20 Geo. 3, c. 51, for sending in false accounts to the farmers of the duties on post horses;

Le Blanc Serjt. on a former day moved for leave to compound on payment of 40s. to the Crown, and such duties as were deficient in consequence of the fraud (which did not amount to 40s.) together with the costs of the action to the prosecutor.

Shepherd Serjt. said he was instructed to consent.

But the Court seemed to doubt whether, as the deficient duties, together with the costs of the action, would amount to more than the 40s. paid to the Crown, the composition could be allowed, and it stood over.

On this day Le Blanc mentioned it again, and said that he had looked into the act, and found that the prosecutor was allowed the full costs of suit; and therefore that the value of the costs could not be considered as a part of the composition.

[52] Accordingly, the Court gave leave to compound, and said that as the act was made for the benefit of the farmers of the post-horse duties, it was not unreasonable that they should make the composition on their own terms. Besides with respect to costs, this was not like other popular actions.

EVANS v. GILL. June 20th, 1797.

The Court will set aside a regular judgment, on an affidavit of merits, though bankruptcy is intended to be pleaded.

Marshall Serjt. shewed cause against a rule for setting aside a regular judgment on an affidavit of merits, upon the ground that the Defendant meant to plead his bankruptcy. This is not more a plea of merits than infancy, coverture, usury, or the Statute of Limitations: and in those cases the Court has refused similar applications (a). Bankruptcy is not a meritorious, but a mere legal defence, against a conscientious claim; it is not such a discharge but that a previous debt may be a consideration for a new promise, as in cases of infancy, and the Statute of Limitations.

Sed per Curiam. Supposing this to be a fair bankruptcy, we should permit the party to make use of it as a defence; when he has given up all his effects, it would be cruel to charge him from a neglect in the attorney; the necessary consequence of

(c) *Holland v. Johnson*, 4 T. R. 695. *Holland v. Richards* and *Gardley v. Burgess*, T. 32 G. 3, *ibid.* in Notes.

(a) *Vid. Forbes v. Lord Middleton*, Str. 1242, and *Willett v. Atterton*, Bl. 35.

which would be, that he must go to gaol. In all cases of fair bankruptcy, we think the party should have an opportunity of taking advantage of it.

Rule absolute on payment of costs.

[53] BUCK, ON THE JOINT AND SEVERAL DEMISES OF WHALLEY Clerk AND WIFE, v. NURTON. June 22d, 1797.

[Referred to, *Cuthbert v. Robinson*, 1882, 51 L. J. Ch. 241.]

Lands usually occupied with a house, will not pass under a devise of "a messuage, with the appurtenances," unless it clearly appears that the testator meant to extend the word "appurtenances" beyond its technical sense (a).

This was an ejectment to recover sixty-four acres and a half of land, consisting of a park, meadow land, pasture land, and orchards, tried before Buller J. at the last Lent assizes for the county of Somerset, when the Jury found a verdict for the Plaintiff, subject to the opinion of this Court upon the following case:

Edward Clarke, deceased, being seised (among other things) of the premises in question, did, by his last will duly executed, and bearing date the first day of November in the year of our Lord 1794, devise (amongst other things) as follows:

"I give and devise unto my trusty and well-beloved friend John Nurton, of Milverton in the county of Somerset aforesaid, Gentleman, (and who was acting for the testator, at his death, as his steward,) his heirs and assigns, all that messuage and farm called Blagroves, and the several pieces and parcels of land therewith held and enjoyed, situate, lying, and being in the parish of Milverton aforesaid, and now in the occupation of Jonas Chorley; also all that close, piece or parcel of meadow or marsh ground, called Great Crook, situate, lying, and being in the parish of Bawdripp in the said county of Somerset, and now in the occupation of John and Richard Langdon; to hold the said messuage or tenement and farm, lands, hereditaments, and premises, with their respective appurtenances, unto the said John Nurton, his heirs and assigns for ever."

Having then given certain legacies and annuities, he further gives and devises as follows;

"I give and devise unto my good friend and relation Elizabeth Whalley, wife to the said Thomas Sedgwick Whalley, (the said Elizabeth Whalley being one of the coheirs of the testator,) all that my capital mansion-house wherein I now live, and the lands and grounds thereto belonging, and therewith held and enjoyed, with the appurtenances: and also all that my manor or lordship of Chipley, and all others my manors or lordships, messuages, farms, lands, tenements, hereditaments, & premises, as well freehold or fee-simple, as copyhold and customary, whereof I have a disposing power; except the messuage or [54] tenement, and farm, lands, hereditaments, and premises hereinbefore devised to the said John Nurton, situate, lying, and being in the said county of Somerset, or elsewhere in the kingdom of Great Britain; to hold the same unto the said Elizabeth Whalley, for and during the term of her natural life, to and for her sole and separate use, with power for the said Elizabeth Whalley to cut and fell timber for the necessary repairs of the said premises only: and from and immediately after her decease, I give and devise my said capital mansion-house, manors, messuages, farms, lands, tenements, hereditaments, and premises, with the appurtenances, unto the said John Nurton, his heirs and assigns for ever: also I give, devise, and bequeath unto the said Elizabeth Whalley, all my leasehold messuages or tenements, lands, and premises, in the said county of Somerset, or elsewhere; to hold unto the said Elizabeth Whalley for so many years of my term, estate, and interest therein as shall run out and expire in her lifetime, to and for her own sole and separate use and benefit: and from and immediately after her decease, I give, devise, and bequeath the same leasehold messuages, or tenements, lands, and premises unto the said John Nurton, his executors, administrators, and assigns, for all the residue of my term, estate, and interest that shall be therein then to come and unexpired. And it is my express will and desire, and I do hereby direct, that the said John Nurton shall hold and enjoy my said capital mansion-house, with the appurtenances, for the space

(a) Vide *Ongley v. Chambers*, 1 Bing. 483, 498.

of one year next after my death. I give, devise, and bequeath unto the said Thomas Sedgwick Whalley, in case he shall survive his wife, the said Elizabeth Whalley, the sum of one thousand pounds, to be issuing and payable out of the estates hereinbefore devised to the said Elizabeth Whalley for life, and to be paid by the said John Nurton at the end of twelve calendar months next after her death. All the rest, residue, and remainder of my personal estate and effects whatsoever and wheresoever, and of what nature or kind soever, after payment of all my just debts, funeral expences, and legacies hereby given, I give, devise, and bequeath unto the said John Nurton, his executors, administrators, and assigns. And I do hereby make, constitute, and appoint him, the said John Nurton, whole and sole executor, of this my will, hereby revoking all former wills by me at any time heretofore made; and do make and declare this to be and contain my last will and testament."

[55] The testator died on the 28th of March 1796, having for many years previous to and at his death constantly occupied all the premises above mentioned, (which were enumerated in a schedule prefixed to the case,) with his said capital mansion-house, and the gardens and pleasure-grounds of Chipley; which include the parlour-garden, the herb-garden, the pond-garden, the old house-garden, the arbour-garden, the shrubbery, the lime-tree grove, and a court adjoining, and the public and private walks or road-ways, one of the latter of which was through the park to Chipley House, besides a back court, and other curtilages.

The question for the opinion of the Court was, Whether the lessors of the Plaintiff, or any of them, were entitled to recover all or any, and what part of the above-named premises; and whether they, or any of them, passed to John Nurton by the clause which directs that he is to have the mansion-house, with the appurtenances, for a year after the testator's death?

Le Blanc Serjt. for the Plaintiff. The 1st question is, What is the true signification of the word "appurtenances?" the 2d, What is the intention of the testator, as it appears on the face of the will? The strict technical sense of the word "appurtenances" is confined to buildings, curtilage, and garden belonging to the house. In old times indeed, there was a question as to the latter. A devise of a messuage with the appurtenances, does not include lands usually occupied with the house: only such as are immediately necessary to the enjoyment of it. Bro. Abr. Feoffment of Lands, pl. 53. *Bettisworth's case*, 2 Co. 32. *Hearne v. Allen*, Cro. Car. 57. Hutton, 85, S. C. This last case was on a will, the two former were on deeds. But notwithstanding the general rule, if it appear to be the obvious intention of the testator, that lands generally occupied with the house should pass, the Court would construe the word "appurtenances," contrary to its strict technical sense, so as to carry the lands to the Defendant. The testator here was possessed of a mansion-house, together with parcels of land, amounting to about sixty-four acres and a half; there were gardens, shrubberies, public walks and ways, which might well come under the word "appurtenances," and it is not contended by the lessors of the Plaintiff that they did not pass: they were sufficient to satisfy the word "appurtenances," without the additional lands. The testator was well aware of the distinction between appurtenances to the mansion-house, and lands occupied with the mansion-house; for in every clause, except the last, (which is the one in question,) he describes the particular [56] premises which are intended to pass, and afterwards adds the word "appurtenances." So in the devise to E. Whalley the words are, "all that my capital mansion-house wherein I now live, and the lands and grounds thereto belonging, and therewith held and enjoyed, with the appurtenances;" but in the last or directory clause, when he takes out of the devise to E. Whalley what was intended to be given to the Defendant for a year, he drops the words which describe the lands occupied, and says only, "mansion-house, with the appurtenances." Besides, it is to be considered that the Defendant had been steward to the devisor, and was by will appointed his executor; it was necessary, therefore, that he should have access to all the papers of the devisor, with as much facility as possible: this could be best afforded him by the devise of the mansion-house for a year, with what was necessary to its actual enjoyment; but a beneficial interest in the lands round it could not come within the same view.

Williams Serjt. for the Defendant. It is manifest from the will, that every thing was meant to pass. If that intent can be shewn, it is admitted that the words are large enough. But some cases may be cited, to shew that *ex vi termini* more will pass by the word "appurtenances" than has been stated on the other side. In *Higham*

v. *Baker*, Cro. Eliz. 16, Anderson Ch. J. says, "That land shall pass as pertaining to a house which hath been occupied with it by the space of ten or twelve years; for by that time it hath gained the name of parcel, or belonging, and shall pass with the house by that name in a will or leases." The same doctrine is laid down in *Loft v. Baker*, 2 Rolle's Rep. 347. So by the case of *Yates v. Clinard*, Cro. Eliz. 704, it appears, that lands may pass under the words, "house, with the appurtenances." In *Boocker v. Samford*, Cro. Eliz. 113, a devise of a "tenement, with the appurtenances, in which H. B. dwelleth in Ebbley," was held to pass lands out of Ebbley, which had been used with the tenement by the space of sixty years, and had always passed by one grant, and under one rent. And in the present case the lands in question had been for many years constantly occupied with the house. The strongest case in favour of the Plaintiff is *Smithson v. Cage*, Cro. Jac. 526; but that was a case of surrender of copyhold, which is construed as strictly as a deed. But even there the orchards were held to pass. By *Hill v. Graunge*, Plowd. Com. 170, it appears that the terms "appertaining to the messuage" may, even in a deed, signify lands usually occupied with the messuage (a)¹. As to the question of intent, it has been said, that if the testator had [57] meant the lands to pass, he would have described them: and the circumstance of the description being inserted in the former clause, and omitted in the latter, has been relied on. But the words, "house with the appurtenances," in the directory clause, refer to the former description, and shew that the Defendant should take in the same manner as E. Whalley. The cases of *Doe v. Collins*, 2 Term Rep. 498, and *Blackborne v. Edgley*, 1 P. Wms. 600, prove that very little is sufficient to pass lands occupied with the house, where it appears to have been the intention that they should pass.

Le Blanc in reply was stopped by the Court.

EYRE Ch. J. I have no doubt upon the case, unless it be with respect to the orchards. Lands will not pass under the word "appurtenances" taken in its strict technical sense: they will pass if it appears that a larger sense was intended to be given to it. If the Courts had always adhered to this line of construction, many reported cases would not now disgrace the books. Every testator ought to be supposed to take legal words in a legal sense, unless, according to the marginal note to the case in *Hobart* (a)², there be demonstration plain of an intent to use them in a different sense. In the former part of the will there is a devise of a house with lands in terms express, to which is added, "with the appurtenances," in order to comprize all which might not fall within the description. Then follows a declaration that the Defendant shall have for one year something which was included in the above devise. The testator must be supposed to have understood what he was talking about. If he had intended to have given the whole, the words were before him, and he ought to have used them. Suppose there had been nothing stated to let us into the intention of the testator, but the mere devise to the Defendant, we must have examined what was occupied by the testator; and if we had found a house situated in a park which had always been occupied with it, and was, as it were an integral part of the thing, this might have proved the intention of the testator to pass the whole together. There, if nothing to the contrary had appeared, we might have supposed the testator to have used the word "appurtenances" in a sense different from its technical sense. But this is not that case. It is true that the premises were occupied for a considerable time together with the house: but first, the whole of the premises are not necessarily connected; in the next place, there is here solid ground to argue, that the testator [58] understood the meaning of the words employed in the devise, having sometimes used the word "lands" as a part of the description, and sometimes dropt it. The Defendant being the testator's executor, and having been his steward, affords a fair ground of argument. The testator gave him the exclusive enjoyment of the mansion-house, "with the appurtenances," for one year only, after having devised the mansion-house and lands also "with the appurtenances," to Mrs. E. Whalley for her life, with remainder to the Defendant. Now with what view was this done? Most probably

(a)¹ Land may be said to be appertaining to an house, as well in the King's case, as of a common person, where it hath been let and occupied together by a convenient time. *Jennings v. Lake*, Cro. Car. 168. Vide etiam Co. Entr. 384. *Dyer*, 362.

(a)² Hob. 33. The note is—No man shall shew me a case in law, where by purchase by devise to an heir, any may take that is not heir indeed, without declaration plain.

for the convenience of the Defendant in the execution of the duty imposed upon him. The general intent, therefore, as collected from the devise, and the relation in which the devisee stood to the testator, does not call upon us to go beyond the strict rule in construing the technical word "appurtenances."

HEATH J. I am of the same opinion. We ought to adhere to the strict technical sense of the word "appurtenances." For though the intention is not clearly expressed, why the Defendant should have the mansion-house at all, yet it appears, that he was executor and residuary legatee; and as such was intitled to the stock, the arrears of the rent, the furniture, &c. A year's occupation therefore was given him, to settle his accounts, and collect what belonged to him. He ought to have the house, and what comes within the strict sense of the word "appurtenances." Besides, this may be distinguished from the cases cited, for it is a separation of the premises for a year only, whereas in some of the other cases it was for a great length of time, and in some perpetual, which might induce the Court to lean against it.

ROOKE J. I am of the same opinion.

The postea to be delivered to the Plaintiff for all the premises except the orchards.

MORGAN Assignee of the Sheriff v. SARGENT one of the Bail of Owen.
June 27th, 1797.

If a declaration on a bail-bond conclude: "Whereby an action hath accrued to the Plaintiff to demand and have of the principal" (instead of the bail), and state non-payment by the principal; it is bad on a special demurrer.

The declaration, after stating the writ, the arrest, the non-appearance, and the assignment of the bail-bond, proceeded thus: "By reason of which said premises, and by force of the statute, &c. an action hath accrued to the said T. Morgan as [59] assignee, &c. to demand and have of the said T. Owen the said sum of 40l. above demanded. Nevertheless the said T. Owen, although often required, hath not paid," &c. inserting Owen's name for that of the defendant.

To this there was a special demurrer, assigning for cause that "it is not averred, or shewn in or by the said declaration, that the said R. Sargent hath been guilty of any breach of the condition; that it no where appears that the said R. Sargent hath neglected or refused to pay the money, or that payment thereof has ever been demanded of the said R. Sargent; and that no sufficient cause of action is any where stated or shewn to have arisen, or accrued to the said T. Morgan against the said R. Sargent."

Joinder in demurrer.

Shepherd Serjt. in support of the demurrer. It is consistent with the allegations in the declaration, that R. Sargent may have paid the money; the latter part of the declaration cannot be rejected, for there never was a declaration on a bail-bond ending with a statement of the assignment; and the Court cannot substitute R. Sargent for T. Owen.

Marshall Serjt. contra. The special demurrer ought to have alleged that the declaration had stated non-payment, by T. Owen instead of R. Sargent; and the averment in the beginning of the declaration, "owes to, and unjustly detains," sufficiently shews a cause of action and non-payment by the Defendant.

Shepherd in reply. The averment in the beginning of the declaration is a mere conclusion of law, and only shews that the debt was once owing; but the Plaintiff must shew how it is owing, and that there is a debt, and detainer at the time of the action brought.

EYRE Ch. J. Is it not shewn that the debt and detainer were existing at the time of the declaration, since the record begins with "was summoned to answer J. M. in a plea that he render to the said J. M. 40l. which he owes to, and detains," &c.? You must argue it as a mere point of form; if you attempt to argue on the substance, you must fail. This is a slip in form; but it is always the best way to make the party pay for this kind of slip, if advantage is taken of it by special demurrer. Infinite mischief has been produced by the facility of the Courts in overlooking these errors: it encourages carelessness, and places ignorance too much upon a footing with knowledge among those who practise the drawing of pleadings. The averment of "often

requested" is [60] an established form, and I think a necessary form: had the Courts even determined it to be substance, I should have had no objection; for many actions might have been avoided, if request had actually been made. The party, if he will not amend, but will join in demurrer, must pay for his blunder.

The other Judges assenting,
Judgment for the Defendant.

SABINE v. ELIZABETH JOHNSTONE. June 28th, 1797.

If a replication to a plea in abatement of the writ begin, "that the said declaration ought not to be quashed," but conclude properly, it is well enough; for such words may be rejected as surplusage.

Assumpsit.—Plea in abatement of the writ: That Eliza Allen Johnstone, who is impleaded by the name of Elizabeth Johnstone, was baptised by the name of Eliza Allen, and had always been called and known by the name of Eliza Allen, without this, that she had ever been called or known by the name of Elizabeth: and prays judgment of the writ. Replication: That the said declaration ought not to be quashed, by reason of any thing in the said plea above alleged: because the said Eliza Allen Johnstone, who now appears to the original writ and declaration, is the same person against whom the Plaintiff sued out his writ, and was at that time, and still is, called and known, as well by the name of Elizabeth as by the christian name of Eliza Allen. Concluding to the country. To this there was a special demurrer, assigning for cause: That the Plaintiff in his replication has not shewn any reason "why the said writ of the said Plaintiff, of which the said Eliza Allen hath above prayed judgment, should not be quashed: but on the contrary thereof hath alleged that his said declaration ought not to be quashed; to which said declaration the said Eliza Allen hath not pleaded, nor is she bound to plead; inasmuch as the said declaration cannot be good or sufficient in law, if the said writ of the said Plaintiff is quashed: and for that the matter alleged by the Plaintiff in his replication should, if true, have been pleaded in support of his said writ, and not of his said declaration," &c.

Joinder in demurrer.

Marshall Serjt. in support of the demurrer. It is a principle in pleading, that the consequence intended to be drawn by one party must be excluded by the answer of the other. Here the Defendant says, that she is miscalled in the writ, and that it ought to be quashed. The Plaintiff in reply says, that the declaration ought [61] not to be quashed, though the Defendant has not alleged that it ought. Suppose a judgment that the declaration should be quashed, yet the writ would remain, and then the Plaintiff could not bring a new action: for he must declare on the same writ as long as it remains. Now if he declared on the same writ, in the same manner, the same objection would lie; and if in a different manner, there would be a variance between the writ and the declaration.

Runnington Serjt. *contra* was stopped by the Court.

EYRE Ch. J. I think the rules of pleading ought to be maintained; but I cannot but consider this as a frivolous objection. The plea is right in praying that the writ may be quashed; and the replication is right: it is an answer by matter of fact, and not by matter of law: it states that the Plaintiff was called and known by one name as well as the other, and concludes to the country. If the Plaintiff had prayed judgment, "if the declaration ought to be quashed," it might have altered the case; but the answer on which the Plaintiff has relied, is an answer of fact. Then what is the consequence? If that fact had been tried, and found for the Defendant, the judgment would have followed the prayer of the plea. As to the beginning of the replication, it does not signify whether it says that the declaration or the writ ought to be quashed, or whether it says neither. If the Plaintiff had simply replied; That the Defendant was called and known, &c. and concluded to the country, it would have been sufficient, and the issue would have been well joined. It is therefore a surplusage form.

HEATH J. Of the same opinion.

ROOKE J. Of the same opinion.

Judgment for the Plaintiff.

MEDDOWSCROFT ONE, &c. v. SUTTON AND ANOTHER, Executors of Bowen.
July 30th, 1797.

If bail be served with process on his recognizance, and die before the quarto die post, and fresh process issue against his executors; they have until the quarto die post of the second writ to surrender the principal (a)¹.

Bowen was served with an attachment of privilege on a recognizance of bail, but died before the quarto die post; until which day he had time to surrender the principal; the Plaintiff then served the Defendants with an attachment of privilege, and before the quarto die post of that writ the principal was surrendered.

Shepherd Serjt. having obtained a rule to shew cause why the proceedings against the Defendants should not be staid, on payment of costs;

[62] Cockell Serjt. shewed cause. The surrender was insufficient. Bowen's death made no difference: his executors could not be in a better situation than himself, and the principal should have been surrendered by the quarto die post of the first writ.

Shepherd Serjt. contra. The bail could not be fixed until the fourth day after the return of the writ; now he died on the first day: if he had lived he might have relieved himself; the executors therefore are not sued as the executors of bail fixed in his lifetime and must be in the same situation as if no action had been brought against their testator. *Hoare v. Mingay*, 2 Str. 915. Though the staying proceedings on a surrender before the quarto die post was formerly *ex gratiâ*, it is now become a matter of right.

Per Curiam (after looking into the case of *Hoare v. Mingay*). The case in *Strange* has established this rule: That if the principal is surrendered within four days after the return of that writ in which there is an effectual proceeding, it is sufficient. The former suit was as much done away in this case by Bowen's death, as in *Hoare v. Mingay*, by the action being brought in the wrong court: the sufficiency of the surrender within the quarto die post, is a privilege to the party sued, to which the executors of the bail are as much intitled as the bail himself.

Rule absolute.

EX PARTE ANSELL AND ANOTHER. July 5th, 1797.

If an annuity-deed contain a proviso that the grantor shall repurchase, the memorial of such deed must state the proviso and the terms and conditions of redemption; if it only refer to the deed, and state the annuity to be redeemable "on such notice, terms, and conditions as are therein expressed," it does not sufficiently comply with the 17 G. 3, c. 26, s. 1 (a)².

C. Ansell and S. W. Fores granted an annuity to E. Boulton, and gave a bond, warrant of attorney, and annuity-deed to secure it. The deed contained a proviso of redemption. The memorial stated the bond and warrant of attorney properly, but described the proviso of redemption as follows: "and in the same indenture is contained a certain proviso or agreement, empowering the said C. Ansell to repurchase the said annuity upon such notice, terms, and conditions as are therein expressed."

Williams Serjt. on the part of the grantors, on the first day of Easter Term, obtained a rule to shew cause, why the "bond, the warrant of attorney, and the deed, should not be delivered up to be cancelled."

[63] The ground of his motion was, that the memorial had set forth the proviso of redemption in too general a way (a)³. He cited *Steadman v. Purchase*, 6 T. R. 737,

(a)¹ Vide *Wilkinson v. Pass*, 8 T. R. 422. *Byrne v. Aguilar*, 3 East, 306.

(a)² Vide *Glasse v. Mount*, 7 T. R. 391. *Desenfans v. O'Brien*, 3 East, 559. *Dickenson v. Boyne*, post, 335. *Defaria v. Sturt*, 2 Taunt. 225. *Jackson v. Milsington*, 6 Taunt. 189. *Bleamire v. Barfoot*, 6 Taunt. 504, 509. *Doe d. Mason v. Phillips*, 5 M. & S. 369.

(a)³ Another objection to the memorial was taken by Williams Serjt. viz. that it was therein stated, that the consideration was paid by "E. Boulton or her solicitor," in the alternative; and for this was cited the opinion of Lord Loughborough, in *Duke of Bolton v. Williams*, 4 Bro. Chan. Cas. 309, where it is said, that "the actual mode

to shew that a memorandum indorsed on the deed, importing that the grantor might redeem on terms, must be inserted in the memorial: and *Appleby v. Smith*, H. 37 G. 3, in Scacc., where it was held equally necessary, though the proviso was contained in the body (b) of the deed.

Shepherd Serjt. shewed cause. Though it has been held that a proviso of redemption ought to be inserted in the memorial, it has never been deemed necessary to state it verbatim. A proviso of redemption is a part of the consideration, and there is a difference between the first clause which relates to setting out the deed, and the second clause which relates to setting out the consideration. The former requires the day of the month and year when the deed bears date, with other particulars to be specified; the latter only a general description. Unless this be sufficient, the whole deed must be set out; the days of payment and the remedy, as whether by distress or otherwise. The clause of redemption is stated generally, referring to the deed for particulars.

Williams in support of the rule. The proviso of redemption forms part of the terms of the agreement on which the annuity is granted: and there is no difference in sense, whether such proviso be totally omitted in the memorial, or only generally inserted, as in the present case. The deed is in the custody of the grantee; it is necessary therefore that the memorial should contain the facts essential to be known to the grantor. From this memorial he can only learn that he has the power of redemption, but not the terms on which he can redeem. If the [64] Courts have been right in insisting that the memorial must state the proviso, it ought also to contain the terms.

EYRE Ch. J. If the 17 Geo. 3, c. 26, had gone no further than the first clause, we must have looked to the import of the words of that clause; and the practice of the Register Counties. There they enter no more than a memorandum, containing the names of the parties, the dates, the premises, and perhaps the consideration. I do not know how ex vi termini or on analogies we can say that more was intended here. The Legislature has said what shall be inserted; namely, the date, the names of the parties, and for whom they are trustees, the witnesses, the annual sum, the name of the person for whose lives the annuity is granted, and the consideration or considerations. Now, unless under the word "considerations," I cannot say that the terms of the proviso are included. I should incline to go some length for the sake of general utility to decide that the terms must be set out in the memorial, but I doubt whether the act requires it. The word "considerations," in the act, may mean mere money considerations. In the case where the Courts have held it necessary to insert the proviso of redemption in the memorial, it has been indorsed on the deed: and has therefore been considered either as a separate deed, or as something collateral to the deed itself, and essential to be set out as a superadded part of the security. In the case of a proviso in the body of the deed, I doubt whether on the general idea of a memorial, or the specific description of it in this act, it need be inserted. I am not therefore prepared at present to consider this memorial as insufficient. It is a memorial only, not a copy of the deed: it states a deed for securing an annuity redeemable "on the terms therein expressed:" for which reference may be had to the deed itself. Is not this a sufficient compliance with the words of the act? He who sees an annuity redeemable, will inquire after the deed, and look into the terms. It has been stated that the act was made for the benefit of the grantor, who has parted with the deeds:

and manner of payment is necessary to be stated in the memorial;" but this was agreed to be a mistake in the report: and Eyre Ch. J. said, "That the deed must express by whom the consideration was paid, but not the memorial." Vide also *Dalmer v. Barnard*, 7 T. R. 248.

(b) See also to this effect *Harris v. Stapleton*, 7 T. R. 205. But where an agreement was made at the time of the grant, that the grantors should have a power of redemption, which agreement was not then reduced to writing; but after the memorial had been enrolled, was indorsed on the bond; the Court of K. B. were of opinion that the third section of the act, which requires the consideration to be stated in every deed, &c. could not be extended to a power of redemption intended to be reserved to the grantor. And though it had been objected for the Defendant, that such an agreement ought to have been stated in the memorial, the Court directed the counsel for the Plaintiff to speak to another point. *Dalmer v. Barnard*, 7 T. R. 250.

I cannot subscribe to that proposition: it was made for the benefit of mankind in general, that the world might know the nature of such transactions, and the parties be restrained by a sense of shame from entering into them. The policy of the law would be amply satisfied by a memorial like the present; it answers all substantial purposes, for it cannot be necessary to load it with the full contents of the deed which would be little short of requiring a copy. But if my Brothers should be of a different opinion, I should wish to take time to consider.

[65] BULLER J. I have considerable doubts upon this question; and cannot quite coincide in the opinion of my Lord. I should sooner say that the proviso need not be inserted at all, than that it should be inserted in this general way. The question is, Whether the proviso be part of the consideration or not? Look through the act. It was there intended to include money considerations only, and one clause actually says "in money only." If then the word "considerations" means money considerations only, a proviso is not within the terms of the act. But the point has been already settled, both here and in the King's Bench, and I am not disposed to disturb what has been settled by two determinations, though the act does not appear to go that length. Having got thus far, that the word "considerations" includes all the terms of the agreement, the remaining question will be, Whether the present proviso be sufficiently stated? I admit no difference between the case of a proviso indorsed, and a proviso in the body of the deed. They are both parts of the agreement. So in a warrant of attorney with a defeasance, the defeasance is a part of the instrument. If then the proviso is to be taken notice of at all, is it not to be taken notice of substantially? The act in my opinion was made for the benefit of the grantor, as well as the public. Let us see then if this memorial be sufficient to protect the grantor, against any improper advantages which might be attempted. He knows the annuity to be redeemable, but the deeds are in the hands of the grantee. Is it not then material for him to know the terms on which it is redeemable: as whether at the end of three or at the end of seven years? Is it not of importance that he should have it in his power to prove all the material facts out of the mouth of the party himself: that he may be able to come to the Court, state the specific terms, and demand the deed on compliance with the proviso? The terms therefore not being inserted, I think the proviso insufficiently stated, and if so, that the annuity should be set aside.

HEATH J. I have great doubts upon the question. There is no analogy between the register acts and the 17 G. 3. The former were made for the benefit of purchasers: the latter to throw a fence about the grantors of annuities, who are usually incautious and extravagant. What my Brother Buller has said appears extremely forcible, that the grantor ought to know the precise terms on which the annuity is redeemable: he would otherwise be left in great doubt and difficulty, unless he has kept a copy of the [66] deed, which is rarely done. As it has been held necessary to register a proviso, it must be shewn on what terms the proviso is to take effect: and I see no difference between a proviso inserted in the body of the deed, and one indorsed on the back of it.

ROOKE J. I am inclined to think the memorial insufficient. The proviso is a part of the consideration. Every circumstance in favour of the grantor is a part of the consideration; for all such circumstances form the ground of the grant, and if every such circumstance be a part of the consideration, it should be so specifically stated, that the grantor may know clearly what the terms of the agreement are. "On the terms therein expressed," is not a satisfactory statement. I think however that this matter requires further consideration.

Cur. adv. vult.

On this day the opinion of the Court was delivered by

EYRE Ch. J. We have conferred with all the Judges on this question, and the result is, that we all think, that where an annuity is redeemable, the terms and conditions of redemption ought to be set forth in the memorial, in order that the party who is to have the benefit of such redemption, may without being driven to any compulsory means, be apprized of those terms and conditions, and may redeem it with most ease and convenience to himself. The consequence is that we must make

The rule absolute (a).

(a) When this matter was first moved, Williams Serjt. stated that no action had been brought on the bond, nor any judgment entered up on the warrant of attorney,

[67] JOHN SCOTT v. GODWIN. July 5th, 1797.

The reversion of lands demised to the Defendant for years, is conveyed to A. and B. and the heirs of B. in trust for A. and his heirs: A. declares singly on a covenant contained in the lease, and after setting out the above title, without averring the death of B., states himself to be "thereby seised of the reversion in his demesne, as of fee." This is bad upon demurrer (*a*).

This was an action on a covenant contained in a lease, by which the Defendant had agreed to repair certain premises, of which he was tenant, at his own costs and charges.

The declaration stated in substance as follows:—That one Thomas Grice was seised of the reversion of the premises in question in his demesne as of fee, subject to a mortgage term of 500 years, which term was subject to be defeated, and was defeated before the making of the indenture thereafter next mentioned; that by an indenture made between the said Thomas Grice and the Defendant, the said Thomas Grice demised the premises in question to the Defendant for a term of twenty-one years; that the Defendant covenanted to repair at his own costs and charges; that the Defendant entered, and became possessed, and that the said Thomas Grice was seised of the reversion in his demesne as of fee; that being so seised, the said Thomas Grice devised the said reversion to his son and died: that the son together with certain persons having mortgage claims upon the premises by lease and release conveyed the said reversion to John Scott and Robert Scott, "to have and to hold the same unto the said John Scott and Robert Scott, to the only proper use and behoof of the said John Scott and Robert Scott, and the heirs and assigns of the said Robert Scott for ever, but nevertheless as to the estate and interest of the said Robert Scott, his heirs and assigns therein, in trust for the said John Scott, his heirs and assigns for ever. By means of which said premises, the said John Scott became, and was, and still is seised of and in the said reversion in his demesne as of fee," &c. That although John Scott had ever since the said reversion came to him by assignment as aforesaid, kept the covenants on his part, yet the Defendant had broken his covenant by delivering up the premises out of repair. Damages, &c.

To this there was a special demurrer, assigning several causes (which were afterwards abandoned) and joinder therein.

Shepherd Serjt. for the Defendant. I shall not argue the special causes of demurrer, but rely on a substantial defect on the record. The declaration is here in the name of one, whereas the legal estate in reversion of the lands in question belonged to John Scott and Robert Scott, as joint tenants for their lives; and those in whom the legal estate in reversion is must bring the action. Now John and Robert Scott may be jointenants for their lives, although [68] Robert had a several inheritance. Co. Litt. 182 a. 2 Black. Comm. 181. It is true that the interest of Robert Scott and his heirs was in trust for John Scott; but that can make no difference in the legal estate, and John Scott's estate in severalty was merely equitable. It is said, Co. Litt. 180 b. "that jointenants must jointly implead, and jointly be impleaded by others." Supposing

but cited *Ex parte Chester*, 4 T. R. 694, to shew that the Court had nevertheless a jurisdiction. The Court said "that every warrant of attorney entered was subject to their cognizance, but that they could not in all cases order all the proceedings to be cancelled, because they were void by the 1st section of the act." So in *Duke of Bolton v. Williams*, 4 Brown Chan. Cas. 310, and 2 Vez. jun. 154, Lord Loughborough said, "The courts of common-law, which will upon their general jurisdiction enter into the validity of the warrant of attorney or judgment upon motion, in the particular application under the act, will only set aside the judgment or execution, or vacate the warrant of attorney; but the jurisdiction does not extend to ordering the bond to be delivered up, and if ever done, it has been done inadvertently." Qu. therefore, Whether the rule in the present case was not made absolute in the form in which it was moved through inadvertence?

See these cases collected and digested in Hunt on the Annuity Act, 2d Edition, published 1796. And see *Symonds v. Cobourne*, post, 482.

(a) Vide *Anderson v. Martindale*, 1 East, 497. *Bloxam v. Hubbard*, 5 East, 407, 411. *Wyburd v. Tuck*, post, 458, 465. *Petrie v. Bury*, 3 B. & C. 353.

them however to be tenants in common, still they must join in this action. Co. Litt. 197 b. There is a distinction between actions for realty and actions for personalty; in the former, the parties may sever, because each may recover his share; but in the latter, not. Here the covenant is for not repairing, in which case damages are to be given; and how shall each have his damages apportioned? But there can be no doubt of John and Robert Scott being jointenants, who were so made in order to bar John Scott's wife of dower. Besides John Scott, as assignee of the reversion, must bring his action of covenant under 32 H. 8, c. 34, and thereby stands in the same situation as the lessor.

The covenant therefore must be considered as being made to both John and Robert, which renders it impossible for John to bring this action alone.

Marshall Serjt. for the Plaintiff. First, I shall contend that Robert Scott is a mere trustee, introduced into the conveyance to preclude John Scott's wife from having her dower, and solely for the benefit of John Scott the cestuy que trust; and it is now a settled rule of law that an estate in trust merely for the benefit of the cestuy que trust, shall not be set up against him. This was laid down by Lord Mansfield, in *Lade v. Holford*, 3 Burr. 1416. 2 Bl. 428, B. N. P. 110, and *Goodtitle v. Knot*, Cowp. 46, and recognized by Lord Kenyon, in *Loe v. Staples*, 2 T. R. 696. Now the difference between the case in Cowper and the present is, that the former was the case of a cestuy que trust with a mere equitable title; this is the case of a cestuy que trust having the whole interest in himself, and also being jointenant of the legal estate. Secondly, Supposing Robert Scott to have been a jointenant with an interest in the demised premises, and admitting, that regularly jointenants should join in personal actions affecting their joint interest, yet the Defendant can only take advantage of this irregularity by plea in abatement, Com. Dig. Abatement, E. 8, which cites Bracton, l. 5. De Exceptionibus, c. 25. "Competit etiam exceptio dilatoria tam ex personâ alterius quam petentis; quia sine alio, agere non potuit per se, qui tantundem juris habet quam ipse qui petit; ut sunt plures participes," &c., and then instances husband and wife, jointenants, &c. [69] So also Fleta, l. 6, c. 38, s. 3. "Competit etiam tenenti exceptio dilatoria contrâ petentem, cum solus petat, quod cum alio paterere deberet; sicut unus vel una cohæredum vel vir sive uxor, de re uxoriâ:" and Skin. 12, *Anon.* This shews that it may be taken advantage of by plea in abatement; to shew that it must, vid. Com. Dig. Abatement, E. 12. "If one jointenant or joint merchant sue alone, and it is not pleaded in abatement, no advantage shall be taken of it in evidence." And so it was held in trover. Skinn. 640, *Dockwray v. Dickinson*; in trespass, *Deering v. Moor*, Cro. Eliz. 554; in trover for injuries done to the inheritance, *Brown v. Hedges*, 1 Salk. 290. *Blackburn v. Grove*, cited Carth. 63; in trover by the assignees of a bankrupt, *Nelthorpe v. Dorrington*, 2 Lev. 113; in an action on a statute, by one of several joint-owners of a ship, *Sands v. Child*, 1 Salk. 31. 3 Lev. 35. Skin. 361; in trespass for seizing the Plaintiff's goods, *L'Eglise v. Champanti*, 2 Str. 820; and in debt on bond against one of several joint obligors, *Whelpdale's case*, 5 Co. 119. *Cabell v. Vaughan*, 1 Vent. 34. 1 Sid. 420, S. C. 238, S. P. It appears that if the Defendant in such cases do not plead in abatement, but plead in chief, 3 Bac. Abr. 218, tit. Jointenants, either the general issue, 1 Mod. 102, per Hale Ch. J. or even the fact in bar, *Hollingworth v. Ascue*, Cro. Eliz. 355, 461, 494, 544, or demurs, 1 Vent. 34. 1 Sid. 420, or even where the fact appears by the finding of the Jury, Cro. Eliz. 554. 5 Co. 119. *Harman v. Whitchlow*, Latch. 152. Sir William Jones 142, the Plaintiff must have judgment. If it appear in the declaration that there are other jointenants who do not join in the action, yet if it do not appear also that they are alive, the Defendant must plead in abatement. *Benyon v. Palmer*, 5 Mod. 73. 1 Salk. 31. Cro. Eliz. 544. 6 T. R. 766. So here it should have been averred that Robert Scott was alive, and pleaded in abatement; for nothing will be intended by the Court in favour of this objection. The only case in which it has been held that this objection may be taken on the general issue, is *L'Eglise v. Champanti*, and there the dictum of Lord Raymond is confined to assumpsit, which seems to be an innovation. Perhaps the Plaintiff here did not know whether Robert Scott was living or dead, and this a plea in abatement would have shewn.

Shepherd in reply. I shall pass by many of the cases cited, because they do not apply, and shall not agitate the question how far it is necessary to plead this matter in abatement on contracts in general. I contend that every person who brings covenant as [70] assignee of a reversion, must state how the reversion comes to him; and

therefore, as the Court on this record cannot see that the Plaintiff is assignee of the reversion, he is not intitled to their judgment. Suppose a covenant made by the Defendant with John and Robert Scott jointly, and an action brought by John Scott alone, the Defendant need not plead in abatement, because the objection would appear on the record, which differs from the case of jointenants in other contracts and in trespass. The case of *Eccleston and Wife, Executors, &c. against Cliphsham*, 1 Saund. 153, is strong, to shew that one jointenant cannot sue alone on the covenant. If one joint-covenantee cannot bring an action alone, neither can one joint-assignee of a reversion; for the action not being founded on privity of contract, the Plaintiff must so state his title, as to shew that he may sue under the statute of Hen. 8, in respect of his estate. The Plaintiff should not have stated that Thomas Grice devised, &c. whereby he became seised of the reversion, for John Scott did not become seised, but John and Robert Scott jointly: he should have stated that Robert Scott was dead, whereby he became seised. The cases of joint-obligors are distinguishable from this, for there the objection does not appear on the record, and it is still the deed of the Defendant. As to what has been said, that the estate of a trustee shall not be set up against the cestuy que trust, that rule will not hold in covenant, though it does in ejectment: if the Court could take notice of a cestuy que trust in covenant, they might as well in every action on a bond assigned allow the assignee to sue in his own name, instead of that of the assignor.

Cur. adv. vult.

The opinion of the Court was this day delivered by Eyre Ch. J. The question on this demurrer (which is now to be considered in the nature of a general demurrer, the special causes having been abandoned) is, whether the Plaintiff has shewn in his declaration a title to sue as assignee of the reversion. That title is to be collected from the operation of law on the deeds which are therein stated. And I take it to be most clear, that the operation of law upon those deeds is to constitute John and Robert Scott joint-assignees. The effect of this is, that the Defendant's covenants became also by operation of law contracts with John and Robert Scott jointly: and that all causes of action to them, arising out of these contracts, must follow the nature of the contracts, & must arise to John and Robert Scott jointly. In fact John Scott has declared on a covenant made with John and Robert Scott, but has supposed himself [71] capable of sustaining an action alone for the breach of it. Now that this is fundamentally wrong there can be no doubt; and the principle on which it is wrong was not denied in the argument: it is only the application of the principle to this particular case as it stands on the record, that is disputed. It has been argued, first, That Robert Scott appearing to be a trustee for John Scott, his title cannot be set up against the cestuy que trust; and secondly, That if it can, it must be by plea in abatement, and by that mode only. On the first of these points we have had no difficulty. It appearing by the Plaintiff's own shewing, that Robert Scott was made joint-assignee with John Scott (to which if it were necessary might be added) for purposes which require that the legal estate should remain in Robert Scott, we cannot by any presumption, or by any rule of law, take the legal estate out of him during his lifetime. It is not that the Defendant sets up the legal estate of the trustee against the cestuy que trust; but the cestuy que trust himself has set it up as part of his own title. On the second point we have paused: not in respect of any difficulty in deciding against the point as it was stated; but on a question which the reasoning in some of the numerous cases which were alluded to by my brother Marshall suggested: and which is this, whether on a general demurrer to a declaration of this kind, it can be intended in support of the declaration that the jointenant, not a party to the action, is dead: in which event the whole legal estate would unite in John Scott, and he alone might sue. In the great bulk of the cases where it has been holden, that if there are not proper parties to a record, advantage must be taken of it by a plea in abatement, the objection has been, that other persons ought to be made Co-defendants with the Defendant on record: and there is an essential difference between these cases and cases where the objection is, that there are not the proper parties Plaintiffs in the suit. Many Plaintiffs can have but one right, having but one interest and one cause of action; which ought to be, and is indivisible, admitting of but one satisfaction. But if in the nature of the thing, if on principles of law or authorities, it could be that a man should derive a several interest out of a joint obligation to himself and others, and that Plaintiffs could sue separately for their portions of one right, it is

most obvious that it must vex and harass Defendants extremely. That this cannot be appears from *Slingsbie's case*, 5 Co. 18, and from the principle of those passages cited from Co. Litt. which shew that jointenants must plead and be impleaded jointly. Whereas in [72] the case of Defendants, in respect of the satisfaction they are to make to the Plaintiff, it is exactly the same thing whether they are sued singly, or with others, for every individual Co-defendant is ultimately liable to the whole demand, and execution may be had against any one. In *Rice v. Shute*, 5 Burr. 2613, Lord Mansfield says: "Every partner is liable to pay the whole; in what proportion the others should contribute is a matter merely amongst themselves." There is therefore more of form than of substance in the objection that others should be made Co-defendants: however, the writ shall abate that has not made all the parties Co-defendants, because the Plaintiff may have a better writ in the same cause; but the action shall not be barred, because the Plaintiff has in himself an absolute right to sue the Defendant. The Defendant can only insist, if he pleases, that the Plaintiff shall sue others with him; and this advantage he may waive, where the objection does not appear on the face of the record, and does waive in that case, unless he plead in abatement. Hence it is, that where one of several joint obligors is sued, and non est factum is pleaded, the better opinion is that a Defendant shall not be allowed to object that there are other co-obligors, for the deed is his^(a), though it is also the deed of others. It is convenient that the obligors should all be sued together, and therefore the Defendant may plead in abatement; but it is not absolutely necessary, and therefore he cannot plead in bar; nor can he take advantage of the objection on the plea of non est factum after oyer. I do not mean to enter into the question, whether if the Plaintiff state in his own declaration that the bond was made by two, the Defendant cannot take advantage of it: but where the declaration is right upon the face of it, if there be no plea in abatement, the Defendant cannot take advantage of it afterwards. I admit that it has been established by many cases, that in assumpsit against one Defendant and non-assumpsit pleaded, evidence of a contract with more than one does not maintain the issue, on the ground that it does not follow the contract in the declaration; but I take the contrary to be now fully settled upon the grounds which I have stated, and upon very old authorities which are taken notice of in the case of *Rice v. Shute*, and apply with equal force in assumpsit as in other cases. In that case, which is the last on this subject, Lord Mansfield lays great stress on the difficulty under which Plaintiffs lie when they are to sue partners. They know, says he, whom they deal with, but [73] they do not know who are the secret partners; a plaintiff may be nonsuited twenty times before he finds them all out, or may be driven to file a bill for a discovery; and therefore he argues that convenience and the ends of justice required that if a Defendant would object that others are concerned with him in the transaction, he should plead in abatement, and so tell the Plaintiff whom he was to sue. Certainly this reasoning has its weight as to co-partners, being made Co-defendants, but as to Plaintiffs it does not apply; they are under no difficulty of this kind; every Plaintiff knows who is concerned in interest with him; he cannot have a better writ given him by a plea in abatement than he might have had without it. In this, and in other respects, as I have already observed, the case of Plaintiffs and Defendants essentially differs^(a); and I conceive the rule of law respecting them is, generally speaking, (with perhaps one^(b) exception,) different. I take it to have been solemnly adjudged in several^(c) cases, and to be the known received law, that one co-covenantor, one co-obligee, or one joint contractor by parol, cannot sue alone. In the last case it is common experience, that where a joint contract appears in evidence on the general issue, the Plaintiff is nonsuited; and there are many cases in the books, in which it has been held to be error for one co-obligee or one co-covenantor to sue alone. The

(a)¹ *Whelpdale's case*, 5 Co. 112.

(a)² In *Barnard v. Kenworthy*, B. R. H. 24 G. 3, which was assumpsit on a note, Lord Mansfield said: "If there are less Plaintiffs than there ought to be, it goes to a nonsuit; if less Defendants, it is only in abatement."

(b) See *Addison v. Overend*, 6 T. R. 766, and *Sedgworth v. Overend*, 7 T. R. 279.

(c) *Vernon v. Jefferys*, Str. 1146. *Graham v. Robertson*, 2 T. R. 282. *Spencer v. Durant*, 1 Show. 8 Bull. N. P. 158. Esp. N. P. 304, Cont. *Isaac and Puget v. Hutcheon*, Cro. Eliz. 202, where it is said that if the Defendant plead in bar the Plaintiff shall have judgment.

consequence is, that the objection that it is necessary to plead this matter in abatement is ill-founded. But where it appears on the record that the Plaintiff has a better writ according to his own statement, why should the Defendant plead in abatement? the object of a plea in abatement is to introduce on the record some new fact, which can only be done in that manner; but where the fact appears in the declaration itself, what remains for the Defendant but to ask the judgment of the Court? It may be answered that the Defendant ought to plead the variance between the writ and the declaration; but there are cases which establish that it may be taken advantage of in error, which could never be, if it were pleadable in abatement of the writ. The first of the cases cited for the Plaintiff, which I turned to, was that of *Cabell v. Vaughan*, 1 Vent. 34; as it is short I will state the words: "In an action of debt upon a bond against one, and it appears another was jointly bound with him, where [74] upon the Defendant demurs; but it was adjudged for the Plaintiff, for the Defendant cannot demur in such case, unless the other obligor be averred to be living, and also that he sealed and delivered the bond. 3 Cro. 494, 544, *Ascue and Hollingworth's case*, 28 H. 6, 3. And if one be bound to two, one obligee cannot sue, unless he avers that the other is dead. In B. R. 1651, 1068, *Levit v. Staineforth*." No notice was taken at the bar of this latter paragraph; it is certainly too material to be passed over in a review of the cases on this subject. As if for the very purpose of preventing the first part of the case from being misunderstood, it adds, that in the case of one of several co-obligees suing alone, a different rule prevails from that which takes place where one of several co-obligors is sued. And the rule is that which goes the whole length of deciding upon the only doubt which could be made in this case; whether on a general demurrer it could be intended that a co-covenantee was dead, in order to sustain the declaration. "If one be bound to two, one obligee cannot sue, unless he avers the other is dead." He must recover upon his own strength; he must shew that which is necessary to make out his title; having by his own shewing given the legal estate to himself and another, he must take upon himself the burthen of divesting that legal estate in the other, and vesting it in himself; he must aver that he is dead. The case of *Cabell v. Vaughan* is also reported in 1 Sid. 421 by the name of *Chappel v. Vaughan*; and in the same book 238, *Osborn v. Cusborn*, it is stated to have been laid down as a rule concerning the bringing debt on obligations, that if an obligation is made to three and two bring the action, they ought to shew that the third is dead. These cases admit of this answer, that though they state a rule, they do not state in what manner advantage is to be taken of it, which it may be said ought to be by plea in abatement. But the case of *Eccleston and others executors of Castle v. Cliphsham*, 1 Saund. 153, and *Slingsbie's case*, 5 Co. 18 b. are decisive on this head. In the first the objection was allowed in arrest of judgment, and the party driven to discontinue; in the last the objection was on error in the Exchequer-Chamber, and for that error the judgment was reversed. Now these cases were both in covenant, and so directly in point. *Sir Josiah Child's case*, 1 Salk. 31, which comes nearest to an authority for the Plaintiff, supposing the rule as laid down in Salkeld to be correctly stated, and to have been well considered, (which the report of the same case, by Levinz, who argued it for the Plaintiff, leads me to doubt,) is distinguishable from the present case, on the ground of distinction [75] taken by Lord Raymond in *L'Eglise v. Champanti*, reported in Str. 820, that it was a case in tort and not contract. There it is said that in assumpsit it might be taken advantage of at the trial, for it would not be the same contract, but in tort it ought to be pleaded in abatement. So of the late case of *Addison v. Overend*, 6 T. R. 766; where it was held on great consideration, that after a general verdict on the general issue it was no objection in arrest of judgment, that in one count of the declaration it was alleged that the Plaintiff was the sole owner of a ship, and in another that he was a part-owner, viz. of a quarter of the ship: for that also was a case of tort and not of contract. It seems to have been supposed at the bar that *L'Eglise v. Champanti*, M. 12 G. 2, was the first case in which such a distinction was taken; but in *Dockway v. Dickenson*, Skinn. 640, it is pointedly said, "That the difference is where it is an action founded on a tort and not guilty pleaded, and where it is founded on a contract; for there it is non-assumpsit, because it is another contract, but the party may make a tort joint and several." In truth, till the case of *Rice v. Shute*, E. T. 10 G. 3, B. R. it seems to have been the usual course to nonsuit the Plaintiff, if on the trial in an action of assumpsit it appeared that the Defendant had a partner who was not sued, as it remains now the course to nonsuit the Plaintiff if he has a

partner not made a Co-plaintiff. I am not called upon to inquire whether the rule in tort, to which it is said 2 Lev. 113, *Nelthorp v. Dorrington*, that Sir William Jones, a sound and able lawyer, accorded hæsitanter, be well established or not. If a tort in respect of joint property can be joint or several, it is very well; a breach of a joint contract with two or more cannot be joint and several. This Plaintiff could not sue alone, therefore we are of opinion that there must be

Judgment for the Defendant.

SMITH v. O'KELLY. July 5th, 1797.

[Referred to, *Mayor of London v. Cox*, 1867, L. R. 2 H. L. 270.]

A Defendant is not liable to be sued in the county-court for a debt under 40s. not arising within the county, though he be resident therein (a).

This was an action of assumpsit; the cause of action arose at Newmarket, but the venue was laid in Middlesex, and the verdict being for 8s. 6d. only, and there being no certificate according to the 23 G. 2, c. 33;

Marshall Serjt. on stating the above facts, & that the Defendant could prove an express promise to pay in Middlesex, obtained a rule to shew cause why a suggestion should not be entered on the [76] roll, that the Defendant was resident in Middlesex, and liable to be summoned to the county-court.

Le Blanc Serjt. shewed cause. The county-court has no jurisdiction where the cause of action does not arise within the county, and a plaint levied in that court must state the cause of action to have arisen within its jurisdiction, otherwise it is error. In *Welsh v. Troyte*, 2 H. Bl. 29, and *Tubb v. Woodward*, 6 T. R. 175, this Court and the Court of King's Bench refused to stay proceedings, though the causes of action were under 40s., upon the ground, that as the Defendant did not reside in the county in which the causes of action accrued, he could not be sued in the county-court.

Marshall in support of the rule. A Defendant is liable to be summoned to the county-court, if resident within the county, though the cause of action does not arise there. The Statute of Gloucester, 6 Ed. 1, c. 8, restrains actions under 40s. to the county-court, but does not confine its jurisdiction to the limits of the county; and the object of the Statute of Westminster 1, 3 Ed. 1, c. 35, is to restrain particular jurisdiction within their proper limits, and yet it never mentions the county-court. In Com. Dig. tit. County, C. 5, Jurisdiction of the County-Court, there is no authority to shew that it is confined to causes arising within the county. If the Defendant's liability to be summoned to the county-court be traversed, he will give in evidence an express promise to pay in Middlesex. Besides, this not being an application to stay proceedings because the action is under 40s. but to enter a suggestion pursuant to a particular act of parliament, the cases cited on the other side do not apply.

Per Curiam. This is a struggle in the teeth of a solemn determination in both courts, and of the principle which governs every inferior court in this country. The rule must therefore be discharged, but as the action is a very shabby one, let it be without costs.

Rule discharged without costs.

JONES v. KITCHIN. July 5th, 1797.

The plea de injuriâ suâ propriâ absque tali causâ to a cognizance for rent in arrear, is bad upon special demurrer.

Replevin for goods and chattels.

Cognizance, stating that the place in which, &c. was a house held by the Defendant, under a demise from one John Osborne, at the yearly rent of 42l. payable on the quarterly feast [77] days; that 31l. of the said rent was due in arrear, and unpaid to the said John Osborne, and that the Defendant as bailiff of the said John Osborne acknowledges, &c.

Plea in bar, de injuriâ suâ propriâ absque tali causâ.

(a) *Harwood v. Lester*, 3 B. & B. 617.

Demurrer thereto, assigning for causes, that the said Plaintiff hath in and by his said plea tendered and offered to put several and distinct matters in issue, that is to say, the holding and enjoying of the said dwelling-house with the appurtenances in the said declaration and cognizance above-mentioned, by the said Plaintiff; and hath also in and by his said plea denied that the said rent in the said cognizance mentioned was due, in arrear, and unpaid as in that cognizance is above alleged and contained; and for that the said Plaintiff hath also in and by his said plea tendered and offered to put in issue, as well the times and manner of the payment of the said rent as also the amount and quantity of the same; and for that the said Plaintiff should and ought in and by this said plea to have tendered and offered to put in issue one single fact only, to be tried by a Jury of the country, and to have relied on the same; and for that in the manner the same plea is above pleaded, no certain or single issue can be joined in the same; and for that the said plea is double, multifarious, and not issuable, and is also in various other respects defective, argumentative, insufficient, & informal.

Joinder in demurrer.

The Court inclining against the plea in bar called upon Shepherd Serjt. to begin in support of it.

Shepherd. Where two facts are necessary to make up one defence, neither of which is matter of record, the plea *de injuriâ suâ propriâ absque tali causâ* is good; and so is the rule in *Crogate's case*, 8 Co. 66 b. 1st resolution. In *Chauncey v. Winde*, *Ld. Raym* 700, this distinction from 2 Leon. 102, was taken in argument, that where the matter of record is but inducement to the action, a special answer is not requisite; and Holt Ch. J. thought the replication *de injuriâ* to a justification of trespass, under a warrant from the commissioners, by virtue of an act of Parliament, good. In *Robinson v. Rayley*, *Burr* 320, Lord Mansfield says, "It is true you must take issue on a single point, but it is not necessary that the single point should consist only of a single fact." So here tenancy in the Plaintiff and rent in arrear are both necessary to intitle the Defendant to distrain. Though at common law the Defendant must have set forth his title, which would have [78] precluded the plea *de injuriâ*, yet by the 11 G. 2, c. 19, s. 22, matter of title is excluded from the avowry, and nothing is to be set out but matters of fact, which in this case are tenancy and rent in arrear. If therefore this be not a good plea, the Plaintiff must either admit the Defendant's title to the land or the rent in arrear. The intention of the statute was only to shorten the pleadings, and the Defendant need not have stated by whom the demise was made, but the Defendant's having gone beyond the statute, makes no difference in the law. In a Precedent Book of Mr. J. Lawrence, there is such a plea as the present, and a note of his in the margin, stating that he demurred to it; but it was over-ruled. The Plaintiff might have traversed every fact in the avowry by leave of the Court, which leave is now become almost matter of right: the Court therefore will not oblige him to do that in a circuitous manner, which may be done more shortly by the present plea.

Marshall Serjt. contrâ. If this mode of pleading be good, the 11 G. 2, instead of conferring a favour on landlords, would produce an inconvenience: it would be better to avow as at common law, and have an explicit answer to one fact. This plea would put in issue, first, the holding, which if there be no privity of contract may involve the distrainor's title; secondly, the terms of the holding, viz. the amount and days of payment of rent; thirdly, that rent was in arrear; fourthly, that the distress was taken for that rent; and in the case of a cognizance, like the present, command. The 4th resolution in *Crogate's case* is decidedly against the present plea in bar; I admit that if the several matters put in issue make together but one defence, they may all be put in issue together, and then *de injuriâ suâ propriâ absque tali causâ* is proper. But when the Plaintiff makes title by his declaration to any thing, and the Defendant pleads something in destruction thereof or of the Plaintiff's cause of action, then the Plaintiff must reply specially, and not say *absque tali causâ*, for *absque tali causâ* goes to the whole plea. *Yelv* 157, *Taylor v. Markham*, *Cro. Jac.* 224, *S. C.* 1 Brounlow, 215, *S. C.* *Horn v. Lewin*, *Fort.* 233. *Salk* 583. *Wilnel v. Cook*, *Cro. Eliz.* 812. *Banks v. Parker*, *Hob.* 76. *White v. Stubbs*, 3 *Lev.* 307, 2 *Saund.* 294, *S. C.* In *Cockerill v. Armstrong*, the declaration was trespass for taking a gelding: Defendant justified as servant of J. S. who was seised in fee: replication, *de injuriâ suâ propriâ absque tali causâ*, and judgment for the Defendant. The case is shortly re-[79]-ported in *Com.* 582 (and in 7 *Mod.* 247): but I will read to the Court the judgment of Lord Ch. J.

Willes, as taken from his Lordship's note (a). It only remains to observe on the cases cited for the Plaintiff. That which was called a single point in *Robinson v. Rayley*, embraced several distinct facts, any one of which being negatived, would have intitled the Plaintiff to judgment; therefore the doctrine laid down there is directly contrary to the doctrine in *Crogate's case*, which, before that, was considered as the great land-mark. In *Chauncey v. Winde*, the Court held the replication good: because the statute being a general one needed not to have been pleaded, and therefore could make no part of the issue: and in that case, as it is reported in 12 Mod. 580, Mr. Eyres, in arguing for the Defendant, admitted that where one claims common by prescription, rent by grant, goods by sale, &c. and so justifies as having an interest therein, there the Plaintiff must answer directly to the title, and not *de injuriâ suâ propriâ*.

The Court understanding that such a plea in bar as the present had been used of late, took time to consider.

The opinion of the Court was this day delivered by

EYRE Ch. J. As a wish has been expressed by the Defendant's counsel, that this case should be disposed of within the term, we will not keep it on foot any longer, for the sake of giving a more formal judgment than is already prepared. It is only necessary to read *Crogate's case*, to be perfectly satisfied, that on the authorities and on the reason of the thing this plea in bar is bad. The second resolution in that case is, "That when the Defendant in his own right, or as servant to any other, claimeth an interest in the land, or to any common, or rent going out of the land, or to any way or passage upon the land, &c. there *de injuriâ suâ propriâ* generally is no plea. That if the Defendant justifieth as servant, there *de injuriâ suâ propriâ* in some of the said cases, with traverse of the commandment, the same being made material, is good, &c. For the general plea *de injuriâ suâ propriâ* (which should be replication) is properly when the Defendant's plea doth consist merely upon excuse, and upon no matter of [80] interest whatsoever. And it is said *de injuriâ suâ propriâ*, because the injury properly in this sense is to the person or to the fame: as battery, or imprisonment to the person, or scandal to the fame. There if the Defendant excuse himself upon his own assault, or upon hue and cry, there properly *de injuriâ suâ propriâ* generally is a good plea, for there the Defendant's plea doth consist only upon matter of excuse." The third resolution is, "That when by the Defendant's plea any authority or power is mediately or immediately derived from the Plaintiff, there although no interest be claimed, the Plaintiff ought to answer it, and shall not reply generally *de injuriâ suâ propriâ*." Thus in this case, the rule is distinctly laid down, that the replication *de injuriâ suâ propriâ* is only to be received, where the defence set up is matter of excuse, and not where it asserts any right or interest. Nor is that all; for if the defence turns on the plea of commandment, *de injuriâ suâ propriâ* is not good, but the commandment must be answered. In the case of *Cockerill v. Armstrong*, Bull. N. P. p. 93, ed. 1790, which was trespass for taking a gelding, and the Defendant pleaded, that the place where, &c. was 100 acres, &c. that J. S. was seised in fee, and that he as his servant and by his express orders took the gelding damage feasant, it was held that the Plaintiff could not reply *de injuriâ suâ propriâ* absque tali causâ, for that would put in issue three or four things; but he must traverse one thing in particular. This case is right in point of authority; and I agree with the rule laid down, that where the excuse arises in part out of the seisin in fee of another, there *de injuriâ suâ propriâ* is not to be received. But the reason is not, because it puts two or three things in issue; for that may happen in every case where the defence arises out of several facts, all operating to one point of excuse: the reason is because this plea is only allowed where an excuse is offered for personal injuries, and not even then, if it relates to any interest in land (and here an interest in land would make part of the issue) or to any commandment. It is right that this case

(a) By that note it appeared that the decision of the Court of C. B. pronounced by Lord Ch. J. Willes, was founded on the second and fourth resolutions in *Crogate's case*. His Lordship said, they did not rely on Cro. Jac. 599, because absque tali causâ was there omitted; nor on *Cooper v. Monke*, C. B. T. 1737, because that was an action for breaking and entering a house; but on what was said in *Taylor v. Markham*, Cro. Jac. 224, Yelv. 157, S. C. and on the case 14 Hen. 4, 32 b. there cited, and Cro. Eliz. 812. He said *The Archbishop of Canterbury v. Kemp*, Cro. Eliz. 539, was contradicted by *Crogate's case*.

should be brought within the general rules of pleading, otherwise the 11 G. 2, which was intended to operate for the ease and benefit of landlords, would be turned against them: for before the making of that statute, the issue in replevin must have been confined to some one material point. If we were now to break in upon the rule so satisfactorily laid down in *Crogate's case*, we should confound all the rules of pleading. If we admit this plea in the [81] present case, I do not see why we must not let it in quare impedit, and every other case. Let us stand by the rules of pleading, which if we infringe here, we may destroy altogether. We are all of opinion that this plea in bar is bad.

Judgment for the Defendant (a).

CAZELET v. DUBOIS. July 5th, 1797.

It is in the discretion of the Court to put a Defendant under terms, who moves to have the issues levied under several distringas's restored to him on his appearance, according to 10 G. 3, c. 50, s. 4.

A rule having been obtained to shew cause why the issues levied under several distringas's should not be restored on the Defendant's appearance,

Le Blanc Serjt. insisted that the Defendant should be put under certain terms.

Heywood Serjt. contra relied on the words of the 10 G. 3, c. 50, s. 4, by which it is provided "that when the purpose of the writ is answered, that then the issues shall be returned; or if sold, what shall remain of the money arising by such sale, shall be repaid to the party distrained upon."

Per Curiam. When a party stands out several distringas's, it is perfectly in the discretion of the Court, whether they shall order the issues to be returned; and as the Court has discretion as to returning the issues at all, they must have a right to impose terms. The words of the statute must be understood with a reference to the constant jurisdiction of the Court. This is a convenient rule, and may perhaps put an end to the practice of standing out distringas's.

Rule absolute on payment of costs, the Defendant undertaking to plead instanter, and take short notice of trial.

BADLEY v. LOVEDAY. July 5th, 1797.

The Court will not grant an attachment for non-performance of an award, pending an action brought on the award: nor allow the Plaintiff to waive the action, in order to apply for the attachment.

Cockell Serjt. having obtained a rule to shew cause why an attachment should not issue against the Defendant for non-performance of an award, though an action on the award was pending in the Court of King's Bench, he was now called upon to support his rule.

[82] Cockell. By 1 Salk. 73, it appears that a party may proceed both by action, and attachment on an award at the same time. Notwithstanding *Stock and Huggens v. Smith*, Cases temp. Hard. 106, 107, in a subsequent case, *Andrews*, 299, a rule was granted for an attachment on the Plaintiff's undertaking to discontinue the action. The Plaintiff in this case is ready to waive the action, being too poor to proceed in it.

Sed per Curiam. We shall not allow him to waive the action, to enable him to make this application. He has made his election.

Rule discharged without costs.

LINGHAM v. BIGGS AND ANOTHER. 1797.

[See *Ex parte Lovering*, 1874, L. R. 9 Ch. 623.]

If the furniture of a coffee-house be taken in execution by a creditor, and without ever being removed, be let by him to the keeper of the coffee-house, who becomes bank-

(a) Vide etiam *Cockerill v. Armstrong*, Willes, 99. *Cooper v. Monke*, ib. 52. *Bell v. Wardell*, ib. 202. 3 Bur. 1385. *Dayrolles v. Howard*, and *Crowther v. Ramsbottom*, 7 T. R. 654.

rupt while in possession of it; the assignees may seize it under the 21 Jac. 1, c. 19, s. 11 (a)¹.

Trover against the Defendants, who were the assignees of Anne Munday a bankrupt, for all the household furniture, and other articles belonging to a coffee-house.

This cause was tried before Eyre Ch. J. at Guildhall, Sittings after last Easter term. Anne Munday, the bankrupt, was the widow of a person who had kept a coffee-house, and being indebted to the Plaintiff, gave him a warrant of attorney for 800l., under which he entered up judgment, and took in execution the goods in question. They were valued by the sheriff at 337l. 13s. 6d. and thereupon a bill of sale was made out by the sheriff at that price, to Thomas Lingham the Plaintiff's brother, in trust for the Plaintiff. In June 1791, articles of agreement under seal were entered into between the said T. Lingham, the Plaintiff, and Anne Munday; by which the Plaintiff let the goods to Anne Munday at the yearly rent of 27l., for four years, and she covenanted not to remove them from the coffee-house without the Plaintiff's consent. The deed contained a proviso, that the Plaintiff should enter and take possession on failure in the payment of rent. Anne Munday continued in possession of the goods beyond the four years, and until they were seized under the commission.

At the trial an objection being taken to the Plaintiff's recovery on the 21 Jac. 1, c. 19, s. 11, the Chief Justice doubted whether this case were within it, and a verdict was given for the Defendant, with liberty to enter a verdict for the Plaintiff, damages 337l. 13s. 6d. if the Court should be of opinion that it was.

[83] Adair Serjt. having accordingly obtained a rule to shew cause why the verdict should not be entered for the Plaintiff,

Cockell Serjt. shewed cause. The 21 Jac. being a considerable extension of the bankrupt laws in favour of creditors, ought to receive a liberal construction. It differs from the 13 Eliz. which only provided against fraudulent conveyances: but this statute attaches on all goods left in the hands of a bankrupt, even without fraud, if the bankrupt has thereby obtained a false credit with the world. It was determined in *Stevens v. Sole*, cited 1 Atk. 170, Cooke's Bankrupt Laws, 229, that an ostensible possession of chattels by the bankrupt was sufficient to intitle the assignee under the 21 Jac. Now here Mrs. Munday had as full and ostensible a possession as possible: she had the use of the articles in question, and they were of a perishable nature. Possession of moveables imports property; and on that ground, a distinction is taken between a mortgage of realty and a mortgage of chattels: in the latter case the supposition of ownership can only be repelled by notice. In *Ryall v. Rolle*, 1 Atk. 165, Lord Hardwicke decided on the spirit, not on the words of the act, and thought that the 11th section ought to be governed by the preamble at the end of the 10th section. This case cannot be compared to that of a banker or a factor, because they are known to deal upon commission; nor to that of furniture in lodgings, which is known not to belong to the person in possession; therefore the world is not deceived. The case of *Bryson v. Wylie* (a)², [84] Cooke's Bankrupt Laws, 234, is exactly like

(a)¹ Vide *Darby v. Smith*, 8 T. R. 82, 3. *Horn v. Baker*, 9 East, 215. *Dawson v. Wood*, 3 Taunt. 256. *Lucas v. Dorrien*, 7 Taunt. 278, 291. *Oliver v. Bartlett*, 1 B. & B. 269, 273. *Monkhouse v. Hay*, 2 B. & B. 114. S. C. 8 Price, 256. *Coldwell v. Gregory*, 1 Price, 119. *Lingard v. Messiter*, 1 B. & C. 308. *Lyon v. Weldon*, 2 Bing. 334.

(a)² The Reporters have been favoured with the following note of the case of *Bryson v. Wylie*, which is something fuller than any already in print.

Bryson v. Wylie, H. 24 Geo. 3, B. R.—Trover for Dier's Plant.

The cause was tried at the sittings after Michaelmas term 1783, at Guildhall, before Lord Mansfield, when a verdict was found for the Plaintiff, subject to the opinion of the Court upon this case.

"That one James Simpson being possessed of the dier's plant in the declaration mentioned, by an indenture dated April 26th, 1781, made between James Simpson and the Plaintiff, after reciting that the Plaintiff in January 1780 sold to James Simpson a plant, &c. for 165l. 6s. 6d. for which sum Simpson gave the Plaintiff two promissory notes, dated 19th January 1780, one for 82l. 13s. 6d. payable the 6th January 1781, and the other for 82l. 13s., the remainder of the sum, payable 6th January 1782; and also reciting, that when the first note became due it was inconvenient for him to pay

the one at bar: now that has been recognized as law, and still remains untouched. The more modern cases, where the rule has been narrowed, are distinguishable from that and from the present. In *Walker v. Burnell*, Doug. 317, the bankrupt held the goods for a special purpose, of which the general creditors had notice. In *Collins v.*

the same, and that be promised, in consideration of the said notes being given up to him, to assign over the plant, &c. to the Plaintiff, to which the Plaintiff agreed: it was witnessed that as well in consideration of the Plaintiff's delivering up the said notes, as also 5s. to Simpson, paid by the Plaintiff, Simpson did assign and deliver to the Plaintiff the said plant, &c. to hold to the said Plaintiff, his executors, administrators, and assigns for ever. And also farther reciting, that it had been agreed between the parties that the Plaintiff should let the said plant to Simpson for three years, from Lady-day 1781, Simpson paying the Plaintiff 8l. 5s. 6d. per annum for the use and occupation thereof, and observing the covenants respecting the same: (these are covenants from Simpson for paying the rent quarterly, for keeping the plant in repair, and not assigning it without the consent of the Plaintiff) it was agreed that if Simpson should make default in any of the quarterly payments, or in the performance of any of the other covenants, then the term granted should cease, and the said Simpson should deliver the said plant, &c. and it should be lawful for the Plaintiff to take immediate possession of the same. There is a memorandum that Simpson had put the Plaintiff into possession, by the delivering of one winch. That on the 5th July 1783 a commission of bankrupt issued against Simpson, and the Defendant was chosen assignee, who took possession of the plant as part of the estate and effects of Simpson."

The question for the opinion of the Court was, whether this case was within the statute of 21 James 1, c. 19, s. 11. If not, the verdict to stand; but if it was, to be entered for the Defendant.

Wood for the Plaintiff. This is only a lease for years, reserving a rent payable quarterly. The question then is, Whether the assignees under a commission of bankrupt are intitled to the absolute possession of premises, of which the bankrupt had only a lease for years? This case is distinguished from all the authorities upon the subject; for in every one of them there was an absolute and complete sale. In this case the use of the chattel is only demised for a term, at a certain rent. The being in possession merely is not a sufficient ground to vitiate the whole transaction. In the cases of bankers and factors, the goods they may have in their possession do not go to the assignees. *Mace v. Cadell*, Cowp. 232, and *Walker v. Burnell*, Doug. 320.

Law contrâ. This might probably be good between the contracting parties, but is certainly fraudulent and void as to the other creditors. It gives a false credit; for with respect to chattels, possession always imports ownership. *Mace v. Cadell*. In this case here is a fair, open, and notorious sale of these fixtures to Simpson; and afterwards there is a private resale and a lease, so that to the world he appears as the absolute owner. From such a transaction fraud may be presumed. But I do not think it is necessary for me to state a circumstance of fraud, in order to get judgment for my client. *Brown v. Heathcote*, 1 Atk. 161. *Ryall v. Rolle*, 1 Atk. 165, *Ex parte Flynn*, 1 Atk. 185, *Hull v. Gurney* in this term. (Since reported, *Cooke's Bankrupt Laws*, 231.) In the business of a brewer and also of a dier, the utensils, the vats, &c. are the chief object of credit, and therefore this lease held out to the world an idea that Simpson was possessed of this plant, and procured him credit.

LORD MANSFIELD. I have no doubt that this is a new experiment to defeat the bankrupt laws. The law has said that a trader cannot mortgage his effects, and at the same time keep possession. What is the case here? He sells and keeps possession, and pays interest for the money. If this contrivance were suffered, it would open a door to avoid the statutes, and therefore it ought not to be allowed to prevail.

BULLER J. The case of a banker or a factor does not come up to the present; for there by the course of trade they must have the goods of other people in their possession, and therefore it does not hold out a false credit to the world. But none of those exceptions apply.

Judgment for the Defendant (a).

(a) And see *Thompson v. Giles*, 2 B. & C. 426.

Forbes, 3 T. R. 316, the timber was appropriated to a special purpose, and the bankrupt had not such an ownership as [85] would give him credit with the world. So also in *Jarman v. Woolloton*, 3 T. R. 618. Buller J. says "It is sufficient to say, that the husband had not the order and disposition of this property with the consent of the real owner, the trustee."

Adair Serjt. in support of the rule. All personal property of which a bankrupt has the possession, is not within the object of the statute. The legislature, not choosing to go that length, added the words "order and disposition," &c. "sale and alteration," &c. which words must be rejected, if the mere circumstances of possession and reputed ownership are sufficient. Indeed, if this were the case, job coaches and horses, and furniture in lodgings, would be brought within the statute. The act was not intended to interfere with any thing but the stock in trade, the possession of which necessarily implies the order and disposition, sale and alteration, &c.; for a trader who is left in possession of his stock, does acts every day which make him the reputed owner, and give him a degree of credit beyond what arises from the naked possession. All the cases cited for the Defendant, except *Bryson v. Wylie*, are cases of mortgage. In mortgages of realty the absolute property vests in the mortgagee, though the mortgagor continue in possession: but in mortgages of personalty it is otherwise; there the property is only pledged as a security, and the absolute ownership does not pass de facto, till default in payment of the money. The doctrine of specific liens agrees with this principle, where a person is always held to have parted with the lien when he parts with the possession. *Bryson v. Wylie* was a case of stock in trade and implements of a profession, which comes so directly within the act as not to be taken out of it by any private agreement. Lord Mansfield there calls it, "a new experiment to defeat the bankrupt laws," which he would not have done if he had considered the act as extending to household furniture. The case of *Collins v. Forbes* was within all the mischief contended for: Kent was the ostensible and reputed owner, and all the arguments with respect to false credit were urged: there no visible alteration of the property took place; but here there was an act of notoriety; there was an execution by matter of record executed in the house, and therefore a visible alteration, both by law and fact. *Jarman v. Woolloton* is the strongest case for the Plaintiff; for the presumption of property in a husband is of course stronger than in a stranger; and the jury found a verdict for the Defendant as to the stock in trade, and for the Plaintiff as to the furniture.

[86] Marshall Serjt. on the same side.

Cur. adv. vult.

This day the judgment of the Court was delivered by

EYRE Ch. J. This stood over, in order to give the Court an opportunity of looking into the case of *Ryall v. Rolle*: we were desirous of reading over that case, lest we should at all break in upon what was there so solemnly decided. In effect there were but two points then agitated, and resolved, 1st, Whether a mortgagee of goods were a true owner within the 21 Jac.; and much labour was employed and learned distinctions taken between Hypothecation and Pignus, absolute and conditional sale, in order to shew that he ought not to be so considered; but by the unanimous opinion of the Chancellor and Judges it was ruled, that a mortgagee was to be considered as the true owner, in opposition to the reputed owner. 2dly, Whether the trustee of the partner of a mortgagor was to be considered as the true owner, and the mortgagor the reputed owner within the statute. But it is very obvious that neither of these points much affect the present case. Perhaps the cases which fall within the statute of James may be divided into two classes; 1st, Where goods not originally the property of the bankrupt are left in his order and disposition. In *Ryall v. Rolle*, Lord Hardwicke intimates a pretty strong opinion that the preamble should govern the eleventh clause, and confine it to cases where the bankrupt was the original owner; but in later times (a) the statute has been considered as a remedial act; and it has been thought, that although the bankrupt was not the original owner, yet if he had in his possession the goods of another person, they fell within the statute: this has formed a class of cases as clearly within the 21 Jac. as the first class. Many cases have certainly been taken out of this class by exceptions, as those of factors. Though *Ryall v. Rolle* goes no further than I have mentioned, yet thus far it may be made use

(a) *Mace v. Cadell*, Cowp. 232.

of as an authority here, that it was assumed throughout the whole discussion, both by the Bench and the Bar, that the words goods and chattels in the statute were not to be confined to stock in trade or utensils. The words were there supposed to include choses in action, which might pass by an act of parliament, though they could not by a bill of sale. The case of an assignment by a bankrupt of a bond which he retains in his possession, and consequently of which he has the disposition, so that he may receive the money, shews how the words "order and [87] disposition," and "reputed owner," are to be understood. They are to be understood thus. Being allowed to have possession of goods under circumstances which give the reputation of ownership, brings the case within the statute; and it is fair so to consider them, because every man who can be said to be the reputed owner, has incidentally the order and disposition; not indeed between the parties, but as to general appearance. It is impossible for the world at large to inquire what accounts may exist between the parties: general credit with the world is all; if the party be the reputed owner it imports that he has the order and the disposition, and that he may sell. Admitting that the words, "order and disposition, sale and alteration," might refer to such goods only as a party has in his shop, and ready to sell to customers, yet they cannot refer to the actual sale, as they seem to import; for if the goods are once sold they are out of the power of the assignees. The act supposes them to remain in the possession of the bankrupt, and because they remain there the assignees are allowed to take them. The words therefore must not have that absolute sense which they seem to bear, but must have a meaning consistent with the end proposed to be attained by the statute. If a man be the reputed owner of goods, and appear to have the order and disposition of them, he must be understood to have taken upon himself the sale, order, and disposition within the meaning of this statute. We must suppose that he has done that which the act supposes; and certainly to hold a construction at this day, different from that of all the cases on this remedial law, could not be justified by the mere letter of the act. The question then comes to this, Can furniture be distinguished from other goods and chattels, to which the statute would extend? Now, I think it cannot, except so far as it may go to shew that this bankrupt was not the reputed owner, did not appear to have, and therefore had not the order and disposition; and it was fairly admitted by my Brother Adair, that it was not worth while to go to another trial on that point: Mrs. Munday had been in such possession, that no Jury could have hesitated to pronounce her the reputed owner. That being admitted, I think it necessarily follows, from her being the reputed owner, that she will appear to the world to have the order and disposition, sale and alteration, &c. She must clearly derive a credit from these appearances, and consequently if the owner allows her to retain the property, however fair that may be between herself and the owner, it must be a fraud upon the creditors.

[88] It has been suggested that this doctrine would go to an inconvenient length, and it was said by way of instance, that no trader could go into a ready-furnished house, or hire horses on a job, because possession would create a reputation of ownership, and consequently the furniture and horses would be liable to be seized. I admit that possession is always evidence of ownership, and with nothing to oppose it, would create a reputation of it: but it is evidence which may be opposed, and so satisfactorily opposed as to destroy that reputation. Let us pursue this idea. A respectable tradesman residing in his own house in London, takes a journey for two months to Brighton, or some other sea-port, and hires a ready-furnished house: all the world would say that he was the reputed owner of the furniture in the house in London, and not the reputed owner of that in the house at Brighton. So as it is notorious that people do not always drive their own coaches and horses, possession in such a case is only equivocal, and too equivocal to create a reputation of ownership; it would therefore be necessary to go into other evidence to determine of what character the possession was. I have no apprehension of this doctrine going to an inconvenient length.

It has been suggested also, that most of the cases are cases of mortgage, and that they are not in their circumstances like the present. But when once it is determined that a mortgagee is an owner within the statute of James, they will be found to be the same in principle. Two cases have been principally relied on at the bar; that for the Defendant was *Bryson v. Wylie*, and that for the Plaintiff was *Jarman v. Woolloton*, which last happened to be a case of furniture, and was held not to be

within the statute of James. I am unable to perceive in those two cases, or in *Collins v. Forbes*, any difference in the rule of construction with respect to the statute. They are cases where the circumstances to which the statute was applicable lead the Court to different conclusions; perhaps both of them were right; but it is sufficient to say that neither of them has any thing in common with the present case: possibly they would not govern other cases much nearer to them in circumstances than this. Notwithstanding *Bryson v. Wylie*, I can suppose that a dier may be in possession of a plant, without being the reputed owner; I can also suppose cases where a trustee for a married woman permitting the husband to take possession of the goods and chattels, and to become the reputed owner to all the world, may lose those goods in consequence. We cannot argue from the circumstance of a dier being in possession of a plant, and being the reputed owner, that therefore this furniture shall be liable to be taken by the assignees; nor from the furniture being protected in *Jarman v. Woollaton*, that the furniture shall also be protected here. As to the case of *Collins v. Forbes (a)*¹, we perfectly agree in that decision: because Kent, the carpenter, who was to do the work, was not, at the time he became bankrupt, in possession of the goods which were lying in the king's yard, and were in contemplation of law in possession of the true owner, whoever he was. It was well observed by Mr. Justice Buller in *Walker v. Burnell*, that questions on the 21 Jac. have much more of fact than of law in them. I believe when once it is ascertained whether the bankrupt was the reputed owner or not, there would be very little difficulty in deciding. From that reputed ownership false credit arises: from that false credit arises the mischief: and to that mischief the remedy of the statute applies. This seems a fair and sound construction of the statute; and the present being confessedly a case of reputed ownership, and the other terms of the eleventh section being incidental to reputed ownership, we think the verdict proper.

Rule discharged (b).

[90] Mr. Justice Buller was absent during the whole of this Term, from indisposition.

[91] CASES ARGUED AND DETERMINED IN THE COURT OF COMMON PLEAS AND IN THE EXCHEQUER CHAMBER, IN MICHAELMAS TERM, IN THE THIRTY-EIGHTH YEAR OF THE REIGN OF GEORGE III.

RIDOAT v. PYE. Nov. 7th, 1797.

The Court will not set aside an award on the ground of the witnesses not having been examined on oath, if no such objection was made at the time of their examination.

Williams Serjt. moved for a rule to shew cause why an award between these parties should not be set aside, on the ground that the arbitrator had not examined the witnesses on oath.

It being asked by Eyre C. J. whether the arbitrator was desired at the time by either of the parties to examine on oath, and answered by Williams, that his affidavit did not state that any objection was made to his omitting to do so,

Per Curiam, Then we shall certainly not make any objection now.

Williams took nothing by his motion (a)².

[92] HASKINS v. MORRIS. Nov. 8th, 1797.

An order for the discharge of an insolvent under the Lords' act, s. 16, cannot be made by a Judge in term, though summonses were taken out in vacation, and the order only delayed till the beginning of term by an irregularity in the affidavits.

The Defendant was taken in execution at the suit of the Plaintiff in the Tholsey

(a)¹ On the decision in that case, see the opinion of Mr. Justice Lawrence, as reported in *Gordon v. The East India Company*, 7 T. R. 237.

(b) See *Manton v. Moore*, 7 T. R. 67. *Darby v. Smith*, 8 T. R. 82.

(a)² *Hall v. Lawrence*, 4 T. R. 589.

Court at Bristol: during his confinement there, another action was brought against him in this Court by the same Plaintiff, to which he put in bail, was surrendered, and afterwards removed by habeas corpus to the Fleet prison. While in custody at Bristol on the first action, he petitioned and obtained his groats, which were regularly paid till his removal to the Fleet, but had been since discontinued.

An application having been made to Heath J. in the long vacation to discharge the Defendant under the 32 G. 2, c. 28, s. 13, three summonses were then taken out; and had the affidavits been regular, the Defendant might have been discharged before the term began: but having been delayed by sending to Bristol for the proper affidavits, he was brought up before Buller J. at his chambers, on a day in term; who doubted first, whether under the words (*a*) of the act, he had a power to discharge the Defendant out of execution in an action brought in the Tholsey Court at Bristol; secondly, whether, as the application to him was made in term time, he could consider himself as only carrying into effect the former proceeding before Heath J. in vacation (*b*), or whether the discharge must not now be by the Court.

The Court were of opinion, that as no order had been made, this ought to be considered as an original motion. And accordingly granted a rule nisi, which was afterwards made absolute without opposition.

Williams Serjt. for the Defendant.

[93] HICKS v. RICHARDSON. Nov. 8th, 1797.

If an arbitrator award, among other things, that each party shall pay a moiety of the costs of the arbitration and of making the submission a rule of Court; and one party, in order to get the award out of the hands of the arbitrator, pay the whole, he may have an attachment against the other party if he refuse to pay his moiety.

The parties in this case having submitted to arbitration, and the submission having been made a rule of Court, the arbitrator awarded 10s. 1d. as the balance due to be paid by the Defendant to the Plaintiff, each party to pay his own costs of suit, a moiety of the costs of the arbitration and of making the submission a rule of Court, and to execute a release to the other party. After notice of the award made, the Defendant, in order to get it out of the hands of the arbitrator, paid the whole expence of the arbitration; then tendered the sum awarded, together with a release to the Plaintiff, and called upon him to pay a moiety of the expence of the arbitration and of making the submission a rule of Court, and to execute a release on his part; this the Plaintiff altogether refused.

A rule nisi for an attachment against him for not performing the award having been obtained by the Defendant,

Williams Serjt. shewed cause, and contended, That it was not competent to the Defendant to pay the whole expence of the arbitration, and then apply for an attachment against the Plaintiff for non-payment of his moiety; but that he ought to resort to another remedy.

Le Blanc Serjt. in support of the rule.

EYRE Ch. J. We shall accommodate the form to the substance of the thing, if we are satisfied that the Plaintiff has refused to pay his moiety of the costs. Shall we oblige the arbitrator to bring an action? Should we not have allowed him to say on this sort of application that the costs of the arbitration amounted to so much, and that by the terms of the award they were to be paid by both parties, and that this

(*a*) The words are, "If any failure shall at any time be made in the payment of any weekly sum which shall be ordered by any such Court to be paid to any such prisoner, such prisoner, upon application in term time to the Court where the suit in which any such prisoner shall be charged in execution was commenced, or shall have been carried on, or in the prison of which Court any such prisoner shall stand committed, on any habeas corpus, or in vacation time to any Judge of any such Court, may by the order of any such Court or Judge be discharged out of custody on every such execution."

(*b*) See *Leach v. Pargister*, Doug. 68, where an order for the discharge of a prisoner was made by Willes J. on the first day of Term, and Ld. Mansfield said, that it must be considered with a reference to the application which was made in vacation.

Plaintiff had refused to pay his moiety? I consider this motion in the same light as if the arbitrator had come to enforce the attachment. On the substantial justice of the case, the Plaintiff is bound to pay his moiety of the costs. He has submitted by a rule of Court to pay them, and the Court will enforce the payment by attachment. It is all matter of form whether the arbitrator himself applies for the attachment or the party who has paid the money to the arbitrator. I cannot but think that it was the better course to be taken in this case, for the arbitrator to get the whole costs from [94] the Defendant by withholding the award, who may redress himself by one attachment, than for the Defendant to have an attachment against the Plaintiff for not obeying the award as far as concerned him, and then for the arbitrator to have an attachment against him, for the moiety of the costs of the arbitration. What a scene of litigation, expence and vexation might this strictness produce? Supposing no objections to the expences themselves, I think the attachment should issue.

BULLER J. My doubt is this. The money has been advanced voluntarily, and without application from the Plaintiff, and the Defendant comes for an attachment as grounded on the award. Being a mere voluntary payment on the part of the Defendant, I doubt whether the Plaintiff is strictly liable to an attachment. Suppose the arbitrator had awarded the expences of the arbitration to be paid by the parties jointly and not severally.—However, I am perfectly satisfied that no injustice will be done; the Plaintiff is certainly bound to pay some way or other: if therefore the Court are inclined to grant the attachment, I shall not oppose it.

HEATH J. I cannot consider this as a mere voluntary payment of money, since the Defendant could not have got the award out of the hands of the arbitrator till all the expences were paid.

ROOKE J. It is clear that one man cannot pay the debt of another officiously. But in this case there is one circumstance on which I lay great stress. It was necessary to make the submission a rule of Court; at least the attachment is right to enforce the payment of half the expences of that proceeding. I do not like attachments on equitable grounds, and I think that the Court should be very strict in granting them. But since there is a legal ground as to part, and as it is the opinion of the Court that no injustice will be done, I shall not oppose the attachment.

EYRE Ch. J. added, that perhaps on strict legal grounds the arbitrator ought to have applied for the attachment to enforce payment of the costs of the arbitration, but that he was unwilling to force arbitrators to come into Court.

Rule absolute.

[95] HOLLAND v. PALMER. Nov. 9th, 1797.

If any one of a bankrupt's creditors, though without the privity of the bankrupt, be induced by money to sign his certificate, it is void (a).

Declaration for goods sold and delivered, and common money counts. Plea, That after the cause of action accrued, and before the commencement of the suit, the Defendant became a bankrupt and obtained his certificate.

At the trial of this cause before Lord Kenyon at the summer assizes for Stafford, it was proved that Richard Pope, one of the creditors who had signed the certificate, had received ten guineas for so doing from one Griffiths the Defendant's brother-in-law, but without the privity of the Defendant. It was contended on the part of the Plaintiff that the certificate was avoided by this circumstance under 5 Geo. 2, c. 30. Lord Kenyon hesitated, but the inclination of his mind was that the certificate was void: and a verdict was accordingly found for the Plaintiff, subject to the opinion of this Court.

Adair Serjt. now moved for a rule to shew cause why the verdict for the Plaintiff should not be set aside, and a verdict be entered for the Defendant. He contended that the acceptance of a sum of money by a creditor as an inducement to sign the certificate, if without the privity of the bankrupt, did not vitiate the certificate so signed. He said the case of *Robson v. Calze*, Doug 228, cited Cooke's B. L. 351, contained an implication in his favour; for as the argument there turned on the knowledge of the bankrupt at a particular time, viz. the time of the allowance of the

(a) Vide *Phillips v. Dicus*, 15 East, 248.

certificate by the Chancellor, it seemed to admit that if the bankrupt had not known it at all, the certificate would not have been void. He added, that if it were otherwise it would be in the power of an enemy to deprive the bankrupt of the benefit of his certificate by maliciously advancing money to a creditor.

BULLER J. It is no matter whether the bankrupt knew of the money being paid or not; it was a fraud on the rest of the creditors. One of the creditors has obtained money which ought to have been divided among all of them. By so doing he has obtained an advantage. Besides, the others may have been induced to sign by his example.

EYRE Ch. J. This has always been the impression on my mind, and I should have had no difficulty upon it at *Nisi Prius*. I do not feel the weight of the distinction between the party [96] coming to the knowledge of the money paid just before the allowance of his certificate, and at any time before. The certificate is as improperly obtained, whether the bankrupt knows of the circumstance or not. My Brother Buller's observation is extremely striking. If a considerable creditor be induced by money to put himself at the head of the list, the majority in number and value may be obtained by that means; since others may be unwilling to refuse signing, when one of the most considerable has consented. The bankrupt is to have the benefit of the certificate, provided the genuine sense of the body of creditors appears in his favour; but if it is not the genuine sense that appears, the certificate is no longer that fair act which ought to have any effect. I should not, therefore, agree to the case which has been put, of money paid maliciously. I should think that a certificate so obtained would be bad; but the bankrupt would be at liberty to procure another. On this case I have no difficulty whatever.

HEATH and ROOKE J^s. being of the same opinion,
Adair took nothing by his motion.

JACOBS v. STEVENSON. Nov. 10th, 1797.

The Court will not stay proceedings till security is given for the costs, in an action by a foreign seaman serving on board an English ship (*b*).

The Plaintiff in this action was a foreign sailor, serving on board an English ship, and declared in trover for a chest.

Le Blanc, Serjt. now moved for a rule to shew cause, why the proceedings should not be stayed till the Plaintiff should give security for the costs of the action. He admitted, that the inclination (*a*) of the Court had been not to adhere to the general rule with respect to foreigners, in the case of seamen serving on board English ships, lest they might be discouraged from entering into our service: but contended, that the exception was confined to cases where they sued for their wages.

EYRE Ch. J. This motion cannot be supported in the case of any foreigner if he be resident in this country. Now the Court may assimilate the case of foreigners serving on board English ships, to that of foreigners resident in this country. Perhaps the present Plaintiff is serving on board an English ship bound to the port of London. He may, indeed, be a foreigner, but he is just as amenable to the jurisdiction of the Court as any English sailor in [97] the same situation. The same reasons which influenced the Court in their former decisions on this subject, will influence them in the present case.

Le Blanc took nothing by his motion.

HIGGINSON v. NESBITT. Nov. 10th, 1797.

The Court will give leave in the first instance to enter up judgment on a verdict reduced by an award.

Adair, Serjt. on a former day having moved for leave to enter up judgment in the first instance, on a verdict reduced by an award; the Court then thought that he could only apply for a rule to shew cause.

(*b*) Vide *Maria v. Hall*, 2 B. & P. 236.

(*a*) *Henschen v. Garvos*, 2 H. Bl. 383 and 384, n. *b*.

He now mentioned it again, and stated that it was the practice of the King's Bench to make the rule absolute in the first instance, and added, that the practice of this Court seemed to have been so considered in a case of *Higginson v. Bell*, in last Trinity term, where a like motion with the present was granted.

The Court upon this made the
Rule absolute (a)¹.

JEYES ONE, &C. *v.* BOOTH. Nov. 11th, 1797.

If a Defendant in custody being about to execute a warrant of attorney to confess judgment, is informed that it must be done in the presence of an attorney on his part, and thereupon produces a person as such, in whose presence he executes the warrant of attorney; the Court will not set aside the proceedings thereon, because the person so produced by the Defendant was not an attorney.

Adair, Serjt. obtained a rule calling on the Plaintiff to shew cause why the judgment entered up, and the ca. sa. issued in this case should not be set aside with costs, on an affidavit stating, that the judgment was entered up on a warrant of attorney executed by the Defendant, when in custody in the Fleet prison, he having no attorney present on his behalf.

The facts were these: The Defendant being in custody for the debt of a third person, but being supersedable, was informed, that if he was superseded, he would be detained at the suit of the Plaintiff, who was an attorney: upon this he sent for the Plaintiff, who by his direction prepared the warrant of attorney in question; the Defendant took it into his hand, read it, and was proceeding to execute it, when the Plaintiff informed him that he must have an attorney on his part present at the execution: accordingly the Defendant went into another part of the prison and brought with him a person, who being asked by the Plaintiff whether he was an attorney, answered in the affirmative; he was then desired to explain the nature of the instrument to the Defendant; and the [98] warrant was executed in his presence. It turned out afterwards that this person was not an attorney, but only a clerk to an attorney.

Le Blanc shewed cause and contended, that where a party produces a person as an attorney who in fact is not one, that party shall not be allowed to turn a Plaintiff round by saying that the warrant of attorney is not, on that account, properly executed.

EYRE, Ch. J. If on the Plaintiff objecting, that the warrant must be executed in the presence of an attorney on the part of the Defendant, the Defendant accepts the instrument, and takes upon himself to find out the person in whose presence he ought to execute it, the Court will not, for the purpose of such a motion as this, doubt that such person was an attorney. The present application is founded on an attempt to cheat the Plaintiff.

Per Curiam. Rule discharged with costs (a)².

THE MASTER, WARDENS, AND COMMONALTY OF FELTMAKERS *v.* DAVIS.
Nov. 11th, 1797.

The Master, Wardens and Commonalty of a company, cannot sue for a penalty forfeited to the Master and Wardens, to the use of the Master, Wardens, and company. The 1st count in a declaration in debt for a penalty under a by-law, set forth the charter empowering the company to make by-laws, the by-law made and the breach of it; The 2d count, omitting the above particulars, stated the penalty as being forfeited "under and by virtue of a certain by-law of the company

(a)¹ Vid. etiam *Grimes v. Naish*, Post, 480, where it was held that the party was in such a case entitled to the postea without any application to the Court. See *Bower v. Taylor*, 7 Taunt. 575.

(a)² Vid. *Birch v. Sharland*, 1 T. R. 715. *Crompton v. Stewart*, 7 T. R. 19. *Gillman v. Hill*, Cowp. 141. *Hutson v. Hutson*, 7 T. R. 7. *Fell v. Riley*, Cowp. 281. *Watkins v. Hanbury*, 2 Str. 1245. *Barnes v. Ward*, Co. Ca. Prac. C. B. 158.

before that time duly made," &c. and this count was on special demurrer held bad (a).

Debt on a by-law for 20l. The 1st count in the declaration set out a charter of 19 Car. 2, incorporating the Feltmakers' Company, giving a power to the Master, Wardens, and Assistants to make by-laws, and directing that the Wardens should be chosen out of the Assistants. It then stated that a by-law was made imposing a fine of 10l. on every member of the company; who being chosen Renter Warden should refuse to take upon himself that office, to be paid to the Master and Wardens, for the time being, for the use of the Master, Wardens, and Company, that the Defendant became a member of the company, was elected Assistant, and took upon himself that office, and was afterwards elected Renter Warden, which office he refused to serve, &c. whereby, &c. The 2d count and the breach were as follows: "And whereas also the said William Davis, so being a member of the said company heretofore, to wit, on, &c. at, &c. was indebted to the said Master, Wardens, and Commonalty of the art or [99] mystery of Feltmakers of London aforesaid, in the sum of other 10l. which he as such member of the said company had before then forfeited to the said Master and Wardens of the said company for the use of the said society, under and by virtue of a certain by-law or ordinance of the said company before that time duly made, ratified, allowed, and approved, for having refused to take upon him, and for not taking upon him the office of Renter Warden of the said company, to which said office he the said W. Davis had before then been duly elected and chosen, to wit, at, &c. By reason of which last mentioned premises an action hath accrued to the said Master, Wardens, and Commonalty to demand and have of and from the said W. Davis, for the use of the said company or society, the said last-mentioned sum of 10l. so forfeited as last aforesaid, being the residue of the said sum of 20l. above demanded, to wit, at, &c. Yet the said W. Davis (although often requested) hath not yet paid the said sum of 20l. above demanded, or any part thereof, to the said Master and Wardens, for the use of the said society, or to the said Master, Wardens, and Commonalty, or to any or to either of them; but to pay the same or any part thereof to the said Master and Wardens, for the use of the said society, or to the said Master, Wardens, and Commonalty, or to any or either of them, he the said W. Davis hath hitherto wholly refused and still doth refuse to the said Master, Wardens, and Commonalty, their damage of 10l."

To the 1st count the Defendant pleaded Nil debet, and to the 2d demurred specially, and assigned for causes, "That the ground of the supposed forfeiture in that count, alledged to have been incurred by the said W. Davis, is not set forth; and also that the said supposed forfeiture is there stated to have been incurred to the Master and Wardens of the said company, for the use of the said society, whereas the said Master and Wardens are not the Plaintiffs in the said action; and also that no power or authority, by custom or otherwise, is set out to warrant the making any by-law or ordinance to create a forfeiture by the said company; and also that the supposed by-law or ordinance in that count mentioned, is not mentioned to have been ratified, allowed, or approved of according to the form of the statute in such case made and provided; and also that no title is shown in the said Master, Wardens, and Commonalty, to the said supposed forfeiture; and also that the said count is too general, and does not set forth the supposed cause of action with sufficient certainty to enable the said William to defend himself against the same; and that the said [100] count is in other respects defective and imperfect." The Plaintiffs joined in demurrer.

Clayton Serjt. in support of the demurrer. This is the first instance of such a count being brought before the Court. All the precedents state, in regular order, the different facts which bring the Defendant within the penalty. A declaration ought to contain such things "whereunto the adverse party may answer, and whereupon the Court is to give judgment." Co. Litt. 303 a. The first objection to this count is, that it does not set out the by-law, which is the ground of the forfeiture. The words here are, "by virtue of a certain by-law;" non constat that the by-law alluded to is a good one. To shew that any penalty is incurred under a by-law or statute, the party must be brought within the terms of that by-law or statute. In the latter case it is the common practice: and the Court will not be more favourable

to a penalty under a by-law, than to a penalty imposed by the Legislature. As the by-law is not set out, the Defendant is deprived of the opportunity of taking the opinion of the Court on its validity. The second objection is, that it does not appear that the Feltmakers' company had any authority to make the by-law in question. In *The Vintners' Company v. Passey*, 1 Burr. 235, a plea setting up a by-law as a defence, and not shewing the authority of the Court which made it, was admitted to be bad. In Com. Dig. tit. Pleader, (2 W. 11) it is said, "a declaration for a penalty of a by-law must shew a power to make, by-law made, and breach," and refers to 2 Vent. 243. 1 Bro. Ent. 170. There are many other precedents in Brown to the same effect; to which may be added Lilly's Ent. 153. The third objection is, that the liability of the Defendant is not stated. It is only averred that he was a member of the company, but in order to incur this penalty he must not only be a member of the company, but one of the assistants. The last objection is, that the Plaintiffs have no right to sue for the penalty. It is forfeited to the Master and Wardens, to the use of the Master, Wardens, and company. Now if a sum be forfeited to A. and B. what right can A. B. and C. have to claim it?

Per Curiam. As to the second objection, the power of making by-laws is incident to every corporation (a)¹ either by the body at large or by a select part; and it is in the latter case only that the [101] power need be shewn (a)². The Court of Lord Mayor and Aldermen, which made the by-law relied on in the plea in 1 Burr. 235, was collateral to the company of Vintners; it was a different body, having no such necessary relation to the Vintners' company as the Court could take notice of judicially. As to the 3d objection the present defendant is stated to be "such member," i.e. that member which is before described in the first count.

Le Blanc Serjt. for the Plaintiffs. In old time it was necessary to state many things at length which are not now required. Thus indebitatus assumpsit for fines and tolls has been held good, *Mayor of Exeter v. Trimlet*, 2 Wils. 95, even on special demurrer. *Seward v. Baker*, 1 T. R. 616. *Whitfield v. Hunt*, Doug. 727 n. The declaration in *The Barber Surgeons of London v. Pelson*, 2 Lev. 252, appears to have been a general (b) assumpsit for the penalty of a by-law, and was held good on demurrer. It does not appear by the words of the general count that the present penalty is forfeited to the Master and Wardens to the use of the body at large. Even if it did, I submit that the party for whose benefit the penalty is forfeited may bring the action (c). If a promise be made to A. for the benefit of B, B. may maintain an action on that promise. The Master and Wardens as such have no power to sue and be sued; the only way in which they could declare must be as individuals; one with an averment that he was at the time Master, the others with an averment that they were at the time Wardens. But if these individuals died, they could not sue by their executors.

EYRE CH. J. The forfeiture in question is to be paid to the Master and Wardens, to the use of the Master, Wardens, and company. If the by-law is badly framed, it is

(a)¹ 10 Co. 31 a. *Norris v. Staps*, Hob. 211. *City of London v. Vanacre*, 5 Mod. 439. 12 Mod. 270, S. C. 1 Salk. 142, S. C. Carth. 482, S. C. Lord Ray. 498, S. C. Holt 431, S. C.

(a)² See *The King v. Lyme Regis*, Doug. 158, 159.

(b) It was observed by the Court that as the necessity of a special count was not the point on which *The Barber Surgeons v. Pelson* turned, all the necessary circumstances might possibly have been stated on the record, though they do not appear in the report. But on a reference to the record, B. R. Pasch. 31 Car. 2. Rot. 428, in the King's Bench treasury office, the declaration appears to be only a general indebitatus assumpsit, for a sum forfeited by virtue of a by-law of the Company &c.

(c) In *Marchington v. Vernon and others*, Sittings at Guildhall, Trin. 27 G. 3, B. R., which was assumpsit on a bill of exchange, by the holder against the Defendants (assignees of the drawee), who had given a promise to the drawer that they would honour the bill, Buller J. said, Independent of the rules which prevail in mercantile transactions, if one person makes a promise to another for the benefit of a third, that third person may maintain an action upon it. See Comb. 219; 8 Mod. 117, also *Dutton v. Pool*, 1 Vent. 318, 332, cited and relied on by Lord Mansfield in *Martyn v. Hinde*, Cowp. 443. And see *Phillipps v. Buteman*, 16 East, 356, 370. *Bowen v. Morris*, 2 Taunt. 373, 384.

the fault of those who framed it. If they have chosen to empower their Master and Wardens to sue, the Court cannot look any further: no regulation [102] with respect to the payment of the money by them to any other persons will vary the right of action. As to the case put at the bar, of a promise to A. for the benefit of B. and an action brought by B., there the promise must be laid as being made to B. and the promise actually made to A. may be given in evidence to support the declaration. The Master and Wardens may bring the action, and apply the money to the use of the company. They may sue in the same manner as the Chamberlain of London (a)¹ does for the Corporation of London: and they would probably declare both in their natural and official capacities. But in truth this is but one of many objections. I think this count is perfectly new, and cannot be supported. I would go as far as possible to prevent loading the record with unnecessary matter; but if I find myself obliged to pronounce that the matter omitted is necessary (and as at present advised it does appear so to me) and that no reference is made to the by-law on which the forfeiture accrues, I must hold the count bad, unless a series of authorities could be shewn to prove the contrary. It is not stated in this second count, that the by-law under which the forfeiture accrued, which is the ground of that count, is the same by-law as that mentioned in the first count: it only says, "by a certain by-law." Now if we cannot refer to the first count in order to get at the constitution of the Corporation, which is to determine where the power of making by-laws resides, and that the by-law in question was actually made according to that constitution, this demurrer must prevail. I never yet saw a count on a forfeiture of this kind which did not state all these circumstances. It may not have been amiss to try if one of these general counts could be slipped into practice, but here unfortunately the blot has been hit. In the case of tolls, I suppose the Court proceeded on the idea that they were known to constitute a right of action, and calling them tolls generally was held sufficient. But in debt on bond, if the Plaintiff were to state generally in his declaration, that the Defendant "was indebted to him on a certain bond," it would not be good. This claim for a penalty under a by-law arises on something in the nature of a specialty. It is true that in assumpsit greater latitude is allowed: because after all it comes to a question upon evidence what legal consideration there is either to support or to raise the assumpsit. I must confess I think that it was an extraordinary proposition to admit, that these general counts were good in the cases of tolls & [103] copyhold fines, and I wonder that the courts ever went that length.

Per Curiam, Judgment for the Defendant.

GREENSILL v. HOPLEY. Nov. 15th, 1797.

The Court will reject bail who have received a verbal promise of indemnity from the Defendant's attorney; but will give time to put in fresh bail.

Bail being brought up to justify, and it appearing on their examination that though they had no written indemnity, yet that they looked to the honour of the Defendant's attorney for being indemnified, who had said that they should not be sufferers;

Palmer Serjt. who opposed them, cited the rule (a)² of Court Hil. 37 Geo. 3.

Le Blanc Serjt. for the Defendant.

The Court refused the bail, but said, that as this was pressing the rule to its utmost extent, they would allow the Defendant time to put in fresh bail.

(a)¹ Vid. *The Chamberlain of London's case*, 5 Co. 63, and *Hollings v. Hungerford*, cited 1 Wils. 235, which was debt on a by-law by the Chamberlain of Bristol.

(a)² Hil. 37 Geo. 3, "It is ordered that from and after the last day of this term no person or persons shall be permitted to justify himself or themselves as good and sufficient bail for any Defendant or Defendants in this Court, if such person or persons shall have been indemnified for so doing by the attorney or attorneys concerned for such Defendant or Defendants."

ROBERT ALMGILL AND ISABELLA his Wife, *Demandants* v. JAMES BRADSHAW PIERSON THE ELDER, AND JAMES BRADSHAW PIERSON THE YOUNGER, *Tenants*.
Nov. 16th, 1797.

Judgment as in case of a nonsuit may be entered up against the demandant in a writ of right; nor will the Court relieve him if he has conducted himself unfairly towards the tenant in the course of the proceedings.

Adair Serjt. on a former day obtained a rule to shew cause why judgment as in case of a nonsuit should not be entered up in a writ of right.

The tenants had been in possession since the year 1746; issue in the cause was joined Trinity term 1796; notice of trial was given at the Lent assizes 1797, when the grand assize was elected; but the demandants neglected to proceed to trial at the Summer assizes following.

Williams Serjt. on this day shewed cause. Though the 14 G. 2, c. 15, only makes use of the words "Plaintiff" and "Defendant," yet from the authorities and practice on the subject it seems admitted, that judgment as in case of a nonsuit may also be [104] had against demandants. *Newman v. Goodman* (a), 2 Bl. 1093, 1110. The reason why we did not proceed to trial at the last Summer assizes was, that we shortly expected to obtain material evidence from France, viz. the Baptismal Register of the elder Pierson, whose legitimacy was to be disputed. This case differs from all others, for where issue is joined on the right, any judgment is peremptory [1] and may be pleaded in bar to every other action on the same right. The estate in question is 3000l. a-year.

It was stated by Rooke J. that an application had been made to him by the tenants, for leave to examine a witness on interrogatories, who was going to Naples with her husband and child, to which the demandants refused to consent.

EYRE Ch. J. In a common case I should have been inclined to think the excuse set up by the demandants sufficient: but the measure which they mete to others we shall mete to them. When they had the staff in their hands they tried to put difficulties in the way of the tenant, and made them risk the loss of an important witness. It was the demandants who made the attack, and who ought therefore to have been prepared to substantiate their claim before they made it. I should be inclined to give more indulgence to the tenants than to the demandants, who come in this case to disturb a very long possession, on grounds which may perhaps be good, but which should be known to be good before the action is commenced. According to the demandants' own account this piece of evidence was a new discovery, and collateral to the only ground on which they were induced to commence the action: nor is there any reasonable probability for supposing that they will be able to proceed at the next assizes. I think the Court ought to adhere to the principle of a case (b) decided in last Easter term, where an application for putting off a trial was refused, because the Defendant had not conducted himself fairly and candidly.

HEATH J. I am of the same opinion. Having refused justice to others, the demandants are not in a state to claim any indulgence from us. Moreover, as the parishes in France are now suppressed, and the registers disordered, it is not very likely that the demandants will be able to obtain the evidence they want.

ROOKE J. I entirely agree with my Lord that those who make the attack ought to be very well prepared to support it. In what [105] passed before me, I think the demandants behaved very ill. On general principles therefore, as well as on this particular case, I think they can claim no indulgence.

Rule absolute.

(a) In that case however the rule for judgment as in a case of a nonsuit had been made absolute without opposition, and the only question before the Court was, whether the tenant was entitled to costs.

[1] F. N. B. 5 N.

(b) *Saunders v. Pittman*, ante 33.

SYMMERS v. WASON. Nov. 16th, 1797.

Arrest by the name of Weston; declaration de bene esse against "Wason sued by the name of Weston," and held regular. The Court will not order the bail-bond to be delivered up to be cancelled because the place where the affidavit to hold to bail was sworn, is not mentioned in the jurat (a)¹.

A rule was obtained on a former day calling on the Plaintiff to shew cause why the proceedings in this action should not be set aside for irregularity, or why a common appearance should not be entered and the bail-bond be delivered up to be cancelled.

Shepherd Serjt. in support of the rule, now relied on the two following objections: 1st, The Defendant was arrested by the name of E. Weston, and the Plaintiff filed a declaration de bene esse against E. Wason, sued by the name of E. Weston, which he contended could not be done on bailable process, unless warranted by the Defendant's putting in bail above in a different name from that by which he was arrested. 2d, The jurat of the affidavit on which the Defendant was held to bail omitted to state the place where it was sworn.

Clayton Serjt. contra.

HEATH and ROOKE, Js. (absente Eyre, Ch. J.) overruled both objections, and Discharged the rule.

JEFFERSON v. THE BISHOP OF DURHAM AND OTHERS. Nov. 20th, 1797.

[Dictum approved, *Wither v. Dean of Winchester*, 1817, 3 Mer. 427. Referred to, *Ross v. Adcock*, 1868, L. R. 3 C. P. 664].

The Court of Common Pleas has no power to issue an original writ of prohibition to restrain a bishop from committing waste in the possession of his see: at least at the suit of an uninterested person (a)² Semb. That no court of common law has that power. Qu. If the Court of Chancery has not?

"England, to wit. Be it remembered that on the Morrow of the Holy Trinity, before the Right Honorable Sir James Eyre Knight, and his Brethren Justices of our Lord the King of the bench at Westminster, cometh Thomas Jefferson, in his own proper person, and giveth the Court here to understand and be informed, that whereas the Right Reverend Shute Lord Bishop of Durham now is and for the space of five years now last past hath been Bishop of Durham, and doing all that time hath been and still is seised in his demesne as of fee in right of his bishopric of Durham, of and in a certain wood, or parcel of wood ground, called Walkington East Wood, in Walkington in the county of York, as belonging to and parcel of the possessions of his bishopric, containing divers, (to wit,) 192 acres and one rood, and wherein during all [106] the time aforesaid, until the waste hereinafter mentioned, were large quantities of timber and wood growing, and in part whereof there are still divers large quantities of timber and wood growing; and that John Lockwood, Gentleman, now holds and during all the time last aforesaid hath held the said wood or parcel of wood ground called Walkington East Wood, as lessee or tenant thereof, under the said Bishop of Durham: And whereas by the law of this land, bishops, or their lessees or tenants, or any other person or persons by their or any of their licence or authority, ought not to commit waste in the wood or wood grounds belonging to and parcel of the possessions of the bishoprics of such bishops respectively; the said Thomas Jefferson farther gives the Court here to understand and be informed, that the said Bishop and the said John Lockwood, during the time aforesaid, agreed between themselves to fell the timber and wood growing in the said wood or parcel of wood ground, and to divide the money arising from the sale thereof between them in certain proportions; that is to say, one-third thereof to the said Bishop, and the other two-thirds thereof to the said John Lockwood; and in consideration thereof to permit, suffer, and authorize such timber and wood to be cut down, felled, and taken away by the vendees thereof to their own

(a)¹ Vide *Delanoy v. Cannon*, 10 East, 328. *Greenslade v. Protheroe*, 2 N. R. 132, *Mestaer v. Hertz*, 3 M. & S. 450.

(a)² Vide *Rex v. Justices of Dorset*, 15 East, 599.

use; and the said Bishop and John Lockwood have also agreed to grub up, eradicate, and destroy the timber and wood growing on the said wood or parcel of wood ground, and to convert the ground and soil thereof into arable, meadow, or pasture; and the said Bishop and John Lockwood, or one of them, in pursuance of such agreement, have or hath sold the timber and wood growing in the said wood or parcel of wood ground to ——— Leatham and William Briggs, for a large sum of money, to wit, the sum of 3000l. to be therefore paid by the said ——— Leatham and William Briggs to the said Bishop and the said John Lockwood, or one of them, and in consideration thereof have permitted, suffered, and authorized the said ——— Leatham and William Briggs to cut down, fell, and take away to their own use, the said timber and wood; and by virtue of the said sale, permission, and authority, the said ——— Leatham and William Briggs have cut down, felled, and taken away to their own use, the timber and wood growing, in great part, (to wit,) 138 acres of the said wood or parcel of wood ground; and the said Bishop and John Lockwood, or one of them, have or hath caused the said last-mentioned timber and wood to be grubbed up, eradicated, and destroyed, in [107] order to convert, and have in fact converted the ground and soil of the said last-mentioned part of the said wood or wood ground into arable, meadow, or pasture; and the said ——— Leatham and William Briggs have declared, that they will, and do proceed to cut down, fell, and take away to their own use, by virtue of the said sale, permission, and authority, the timber and wood growing in the residue of the said wood or parcel of wood ground; and the said Bishop and the said John Lockwood do intend to proceed in causing the same timber and wood in the said residue of the said wood or parcel of wood ground, to be grubbed up, eradicated, and destroyed, and in converting the ground and soil thereof into arable, meadow, or pasture. Whereupon the said Thomas Jefferson hereby humbly imploring the aid of this Court, prayeth a remedy and the writ of our Lord the King of prohibition, to prohibit the said Bishop, the said John Lockwood, and the said ——— Leatham and William Briggs from doing any further waste in the said wood or parcel of wood ground, by cutting down or felling the said timber and wood there growing, or by grubbing up, eradicating, or destroying the timber and wood there growing, or converting the ground and soil thereof into arable, meadow, or pasture. And it was granted, &c."

The circumstances under which the present application was made, as appeared from the affidavits on both sides, were as follow: The wood in question, of which Mr. Lockwood had been lessee under the late, and is now lessee under the present, Bishop of Durham, had, previous to the year 1793, been subject to certain rights of pasturage in the owners and occupiers of houses and lands in Walkington. About that time an act was passed for the inclosure of the wastes, open fields, and commons in Walkington, and East Wood was comprehended therein. In the affidavits in support of the rule, it was stated that at the time the above inclosure took place, assurances had been given by Mr. Lockwood, that the wood in question would not be cut down; but this was denied by those on the other side, and proof adduced of Mr. Lockwood's ever having exercised the right of cutting timber in East Wood. There was no denial of the agreement complained of in the suggestion, between the Bishop and Mr. Lockwood for cutting down the wood; but on the part of the Bishop it was sworn, that the wood was in a very decayed state; that seventy out of the 192 acres of which it consisted were to be replanted, which [108] would produce timber of greater value than the whole then standing; and that the residue being employed in husbandry would be for the advantage of the see. It appeared, moreover, that Jefferson, in whose name the application was made, was, with respect to the wood in question, an uninterested person.

In Trinity term, Le Blanc Serjt. obtained a rule to shew cause why the prohibition should not issue, which was enlarged till this term: the parties undertaking not to fell any timber in the mean time.

Accordingly, in this term, Shepherd, Heywood, Williams, and Palmer, Serjts. shewed cause against the rule, which was supported by Adair, Le Blanc and Cockell, Serjts.

The counsel who opposed the rule, argued in the following manner: This question may be divided into three heads, 1st, Whether a prohibition to stay waste directed to a bishop, can issue out of any court of common law: 2dly, Supposing that any court of common law may grant it, whether it can issue out of the Court of Common Pleas: 3dly, Supposing the Court of Common Pleas to have the power, whether they will grant it under the circumstances of the present case.

1st, At common law waste could be committed by three persons only, tenants in dower, guardians in chivalry, and tenants by the curtesy. Co. Litt. 53 b. 54 a. 2 Inst. 299, and some have doubted as to the latter (a)¹. By Stat. Marlebridge, 52 Hen. 3, c. 23, and Stat. Gloucester, 6 Ed. 1, c. 5, a writ of prohibition of waste was given against all tenants for life and tenants for years. The Stat. West. 2, 13 Ed. 1, c. 14, took away the writ of prohibition of waste in all cases, and substituted a writ of summons. 2 Inst. 389. By another clause of the Stat. Glouc. viz. c. 13, a writ of estrepement pendente placito was given; but according to Lord Coke, 2 Inst. 328, that is to be sued out of the Court of Chancery, or the Court in which the plea is pending: several forms of this writ may be seen in the Register, 76, 77, which are not founded on the common law, but are all *contra formam statuti*; besides here, no plea is pending. After judgment indeed, a writ of estrepement lies at common law, Reg. 77, Reg. Judic. 13, 2 Inst. 319, but it is equally obvious that such a writ does not apply to the present case. Again another prohibition (b)¹ lies by the 35 Ed. 1, Stat. 2, *Ne rector prosternat arbores in cimiterio, &c.* [109] which notwithstanding what is said in *Liford's case*, 11 Co. 49 b., does not appear to be in affirmance of the common law, but an innovation. There is one writ, 2 Roll. Abr. 813, directed to the sheriff, to prevent an abbot from committing waste in the possessions of his priory; this writ is *teste rege*, therefore out of Chancery; and a *seire facias* is added for the party to appear *coram nobis*: this therefore probably issued out of Chancery, returnable in the King's Bench, and is the only writ at all resembling that now moved for, and this issued at the suit of the King, who was the patron, and was directed to the sheriff and not to the party. Perhaps it was the writ alluded to by Lord Coke, 2 Inst. 299, which went to the sheriff to prevent waste, and which, he says, may be used at this day. The prohibition of waste directed to the party which lay at common law, having been taken away by the Stat. West. 2, the present motion cannot be supported unless upon some distinction in favour of the Crown.

This is an application for a prerogative writ, without any other foundation than the angry dicta (a)² of Lord Coke, sitting in the King's Bench, and asserting the jurisdiction of that Court by throwing out an invitation to all the King's subjects to move for such a writ; and yet it is remarkable, that, in the course of 200 years, no person appears to have accepted the invitation. For his own opinion he had no other ground than a case in Parliament which occurred 300 years before that time, viz. *The Bishop of Durham's case*, 35 Ed. 1 (b)², Rot. Parl. vol. i. p. 198, No. 46. That case seems to have been much understood. Anthony Beak was then Bishop of Durham, of whom Lord Coke says, 4 Inst. 216, in the margin: "This was Anthony Beak of that state and greatness (c) as never any bishop was, Wolsey except." By a record of 33 Ed. 1, [110] Rot. 101, cited by Noy Attorney-General Cro. Car. 253, it appears that the Bishop of Durham pretended he had such privileges, that the King's writ

(a)¹ Reg. 72, 73, Bro. Abr. tit. Waste. pl. 88. 2 Inst. 145. F. N. B. 56.

(b)¹ For a precedent of this writ, see Thompson's Entries, 240.

(a)² In 1 Roll. 86, speaking of the writ of prohibition to a bishop, he says, "If any man will move it, I will grant it;" and in 1 Roll. 335, and 3 Bulst. 91, "any one may have this writ against him (a vicar), for it is the writ of the King."

(b)² PETITIONES IN PARLIAMENTO.

A. D. 1306. 35 Edw. I. No. 46. *Ant. Bek.*

Voille nostre Seigneur le Roy entendre qe Sire Antoy n Evesq; de Dorem wast & destruit tut le Boys apurtenaunt a sa Eglise en l'Evesche de Dorem p doun & vent & mauveise garde & p mettre forges de fer & de plume & de arder Carbons. E etre ce il charge les bondes del Eglise p diverses mises et taillages auxi bien des damages qe le Priour de Dorem' & autre Gentz ount desrene vers lui devaunt les Justices nre Seignr le Roy pur trespas donnt ill est atteint, come d'autre manere de taillages, qil sount si enpoveriz qil ne pount leur terre tener dount si nre Seignr le Roy qe est avowe del Eglise avantdite ne y mette remedic l'Eglise avantdite sera disherite & enpoverie en prejudice nre Seignr le Roy & de sa Corone & du Chapitre de Doream.

Responsio—Ita responsum est. Inhibeatur per breve de Cancellaria Episcopo & ministris suis ne faciant vastum de contentis in petitione.

(c) Vid. also Stowe's Chronicle, p. 207.

ought not to run there, and because one brought the King's writ there, imprisoned him; and for this cause it was adjudged, that he should lose his liberties for his time. And we may collect from Rot. Parl. vol. i. p. 197, No. 39 (a)¹, p. 205, No. 77 (b)¹, which are both of the 35 Ed. 1, that the temporalities of the Bishop, together with the regalis libertas, were then in the hands of the King (c); for with the regalis libertas the temporalities passed, as the demesnes of a lord go with the manor, and the profits and rents of burghage lands with the borough, Madox Firma Burgi, p. 7, 251. Nor is this at all improbable, since the temporalities of the Bishop of Norwich were seized a few years before for a similar offence, as appears by Trin. 21 Ed. 1, Rot. 406, cit. Cro. Car. 253. If it be true that the King was in possession of the temporalities, we may suppose that the aid of parliament was called in to prevent so powerful a subject as Anthony Beak from committing waste on lands belonging to the Crown. The case of *The Bishop of Durham*, 35 Ed. 1, was probably a petition of the commons on the relation of the Dean and Chapter, to the King sitting in council, that is, the council of peers, and there-[111]-fore having had the concurrence of the three estates, may be considered as an act of parliament (a)². The order made was not declaratory of the common law, for the petition not only recites waste committed, but talliages levied on the bondsmen of the church to pay the damages which the Prior of Durham had recovered (b)² in an action against the Bishop; and the writ in that case issued out of Chancery, not as a court of justice, but as the repository of the great seal, which was necessarily annexed to the writ; and Lord Coke must have been mistaken when he said, in *Liford's case*, 11 Co. 49 a. "that the parliament did refer him to the ordinary remedy of the common law by writ of prohibition in such case," since by the Stat. of West. 2, 13 Ed. 1, that writ (if ever it lay against a bishop) was taken away.

(a)¹ A. D. 1306. 35 Edw. I. No. 39. *Uxor Will'i le Mareschall*.

Ad peticoem Beatricis que fuit uxor Will'i de Mareschal petentis remedium super eo, quod cum Ricus pater ejus feofasset &c. et postmodum ten' illa devenerunt ad manus Antonii Episcopi Dunolm' tempore cujus dictus Willus vir suus obiit, post cujus mortem sequebatur ad Ep'm exigendo jus suum qui nichil ei inde facere voluit p quod supplicat Domino Regi desicut illa non habet aliam sustentacoem quod remedium et jus sibi fiat ne pereat pro defectu. Et dicit quod dicta tenementa sunt in Werk in Tyndale infra libertatem et sunt in manu Regis simul cum aliis terris que fuerunt in manu dicti Ep'i infra eandem libertatem, &c.

(b)¹ A. D. 1306. 35 Edw. I. No. 77. *Ballivas Ep'i dunelm'*.

Ad petitionem ejusdem Ballivi petentis remedium super eo quod cum Regalis Libertas Epatus capta sit in manu regis certis de causis, custos dicti Epatus impendit ipsum Episcopum quod non possit habere Curiam suam Baron' sicut alii liberi dicti Epatus habent, & etiam idem Custos levare facit blad ad valanc. XL. ti de villanis dicti Ep'i pro sustentatione Coronatorum & sub-ballivorum Regis ibidem, & non dis tringit aliquem liberum seu villanum in dicto Epatu pro hujusmodi sustentacoem nisi tantummodo villanos dicti Ep'i. Et præterea idem custos cepit in manum Dni Regis Burgum Dunelm', Derlington, Ankellond, Stoketon, & Gatisheved, & mercat' et tolnet' in dicto Epatu & tenet Curias ibidem & capit proficua & jam duo Brevia de recto pendent in Curia ipsius Episcopi & Ballivi sui non possunt ingredi cur' predictam ad faciend' partibus justiciam: Item dictus custos seisivit in manum Regis manerium de Sadberg cum wapentach' eidem manerio pertinen' quod quidem manerium est de novo perquisit' de antecessoribus Domini Regis, & est extraneum regali libertati dicti Epatus, &c.

Responsio.—Ita responsum est, Mittatur sub pede sigilli Cancellar' ista petitio Rogerio le Branbanzon & sociis suis, &c. coram quibus judicium redditum fuit de regali libertate capiendi in manum Regis, & ipsi super hoc ordinent remedium competens quoad omnes istos articulos.

(c) In the account of this transaction in Holingshed's Chronicles, vol. 3, p. 315, it is said that the King levied talliages on the tenants of the see of Durham.

(a)² Vid. 1 Bl. Com. 182. 4 Inst. 25.

(b)² 4 Inst. 216. 1 Rot. Par. p. 169, No. 87.

The accounts of *The Bishop of Durham's case* given by Lord Coke, when sitting in the Court of King's Bench, are variously reported in the books. In *Stockman v. Wither*, Mich. 12 Jac. 1 Roll. 86, he is made to assert "that the Parliament said that a prohibition ought to be granted out of the King's Bench, and that it was granted accordingly." And in a note in 2 Bulst. 279, of the same year and term that "on motion made, the prohibition was granted by the Judges of the King's Bench." But in the case of *Knowle v. Harvey*, 1 Roll. 335, he says, "that it was granted in Parliament." In *Stampe v. Clinton*, alias *Liford*, 1 Roll. 100, he is again reported to have said, "that it was granted in the King's Bench;" whereas in his own report of *Liford's case*, he cites the Roll in Parliament, "inhibetur per breve de cancellaria." In three books therefore he is reported to have affirmed that the writ in *The Bishop of Durham's case* went from the King's Bench; and probably he did so; but had reason to alter his opinion when he came to make out and publish his own report of *Liford's case*. If however we are to consider the writ in that case as a common law writ, perhaps these discordant accounts may be reconciled in this manner. Formerly the courts of common law could not grant any prohibition in any case, unless the party were in contempt of an original writ directed to him out of Chancery; which was not returnable either in the King's Bench or Common Pleas, but was directed to the Court or party prohibited: if notwithstanding such writ with alias and pluries, the Court or party persisted in doing that which was prohibited, an attachment sur prohibition issued returnable either in [112] the King's Bench or Common Pleas. *Langdale's case*, 12 Co. 58. 38 H. 6, 14, abridged Bro. Prohibition, pl. 6. This was probably the original practice in all prohibitions. Afterwards these Courts on a fiction issued an original writ in prohibition to confine Ecclesiastical Courts within their jurisdiction; if the Judges of those Courts proceeded contrary to the common law, the Courts of King's Bench or Common Pleas allowed a suggestion to be filed that they had proceeded so and so, and supposed them in contempt, as if a writ had actually issued out of Chancery: and this may serve to explain the words in Fitz. Abr. Attachment sur Prohibition, pl. 15, 2 Inst. 300, and 4 Inst. 99. "That the common law, which in those cases is a prohibition of itself, stands instead of an original." This fiction did not easily gain ground in the Common Pleas. Broke, who was himself Chief Justice of the Common Pleas, doubts it (*a*). In Mich. 5 Jac. *Langdale's case*, 12 Co. 58, it was debated in the Common Pleas, whether that Court could issue a prohibition to the Court of High Commissioners, when no plea was there pending, and it was resolved by Coke, Chief Justice, and the other Judges of that Court, that it might. And in the next year Lord Chancellor Egerton called together the Judges of the King's Bench and Exchequer, of whom he demanded whether the Court of Common Pleas had authority to grant any prohibition without writ of attachment or plea depending; and the above resolution was unanimously affirmed. 4 Inst. 99, 100 (*b*). And this seems to be now settled; for in *Bushell's case*, Vaughan, 157, Lord Vaughan, speaking of the Common Pleas, said "all prohibitions for inroaching jurisdiction issue as well out of the Common Pleas as King's Bench." This view of the subject seems to reconcile Lord Coke's different dicta respecting *The Bishop of Durham's case*. For as the fiction did not extend to prohibition of waste, an order was probably made in Parliament, that a writ should issue out of Chancery, directed to the Bishop and his ministers, and this was the ordinary remedy out of Chancery; if the Bishop persisted, another writ was issued returnable in the King's Bench, and then, if he continued to waste, he was in contempt, in which case the ordinary remedy was by a writ out of the King's Bench. But on no ground can *The Bishop of Durham's case* be considered as an authority for granting an original writ in a Court of Common law.

[113] The first case in which the power of the King's Bench to issue an original writ in prohibition of waste was asserted, was *Stockman v. Wither*, 1 Roll. 86; also alluded to in the anonymous note, 2 Bulst. 279, which varies from Rolle by saying, "We will grant it by the stat. 35 Ed. 1." As that however was founded on the idea that the writ in *The Bishop of Durham's case* issued out of the King's Bench, contrary to the authority of the Parliament Roll, it must fall to the ground. Besides it is contradicted by a report of the same case under the name of *The Bishop of Salisbury's case*, Godb. 239, where it was holden that though waste by a bishop may be punished

(a) See Bro. Abr. Prohibition, pl. 17.

(b) See also 12 Co. 109.

in the Ecclesiastical Court, that a prohibition will not lie; and the reporter cites 2 H. 4, 3, where Thirning C. J. and Tirwit J. maintain the same doctrine. Vid. also Bro. Abr. Deposition, pl. 1. The next case in order is: *Knowle v. Harvey*, 1 Roll. 335. 3 Bulstr. 158, where a prohibition was granted to a vicar by the common law for cutting down trees; but from Bulstrode it appears that the trees were growing in the churchyard which would bring it within the 35 Ed. 1, "ne rector prosternat arbores, &c." moreover the writ was moved for by the churchwardens pending a suit between them and the Defendant, and might therefore have issued under the statute of Gloucester. *Sacher's case*, 3 Bulst. 91. Moor, 917, cited 1 Roll. 335, which comes next, was a prohibition against a vicar continuing in possession of the vicarage by consent of the parties after judgment against him, and was therefore either pendente placito, or founded on the writ in the Register, p. 77. *Costard's case*, 2 Roll. 111, was only a prohibition to a vicar under 35 Ed. 1, and *Drury v. Kent*, Hob. 36, to an incumbent for waste while a quare impedit was pending. There is a case of *The Lord of Rutland*, 1 Lev. 107. 1 Keb. 557. 1 Sid. 152, which according to the two last reporters was an application for a prohibition to a rector, for opening mines in the glebe; according to Levinz for opening mines and cutting down trees; but from the record of the case, Liber Placitandi, 246, the first account appears to be correct; the Court said, "that if it were grantable, no mines could ever be opened in the glebe;" but added "that for cutting down trees to the destruction of the church, they would grant it;" probably under the 35 Ed. 1. All the cases in the books have now therefore been disposed of, except a case of *Acland v. Atwell*, 2 Roll. Abr. 813, where a prohibition was granted to a patron against a prebendary [114] for cutting down trees, by Lord Keeper Coventry; that indeed is a very loose note, and though we cannot say on what grounds it was allowed in a Court of Equity, yet we contend that there is no authority for an original writ of prohibition out of a Court of common law.

Admitting however that a prohibition may be granted against a parson, there is nothing to shew that it can against a bishop. With respect to a parson the fee of the glebe is in abeyance; but the fee of the bishoprick is in the bishop; the latter may join the mise in a writ of right. Co. Litt. 300 b. but the former cannot for the weakness of his title. F. N. B. The seisin of a bishop may be compared to that of a corporation aggregate, and a prohibition might as well go against the one, as against the other; indeed 2 H. 4, 3, shews that a bishop is not punishable for waste at common law: and in *The Lord of Rutland's case*, 1 Keb. 557, where a doubt was raised, whether a parson could open mines, the Court said, "he may well enough do it as eves que." Before the 13 Eliz. a bishop was so far seised in fee that he might alienate, and even after that time, till 1 Jac. 1, he might alienate to the crown.

2dly, At the division of the Aula Regis the power of the Court of Common Pleas was chalked out with precision. Its jurisdiction arises in consequence of original writs out of Chancery, returnable here. This appears from the words of Bracton, 105 b., sine warranto jurisdictionem non habet nec coercionem, &c. and again Bract. 108, a iusticiarii loquelas omnes de quibus habent warrantum terminantes, &c. and from 4 Inst. 99. There are indeed some exceptions to this rule. This court may issue original writs, where their own officers are concerned: or where their own jurisdiction is to be protected from the infringements of Inferior or Ecclesiastical Courts. 4 Inst. 99. *Langdale's case*, 12 Co. 58. The latter right was formerly necessary to its existence; for the Chancellor and his clerks, who in old times were all clergymen, would not have so framed their writs as to oust the Spiritual Courts of jurisdiction. If the Court should grant the writ now applied for, they must do the same with respect to the writs de telonio and ne injustè vexes, of which they never take cognizance, unless authorised by writs out of Chancery. This is a prerogative writ: there is no distinction in principle between a mandamus and a prohibition, the one commands the party to do something, the other restrains him from doing something. Nay, there is a difference between the [115] method of granting prohibition in the King's Bench and the Common Pleas: here a suggestion must be entered on record, for it is the suit of the party; there it is a commission prohibitory issuing at the suit of the King on a mere surmise. Latch, 114. The words of Lord Coke, when sitting in the King's Bench, "we will also for the King grant a prohibition," 2 Bulst. 279, and "it is the King's writ," 1 Roll. 335, can have no application to the Court of Common Pleas; for its being the King's writ is the very reason why it should not issue from this Court, which only holds pleas between party and party. But the Court of King's Bench

has the power of issuing certain writs, such as mandamus and quo warranto, which are peculiar to that Court where the King himself is supposed to sit, and with which no other Courts, not even the Court of Chancery, can interfere. Besides there is less objection to this writ lying in the King's Bench, where the Crown has its officer called the King's coroner, who acts as its attorney.

3dly, This is an application to the discretion of the Court. 1 Ld. Raym. 587. If the writ were demandable ex debito justitiæ, the party need have done nothing more than file an affidavit of the truth of the suggestion; but here the Court has granted a rule to shew cause. It is to be observed, that in all the cases where prohibitions have been granted against churchmen, it has been at the suit of their patrons. From the record, Liber Placitandi, 246, the application in *The Lord of Rutland's case* appears to have been made by the patron, though the reports do not state it so. In *Strachey v. Francis*, 2 Atk. 217, an injunction was granted against a rector on behalf of the patron, to stay waste in a church-yard; but there the Lord Chancellor, according to a manuscript (a) note and another report of the same case in Barnardiston's Reports in Chanc. 399, by the name of *Bradley v. Strachey*, doubted at first whether even a patron could have it, or whether it must not be obtained at the suit of [116] the crown. So the injunction in *Knight v. Moseley*, Ambl. 176, was allowed on a bill by the patron; and it was there said by the Lord Chancellor, "that an injunction has been granted against a bishop at the instance of the Attorney General," though indeed on a search in the Court of Chancery, no injunction to a bishop is to be found on its records. Here the application is on the part of an uninterested stranger; which if the Court were to allow, a writ might be obtained, to prevent that being done, which those who have the patronage might consider as tending to the melioration of the see, on the ground of its being waste within the strict terms of the common law. The only line for the Court to pursue, is to examine whether the act of the bishop has been for the benefit of the church or not. Now it appears by the affidavits on the part of the bishop, that in this very instance the most effectual means are taken by him for the improvement of the revenues of the see. If the trees belonging to the church could never be cut down, the consequence would be, that after a certain period they must decay, and the see would be rather impoverished than improved. That bishops may cut them, may be collected from the right which they formerly possessed of granting leases without impeachment of waste; which right was recognised in *The Bishop of London v. Web*, 1 P. Wms. 527, and *The Bishop of Winchester's case*, cited Freem. 55: in the first of those cases an injunction was obtained against the tenant for carrying away the soil for bricks, and in the second for cutting down all the trees at the end of his term; but both at the desire of the bishops for an abuse of a privilege which their predecessors had a right to grant.

The Counsel in support of the rule. The questions of law are three: 1st, Whether in the case of a bishop felling and grubbing up the woods of his see, a prohibition will lie at all? 2dly, Whether it will lie in the Court of Common Pleas? 3dly, Whether it will lie in the Court of Common Pleas without plea depending? The stat. West. 2, c. 14, was only intended to correct an error which had obtained, that damages could not be recovered for waste done before prohibition issued, and for that purpose a writ of summons was given: but that it was not intended to take away the original writ of prohibition is clear from the preamble, and from Lord Coke's comment on the stat. Gloucester, 2 Inst. 299, where he says, "this remedy may be [117] used at this day." It is also to be considered whether bishops and other ecclesiastical persons who hold estates for life do not come within the spirit of stat. Marlebridge, c. 23, and stat.

(a) This was a note in the margin of 1 Eq. Ca. Abr. 399, formerly belonging to Mr. Brown of the Chancery bar, and was as follows; "March 17th, 1740, at the seal *Strachey v. —*, Motion by Mr. Attorney General for injunction by the Plaintiff who was patron of the church, (and Qu. if ordinary was not co-plaintiff?) to stay waste on lands bought out of the money for the augmentation of poor livings. Lord Hardwicke at first doubted if such a bill was proper, unless in the name of the Attorney General, imagining the patron was only a trustee for the church, and interested only as to the presentation, and denied the injunction, but the next day he changed his opinion and granted it, saying it was a proper bill, in imitation of the prohibition of waste, which the patron might have at common law; and he cited Roll's Abr. tit. Waste, and *R. Liford's case*, Co. Rep."

Glouc. c. 5; for although bishops are held to be something more than mere tenants for life, yet that is only to enable them to sue, not to aliene their estates. Besides, they fall within two of the descriptions of persons who were liable at common law: the church lands being constantly denominated the dowry of the church, and churchmen being assimilated to tenants in dower, and also being looked upon as the guardians of the church, which according to the maxim of the law is always *infra ætatem*, they must be equally liable to a writ of prohibition with tenants in dower and guardians in chivalry. It has been contended that a bishop is so far seised in fee of his temporalities, that before the restraining statutes he had the complete disposal of them, except as to absolute alienation: and two cases were cited in support of this doctrine, 1 P. Wms. 557, and Freem. 55, but both those cases seem to refute the proposition, for in both of them the Court enjoined the lessees from doing what they certainly might have done under a lease from any other tenant in fee. The Act of the Court in those cases can be supported on no other ground than this, that if the lessee, under colour of an authority from the bishop, was attempting the disberison of the successors of the see, he was exceeding that power which the bishop was entitled to confer, and doing what the bishop himself could not have done.

It has been argued that the cases of prohibitions to stay waste committed by rectors in their church-yards, were grounded on the 35 Ed. 1, and that that statute was not in affirmance of the common law: but the church-yard is a part of the glebe, and the rector was as much restrained from committing waste there, as on any other part of the glebe: besides, Lord Coke expressly says, in *Liford's case*, that the treatise, intituled "*Ne rectores prosternant*," &c. is in affirmance of the common law.

The application of *The Bishop of Durham's case* to this has been denied. It has been contended, that having received the assent of the three branches of the Legislature, it ought to be considered as a statute; but its never having been treated as such in the courts of law affords a sufficient answer to that observation. We must also recollect that the two Houses of Parliament [118] at that time entertained a species of original (*a*) jurisdiction, which has been many years disused. The Rolls of Parliament shew that the House of Commons, as the great inquest of the nation, not only presented offences, but preferred the complaints of individuals, which were decided upon by the Crown, assisted sometimes by the councils, and sometimes by the courts of law. Perhaps *The Bishop of Durham's case* was decided in the latter way. It seems to have been a presentment by the Commons to the crown, and by the crown referred to the Courts of law. The matter of complaint was cognizable by them: and the remedy pointed out and given, was a prohibition issuing somewhere, and applicable to the case of a bishop cutting down the timber on his diocese. Lord Coke's words in *Stockman v. Whither* do not contradict the Roll in Parliament. The parties were referred to the ordinary process of the Courts of Westminster Hall, and possibly, instead of applying to Chancery, they applied to the King's Bench, and so the prohibition went from thence: or the contradiction may be explained in the manner suggested by the counsel on the other side. Anciently all prohibitions may have originated in writs out of Chancery; and this is much confirmed by the forms of pleading at this day: for the declaration supposes such a writ to have issued, and charges the party with having disobeyed it, and he is proceeded against as if he had. It is well known, that in common cases in this Court, no original is sued out till the record is made up: in this manner the original writ in prohibition may have been intirely disused: but if the ancient practice had not been departed from so early as the 35 Ed. 1, the writ would first have issued from Chancery, and the process upon that writ might have been made returnable in a court of common law, 38 H. 6, 14, and then if that Court gave judgment upon appearance of the party, it would issue the ultimate process, which would be the effectual writ of prohibition. An attempt has been made to shew that the Bishop of Durham was not in possession of his temporalities at the time when the above case was decided; but that he was considered as a stranger trespassing on the lands of the Crown: this however could not be the case, for he appears to have been levying talliages at that very time on the bondsmen of the church.

But the power of the courts of common law to grant this writ does not rest on *The Bishop of Durham's case* alone. For [119] in *Stockman v. Whither*, 1 Roll. 86,

(a) Vid. Hale on Parliaments, c. 17, by Hargrave.

Lord Coke, after adverting to that case, says, "and this seems to be good law;" and in 2 Bulst. 279, it is said, that the whole Court agreed with him. The same is again recognised in *Stampe v. Liford*, Roll. 100, and *Liford's case*, 11 Co. 49, where it is called the ordinary remedy of the common law. That a prohibition may issue against a parson is clear from *Knowle v. Harvey*, 1 Roll. 335, 3 Bulstr. 158, and though that case is open to the observation that there was a plea pending, yet it is expressly said to have been granted by the common law on suggestion. *Sucker's case* was not plea pending, for the suit was at an end, and Lord Coke there said, "you may have a prohibition, not only for the patron, but also for any; for the second incumbent: for this is the King's writ, and any one may have a prohibition for the King." Whether *Costard's case* was under 35 Ed. 1, ne rector, &c. or not, is immaterial, since that statute was in affirmance of the common law, and clearly a prohibition of waste was there granted against a vicar on motion in the King's Bench. These cases are almost all abridged in 2 Roll. Abr. 813, and to them is added *Acland v. Atwell*, to which no answer has been given. In *The Lord of Rutland's case*, 1 Keb. 557, which, according to the record in the Liber Placitandi, 246, is the most accurate report, the Court said they would grant a prohibition against a parson for waste in cutting trees; and in Liber Placitandi, 240, there is a record of a suggestion for such a prohibition in the King's Bench, which serves to shew that cutting down trees was then the subject of prohibition on suggestion in a court of common law. This doctrine therefore does not depend on the hasty dicta of Lord Coke in Court, but was deliberately adopted by him in his closet, and introduced into his reports; nor does it rest on the authority of one Judge or one reporter, but is confirmed by the repeated determinations of the whole Court, reported in different books. It seems also to have been sanctioned by the subsequent opinions of Lord Hardwicke, 2 Atk. 217. Barnardist. 399, and Amb. 176, who granted injunctions against churchmen to stay waste on analogy to the prohibition at common law.

2dly, A distinction has been attempted between prohibitions to restrain waste, and to restrain an excess of jurisdiction, but has been supported by no authorities; and reason operates against it. It has been urged, that unless this Court were to issue prohibitions to inferior Courts, its own jurisdiction would be infringed. But it may be answered, that such prohibitions [120] issue on matters which could never come before the Common Pleas for judgment. Thus if an inferior Court construe an act of Parliament, in a subject peculiar to its jurisdiction, contrary to the rules of the common law; as in cases of prize, which are not cognisable by this Court. *Brymer and others v. Atkins*, 1 H. Bl. 164. But supposing it had any where been holden that this Court had not a concurrent authority with the King's Bench in prohibiting the inferior Courts, yet in cases of waste, which seem to be peculiar to this Court, it ought to have the power of prohibition. This is called a prerogative writ, but it is also a civil remedy; and indeed the prohibition to the inferior Courts is as much a prerogative writ as the present. So *quare impedit* is a prerogative writ; and yet that is so peculiar to this Court, that it is an instance of the King's power that he may sue it in any other Court (a).

3dly, It stands settled as the unanimous opinion of all the Judges, that this Court may grant prohibitions in certain cases without plea pending. *Langdale's case*, 12 Co. 58. 4 Inst. 100. If therefore it is established that the circumstance of plea pending is not necessary to give jurisdiction to this Court, then all the cases which have been cited of prohibitions granted in the King's Bench plea pending, may be considered as authorities for the Common Pleas to grant them where plea is not pending. In this question the Court will not examine how far the timber ought, with a view to the benefit of the church, to be cut down, or whether the produce is to be employed for the reparation of the palaces or other tenements of the see. The intention of destroying the woods of the diocese is avowed. But the law protects the thing as it is, and the Court will not allow him who is committing what must be deemed waste, to say, that such waste will be for the benefit of his successors.

EYRE Ch. J. One good effect which has arisen from the length of this discussion is, that the way has been much cleared for the consideration of the precise question before the Court; namely, Whether a writ of prohibition lies in the Court of

Common Pleas to restrain a bishop from committing waste in the possession of his see?

The state of the common law with respect to waste has been so fully laid open by the bar, that I need do little more than allude to it. At common law, the proceeding in waste was by writ of [121] prohibition from the Court of Chancery, which was considered as the foundation of a suit between the party suffering by the waste, and the party committing it. If that writ was obeyed, the ends of justice were answered; but if that was not obeyed, and an alias and pluries produced no effect, then came the original writ of attachment out of Chancery, returnable in a court of common law, which was considered as the original writ of the court. The form of that writ shews the nature of it. It was the same original writ of attachment which was and is the foundation of all proceedings in prohibition and of many other proceedings in this Court at this day. Si (a)¹ A. B. fecerit te securum, &c. tunc pone, &c. quod sit coram justiciariis nostris, &c. osten sura quare fecit vastam, &c. contra prohibitionem nostram, &c. That writ being returnable in a court of common law, and most usually in the Court of Common Pleas, on the Defendant appearing the Plaintiff counted against him; he pleaded, the question was tried, and if the Defendant was found guilty, the Plaintiff recovered single damages for the waste committed. Thus the matter stood at common law. It has been said, (and truly so I think, so far as can be collected from the text-writers), that at the common law this proceeding lay only against tenant in dower, tenant by the courtesy and guardian in chivalry. It was extended by different statutes (b) to farmers, tenants for life, and tenants for years, and I believe to guardians in socage. That which these statutes gave by way of remedy, was not so properly the introduction of a new law, as the extension of an old one to a new description of persons; the course of proceeding remained the same as before these statutes were made. The first act which introduced any thing substantially new, was that (c) which gave a writ of waste or estrepement pending the suit. It follows of course that this was a judicial writ, and was to issue out of the courts of common law: but except for the purpose of staying proceedings pending a suit, there is no intimation in any of our text writers that any prohibition could issue from those Courts. By the stat. of West. 2, the writ of prohibition from the Chancery which existed at common law is taken away, and the writ of summons substituted in its place: and although it is said by Lord Coke, when treating of prohibition at the common law, that it "may be used at this day," those words, if true at all, can only apply to that very ineffectual writ directed to the [122] sheriff, empowering him to take the posse comitatus to prevent the commission of waste intended to be done. The writ directed to the party was certainly taken away by the statute. At least as far as my researches go, no such writ has issued even from Chancery, in the common cases of waste by tenants in dower, tenants by the curtesy, and guardians in chivalry, tenants for life, &c. &c. since it was taken away by the statute of Westm. 2. Thus the common law remedy stood with the alteration above-mentioned, and with the judicial writ of estrepement introduced pendente lite.

As far as can be collected from the text writers of a very early period, and from the forms of proceeding contained in books of very high authority, such as the Register and Fitzherbert's *Natura Brevium*, it seems that there did not occur in practice, and that there was not in fact any remedy at common law against churchmen committing waste, sufficiently known for them to treat of. Bracton has two whole chapters in the fourth book, on the subject of waste. His observations are confined to persons liable to the action in the time of Hen. 3, and he (a)² gives the writ of prohibition as the foundation of the suit. The Register and Fitzherbert take no notice of that writ, because they proceed upon the law as altered by the statute of Westminster 2, and accordingly consider the writ of summons as the foundation of the suit. But no one of them has a writ directed against a churchman. It is not merely that these books are silent on the subject, but the case which was alluded to, 2 H. 4, 3, proves to demonstration that such a course of proceeding at the common law against churchmen was not in use at that time. In that case Thirning Ch. Just. takes upon himself to pronounce, very authoritatively, that churchmen cannot be punished at

(a)¹ Bracton, lib. 4 Tr. 6, c. 18 & 19. 2 Inst. 299. Reg. 35 & al.

(b) Marlbridge, c. 24. Glouc. c. 5.

(c) Glouc. c. 13.

(a)² Bracton, lib. 4. Tr. 6, c. 18, s. 2. 2 Inst. 299.

common law if they cut down all the woods of their ecclesiastical possessions. I will not say that the law was so, but I may safely make this inference from his words, that such a proceeding was not usual or in practice at that time.

Our books are full of declarations that destruction and dilapidation are causes of deprivation in churchmen, and that affords some argument to prove that waste by them was not that of which it was supposed the common law could take notice, since it was referred to another jurisdiction. It is not very consonant with the simplicity of the old law to give two remedies for the same evil; [123] if a remedy was already provided at the common law, the ecclesiastical jurisdictions would not be allowed to interfere to the extent of deprivation. So if there was an effectual remedy by the ecclesiastical censures to that extent, it affords a strong ground to infer, that there was no proceeding at common law in the same case. I cannot find, from the earliest writers, down to the 12th of Jac. 1, that it was ever understood or treated of in the books of common law, that any proceeding in waste lay against a churchman. It was reserved for the learning and industry of that great man Sir Edward Coke, whose name ought never to be mentioned in a court of law without the highest respect, to bring to light the record of the Parliament Roll of 35 Ed. 1, which I need not now re-state, as it has been so often mentioned at the bar. After that record was brought to light and considered, Sir Edward Coke and the Judges of his time, thought themselves warranted in making several very important conclusions from it: First, they said that the King's answer had a reference to the course of the common law; they went further, and from thence inferred, that a writ of prohibition lay at common law against a churchman who committed waste: they proceeded further still, in concluding that such a prohibition lay in the Court of King's Bench, and going one step beyond that, they declared that such a writ of prohibition being the King's writ, and founded on his right of patronage, any man might have it. In this manner may be explained the strong language of Sir Edward Coke as reported in 1 Roll. 86, "If any man will move it, I will grant a prohibition." I do not perceive that it was observed at the time when this language was held, that such had been the known course of the common law previous to the discovery of that record. An expression which, according to the report of the same case in 2 Bulst. fell from Sir Edward Coke, and which confirms me in the opinion that it had not been so understood by those Judges, is very remarkable. Sir Edward Coke there says, "We will revive this proceeding:" an expression which leads me to infer, that if such a remedy ever existed, it had been buried for three centuries in obscurity. Let me now suppose for a moment that Sir Edward Coke and the Judges of his time were right in their conclusions on that record; that there was a remedy at common law; that such remedy was the writ of prohibition; that the Court of King's Bench might issue it, and lastly, that any man who applied to that Court might have it; still we must recollect that we are sitting in the Court of [124] Common Pleas and not in the Court of King's Bench. All these admissions therefore do not prove that the Court of Common Pleas can issue such a writ; and before we do issue it that must be proved. I have watched the course of this argument to see whether there was any instance, I will not say usage, or even any adjudged case, but whether there was any instance to be found, where the Court of Common Pleas had thought itself authorized to issue such a writ. I find no such instance. There being no such instance, we might stop here; we might say that the Court of Common Pleas not being a court of original jurisdiction, but deriving its jurisdiction from the great seal, from the *Officina Brevium*, it must not take upon itself to issue writs of prohibition, because they are issued by the great seal, or because they may have been issued by the King's Bench, for reasons which have not been disclosed, or which do not apply to the Court of Common Pleas. But as the matter has been gone into so largely at the Bar, and is of importance, I will go a little farther into it here.

Notwithstanding the text writers on the common law, and Fitzherbert in his *Natura Brevium*, and the Register, have no reference to any common law remedy against churchmen committing waste, yet there is much to be collected now which will give great support to the idea of Sir Edward Coke, that there was such a remedy at common law. The first thing on which I lay great stress is, the record to be found in 2 Roll. Abr. 813 (a), of a proceeding in the case of an abbot in the King's patronage,

(a) *Rex vicecomiti salutem: Cum ad nos providere pertineat ut Eleemosina que*

to whom a writ of prohibition is directed, and not only that, but there is a *scire facias* to bring him in to appear and answer in the Court of King's Bench for his defaults. So that there is a formal process in prohibition at the common law under the great seal with a *scire facias* directed to the sheriff immediately following the reference to the place where the writ is to be found. That is a record of an earlier date than 35 Ed. 1, being dated 3 Ed. 1; and therefore does seem to lay a foundation for the conclusion of Sir Edward Coke, that the proceedings in 35 Ed. 1 had a reference to the course of the common law. The reasoning stated in [125] the introductory part of the writ, on which it is founded, seems to contain fair common law grounds of argument. What is in the King's patronage ought to be preserved in its proper state without alienation or destruction: and this is perfectly consistent with the whole system of the common law, which, while it preserved the immunities of the church, was extremely attentive to the prerogatives of the Crown; whilst it secured the churchman in the fullest enjoyment of the possessions of the church, it looked up with anxious care to the preservation of the patronage of the King. When therefore I find a record of greater antiquity than the record in Parliament of the 35 Ed. 1, grounded on the principles of the common law, I cannot but think that it gives great support to the opinion of Sir Edward Coke: and though I am unable to explain how it should have happened that no mention is made by text-writers of such a course of proceeding, and though probably Sir Edward Coke never saw this record of a proceeding in 3 Ed. 1, yet I do not complain, or think that there was any thing of haste or passion in the inference which his sagacity drew from the single record of 35 Ed. 1. That record however only authorizes a writ from Chancery; Sir Edward Coke went further, and said that it might issue from the Court of King's Bench. When I look for the authority for that part of his proposition, I do not find it. It seems pretty evident that when he first mentioned that record in court, he did not perfectly understand it, and proceeded on a misapprehension of its contents. He says it was agreed in Parliament, that the Court of King's Bench should issue the writ, and that it was so ordered. He could not have supposed that the Court of King's Bench was ordered by Parliament to issue the writ, if the King's answer had been before him "*Inhibetur per breve de Cancellariâ.*" He undertakes to say that it was actually moved for in the King's Bench, and issued by that Court; but not vouching his authority, one may conclude that it being so ancient a record he might have but confusedly remembered it, and was only following up his first mistake, and considering that as done, which, as he believed, was commanded to be done. When that part, therefore, of his proposition comes to be examined, it may be exceedingly doubtful, whether it be equally well founded with the other. It may be perfectly consonant to the principles of the common law, that a writ of prohibition to a churchman should issue from the *Officina Brevium*, from which all writs of prohibition issue, in all cases at common law. Lord Keeper Coventry, it appears in Roll. Abr. 813, [126] did afterwards issue such a writ, which is a further confirmation of Sir Edward Coke's doctrine to that extent; yet it does not therefore follow that it may also issue from the King's Bench: but when he goes one step further, and says that it may be had by any body, his assertion seems totally unsupported. I do not mean to pronounce that the Court of King's Bench could not lawfully issue that writ, and that it could not issue it on the application of any man; but I do mean to say, that I do not perceive the reasons for its so doing. And not perceiving the reasons, it becomes a very difficult thing for us in this Court by any analogy to follow the Court of King's Bench. If the question should arise there they will consider it, and inform us on what grounds they proceed; but where the grounds of this proceeding at present are involved in so much obscurity,

de Patronatu nostrorum Predecessorum & nostro fuit, in statu debito absque vasto venditione vel destructione inde facienda conservetur: tibi præcipimus quod non permittas quod Abbas de G. &c. sui vastum venditionem vel destructionem faciant de hoscis dominibus hominibus pertinentibus ad Prioratum sive cellam de L. quod est de Patronatu nostro & taliter te habere in hac parte ne pro defectu tuo vel Ministrorum tuorum ad te nos graviter capere debeamus. Teste Rege 3 E. 1, Rot. Clausarum memb. 10. Et la apres un Brief direct. al Vicount quod Seire faciat Abbati de . . . & Priori cellæ suæ de L. quod sint coram nobis in octabis ut super defectibus, &c. respondeant.

so little known, so little understood, can the Court of Common Pleas take upon itself to do by analogy what has been done by the King's Bench?

My Brother Adair felt a difficulty as to the King's Bench having granted the writ of prohibition in 35 Edw. 1, arising from the words "inhibetur per breve de Cancellariâ." He tried to explain it by a reference to a case in the Year Book, 38 H. 6, 14. That case begins, "A prohibition was sued out of Chancery, directed to the Justices of the Common Bench to make attachment," &c. but the first line of that case, after all the pains we have taken, remains altogether unintelligible. He supposed the prohibition might be in some manner returnable in the King's Bench, and that when it was there, that Court would act upon it. But that proceeding must then have been in consequence of a writ from Chancery coming to the King's Bench. Taking that to be so, though I never saw such a writ, or heard of it, except in the Year Book I have alluded to, it will not serve the purpose of the present application, which is an original application for a prohibition in the first instance to this Court. Here there is no commencement of a suit, no writ to us from Chancery to give us jurisdiction in the matter. If therefore (though I have no idea that such a writ could issue) the difficulty could be reconciled in that way, it would not avail in this case.

It is said that there is such a cogent analogy between the proceedings of this Court and the Court of King's Bench in prohibition, that if they could lawfully issue such a writ, we ought to do so likewise. Granting that they did issue such a writ in the 12 & 13 Jac. 1, as it appears from 1 Bulst. and 1 Rolle, they did, and that they meant to act on the idea which has been stated, I [127] can only consider those cases as authorities so far as they go. But if the foundation on which they proceeded fails, those cases will fail also: and seeing how little has been done upon them in later times, they do not now furnish that great weight of authority which will justify us in acting upon them. I have mentioned that there was another case subsequent to these, in the reign of Charles the First, where Lord Coventry thought proper to issue a prohibition of waste to a churchman under the great seal, on the application of the patron. This I have said affords a further support to the principle of an original remedy at common law, which Sir Edward Coke, unassisted by, and indeed contrary to all practice, most sagaciously inferred from the 35 Edw. 1; but this does not aid the jurisdiction of the King's Bench. As to what the Court of King's Bench afterwards considered itself at liberty to do, in *The Lord of Rutland's case*, 1 Keb. 557, that went no further than a rule to shew cause, and therefore much stress cannot be laid upon it. The question is, Whether if the King's Bench has done right, the Common Pleas will also do right in following its example? I, who am not prepared to say that the King's Bench has done right, who ought not to say that it has done wrong, because the matter is not before me in a judicial way, cannot, on the ground of analogy, pronounce that the Common Pleas would be justified in doing what is now required of it. I must keep in mind what is said by Bracton of this Court, "*sine warranto jurisdictionem non habet*," and that the exposition of *warranto*, &c. by Lord Coke (4 Inst. 99) is, "that this Court cannot regularly hold any common plea in any action, real, personal, or mixt, but by writ out of the Chancery, returnable in this Court." And though he afterwards says, by way of exception to the general rule, that this Court, without any writ, "may, upon suggestion, grant prohibition to keep as well temporal as ecclesiastical courts within their bounds and jurisdiction;" yet it should be remembered that the jurisdiction which we do exercise in those cases, is a jurisdiction which was established after a great deal of struggle and hesitation, even so late as the 7 Jac. 1, on a reference by the Chancellor to the Judges of the King's Bench and Exchequer. It is true that their answer is reported in general terms; but it is equally true that Lord Coke introduces the subject when treating of the power of the Common Pleas to restrain ecclesiastical and inferior temporal courts, and therefore the answer must be understood to be confined to that [128] particular species of prohibition. The circumstance which has been insisted upon, of this writ being for the King, rather militates against the power of this Court. The Crown has its peculiar courts for prerogative process: as the Courts of King's Bench and Exchequer, or a Court of Chancery. But the Court of Common Pleas is emphatically a court of pleas between party and party; and though the Crown may elect to proceed here for the maintenance of its civil rights, yet the Court of Common Pleas would be going out of its way, if, on the principle of this writ being "for the King," it should upon the ground of any analogy take upon itself to do what other Courts have

done. In a case therefore where there is not practice to support us, where we have not strong lights to guide us, and analogies so complete and satisfactory as not to admit of being mistaken, I cannot but think it the safest course for us to decline doing now, what it does not appear that this Court has ever done before. The consequence is that I think the Court of Common Pleas ought not to issue this writ of prohibition. Admitting this to be the law, it is unnecessary for me to enter into the grounds contained in the affidavits. I need not say whether this application has been made on mere splenetic, or on more worthy motives; nor whether the Lord Bishop of Durham, in this instance unintentionally doubtless, may not have done that which the law does not sanction, even though it should turn out clearly that the annual revenues of the see have been improved. Most certainly it is not to be concluded that, provided an increase of the annual revenues of the see is obtained, a permanent fund of real property in woods may be utterly destroyed. Few who know the Honorable and Right Reverend Prelate, who have been witnesses to the munificence which he has displayed in repairing and beautifying the fabrics of his church, of his castles, and his palaces, will suspect him of having intentionally wasted the possessions of the see of Durham. At the same time it is by no means impossible that he, as well as many other churchmen, may unwarily have slid into this heavy ecclesiastical offence, which all agree to be a cause of deprivation, and which may probably be found to be also an injury cognizable by some of the King's temporal courts. I do not at all regret the expence of time and trouble in this proceeding, since I cannot but think it may be productive of very good effects. It may awaken men's minds to the consideration of this sort of question, to which, at this time, it is of importance that they should be directed. We have already seen one cathedral church almost in ruins, and we have seen with what expence and [129] exertion both of the clergy and laity that church was restored. Had it been in the minds of the clergy and laity for a course of years past, that the woods of bishops, and more especially of deans and chapters, including prebendaries, were a solid, permanent, and increasing fund of real property, devolved to them for the sustentation of the cathedrals, the palaces, and houses of the church, probably that venerable edifice might never have fallen into such ruin, or might have been restored with much less difficulty. I am afraid that the state of some other noble monuments of the finest Gothic architecture in this kingdom is not very consoling; that they are mouldering and crumbling into ruins. I have heard it observed with grave and serious regret, that no funds have been appropriated for the preservation of them: perhaps a time will come when that which I take to be an error will be corrected, and when it will be found that all the property of the church is a fund for the sustentation of those fabrics; but that the woods in particular are a specific fund so to be employed no man can doubt. I repeat my opinion that the consequences of this discussion may be highly beneficial to the public; and though I must now say that this rule must be discharged, perhaps hereafter the public will be disposed to acknowledge that the promoter of this application was a friend to the Church of England.

HEATH J. Though many points have been properly made in this cause, and have been elaborately argued at the bar, yet I shall confine myself merely to the discussion of those which principally affect the question in the view wherein I shall consider it. Previous to the inquiry whether the Bishop of Durham is liable to a prohibition for having felled the trees and grubbed up the woods in question, it must be decided whether such prohibition be grantable at the instance of Jefferson, a stranger, who is in nowise connected with this transaction in point of interest or otherwise. A prohibition for waste was certainly a common law remedy; it was therefore grantable at the instance of the party injured, and of no other person whatever. In ancient times it probably commenced in an original writ issuing out of Chancery; afterwards the Court itself granted it on a fiction that an original writ had issued. In the books there are some loose dicta that an act of parliament and the common law should respectively stand as originals according to the circumstances of the case; but this is not law, unless it be confined to prohibitions for excess of jurisdiction, and to restrain waste. Recourse has been had to reasoning by analogy from the [130] cases of rectors; but no case has been cited, no precedent has been produced of a prohibition against a parson to stay waste in felling trees that was not granted at the suit of the patron or churchwardens. The report of *Knowle v. Harrey* is very loose and inaccurate; it is not stated on whose suggestion the prohibition was granted; probably it was at

the instance of a party interested. The same observation will apply to *Costard's case*, 2 Roll. 111. In *Sacker's case*, 3 Bulst. the prohibition was granted pendente lite. There being therefore no instance of a prohibition granted in any analogous case, it remains to examine the case of *The Bishop of Durham*, 35 Ed. 1. I shall take my Lord Coke's own report of this proceeding, "by which it appears," says he, 11 Co. 49, *Liford's case*, "that the Parliament referred him to the ordinary remedy of prohibition at common law." It does not appear even in this case who were the petitioners in Parliament. It might be at the instance of the bishop's own tenants who had common of estovers in his woods. The commons made the application; for the commons were the great inquest of the nation. Cutting down the woods at that time was no small grievance, when the use of fossile coals was not common. According to several books, it was said by Lord Coke that a prohibition was afterwards granted in the King's Bench; though it is not expressed whether, on the application of the King, the tenants of the bishop, or any other person injured by the spoil and waste. It is however observable that from the 35 Ed. 1 to the time of Lord Coke the precedent was never followed in a single instance. This appears by the avowal of the Chief Justice himself, for he is made to say, 2 Bulst. 279, "We will revive this again." In the Year Books 2 H. 4, cited at the bar by the counsel who shewed cause, it is said by Thirning Ch. J. that if a bishop or archdeacon shall cut down all his wood, he shall not be punished at common law: but this must be understood according to the subject-matter, that they shall not be subject to an action of waste.—Thirning says he shall not be punished by the patron, nor by any other way. It does not follow that a prohibition will not lie at the instance of a party injured, because a prohibition is not a procedure for punishment originally, though it might follow in the case of a contempt of the prohibition. The opinion of Thirning was extrajudicial; it may however serve to shew the current opinion of the day. It remains to be considered whether the circumstance of the King being interested will furnish a ground for the prohibition. This [131] idea is founded on a dictum of Lord Coke, reported to have been uttered on a different occasion, and principally referred to in 1 Roll. 335. "Any person may have this writ against him, (meaning Sacker,) for it is the King's writ," and the prohibition was not to waste. By the King's writ he must be understood to mean a prerogative writ, for every writ is the King's writ. Does then this doctrine hold with respect to the other prerogative writs? It is not applicable to the writ of mandamus in the Court of King's Bench, or to the writ of ne exeat regno in a Court of Equity. Those writs are only grantable at the instance of some party interested. The writ of habeas corpus from necessity can only be applied for on behalf of the party interested. Admitting that a subject cannot sue an original writ in the King's name, the inference is, that he could not sue an original writ issuing out of the Court of Chancery; and if so, it goes a great way to prove that he is not intitled to a prohibition in this Court, which presumes a writ of prohibition issuing out of the Court of Chancery. Add to this, that this is a prohibition of a singular nature, inasmuch as it is founded on a suggestion, and applied for merely on affidavit. After all, what reliance can there be had on these dicta of Lord Coke under all the circumstances attending them? They were not the result of a calm dispassionate inquiry: that great lawyer was much heated in the controversy between the Courts at Westminster and the Ecclesiastical Courts. In every part of his conduct his passions influenced his judgment. Vir acer et vehemens. His law was continually warped by the different situations in which he found himself. There is the less reason for granting this prohibition, because it is not the only remedy: the Crown has its officers, whose duty it is to watch over its interests: the metropolitan may proceed against the bishop for dilapidation: the officers of the Crown and the metropolitan may exercise their discretion, and are competent to decide whether this supposed melioration be really one or not. But we are bound by the strict rules of law, and cannot decide upon the propriety of the bishop's conduct, but only whether in strictness it amounts to waste. However, I do not found my opinion on the exercise of a discretionary power residing in the Court, but that neither on principle nor on precedent are we warranted in granting this prohibition at the instance of a stranger.

ROOKE J. I am of the same opinion. The question with respect to the power of the Court has been already so completely [132] exhausted, that there is nothing for me to add. Something however has been said in the course of the argument, as to the right of bishops to destroy the woods which are the property of the church, on

which I think it necessary to make some observation. I consider the bishop as having to certain purposes a fee-simple in his bishopric. But he is seised to a special intent, as a public officer for public trusts. If before the restraining statute he had alienated the property of the see, he would have been guilty of a gross breach of trust, and I conceive there was a remedy at common law. As a general principle it is waste to destroy woods. But these great officers have duties annexed to their station; as the repairs of the palaces, bridges, and mansion-houses of the see; and they would not exceed the limits of their duty if they applied the woods to the repair of their cathedrals. If through the forbearance of their predecessors, the woods belonging to the church are in such a state that it is advisable to cut them down, this may be done, very beneficially for the see, by cutting only a part one year and a part another, and at the same time planting so as to create a renewal of this kind of property. But it may be doubted whether a bishop can grub up the woods at all without the licence of Parliament. At any rate, however, I am clear that this court has no jurisdiction in the present case.

Rule discharged.

CHAPMAN v. SNOW. Nov. 21st, 1797.

A defendant by perfecting bail above, waves all objections to the sufficiency of the affidavit on which he was held to bail (b)¹.

Runnington Serjt. on the 18th November obtained a rule to shew cause, why an exoneretur should not be entered on the bail-piece and a common appearance allowed; the affidavit of debt having omitted to negative a tender in bank notes according to the directions of 37 G. 3, c. 45, s. 9 (a)¹.

[133] The arrest took place on the 5th of August: the Defendant had put in and perfected bail above, and a plea had been demanded.

Le Blanc Serjt. shewed cause: and contended that the Defendant had waved any irregularity in the affidavit: 1st, By putting in bail above; 2d, By delaying to apply to the Court till the 18th November, twelve days after the commencement of the term (a)².

Runnington in support of the rule. It was impossible for the Defendant to make this application, till he was regularly in court, which he was not till he had put in and perfected bail.

HEATH and ROOKE J^s. (absente Eyre Ch. J.) held that the Defendant had waved the irregularity, and

Discharged the rule (b)².

EYRE Ch. J. on the next day said, My Brothers have mentioned to me a rule for entering an exoneretur on the bail-piece, and allowing a common appearance, which was yesterday discharged, and I think properly discharged. The Defendant is not now in custody, he has put in bail, and is therefore too late to make this application.

(b)¹ Vide *Jones v. Price*, 1 East, 81. *D'Argent v. Vivant*, Id. 330. *Knight v. Dorsy*, 1 B. & B. 48.

(a)¹ In *Stewart v. Smith*, a similar rule having been obtained, Shepherd Serjt. this day shewed cause, and stated that the affidavit was made in Ireland only two days after the passing of the act.

HEATH and ROOKE J^s. (absente Eyre Ch. J.) said, that though it was a hard case, they could do nothing, for the act was positive. Vid. *Nesbitt v. Pym*, 7 T. R. 376, note (c).

Shepherd then applied for leave to file a supplemental affidavit. Sed per Curiam — We have conferred with the Judges on the construction of this act, and think that a supplemental affidavit cannot be allowed.

Rule absolute.

(a)² Vid. 7 T. R. 376, n. (a), *Fenwick v. Hunt*, where length of time was holden by the Court of K. B. to be no waiver of the objection. Cont. *Levy v. Duponte*, ib. and *Deborough v. Copinger*, 8 T. R. 77.

(b)² Vid. *Goodwin q. t. v. Parry*, 4 T. R. 577. *Hussey v. Wilson*, 5 T. R. 254. *Morgan v. Johnson*, 1 H. Bl. 628. *Norton v. Buller Danvers*, 7 T. R. 375. *King q. t. v. Horne*, 4 T. R. 349.

If he were to be allowed to move now, I do not see why he should not be at liberty to move after proceedings commenced against the bail. Perhaps the Plaintiff has proceeded against them, and is very near judgment; for any thing that I know, he may have got judgment. Where then is the Court to stop? Here the process is bad: the party does not come in the first instance, but does a voluntary act by perfecting special bail: the cause goes on with a total disregard to what has passed; the bail to the sheriff are discharged, and the whole of that proceeding is gone. Shall the Defendant now be allowed to apply to us to discharge the special bail, and introduce common bail in their place? I think that he should not be heard.

[134] WATTS v. HART. Nov. 22d, 1797.

[Held overruled, *Walker v. Barnes*, 1814, 5 Taunt. 779.]

If a Plaintiff become bankrupt after a nonsuit at nisi prius, and before the judgment of non-suit, the costs of the nonsuit are a debt proveable under the commission (a).

Shepherd Serjt. obtained a rule to shew cause why the writ of capias ad satisfaciendum issued and executed on the judgment of nonsuit in this cause should not be set aside, and why the sum of 24l. 2s. 6d. levied thereon and paid into the hands of the sheriff of the county of Middlesex, should not be restored to the Plaintiff, he having obtained his certificate; and cited *Hurst v. Mead*, 5 T. R. 365.

The Plaintiff was nonsuited in an action against the Defendant at the Sittings after Hilary Term 1797; on the 26th of April following a commission of bankrupt issued against the Plaintiff, and on the 7th of May, being the 4th day of Easter Term, costs were taxed, and the judgment of nonsuit afterwards signed; on the 30th of June in the same year the Plaintiff obtained his certificate, and on the 5th of August following the Defendant sued out a ca. sa. under which the sheriff levied the above mentioned 24l. 2s. 6d.

Adair Serjt. for the Defendant. It was uniformly holden till the case in 5 T. R. 365, that costs of this description not converted into a debt by judgment, or liquidated by taxation, could not be proved under the commission. In 3 Wils. 272, the case of *Walter v. Sherlock*, 11il. 23 Geo. 2 is cited, where in an action of assault and battery before bankruptcy of the Defendant, and verdict for the Plaintiff with damages during his bankruptcy, but no judgment till after certificate, the Court held the debt not proveable under the commission, as not due at the time of the bankruptcy. So in *ex parte Sneeps*, Cooke's B. Laws, 192, where costs were taxed subsequent to the bankruptcy, but the order of the taxation was made before it, the Chancellor held that the taxation constituted the demand. The case of *Blandford v. Foote*, Cowp. 138, though apparently against the Defendant, does in fact contain a strong implication in his favour; for though the bankrupt was there discharged, yet the reason given was that the original debt being clearly due before the bankruptcy, the interest and costs which had accrued since should stand on the same foundation. But in the present case there is no original debt to which a reference can be made: [135] there is no damage and no demand, till the costs are taxed, and the judgment of nonsuit signed. The same observation applies to the case of *Lewis v. Piercy*, 1 H. Bl. 29, as to that of *Blandford v. Foote*. So in *ex parte Todd*, cited in *Goddard and Vanderheyden*, 3 Wils. 270, where the Defendant became bankrupt after a verdict in ejectment against him with nominal damages, and the Plaintiff signed judgment in the following term, and had costs de incremento taxed and allowed, Lord Chancellor Henley held that the costs did not become a debt till the judgment. This current of authorities is too strong to be shaken by the single authority of *Hurst v. Mead*, which appears to have been a hasty decision, as cause was shewn in the first instance.

Shepherd, in support of the rule, relied on the case of *Hurst v. Mead*, and said that Buller J. had there alluded to a similar case in the Court of Common Pleas, where the point was ruled the same way: but admitted, that he had not been able to find any other than that of *Lewis v. Piercy*.

EYRE Ch. J. The ground of the decision in *Lewis v. Piercy* must have been that

(a) Vide *Ex parte Charles*, 14 East, 197. 11 Vez. Jun. 655. *Walker v. Barnes*, 4 Taunt. 777. *Young v. Taylor*, 8 Taunt. 315, 323. *West v. Pryce*, 2 Bing. 455.

there was an actual debt which existed before the bankruptcy, and though not converted into a judgment might have been proved under the commission independent of the action; and being so proveable, the subsequent proceedings might be considered as incident, and as nothing when separated from the subject to which they were incident. I would go as far as I could towards relieving the bankrupt, and if it could be made out that the substance of the debt were constituted by the nonsuit, and nothing more than the mere taxation were necessary to reduce it into a practical shape, in which it might be recovered, it might then be considered in the same manner as if the taxation were made on the very day (a)¹ of the verdict given: but if a nonsuit at nisi prius be only a ground on which the Court is to pronounce judgment, then the judgment being that which constitutes the debt, and being after the bankruptcy, I do not know how to refer the debt to the time of the nonsuit. There seems to be only an incobate interest arising on the nonsuit at nisi prius; you could not tax the costs till after the day in Court, and the postea returned: the nonsuit alone is nothing, absolutely nothing. When the record is returned into Court, the Court is to deal with it, and to pronounce the judgment of the law upon it; upon which the costs attach; but in order to make the judgment complete, the costs are first taxed. The costs are given with reference [136] to the judgment of nonsuit, and not to the nonsuit at nisi prius, and therefore, as at present, advised I cannot agree to the case of *Hurst v. Mead*. The nonsuit at nisi prius was not that which gave any specific demand, proveable under the commission; for the debt was wholly unliquidated till the moment that the Court had pronounced judgment.

HEATH J. I do not see how any possible reference can be made to the time of the nonsuit at nisi prius; but after judgment had, the debt arising from the costs transit in rem judicatum by virtue of the act of Parliament.

ROOKE J. This is one of many cases which bears hard upon the bankrupt. I should be glad to support the judgment in the King's Bench, and relieve the bankrupt, if it could be done consistently with the rules of law. But, as at present advised, I think the authorities the other way too strong.

The Court having desired the counsel to make inquiry into the circumstances of the case of *Hurst v. Mead*,

Shepherd on this day said, that by the rule and original affidavit in that case which he had obtained, it appeared to have been an application to discharge the bankrupt out of execution, on a ca. sa. for the costs of a judgment of nonsuit.

EYRE Ch. J. Thus much is certain that the nonsuit at nisi prius is that which necessarily produced the judgment of nonsuit. It will be difficult to distinguish this case from a case (a)² where an action of slander was brought, and damages given by the jury, and before the day in bank, a commission of bankrupt issued against the Defendant, who on this ground was discharged out of execution. There was no original debt previous to the verdict in that case any more than before the nonsuit at nisi prius, in the case of *Hurst v. Mead*. I do not think either of the cases founded on principle. But the question is, Whether we ought not to adhere to a decided case rather than contradict it, where the demand is such as the Court cannot look upon with favour? On this ground we are of opinion that we must make

The rule absolute.

[137] JOHN NORMAN CROSS *Demandant*, WILLIAM GREY *Tenant*, AND ANNE PEAD AND ANOTHER *Vouchees*. Nov. 22d, 1797.

The Court will give leave to amend a mistake in the writ of entry in a common recovery (a)³.

Clayton Serjt. on a former day moved to amend the writ of entry, mittimus, transcript, and recovery, in this case. The premises, as described in the deed to lead

(a)¹ The day at Nisi Prius and the day in bank are but one day in law, and therefore if a defendant alienate his hand between the day at Nisi Prius and the day in bank, the Plaintiff shall have execution against the hand which he had at the day of Nisi Prius. Dier, 149. 1 Roll. Ab. 892.

(a)² *Longford v. Ellis*, cit. 1 H. Bl. 29, n.

(a)³ Vide *Ex parte Motley*, 2 B. & P. 455. *Wheeler v. Hill*, 2 B. & P. 560.

the uses, amounted, on being added together, to one hundred and sixty-eight acres two roods fifteen poles: in the recovery the parcels were described to be two messuages, thirty acres of land, thirty acres of meadow, and thirty acres of pasture, whereas the recovery was intended to be suffered of two messuages, fifty acres of land, fifty acres of meadow, and fifty acres of pasture: the mistake was supposed to have originated with the clerk in the country writing the figures 30 instead of 50; the parties were all alive.

It was urged that no inconvenience would arise from this amendment, provided that the increased fine for alienation were duly paid.

The Court directed the parties to apply, in the first instance, to the Alienation Office, and mention the matter again when that was done.

Accordingly it was afterwards brought on again by Clayton, who stated that an application had been made at the Alienation Office, where the practice was to rate a new fine for King's silver, on the whole number of acres, and then make allowance for the money received before, and that there was a precedent in the office of a manor having been added on a similar motion.

But the Chief Justice intimating his recollection of a resolution in the House of Lords, that no original writ could be amended, and wishing to consider to what length the practice of amendments had gone since that time, the case stood over till this day, when being again moved,

EYRE Ch. J. I hesitate about granting this motion, because I find a case in the House of Lords, where, on a reference to Lord Holt and the Judges, it was determined that a mistake in a writ of entry could not be amended either by common law or by statute. It is the case of *Lord Pembroke*, 1 Salk. 52. The practice I understand to be in favour of the amendment. My only difficulty arises from the case I have mentioned; but if my Brothers are satisfied I shall not oppose the amendment.

[138] HEATH J. By *Gage's case* (a), 5 Rep. 45, and several cases to be found at the end of Piggott (b)¹, amendments of common recoveries are warranted; and during twenty-two years that I have sat here, it has been the constant practice to amend them by the deed to lead the uses.

ROOKE J. By the 8 H. 6, c. 12, original writs may be amended as to mistakes of the clerks. There is a case in Blackstone (c) also, where it was held that if a clerk mistake his instructions the præcipe shall be amended.

Leave was given to amend (d).

VICTOIRE ADELAIDE FRANCOISE MELAN v. THE DUKE DE FITZJAMES.
Nov. 23d, 1797.

[Discussed, *De la Vega v. Vianna*, 1830, 1 B. & Ad. 287.]

If a defendant be held to bail in this country on an instrument entered into in France, and by which instrument his property only and not his person, was according to the law of France made liable, the Court on motion will discharge him on his entering a common appearance (b)².

A rule had been obtained by Shepherd Serjt. calling on the Plaintiff to shew cause why the bail-bond given for the appearance of the Defendant in this cause should not be delivered up to be cancelled, on the Defendant entering a common appearance.

The affidavit of debt stated, "That the Defendant was justly and truly indebted

(a) In 1 Salk. 53, and Fortescue, 188, *Gage's case* is said to be misreported, and not law.

(b)¹ *Drake and another v. Biddulph*, p. 222. *Skinner and Others v. Land*, p. 228.

(c) Vid. *Watson v. Cor*, and *Henzel v. Lodge*, 2 Bl. 747 and 1065, also 3 Wils. 154.

(d) Vid. 2 Barnes, 24 and 216, and *Jenkinson v. Staples*, Cruise, 2 vol. p. 183, where the præcipe and writ of entry in a common recovery were amended.—Also *Arthur Blackamor's case*, 8 Co. 156, 163, and *Wynne v. Wynne*, 7 Mod. 492, 506. 1 Wils. 35, 42, S. C. *Pearson v. Pearson*, 1 H. Bl. 73. *Winch*, 99.

(b)² But see *Imlay v. Ellefsen*, 2 East, 455. *Mure v. Kaye*, 4 Taunt. 35, 40.

to the deponent in the sum of 1000*l.* and upwards (*a*) on a certain deed, under the hand and seal of the Defendant, bearing date the 22d January, 1789, made and executed in France, according to the laws there in force, to and in favour of the deponent."

By the instrument in question, the Defendant "creates, constitutes, promises, secures, and grants to the Plaintiff the sum of 30,000 livres, by way of yearly annuity, &c. which sum the Defendant promises and binds himself to pay to the Plaintiff, at his house, or to the bearer of this present deed, in four equal payments, at the four usual periods of the com-[139]-mon year, &c. authorizing the Plaintiff to take and levy the said annuity severally upon the property, goods, moveables and immoveables, at present or hereafter to be in possession of the Defendant; who for the better securing the payment of the said annuity, mortgages and renders responsible the whole of the said property, goods, &c. as above stated. This instrument to bear the interest of 10 per cent. according to law, &c. the Defendant promising and binding himself to fulfil the tenor of this deed, under penalty and mortgage of all his property, goods, moveables and immoveables, now or hereafter to be in his possession, and which he submits for that purpose to the restraint of jurisdiction of the Court of Chatelet at Paris, and fully renouncing every thing which may be contrary or injurious to these presents," &c.

An affidavit of a M. D'Outrement was also produced, stating, "That the deponent had been a counsellor of the Parliament of Paris during twenty-five years, and in that character was skilled in the laws of France: and that by the laws of France, and particularly by the 6th article of the 34th title of the Ordinance or Law of 1667, which was in full force when the said deed was made, not only the person of the contractor or grantor was not engaged or liable, but it was not even permitted to the party contracting to stipulate that his body should be arrested or imprisoned by reason of a deed of that sort; and that the only case where a person could be arrested or imprisoned by the laws of France for debt, was upon a bill of exchange, or a commercial engagement; and that in every other case the property only was liable to be seized."

Adair Serjt. now shewed cause. This rule was granted in order to ascertain whether the security in question was that kind of security which imported a remedy against the person of the Defendant, or whether it was only in the nature of a mortgage on his estate. If this be a mere security, affecting the land and personal property only of the Defendant, and if it so appears on the face of it, the Court will attend to that circumstance. But if I can shew that it is a personal security affecting the person and following it every where, whatever may be the law of France as to the form of proceeding, yet when the party is found in this or any other country, he may be proceeded against according to the rules and practice of the country in which he is resident. The instrument was given for a subsisting debt, and may be called a bond. By it the Defendant binds, first, himself, and then his property. [140] It is therefore in fact a double security. 1st, It is a personal security by which the person is charged. 2dly, It is a charge on the property real and personal of the Defendant. And yet it is contended, that though it has a double aspect it extends only to the property, and not to the person. Indeed the property, which in the subject of this mortgage, being in another country, and subject to the laws of that country only, the sole remedy which the Plaintiff now has is against the person of the Defendant.

Shepherd in support of the rule. The affidavit of M. D'Outrement is confirmed by the comment on the Ordinance of 1667, to be found in the posthumous works of M. Pothier, quarto edit. vol. 7, Cinquieme Partie, chap. 1. "De la Contrainte par Corps," from p. 278 to p. 285; where it is laid down, that all constraint of the person, even after judgment, on all contracts, (except those which are there specified, and amongst which such a contract as the present is not included), was taken away by the law of 1667. This motion is not made on the ground of privilege; in that case the law of England would proceed according to its own rules. But if the contract was entered into with reference to the laws of France, it is the same thing as if those laws were expressly stated on the instrument. So if a bond is made in France,

(*a*) When this was first moved, the Court doubted whether the words "on a certain deed" were a sufficient description of the debt, to hold the Defendant to bail. But this objection was never mentioned again.

payable in England, being made with a view to the law of England, that law must prevail, *Robinson v. Bland*, Burr. 1077. In *Talleyrand v. Boulanger*, 3 Vezey jun. 447, the circumstances were much of the same nature as in the present case. It was stated in argument, that the Court of Common Pleas had discharged a Defendant on common bail, because his person would not have been liable by the law of France (a). And the Lord Chancellor said, "It would be contrary to all the principles which guide the Courts of one country in deciding upon contracts made in another, to give a greater effect to the contract than it would have by the laws of the country where it took place;" and added, "that he had no doubt that a court of law would upon such grounds discharge a Defendant, upon common bail."

EYRE Ch. J. In cases originating in this country, and wholly governed by the laws of this country, this Court rarely interferes in a summary manner to discharge a party on a common appearance, provided the affidavit of debt is conceived in positive terms; nor will the Court do it in any case unless it sees distinctly that an ill use has been made of the power of holding to bail. It has [141] been very often repeated, and I wish it were more clearly understood, that the Court does not mean to try the question between the parties on these preliminary motions. But it is a very different case when the ground of the debt is a transaction in a foreign country. It does not then originate in our law, but in the law of that country which creates the obligation. That law must be laid before us by evidence; since we do not take notice of it of course. When it is sworn that a party is indebted on a bond or a promissory note, we know what the nature of those instruments is, and the law concerning them; or if for goods sold and delivered, we know that goods sold and delivered may create such a debt. But if the plaintiff swear positively to a debt in this country, and refer to something which renders it ambiguous whether there be a debt or not, the party ought not to be held to bail. Suppose he were to refer to some contract which had the appearance of being equivalent to a bond, and the Defendant were to shew that it raised a demand for damages unliquidated; I think the Court would say, the Defendant may be held to bail upon a special order, but not by the mere force of the affidavit. Apply this reasoning to the case before us. The Defendant is held to bail on a contract made in France, the nature of which we must learn, not from the face of the instrument, but from evidence. There is no reference in it to the laws of this country. It must therefore be shewn what the laws of France are, and that they create an obligation which the laws of England will enforce. What would be a defence there, will be a defence here. The whole therefore turns on the laws of a foreign country. No general rule can be laid down; for whether there be a debt or not does not come within our knowledge, nor indeed that of the party himself, who may be mistaken with respect to the law. I do not know that we have ever done what is now desired of us before; but if it appears that this contract creates no personal obligation, and that it could not be sued as such by the laws of France, (on the principal of preventing arrests so vexatious as to be an abuse of the process of the Court) there seems to be fair ground on which the Court may interpose to prevent a proceeding so oppressive as a personal arrest in a foreign country, at the commencement of a suit, in a case which, as far as we can judge at present, authorizes no proceeding against the person in the country in which the transaction passed. If there could be none in France, in my opinion there can be none here. I cannot conceive that [142] what is no personal obligation in the country in which it arises can ever be raised into a personal obligation by the laws of another. If it be a personal obligation there, it must be enforced here in the mode pointed out by the law of this country; but what the nature of the obligation is must be determined by the law of the country where it was entered into, and then this country will apply its own law to enforce it.

HEATH J. I wish I could concur in opinion with my Lord; for I think this a very hard case. This affidavit swears as strictly as possible to a debt due on a written contract. It being a foreign contract the party has been called upon to produce it, and shew of what nature it is, before we allow the Defendant to be held to bail. Now this, on consideration, does seem to me to be a personal contract, and if it be so, I have not the least doubt that the Defendant should be held to bail. That being the case, we all agree, that in construing contracts, we must be governed by the laws of

(a) Shepherd admitted that he had not been able to find any account of such a case in this court.

the country in which they are made; for all contracts have a reference to such laws. But when we come to remedies it is another thing, they must be pursued by the means which the law points out where the party resides. The laws of the country where the contract was made can only have a reference to the nature of the contract, not to the mode of enforcing it. Whoever comes into a country voluntarily subjects himself to all the laws of that country, and therein to all the remedies directed by those laws, on his particular engagements. If an Irish peer comes over to this country, he may be arrested on a contract entered into in Ireland, though his privilege would have protected him in that country. It would be hard if it were otherwise, since the advantage would not be mutual between the contracting parties. Suppose the Duke de Fitzjames might have been arrested by the law of France, and that he could not by our law, in that case he would have had the advantage; as it is, the Plaintiff has obtained an advantage, and ought not to be deprived of it. I shall be glad, however, if my Brother Rooke shall agree in opinion with my Lord, since it is a case which deserves compassion.

ROOKE J. I entirely agree with my Lord Chief Justice. Though the contract, on the face of it, may seem to bind the person of the Duke de Fitzjames, by the words, "binding himself," &c. yet being made abroad, we must consider how it would be understood in the country where it was made. According to [143] the affidavit which has been produced on one side, and not contradicted by the other, this contract is considered in France as not affecting the person. Then what does it amount to? It is a contract that the Duke's estate shall be liable to answer the demand, but not his person. If the law of France has said that the person shall not be liable on such a contract, it is the same as if the law of France had been expressly inserted in the contract. If it had been specially agreed between the parties not to consider the Duke's person liable, and under those circumstances he had come over here, there would have been no difference between us; for if it were agreed there that the person should not be liable, it would not be liable here. Now as far as I can understand the contract, this is the true meaning of it. The defendant is not bound by the mere words of the contract, but has a right to explain by affidavit how it would be considered in France. With the explanation given I am satisfied, and being satisfied with it, I think the Defendant should be permitted to enter a common appearance.

Rule absolute (a).

HUTCHINS v. HESKETH. Nov. 23d, 1797.

If a prisoner brought up to be discharged under s. 13, of the Lords' act, deliver in a false schedule and is remanded, the Court will not at the instance of a creditor, even with the prisoner's consent, order him to be brought up a second time, for the purpose of amending his schedule and assigning over that property which he had before concealed.

The Defendant, a prisoner in the Fleet, had formerly applied to the Court to be discharged under the Lord's act (32 Geo. 2, c. 28), and accordingly at that time delivered into Court a paper by way of schedule, stating that he was possessed of no property; on which he was remanded, the Plaintiff undertaking to pay him his groats. The Plaintiff having since discovered that the Defendant had some property at the period of his former application.

Clayton Serjt. moved the Court to have him brought up under s. 16, of the above act, in order that he might be compelled to assign over such property.

EYRE Ch. J. I am not prepared at present to direct the prisoner to be brought up and have a new oath tendered to him, by which, if he takes it, he must be convicted of perjury.

ROOKE J. I think we cannot make this order.

Clayton, having been desired by the Court to look into this matter, this day mentioned, that he now had the consent of the pri-[144]-soner to assign his effects by amending his schedule, and moved that he might be brought up for that purpose.

Sed per EYRE Ch. J. This motion is not made on any affidavit, stating any misapprehension on the part of the prisoner at the time of delivering in his schedule.

What reason then is there for our doing what is desired of us? If a man in the situation of the Defendant had made a mistake, the Court would go as far as possible to assist him. But this is not that case. This is a detected man who has dared to give in a schedule as the schedule of a man without effects, when he really had effects. Here we are without apology for allowing him to amend his schedule. Should we assist him in his attempt to avoid those heavy penalties which are imposed by the act on persons who have conducted themselves in this way? He may possibly escape those penalties for aught I know, but it must not be by any act of this Court. Nor is it necessary for the sake of the creditor that we should interpose. If the Defendant really has such effects as the Plaintiff supposes, he may procure a title to them without coming to this Court. We shall not, after what has passed, order the prisoner to be brought up on this suggestion.

Clayton Serjt. took nothing by his motion.

SIR B. HAMMET, KNT. AND OTHERS v. SIR W. YEA, BART. Nov. 25th, 1797.

A. being a banker in the country, discounts bills at four months for B. and takes the whole interest for the time they have to run; B. on being asked how he will have the money, directs part to be carried to his account, part to be paid in cash, and part by bills on London, some at three, some at seven, and some at 30 days' sight; and held not to be an usurious transaction, so as to induce the Court to grant a new trial, since the surplus of interest taken by A. might be referable to the expences of remittance (a)¹.

Debt on bond for 25,200l.

Pleas.—1st, Non est factum; 2d, 3d, and 4th, Usury in the manner of discounting a promissory note for 1800l dated the 13th of August 1795, and payable four months after date. 5th and 6th, Usury in the manner of discounting a promissory note for 3000l. dated the 25th August 1795, and payable four months after date. 7th and 8th, Usury in the manner of discounting a promissory note for 2300l. dated the 17th Sept. 1795, and payable four months after date: Each of the seven last pleas averring that the bond in question was given to secure to the plaintiffs (among other sums of money) the payment of the promissory note to which it related.

Replication. Issue joined on the first plea. To the seven last, "that it was not corruptly and against the statute, &c. agreed, [145] &c. as the said defendant hath in that behalf alleged;" tendering issue (a)².

(a)¹ And see *Marsh v. Martindale*, 3 B. & P. 154. *Kent v. Lowen*, 1 Campb. 177, 8. *Carstairs v. Stein*, 4 M. & S. 192. *Gilpin v. Enderby*, 5 B. & A. 954, 961.

(a)² The special pleas, which were drawn and settled with much consideration, were as follows:

1st, That after the 29th day of September A.D. 1714, and before the making of the said writing obligatory, to wit, on the 14th day of August, A.D. 1795, at, &c. the said J. H. was possessed of and interested in a certain note in writing, commonly called a promissory note, bearing date the 13th day of August in the said year of our Lord 1795, made and subscribed by the said J. H., whereby the said J. H. four months after date promised to pay to the said Sir William Yea or order 1800l. value received. And the said Sir W. afterwards, to wit, on, &c. at, &c. indorsed the said promissory note; his own hand being thereunto subscribed, and delivered the said promissory note so indorsed to the said J. H., and the said promissory note being so made and indorsed, and the said J. H. being so possessed thereof as aforesaid, after the 29th day of September A.D. 1714, and before the making of the said writing obligatory, to wit, on, &c. at, &c. it was corruptly and against the statute made in such case agreed between the said Plaintiffs, then and there being bankers and partners, and carrying on the business of bankers in partnership, and the said J. H. that the said Plaintiffs should lend to the said J. H. 1770l. in manner following; (that is to say,) that the said Plaintiffs, on the said 14th day of August in the said year of our Lord 1795, at Taunton in the county of Somerset, to wit, at London aforesaid, in the parish and ward aforesaid, should deliver to the said J. H. a certain bill of exchange in writing, drawn by them the said Plaintiffs on certain persons trading under the stile and firm of Sir James Esdaile and Co. for 500l. payable three days after sight of

[146] Rejoinder. Issue joined.

The bond in question was given to secure the payment of six promissory notes at four months, drawn by one James Haviland, to the order of the Defendant, and by him indorsed to the Plaintiffs, who were bankers at Taunton, (*viz.* one dated the 1st of July for 1500l.; one dated the 13th of August for 1800l.; one dated the

that bill of exchange; and also a certain other bill of exchange in writing, drawn by them the said Plaintiffs upon the said persons trading under the stile and firm of Sir James Esdaile and Co. for other 500l. payable seven days after sight of the said last mentioned bill of exchange; and that the Plaintiffs then and there, to wit, on, &c. at, &c. should lend and advance to the said J. H. other 470l. and should give credit to the said J. H. for other 300l. in account between them the said Plaintiffs, as such bankers and partners as aforesaid and the said J. H.; and that they the said Plaintiffs then and there, to wit, on, &c. should forbear and give day of payment to the said J. H. of the said 1770l. so to be lent to the said J. H. in manner aforesaid, until the said 1800l. mentioned in the said promissory note should become due and payable according to the form and effect thereof; (that is to say,) until the 16th day of December in the said year of our Lord 1795, and that they the said Plaintiffs for such loan and forbearance of the said 1770l. so to be lent and forborne as aforesaid, should take 30l. when the said 1800l. mentioned in the said promissory note should become due and payable according to the form and effect thereof, to wit, on the 16th day of December in the said year of our Lord 1795, and that for securing the payment to the said Plaintiffs, as well of the said 1770l. as of the said 30l. the said J. H. should deliver to the said Plaintiffs the said promissory note so made and indorsed as aforesaid, to wit, at, &c. And the said Sir W. further saith, That in pursuance of the said agreement, the said Plaintiffs afterwards, to wit, on, &c. at, &c. did lend to the said J. H. the said 1770l. in the manner so agreed upon as aforesaid, and did forbear and give day of payment of the said 1770l. until the said 1800l. mentioned in the said promissory note should become due and payable according to the form and effect thereof, to wit, until the 16th day of December in the said year of our Lord 1795. And the said Sir W. further saith, That in further pursuance of the said agreement, and for securing the payment to the said Plaintiffs, as well of the said 1770l. as of the said 30l. the said J. H. afterwards, to wit, on, &c. at, &c. did deliver to the said Plaintiffs, and the said Plaintiffs did take and receive from the said J. H. the said promissory note so made and indorsed as aforesaid: And the said Sir W. further saith, That the said 30l. so agreed to be taken as last aforesaid by the said Plain-[146]-tiffs for the said loan and forbearance of the said 1770l. in the manner so agreed upon as aforesaid, is above the rate of 5l. for the forbearance of 100l. for a year, to wit, at, &c. And the said Sir W. further saith, That he the said Sir W. afterwards, and after the said 29th day of Sept. A D. 1714, to wit, on, &c. at, &c. sealed, and as his act and deed delivered to the said Plaintiff the said writing obligatory with the said condition thereunder subscribed, for securing to the said Plaintiffs the payment of the said 1800l. mentioned in the said promissory note among other sums of money; and the said Plaintiffs then and there, to wit, on, &c. at, &c. accepted and took the said writing obligatory from the said Sir W. for the cause and purpose last aforesaid. By means whereof, and by force of the statute made in that case, the said writing obligatory is wholly void in law; and this, &c. wherefore, &c.

The 2d plea stated a corrupt agreement to discount the same note thus: That the Plaintiffs should lend J. H. 1770l. in manner and at the time following, *viz.* 770l. on the 14th Aug. 500l. on the 22d Aug. and 500l. on the 27th Aug. and should forbear and give day of payment of the 1770l. until the promissory note should become due; and that for the loan and forbearance of the said 1770l. the Plaintiffs should take 30l. when the promissory note should become due.

The 3d plea; That the Plaintiffs should give credit to J. H. for 300l. on the 14th Aug. and should forbear and give day of payment of that sum till the promissory note should become due; and should lend to J. H. 1470l. thus, *viz.* 470l. on the 14th Aug. 500l. on the 22d Aug. and 500l. on the 27th Aug.

The 4th plea, (which was on the note for 3000l.) after averring that J. H. was indebted to the Plaintiffs in 2500l. stated the corrupt agreement to discount thus; That the Plaintiffs should forbear and give day of payment of the 2500l. till the

25th of August for 3000l.; one dated the 17th Sept. for 2300l.; one dated the 17th of October for 2000l.; and one dated the 26th of October for 2000l.; amounting in all to 12,600l.), and all of which had been discounted by them. The [147] Defendant however in his pleas made no mention of the note for 1500l. or either of those for 2000l. but only relied on the manner in which the three bills for 1800l. 3000l. and 2300l. had been discounted, as usurious; which was as follows:

The note for 1800l. was discounted on the 14th of August, thus:

| | | | |
|---|-----------------|---|---|
| By a draft on Sir James Esdaile and Co. payable to Haviland or order, three days after sight, for | £500 | 0 | 0 |
| By ditto, at seven days sight, for | 500 | 0 | 0 |
| By cash carried to the credit of Haviland's running account | 300 | 0 | 0 |
| By twenty-three cash notes of the Plaintiffs, payable on demand at their bank at Taunton or in London for 20l. each | 460 | 0 | 0 |
| By one ditto for 10l. | 10 | 0 | 0 |
| | <hr/> £1770 0 0 | | |

The remaining 30l. was taken as interest on the note for the four months it had to run from the day on which it was discounted.

The note for 3000l. was discounted on the 24th (a) of August, thus:

| | | | |
|---|-----------------|---|---|
| By a draft on Sir James Esdaile and Co. payable to Haviland or order, thirty days after date, for | £250 | 0 | 0 |
| By cash in discharge of a returned note of Haviland's, dated the 18th of April 1795, and indorsed by the Defendant, for | 1500 | 0 | 0 |
| By cash carried to the credit of Haviland's running account | 1200 | 0 | 0 |
| | <hr/> £2950 0 0 | | |

The remaining 50l. was taken as interest on the note for the four months it had to run from the day on which it was discounted.

promissory note should become due; and should lend to J. H. 450l. in this manner, viz. 200l. on the 26th Aug. and 250l. on the 28th Sept. and should forbear and give day of payment of the 450l. till the promissory note should become due; and that for forbearing and giving day of payment of the 2500l. and for the loan and forbearance of the 450l. the Plaintiffs should take 50l. when the promissory note should become due.

The 5th plea stated an agreement that the Plaintiffs should lend to J. H. 2950l. in this manner, viz. 2700l. on the 26th Aug. and 250l. on the 28th Sept. and should forbear and give day of payment of the 2950l. &c.

The 6th plea, (which was on the note for 2300l.) after averring that J. H. was indebted to the Plaintiffs in 1000l. stated that it was corruptly agreed between J. H. and the Plaintiffs, that the Plaintiffs should lend to J. H. 2261l. 13s. 4d. thus: That they should forbear and give day of payment of the 1000l. till the promissory note should become due, and should deliver to J. H. a bill of exchange on Sir James Esdaile and Co. for 500l. at thirty days sight, and another for 300l. at the same number of days; and that the Plaintiffs should give credit to J. H. for 461l. 13s. 4d. and should forbear and give day of payment of the 2261l. 13s. 4d. till the note should become due, and for such loan and forbearance should take 38l. 6s. 8d. when the promissory note should become due.

The 7th plea, after averring that J. H. was indebted to the Plaintiffs in 1000l. stated a corrupt agreement to discount thus: That the Plaintiffs should forbear and give day of payment of the 1000l. till the promissory note should become due, and should lend to J. H. 1261l. 13s. 4d. in this manner, viz. 461l. 13s. 4d. on the 24th Sept. 500l. on the 27th Oct. and 300l. on the same day; and should forbear and give day of payment of the 2261l. 13s. 4d. &c.

(a) This note was dated the 25th, and discounted on the 24th, being one day too soon, by mistake.

[148] The note for 2300l. was discounted on the 24th Sept.(a)¹ thus :

| | | | |
|---|------------------------|----|---|
| By cash in discharge of a returned note of Haviland's, dated the 15th of May 1795, indorsed by the Defendant, for . . . | £1000 | 0 | 0 |
| By a draft on Sir James Esdaile and Co. payable to Haviland or order, at thirty days after date, for . . . | 300 | 0 | 0 |
| By ditto, at thirty days after date, for . . . | 500 | 0 | 0 |
| By twenty cash notes of the Plaintiffs for 10l. each . . . | 200 | 0 | 0 |
| By cash carried to the credit of Haviland's running account . . . | 261 | 13 | 4 |
| | <hr/> £2261 13 4 <hr/> | | |

The remaining 38l. 6s. 8d. was taken as interest on the note for four months.

When the above notes were brought to the Plaintiffs to be discounted, the manner in which the money was to be advanced, and the respective dates of the drafts on the house of Sir James Esdaile and Co. were directed by the persons who brought them, and who (as it appeared from the evidence of the managing clerk in the Plaintiff's house) might, had they wished it, have had either cash or bills payable on demand. Nothing was charged by the Plaintiffs for commission, postage, stamps, &c.

This cause was tried before Eyre Ch. J. at the Guildhall Sittings after Trinity term 1797, when his Lordship directed the special jury, that the charge of usury rested wholly on the Plaintiff's having made no rebate of interest on the bills which had a long time to run ; that they appeared to be in the nature of a remittance of the borrowers money to London, and that if the Plaintiffs had not taken more than a reasonable compensation for their trouble, unless indeed the mode of payment had been made a term on which alone the bills would be discounted, it was not usury ; that as to the bills of a short date there appeared to him to be little doubt ; that if the bills had borne a very long date, it would have been strong evidence of a device to elude the statute ; but that the bills at thirty days seemed to be of a middle kind ; and it was for them to draw the line. The jury without hesitation found a verdict for the Plaintiffs. But on its being suggested that Lord Kenyon in *Matthews qui tam v. Griffiths*, Peake's Ni. Pri. 200, had delivered an opinion decidedly contrary to the verdict then given, Eyre Ch. made an order for the Plaintiffs to enter up their judgment as of [149] Trinity term, according to an undertaking of the Defendant, but that execution should be staid, in order to give the Defendant an opportunity of applying to the Court for a new trial.

Accordingly a rule having been obtained to shew cause why the judgment should not be set aside and a new trial be had between the parties.

Adair and Le Blanc Serjts. were this day called upon to begin in support of the rule (a)². Wherever more than five per cent. per annum is taken for the loan or forbearance of money, with the knowledge and by the agreement of the parties, it is usury, whatever the nature of the transaction may be. On the principle of the laws against usury no consent or request of the person borrowing can make any alteration in the case, since those laws were made to protect indigent men against themselves. Indeed the form of pleading on the statute of usury shews that the consent of the borrower can never vary the case ; since it is always stated that it was "corruptly

(a)¹ This note having been dated the 17th, and not discounted till the 24th of the same month, the whole discount ought not to have been taken ; but being admitted to be a mistake, that was not insisted upon.

(a)² The following preliminary objection to the argument was taken by Shepherd Serjt. That a writ of error had been brought on the first day of this term, the motion for a new trial made on the second, and bail in error since justified ; that the Defendant therefore had no right to have a motion for a new trial discussed, having expressed his intention of withdrawing the subject from the consideration of the Court ; that he recollected a similar case in K. B. where the Court were of that opinion. Sed per Eyre Ch. J. Perhaps the writ of error was brought under an apprehension of execution being sued out on the first day of term. Where a point of importance is depending and the effect of such an objection as the present would be to shut out that point in the court of error, we shall not allow the objection to prevail.

agreed," which necessarily implies consent. Wherever country bankers have been allowed to receive more than five per cent. they have received it as a compensation for the risk, trouble, and expence of remittance. Here the idea of referring the excess of interest to those circumstances can only be an after-thought (b)¹, as it formed no part of the original transaction, which was a mere transaction of loan and discount, and not of remittance. If indeed it could be divided into two parts, and the Court could understand that after the money had been paid down to the borrower upon the bills, a second application had been made to the banker to remit part of that money to London, a question might then arise if the sum taken under the term of remittance was such as any custom authorized. Whether such a charge of remittance were a device to evade the statute or not, would be a point [150] to be determined by the jury. But there is an essential difference between the cases where a charge is professedly made for commission, and where no such charge is professed to be made, but more than five per cent. is actually taken. Nothing can take the latter case out of the statute; but in the former it will at once appear to the Court and jury, whether the sum taken is a fair charge for what it purports to be. If this had been a transaction of remittance, the banker would have had some certain rule to go by in his charge, as in the *Sudbury case* (a), where 5s. per cent. were taken; but here one bill for 500l. is drawn at seven days, and another for the same sum at thirty days. Though the party remitting has a right to stipulate for a compensation for the trouble and expence of remittance, yet he is not allowed to charge it in the shape of interest. This was the decided opinion of Lord Kenyon in the case of *Matthews qui tam v. Griffiths and others*, Peake's Ni. Pri. 200 (b)².

Shepherd and Runnington Serjts. contra. It is admitted that more than 5l. per cent. may be taken, if taken for commission eo nomine. But the name cannot make the transaction more or less usurious, for if it be substantially usurious no device will protect the party; and, whether the money be received under one name or another, the reasonableness of the charge must be decided by a jury. The objects of the statute were two: 1st, To make void all bonds, contracts, and assurances for payment of money lent upon usury. 2dly, To punish the party who takes such usurious interest. Before the first of these provisions therefore can attach, there must be a contract, 4 Bl. Com. 158. *Loyd v. Williams*, 3 Wils. 261. *Murray v. Hardinge*, 2 Bl. 865, per Gould J. The terms of that contract are matter of fact. If it appears not to have been in the contemplation of the parties to take usurious interest, it will not avoid the bargain. *Abrahams qui tam v. Bunn*, 4 Burr. 2253. The question to be tried on this record was the existence of a corrupt contract, which has been negatived by the jury. They have determined that the money received was fairly referable to the expence of remittance as much as if it had been specifically stipulated for on that account. The contract for discount was complete when the borrower said, I want bills discounted, and the lender answered, I will discount them. The remittance was as distinct a transaction as if it had taken place on [151] another day. If therefore no part of the original contract was usurious, nothing subsequent to that will vitiate the bond. 4 Burr. 2253. So in *Floyer v. Edwards*, Cowp. 115, Lord Mansfield says, "Usury is an agreement originally to pay the principal, with interest above the rate of 5 per cent." and cites Hawk. P. C. c. 82, s. 19. That a party is entitled in some cases to take, not only 5 per cent. for legal interest, but also a reasonable sum for remitting, and other necessary incidental expences, is clearly settled. *Auriol v. Thomas*, 2 T. R. 52. *Bodily v. Bellamy*, 2 Burr. 1096. The true distinction is, whether the conditions of the contract are imposed on the borrower or not; in the present transaction they were not. So where there is nothing to which the money taken can be applied, but interest, it is usury. But here the excess of interest was fairly applicable to the expences of remittance. As to the case of *Matthews qui tam v. Griffiths*, it may be distinguished from the present, for Lord Kenyon

(b)¹ In *Maddock q. t. v. Sir B. Hammett and others*, 7 T. R. 185, Lord Kenyon said: "It shall not be permitted to a party who has knowingly received any thing as interest, to apply it afterwards to another account as he finds it convenient."

(a) *Winch q. t. v. Fenn*. Sittings after H. T. 1786, B. R. before Buller J. cit. 2 T. R. 52.

(b)² The decision of that case was fully recognised by His Lordship in *Maddock q. t. v. Sir B. Hammett and others*, 7 T. R. 185.

himself observed that a second discount had there actually been paid on the notes in question.

EYRE Ch. J. I will begin with stating my assent to the proposition, that where a party on a contract for a loan intentionally takes more than 5l. per cent. per ann. for forbearance of that loan, he is guilty of usury. But I add to it this further proposition, that whether more than 5l. per cent. is intentionally taken upon any contract for such forbearance, is a mere question of fact for the consideration of the jury, and must always be collected from the whole of the transaction as it passes between the parties. And I am of opinion that it never can be determined that any particular fact constitutes or amounts to usury, till all the circumstances with which it was attended, have been taken into consideration. As on the one hand I am to carry into effect a law which the policy of all times has deemed useful, and which expressly provides against any subtle devices or evasions by which its penalties may be eluded (and had it not been so provided, I should have thought it my duty to use all the influence of my situation to prevent such devices and evasions from having any effect); so on the other hand common justice requires that the whole of the transaction should be before the jury, and should be taken fairly, with a just application of all the circumstances to every conclusion of fact which the evidence will warrant. Being of that opinion I cannot agree to the doctrine laid down at the Bar, that this transaction was necessarily to be taken to be a mere transaction of loan and not of remittance; I think there was room to consider it as a mixed case [152] of loan and remittance, and that we should do great injustice to the party, if we were to confine it to one and exclude the other. What is this case in matter of fact? Haviland applies to have his bills discounted; to which the banker agrees, and calculates the interest upon the time the bills have to run, as is usual. He asks how Haviland would have the money? Haviland desires to have a part in cash, part in account, and part in bills on London of different times to run. Had the banker told down the money, or tendered bank notes, and had Haviland put them into his pocket, or swept them into his hat, and then said, "But I want to send money to London; will you take part of my money back and give me bills?" and the banker had accordingly done so and given these bills, I cannot see that there would have been any colour for calling it an usurious transaction. Are we then to administer justice on such frivolous distinctions as the difference between the case I have put, and the case which actually happened? Can the usury depend on the circumstance of the money being told down or not? It was proved by the witness that the banker asked, "How will you have the money?" Which short question includes whether he would have it in cash or in cash notes, or in account, or whether he had any desire to have part of it remitted for him to London? the answer completes the transaction. Few words are necessary among men of business. Bills on London are given to a certain amount, and the rest is taken in cash, or that which is equivalent to cash. When we are construing any particular circumstance given in evidence in order to found a conclusion of fact in any case, and especially in a case of usury arising upon a transaction between men of business, we ought to deal with those circumstances according to the common sense of mankind. Surely there is a great difference between transactions with bankers, and the ordinary transactions between man and man. What passed between the parties, one of them being a banker, was equivalent to an agreement by the banker to discount Haviland's bills in cash; and equivalent to the actual discount of them; and also equivalent to an agreement to remit a part of that cash to London for Haviland; for which last purpose bills on London were given. Is there any thing unreasonable in the nature of this transaction? It has now become the course for bankers in the country to have credit on some house in London which is maintained at no small expence, and by means of which remittances are made with great facility. But let us simplify this idea. A. [153] says to B. take my specie, you can find better means of conveying it to London than I can, and pay it to the person in London whom I shall appoint. In such a case, A. could not have sent his specie by the post, but must have hired a waggon for that purpose. Now if B. has established a mode of conveyance which renders the remittance more easy to him, what is that to A. whose money is remitted? Is not the banker entitled to a recompence for the accommodation he affords to his customer; and if in such cases the remittance is usually made by bills of thirty days, is not that a fair measure of a recompence, supposing there is no device in the transaction, and that the remittance is not intended to be used as a colour for

putting more money into the bankers pockets for the mere forbearance of a loan than is allowed by law? I stated to the jury that if the banker had imposed this remittance on the borrower as a term of the discount, it would have been usury. I might have added, that if all consideration of loan were out of the case, a banker may lawfully take as much money as he can get for his bills without the least regard to the time they have to run. The authority of a case said to have been determined at *Nisi Prius* have been very properly pressed upon us in the argument. Certainly the opinions of the Judge who is said to have decided that case are at all times entitled to the highest respect from me, and from every Judge in Westminster-hall, and I never will hastily decide against the advised opinion of that great lawyer. But in my apprehension we are here debating no question of law; we are examining the evidence of a mere matter of fact, on an inquiry into a transaction between a banker and his customer. According to the letter of that case, as it has been reported to us, it was said, that unless the payment is made in ready money (*a*), the transaction is usurious; this would at once put an end to the banker's business. Neither in this nor in any other case of the same kind, does it necessarily happen that a single farthing in ready money passes between the parties. Here part of the money was carried to Haviland's account, the whole might [154] have been, and non constat when it would be actually advanced in cash by the banker. The counsel for the Defendant supposed a case where part of the money was not to be paid till a month after the transaction. I agree that would be taking interest for money not in any sense advanced, and would amount to usury. But if part of the money were carried to the account of the borrower, though he did not mean to draw for it for some time, and did not actually draw for it till the whole time on the discounted bill was expired, no man would doubt of the fairness or lawfulness of the transaction; and yet an interest is gained for the whole of that time, upon money not actually advanced. Suppose on discounting a bill a banker gives his cheque made payable on demand; every one considers it as cash, because it may be converted into cash directly; yet it may happen that the money may not be demanded for any given length of time. I am inclined to think that the jury considered these thirty days bills as cash; and there is a great deal to be said for it. It is true that they may be discounted by a bolder, and so the taker of them may be charged with double interest, but they may also circulate through the country up to the moment of their falling due as cash, and may pass to all effective purposes as such, and though I do not think it fit for me to say that such bills are always to be considered as cash, because an ill use might be made of it, yet I cannot say that the verdict in this view of it was improper in this case. My opinion being, that the real transaction was just the same as if the whole sum had been told down, and then a part had been returned for bills drawn to suit the borrower's convenience, for the purpose of remitting the money to London; I repeat, that I cannot agree that in usury, more than in any other case, the whole transaction is not to be taken together: that it is not to be analyzed and reduced to all the parts of which it is composed, and to all the conclusions of fact, which fairly result from the whole of the evidence; and that the law does not arise from a fact so considered. Whether more than 5 per cent. be intentionally taken for the loan and forbearance of money, is the question of fact to be decided by the jury. If it be proved that a bill is discounted, partly in cash, and partly in bills upon London, payable of course at a future day; this is but evidence to prove the fact in question, and may or may not prove that fact according to the explanations which may be given. If more than 5 per cent. was gained by the transactions, the excess according to circumstances might have been usu [155]-rious, or might arise from a part of the transaction collateral to the mere loan; lawful in its nature, and extremely convenient to the other party; neither unjust nor oppressive; contrary neither to the letter nor

(a) According to a manuscript note of *Matthews q. t. v. Griffiths*, mentioned by the council in support of the rule, Lord Kenyon in the course of his opinion used the following expressions: "Where a party takes 5 per cent. discount as for ready money, and yet does not pay ready money, but bills payable at a future day, though both parties consent to this transaction, and though it may be for the convenience of both, I am clear that it is usury." And, "This is an offence against the statute of Usury, for taking 5 per cent. for that which was not money at the time, and which was incapable of being converted into money's worth up to the extent for which the discount was taken."

to the spirit of the statute. Nor do I think there is any danger in this doctrine. The transaction is always before a jury. It is for them to say whether it is a device, or a fair agreement on good consideration; whether if there be any overplus, after the 5 per cent. taken for discount, it is properly referable to some lawful collateral consideration, or not; if it be so referable, we should do the grossest injustice, if instead of distributing the transaction into the parts of which it is composed, we were by a strict literal construction upon evidence to pronounce the contract to be what in substance it is not, a contract for mere loan and forbearance. On the whole of the case, I see no sufficient ground to say that the verdict is wrong. I thought the transaction so far doubtful at the trial, that I wished the jury to consider whether the giving these bills on London was not a mere cover for an usurious contract. I said that if the bills were drawn at a longer date than is usual in the course of business, it ought to be construed as a device. They were the best judges, and they thought there was no device: had they determined the other way, I should not have quarrelled with their verdict; but I think there is no sufficient reason for granting a new trial.

HEATH J. I am of the same opinion with my Lord, and cannot therefore think this a case in which we should grant a new trial. This was a transaction which commenced in discount and loan, and terminated in remittance. The question then is, Whether these two things must be consolidated, or whether they may not be divided? Now I think upon the evidence reported, that that question cannot be again raised here, if it has once been properly submitted to the jury; since they have decided it. The subsequent transaction of remittance was no part of the antecedent contract; the bargain for the discount was complete, and then the banker asked the person who brought the bill, how he would have the money. The true question is, whether the terms of the remittance formed the consideration of the loan; for if they did, the transaction was usurious. I agree to the general proposition of law as laid down by the Defendant's counsel, but think it a question for the decision of a jury. As to the case put at the Bar, of an agreement to leave a certain sum in the banker's hands for a month, that would be a clear device to elude [156] the statute, and no jury could doubt of the intention. Those who advanced money may impose their own terms on those who are in want of it; but those who come with money to purchase bills, not being distressed men, need never be imposed upon. In the west-country thirty days is the usual time for which the bills are made to run; and sometimes money is given for those bills, when there is more money to be paid in London than there are bills upon that place. Considering the discount and remittance as separate transactions, and the jury having found a verdict agreeable to the evidence, I think we cannot meddle with it.

ROOKE J. I agree in opinion with my Lord and my Brother Heath. By the statute law of this land, it is usury to take more than 5l. per cent. per annum. But where money is advanced under particular circumstances, a man may be warranted in taking more than 5l. per cent., if the surplus be taken for additional expence, risk, and trouble; generally speaking, where a party prefers taking bills instead of ready money, it would be right for the banker to say, "I will make a rebate for the time the bills have to run." But if he does so, he has a right to add, "I must have so much for my trouble and expences;" and on saying this, a new contract would commence, and it would be for the jury to determine whether a fair sum was taken or not. Here bills are brought to the banker to be discounted, and he asks, "How do you choose to take the money, in cash or in bills, and for what time?" The person who brought the bills, took part in cash and part in bills at different dates. It was left to the jury to consider whether this was not colourable, and more in fact taken for the commission than was proper; and the jury found that nothing more was taken than was reasonable. On a penal statute shall we be so strict for the purpose of defeating a fair claim? For I cannot but consider this defence in the same light as I should a proceeding on the other branch of the statute; and think the present transaction entitled to as favourable a construction as if it were the subject of a penal prosecution.

Rule discharged.

[157] MILLIKEN v. FOX AND ANOTHER. Nov. 27th, 1797.

The Court will not allow a Defendant to strike out the entry of a judgment of nolle prosequi entered by the Plaintiff, as to one of the counts of his declaration after it has been demurred to. Nor will it in that stage of the proceedings determine a question of costs respecting such a count (b).

A rule was moved for by Shepherd Serjt. calling on the Plaintiff to shew cause why the entry of the judgment of nolle prosequi as to the first count of the declaration in this cause should not be struck out, or why the Plaintiff should not pay the costs of the count on which the nolle prosequi was entered.

The declaration was for goods sold and delivered, with a quantum meruit and the common money counts. In the first count it was by mistake stated, that the Defendant "was indebted for sold and delivered," leaving out the word "goods." This count was demurred to, and judgment recovered pleaded to the others; on which the Plaintiff entered a nolle prosequi as to the first count, and replied nul tiel record to the other pleas.

Shepherd contended that the Plaintiff's object was to deprive the Defendant of his costs on the demurrer, and cited *Couper v. Tiffin*, 3 T. R. 511, where the 8 Eliz. c. 2, s. 2, was relied on; he said there were other cases where it had been held that after a demurrer, the Plaintiff cannot enter a nolle prosequi, *Rose & ux v. Bowler*, 1 H. Bl. 108. *Drummond v. Durant*, 4 T. R. 360.

Le Blanc Serjt. shewed cause in the first instance, and endeavoured to prove that the object of the application made so late in the term was only to carry the cause over till next term. He urged that if the Defendant was entitled to any costs, they would be allowed on taxation after the trial of the cause, and that if the officer exercised his discretion improperly, then would be the season to apply to the Court.

EYRE Ch. J. The single question is, Whether the Plaintiff has a right to enter a nolle prosequi in this stage of the proceeding? *Relictâ verificatione non vult ulterius prosequi* is to be found in every book of entries. The right to costs is a matter for future consideration.

Shepherd Serjt. took nothing by his motion (a).

[158] KEATE v. TEMPLE. Nov. 27th, 1797.

On a motion for a new trial by a Defendant in an action against him for goods delivered to the use of a third person on his undertaking to see the Plaintiff paid, the Court will take into consideration not only the expressions used, but the particular situation of the Defendant at the time of his undertaking, and the amount of the sum for which he will thereby be made liable.

Assumpsit for goods sold and delivered, work and labour, and common money counts.

Plea. Non assumpsit.

This cause was tried before Lawrence J. at Winchester summer assizes 1797, when the principal facts in evidence were as follow:

The Plaintiff was a tailor and slopseller at Portsmouth, and the Defendant the first lieutenant of His Majesty's ship the "Boyne." When that ship came into port, the Defendant applied to a third person to recommend a slopseller who might supply the crew with new cloaths, saying, "He will run no risk; I will see him paid." The Plaintiff being accordingly recommended, the Defendant called upon him, and used these words, "I will see you paid at the pay-table; are you satisfied?" The Plaintiff answered, "Perfectly so." The cloaths were delivered on the quarter deck of the

(b) Vide *Parker v. Baglis*, 2 B. & P. 73. *Bertram v. Gordon*, 6 Taunt. 444.

(a) Vid. *Goddard v. Smith*, Salk. 456. *Parker v. Sir T. Lawrence and Neill and Wood*, Hob. 70. *Slowley v. Evelyn*, ib. 180. *Sir John Sands and Packsal, Broca's case*, 2 Leon. 177.

After demurrer in law joined, if the Court doth give a day over, at that day the Demandant or Plaintiff is demandable, and therefore may be nonsuit. Co. Litt. 139 b.

"Boyne:" slops are usually sold on the main deck: the Defendant produced samples to ascertain whether his directions had been followed: some of the men said, that they were not in want of any cloaths, but were told by the Defendant that if they did not take them, he would punish them; and others, who stated that they were only in want of part of a suit, were obliged to take a whole one, with anchor buttons to the jacket, such as are usually worn by petty officers only. The cloathing of the crew in general was light and adapted to the climate of the West Indies, where the ship had been last stationed. Soon after the delivery, the "Boyne" was burnt, and the crew dispersed into different ships. On that occasion, the Plaintiff having expressed some apprehensions for himself, was told by the Defendant "Captain Grey (the Captain of the 'Boyne') and I will see you paid; you need not make yourself uneasy." After this the commissioner came on board the "Commerce de Marseilles" in order to pay the crew of the "Boyne"; at which time the Defendant stood at the pay table, and having taken some money out of the hat of the first man who was paid, gave it to the Plaintiff; the next man refused to part with his pay, and was immediately put in irons. The Defendant then asked the commissioner to stop the pay of the crew, who answered that it could not be done.

[159] The learned Judge in his directions to the jury said, that if they were satisfied on the evidence, that the goods in question were advanced on the credit of the Defendant as immediately responsible, the Plaintiff was entitled to a verdict; but if they believed that at the time when the goods were furnished, the Plaintiff relied on being able, through the assistance of the Defendant, to get his money from the crew, they ought to find for the Defendant.

Verdict for the Plaintiff 576l. 7s. 8d.

A rule nisi for a new trial having been obtained on a former day by Shepherd Serjt. on the ground of the Defendant's undertaking being within the statute of frauds (29 Car. 2, c. 3, s. 4).

Le Blanc and Marshall Serjts. now shewed cause, and contended that the only question in the case had been left to the jury, and decided by them, viz. Whether the sailors were liable in the first instance, and the Defendant only came in aid of their liability: or whether the Defendant was immediately responsible? They said that if the "Boyne" had been burnt before the delivery of the goods, the Plaintiff would have had no communication with the crew, and of course no ground of action against them; if therefore they were not liable on the original contract, the subsequent delivery would not shift the credit upon them.

Shepherd Serjt. in support of the rule, was stopped by the Court.

EYRE, Ch. J. There is one consideration, independent of every thing else, which weighs so strongly with me, that I should wish this evidence to be once more submitted to a jury. The sum recovered is 576l. 7s. 8d. and this against a lieutenant in the navy: a sum so large that it goes a great way towards satisfying my mind that it never could have been in the contemplation of the Defendant to make himself liable, or of the slopseller to furnish the goods on his credit, to so large an amount. I can hardly think that had the "Boyne" not been burnt, and the Plaintiff been asked whether he would have the lieutenant or the crew for his pay-master, but that he would given the preference to the latter. The circumstances of this case create some prejudice against the Defendant, but which I think capable of explanation. There is some appearance of harshness in making the men purchase these cloaths against their inclination. But it was in evidence, that though they were pretty well cloathed, yet their cloaths were adapted to a warm climate rather than to the service in which they [160] were to be engaged. It was therefore the bounden duty of the officer to take some course to oblige the crew to purchase proper necessaries. We all know that a sailor is so singular a creature, so careless of himself, that he cannot, though his life depend upon it, be prevailed upon, without force, even to bring up his hammock upon deck to be aired. We know that he will risk any danger in order to employ his money in a way that he likes, rather than lay it out in that provident method which his situation may require. The whole of the imputation then on the Defendant and Captain Grey amounts to this, that when the men were to be cloathed, they wished them to be somewhat well dressed. I do not know but that this circumstance may have had some influence with the jury. But I do not feel the force of it when opposed to the weight of the evidence on the other side, so as to make the officer liable for so large a sum. From the nature of the case it is apparent that the men were to pay in

the first instance: the Defendant's words were "I will see you paid at the pay-table; are you satisfied?" and the answer then was, "Perfectly so." The meaning of which was, that however unwilling the men might be to pay themselves, the officer would take care that they should pay. The question is, Whether the stopman did not in fact rely on the power of the officer over the fund out of which the men's wages were to be paid, and did not prefer giving credit to that fund, rather than to the lieutenant, who, if we are to judge of him by others in the same situation, was not likely to be able to raise so large a sum? Considering the whole bearing of the evidence, and that the learned Judge who tried the cause has not expressed himself satisfied with the verdict, I think this a proper case to be sent to a new trial.

HEATH J. I am of the same opinion.

ROOKE J. I am of the same opinion.

Rule absolute on payment of costs.

[161] MACDONALD v. PASLEY. Nov. 27th, 1797.

C. by virtue of an order from B. to receive all money due to him on a particular account obtains three out of four instalments due from A. to B. on that account; these payments are afterwards questioned by B. who brings his action against A. for the whole sum, and at the same time C. demands the 4th instalment; an application to the Court by A. to stay proceedings in the action against him by B. on his paying the 4th instalment to such person as they should appoint, was refused.—Semb. That nothing but a power of attorney or will, complying with the provisions of 26 Geo. 3, c. 63, and 32 Geo. 3, c. 34, will warrant the payment to third persons of money due from the public to sailors and marines.

The Plaintiff had been a sailor on board the "Romney," belonging to Commodore Johnson's squadron in 1781; the Defendant was the prize agent of that ship.

In 1789 the Plaintiff made the following note—

"Liverpool, Nov. 23, 1789.

"Please to pay to Mr. Abraham Joseph, or order, my share of prize-money for the 'Romney,' for prizes captured by the fleet under Commodore Johnson, for which this shall be your discharge.—From your humble servant,

"To the agents for the 'Romney,' London.

his
"JOHN + MACDONALD,
mark.

"Witness, W. L. Moyley."

All the prize-money due to the Plaintiff on account of the captures made in 1781. (which was payable by four instalments, viz. 3l. 4s.; 4s.; 2l. 15s. 6d.; and 3l. 2s. 6d), had been paid to one Grant as indorsee of the above note; except the first instalment of 3l. 4s. The present action was brought by Macdonald against the Defendant, for the whole sum, and Grant at the same time claimed the 3l. 4s. still unpaid, as due to him.

A rule having been obtained to shew cause why, on payment of 3l. 4s. to such persons as the Court should appoint, all further proceedings on the action should not be stayed,

Adair Serjt. shewed cause, and contended that the payments to Grant could not discharge the Defendant, since the note on which they were made did not comply with the directions of 26 Geo. 3, c. 63 (a), and 32 Geo. 3, c. 34, which were passed to

(a) By 26 Geo. 3, c. 63, s. 1, "No letter of attorney or will made by any petty officer or seaman in the service of His Majesty, &c. to empower any person to receive wages, pay or allowances of money of any kind due for such service, shall be good, unless made revocable; if made by any such officer or seamen then in the service of His Majesty, &c. such letter of attorney or will must be signed before and attested by the captain, &c. and shall specify the name of the ship and also the number at which the maker stands upon the ship's book; if made by any such officer or seaman discharged from the service of His Majesty, and within the bills of mortality, it shall be attested by an officer appointed by the treasurer of the navy; if at any of the ports where seamen's wages are paid, by the treasurer of the navy's clerk; if at any other

[162] protect sailors and marines from imposition. He insisted that if it was necessary to subject a letter of attorney to the restrictions of the above act, a fortiori it was so with respect to an order like the present, which was a less solemn instrument.

Le Blanc Serjt. in support of the rule said, that the Defendant was ready to pay into court the 3l. 4s. for the benefit of those to whom it belonged: that in his present situation he must defend this action, with a certainty of paying costs to the Plaintiff, if he failed, or to Grant if he succeeded; and that as the acts alluded to only related to letters of attorney, they were out of the question in the present case.

EYRE, Ch. J. We ought not to decide against the Plaintiff on this summary application. If the sum of 3l. 4s. had been the extent of the Plaintiff's demand, and another person besides the Plaintiff had claimed it of the Defendant, he would then have been in the situation described: and having different claims made upon him for the same thing, it would be reasonable that he should be relieved. But that is not the state of the present case. Here the plaintiff says, that all the money which has been paid to Grant has been paid by the Defendant in his own wrong. There is a great deal of colour for the argument which has been used respecting the nature of the authority under which these payments have been made. If the legislature thought fit to put a power of attorney under particular regulations, there is great reason to suppose that it was meant that the agent should not be discharged by any thing less than a power of attorney. The Defendant is not in that situation in which the Court ever does or can interfere. If he can shew that the payments have been made on good grounds he may then bring the 3l. 4s. into court.

Per Curiam. Rule discharged (a)¹.

[163] SPARENBURGH v. BANNATYNE. Nov. 27th, 1797.

A native of a foreign state in amity with this country, taken in an act of hostility on board an enemy's fleet, and brought to England as a prisoner at war, is not disabled from suing while in confinement, on a contract entered into as a prisoner at war (a)².

Assumpsit for wages due to the Plaintiff as a seaman.

Pleas. 1st, Non assumpsit.

2d. That the Plaintiff is an alien, born in foreign parts, to wit, in Holland, in parts beyond the seas, out of the allegiance of the King of Great Britain, and within the allegiance of a foreign power, and that before the suing out of the original writ of the Plaintiff, and before the said day and year in the said declaration mentioned, to wit, on, &c. a public and open war was commenced, waged, and carried on, and from thence hitherto hath been, and still is waged, and carried on, between our Lord the now King and his subjects, and the persons exercising the powers of government in Holland and the inhabitants and people of Holland under such government, to wit, at, &c. And that the Plaintiff before the said day and year in the said declaration mentioned, and at the suing out of the said original writ of the said Plaintiff, and also at the commencement of the said war, was and ever since has been and still is an enemy of our said lord the King, adhering to the persons so exercising the powers of government in Holland, and so being enemies of our said lord the King as aforesaid, to wit, at, &c. And this the Defendant is ready to verify: wherefore, &c.

3d Plea. The same as the second; only omitting "That the Plaintiff is an alien, borne in foreign parts, to wit, in Holland, in parts beyond the seas, out of the allegiance of the King of Great Britain, and within the allegiance of a foreign power."

place by the minister," &c. By s. 2, "every such letter of attorney or will shall contain the name of the ship to which the person granting the same last belonged, the residence, profession, or business of the person in whose favour it is made, and the day of the month and place where it was executed." By 32 Geo. 2, c. 34, s. 1, these provisions are extended to marines; and by s. 2, "No letter of attorney or order made by any petty officer, seaman, marine, &c. discharged from the service of His Majesty shall be good and valid, for receiving wages, prize-money, or other allowances of money due for such service, unless attested by a clerk of the treasurer of the navy," &c.

(a)¹ Vid. *Turtle v. Hartwell*, 6 T. R. 426.

(a)² Vide *Maria v. Hall*, 2 B. & P. 236. S. C. 1 Taunt. 33. *Rex v. Depardo*, 1 Taunt. 26. *Bazett v. Meyer*, 4 Taunt. 824, 834.

Replication. To the first Plea, joinder in issue.

To the 2d. Protesting that the said Plea, and the matters therein contained, in manner and form as the same are above pleaded and set forth, are not sufficient in law to bar the Plaintiff from having and maintaining his aforesaid action against the Defendant: nevertheless, for replication in this behalf the Plaintiff saith, That he, before the making the said several promises and undertakings of the Defendant, in the said declaration mentioned, to wit, on, &c. was a prisoner of war, in custody of the forces of our Lord the King, in parts beyond the seas, to wit, at the island of Saint Helena, to wit, at, &c. and being such prisoner as aforesaid, he the Plaintiff then and there was, by and with the consent and permission of the commanding officer of [164] the forces of our said Lord the King, at the island of Saint Helena aforesaid, hired, employed, and retained by the Defendant to serve as a seaman and mariner in and on board the said ship or vessel called the "Caledonia," on his retainer, and at his special instance and request; and he the Plaintiff did then and there serve as such seaman or mariner in and on board such ship or vessel on a certain voyage whereon the said ship or vessel was then bound, to wit, from the island of Saint Helena aforesaid, to the port of London aforesaid, to wit, at, &c. Without this, that he the Plaintiff, at the time of suing forth the original writ of him the Plaintiff, was, or at any time hitherto hath been, an enemy of our said Lord the King, adhering to the persons exercising the powers of government in Holland, and so being enemies of our said Lord the King, as in and by the said plea is above alleged. And this he is ready to verify: wherefore, &c.

To the 3d Plea. Inducement and traverse, the same as to the 2d.

Rejoinder. Tendering issue on the traverses.

Surrejoinder. Joinder in both issues.

This cause was tried before Eyre Ch. J. at the Guildhall Sittings after last Trinity term, when it appeared in evidence, that the Plaintiff, being a native of Oldenburgh in Germany, was taken prisoner at the Cape of Good Hope, he then serving as a sailor in the Dutch fleet under Admiral Lucas; that he was sent from the Cape to Saint Helena, in a British frigate, as a prisoner of war, and was there put on board the "Caledonia," a British merchantman, then in great want of hands, by order of the governor of the place, that during the voyage from Saint Helena to England he was treated like the rest of the crew, and did his duty to the satisfaction of the captain, the Defendant in the action; that on his arrival here, he was taken over to the commissary with the other prisoners taken on board the Dutch fleet, and was at the time of the action brought in custody as a prisoner of war. Verdict for the Plaintiff, 24l.

Shepherd and Heywood Serjts. on a former day, moved for a rule to shew cause why the verdict should not be set aside, and a new trial be had; which was granted by the Court, after some hesitation.

Marshall Serjt. now shewed cause. First, the Plaintiff being a German born is not an alien enemy within the legal acceptation of the term. Though there is no exact definition of alien enemy in any of the text writers, yet all the entries describe him in the same way. *Alienigena natus in regno Franche in com. de B. sub [165] ligeantiâ adversarii domini regis Angliæ, de Franciâ, de patre et matre inimicis ipsius domini regis Angliæ, et eidem adversario suo adherentibus oriundus, &c.* Rast. 252. 3 Instructor Cler. 16. That the place of birth is material appears from 3 Salk. 28. Comb. 212, and Carter, 48 and 191, in which last case it was objected, that the general averment of the Plaintiff's birth in the United Provinces was not sufficient, because there might be some place in those countries not under the jurisdiction of the King's enemies. Secondly, Supposing the Plaintiff a native of Holland, and taken in actual hostility to this country, yet under the circumstances of the case he is entitled to recover. Having entered into a contract with the license of the King's officer, that license may be presumed to have been given with the King's permission; and a license to contract, necessarily implies a license to sue. The plea of alien enemy is not now favoured by the courts. Formerly an alien enemy was disqualified in all cases, and his goods might be seized: the reason given was, that his property was forfeited as a reprisal for the damage committed by the enemy. Gilb. H. C. P. 205. The reason at this day for the disability of an enemy is, that he shall not recover effects which, being carried from hence, may enrich his country: and it has been holden, that the subject of a power at war, who came here before the war broke out, or who

comes here even in time of war, with the King's permission, may maintain an action. *Wells v. Williams*, 1 Salk. 46. Lord Raym. 282. The disability is now confined to two cases, viz. where the right sued for is acquired in actual hostility, *Anthony v. Fisher*, Dougl. 649, n. ; and where the Plaintiff being an alien enemy is resident in the enemy's country. *Brandon v. Nesbit*, 6 T. R. 23. *Bristow v. Towers*, 6 Term Rep. 35. Thirdly, This defence is founded on an idea of a right in the conqueror to reduce his prisoners to slavery, which is contrary to the law of nations. If the commanding officer may compel the prisoners to labour, and subject them to punishment for disobedience of orders, there is nothing to prevent his selling them for slaves. Among barbarous nations prisoners of war are put to death with cruelty ; in a more advanced state they are sold for slaves ; among civilized nations both are disavowed, and their persons are only confined, till ransomed or exchanged. Grotius de Jure Belli ac Pacis, l. 3, c. 7, s. 9. If it be said that the Plaintiff has made himself an enemy by his own act, the answer is, that a person who owes no natural allegiance to the power at war with us, may by his own acts cease to be an enemy and become [166] a friend ; his character of enemy continuing no longer than while he adheres to the enemies of the King.

Shepherd and Heywood Serjts. in support of the rule. Notwithstanding the language of the entries, there is no ground afforded by any of the text writers for supposing that the disability of an alien depends upon his birth. In Co. Litt. 129 b. an alien enemy is spoken of as "a subject to one that is an enemy to the King," not as a native of the country at war. Nor in the following books, Thelwall's Dig. l. 1, c. 4. 1 Black. Com. 372. Terms de la Ley, 36. Fost. C. L. 185. H. P. C. 164, which treat of an alien enemy, is any mention made of birth. It is true that birth raises and perpetuates the character of alien enemy ; for by the law of England allegiance always follows the person ; and if by the law of any other country the party could rid himself of his allegiance by his own act, it ought to be replied that he had done so. The circumstance of birth however is no farther material than as it is one of the cases which constitute alien enemy, and even that is not decisive ; for Lord Holt says that a person may be born in a country at enmity with us, and yet *infra ligeantiam Angliæ* ; and he instances the attendants of an ambassador. Comb. 212. Now the present Plaintiff, when he accepted a commission from the Dutch government, (for the commission of the ship is his commission,) became a subject of Holland, owed allegiance to Holland, and was liable to be prosecuted for the breach of it as a traitor. If then the Plaintiff ever became a subject of Holland, the next question is, how far that character has been altered by subsequent events? A prisoner at war must be considered as much the subject of the country from which he was taken, as when he was in actual service ; and his detention is justified on no other principle than that of preventing such country from having the benefit of his service again. If he be released, he will become *sui juris*, and may put off the temporary allegiance which he owed to the country under which he served : but the period is not arrived at which the present Plaintiff is become *sui juris*. The conqueror might have slain him in battle : now the mercy of the conqueror has not changed his character ; but it continues the same in prison, as when no mercy had been extended to him. The Plaintiff is not treated as a neutral in this country, nor does that character attach while he continues a prisoner : if he endeavoured to escape and was shot in the attempt, the soldier shooting him would not be tried by the municipal law. He is confined and fed like any of [167] the other Dutch prisoners. Indeed it is said, Vattel, l. 3, c. 15, s. 230, that "volunteers taken by the enemy are treated as if part of the army in which they fight." The reason why no other plea is to be found in the entries than that of alien enemy *née*, is because no other person coming under the description of alien enemy could be resident here. If an action be brought by a native of an hostile state, the Defendant may plead alien enemy on the discovery of the Plaintiff's birth : but any other alien becomes *sui juris* by residence, except in the present case of a prisoner at war. The only remaining question relates to the license of the officer. The act of an individual can no more remove the disability of an alien enemy to contract, than it can create the character of alien enemy. Bro. Abr. Denizen, pl. 20. Unless this were so, any Englishman by contracting with an alien enemy might relieve him from that character : but license is an act of state. Besides, if license is to be relied on, it should have been pleaded, 7 Mod. 150. 1 Ld. Raym. 282. In *Brandon v. Nesbitt*, 6 T. R. 23, there were two pleas exactly similar to the

second and third in the present case, and though they were demurred to, the Defendant had judgment.

LYKE Ch. J. The question is, Whether on the evidence produced in this case the Plaintiff is to be considered as an alien enemy at the time when the writ issued? If he must be so considered, I take it to be a necessary consequence that this action must fail. The fact is, that this man, being a native of some part of Germany, and therefore a neutral by birth, was found on board a ship belonging to the enemies of this country, and was captured in actual hostility. What then is his situation? Having been taken in the act of hostility, he is either a pirate, or quoad that act of hostility a subject of the prince or power under whose commission he acted. No doubt, this man being a neutral by birth committed an act of hostility against this country, under a commission from a state at war with this country. So far I take to be clear. I therefore go a great way with the Defendant's counsel, who have argued that at this day the form of the plea of alien enemy, which states the party to be alien enemy born, is not absolutely necessary to be adhered to in exclusion of every other case of enmity. In the course of the argument we have had many reasons and authorities adduced to shew, that if a man is really to be considered as alien enemy, though not a native of the country at war, he is so to be considered as to all the con-[168]-sequences which apply to alien enemy by birth. But here the Plaintiff became an enemy in consequence of having participated in one single act of hostility. Now suppose it had been the pleasure of this state to shew him favour. Suppose this had been said, "You are a neutral, and perhaps have been drawn into the act in which you were engaged: you are at liberty to return to your own country, or you may remain here, as you are the subject of a prince in amity with us." It has been admitted in argument, that as soon as he should become *sui juris*, the character of enemy would be purged. If then the Crown had not thought fit to hold the Plaintiff prisoner at war, he could not have been considered as sustaining the character of enemy, but would have been treated as the subject of a state in amity with this country. The difficulty of the case, if there be difficulty, arises from the Plaintiff having been detained as prisoner at war: it has been contended that if, at the moment of capture, he was alien enemy, that character must continue till he ceases to be prisoner at war. That part of the argument I never was satisfied with; I cannot deny that he was captured as alien enemy; at that moment he was so: but how came he to be so? Not in consequence of any permanent character of enemy, but because he had joined in one act of hostility, for which act he is not, according to the rigour of antient war, put to the sword, or delivered into the hands of the individual who took him prisoner, to be kept prisoner by him, till he should receive the ransom; but he remains in the hands of the King till he is ransomed by an exchange for the benefit of the state, or set at liberty by the King's command. But how does this tend to fix on him the permanent character of an alien enemy? That character arises from the party being under the allegiance of the state at war with us; the allegiance being permanent, the character is permanent, and on that ground he is alien enemy, whether in or out of prison. But a neutral, whether in or out of prison, cannot, for that reason, be an alien enemy; he can be alien enemy only with respect to what he is doing under a local or temporary allegiance to a power at war with us. When the allegiance determines, the character determines. He can have no fixed character of alien enemy who owes no fixed allegiance to our enemy, and has ceased to be in hostility against us; it being only in respect of his being in a state of actual hostility that he was even for a time an enemy at all. As a prisoner of war, how does he differ from any [169] other individual who is in custody for an offence which he has committed, and for which he is answerable? Captain Vaughan (*a*) was not an alien enemy, but being a natural born subject of this realm, he became a traitor; for that he was put in prison, for that he answered, and with his life. But it was for that act of hostility merely. With regard to his character of a subject, he remained, till the moment of his execution, as if that act had never been committed. There is very little light to be procured from our books, to assist us in our inquiry, how far a neutral joining in an act of hostility is to be considered as having acquired the character of alien enemy. The subject was indirectly discussed in the case of Captain Vaughan to which I have alluded. He was charged in the

indictment (a)¹ with adhering to the King's enemies, by cruising cum subditis Gallicis; the fact was, that many of his crew were not natural born subjects of the French King, but Hollanders. It was made a question whether the Hollanders could be called subditi Gallici; and though the point was not authoritatively decided, because some of the crew were certainly French, which was sufficient to support the indictment, yet it was held by Holt Ch. J. and agreed to by the rest of the Court, that the Hollanders by accepting a commission from the French King became subditi Gallici and so remained, during the continuance of their service, in a state of qualified subjection, arising out of the service and determining with it. This, had it been the very point in judgment, would have gone a great way towards deciding the present question. The commission under which the Plaintiff, being a German, acted, was put an end to by the capture of the frigate in which he was. After that time he had no opportunity of continuing in the service of the State of Holland; and his temporary character of alien enemy ceased and determined with the authority under which he acted. *Captain Vaughan's case*, as far as it goes, draws a line, and fairly marks out when that character begins, and when it shall end. I am of opinion that it is determined by the very nature of the subject, and being so determined, why should we desire to enlarge the disability of the Plaintiff, or continue it, until the war is concluded? Why, but in order to let in one of the harshest, one of the most impolitic, nay immoral defences that ever was set up in a court of justice? This man, whether he was under a safe conduct or not, did his duty faithfully, and was duly approved of by the officer of the "Caledonia." That ship was in such distress, that she was, as it appeared at the trial, under the necessity of taking in more hands at Lisbon, and probably would have been lost without such assistance as was afforded by the Plaintiff. He now only asks for a moderate reward, and is paid with a plea of alien enemy. This is certainly one of the hardest cases I ever knew, and I think we ought to lean against it. And if a distinction is to be found between the permanent character of alien enemy, to which the courts of justice cannot give protection, and the temporary character, we shall readily adopt it. As to the ground of policy which has been taken in argument for the Defendant, namely, that a benefit would result to the enemy from the Plaintiff's recovering; it is a policy, perhaps doubtful, certainly remote, and which I do not hold to be satisfactory. I take the true ground upon which the plea of alien enemy has been allowed is, that a man, professing himself hostile to this country, and in a state of war with it, cannot be heard if he sue for the benefit and protection of our laws in the courts of this country. We do not allow even our own subjects to demand the benefit of the law in our courts, if they refuse to submit to the law and the jurisdiction of our courts. Such is the case of an outlaw. Modern civilization has introduced great qualifications to soften the rigours of war; and allows a degree of intercourse with enemies, and particularly with prisoners of war, which can hardly be carried on without the assistance of our courts of justice. It is not therefore good policy to encourage these strict notions, which are insisted on contrary to morality and public convenience. As the real justice of the case is with the verdict, and a legal distinction to exclude this unworthy defence can fairly be maintained, I think no new trial should be granted.

HEATH J. I am quite of the same opinion with my Lord, and I am glad that some legal ground can be found, on which we may repel this dishonest defence. I will first consider, Whether in a plea of alien enemy, it is necessary to state that the Plaintiff is alien enemy by birth? The forms of pleading have always been considered as strong evidence of the law, and it is said that they all aver that the party was born in the country at war with us. But I observe that in 4 Mod. 405, where the plea was "alienigena in regno Franciæ sub ligeantia adversarii domini regis, &c. oriundus," exception was taken on demurrer that it ought to have been natus, and some precedents being cited out of Rastall, where the word "natus" was supplied by "oriundus," the plea was held good. Next as to the general question, the pleas state that the [171] Plaintiff was adhering to the King's enemies; they must be proved in all their parts; but a prisoner at war is not adhering to the King's enemies, for he is here under protection from the King. If he conspires against the life of the King, it is high treason (a)²; if he is killed, it is murder; he does not therefore stand in the same

(a)¹ See 6 State Trials, Appendix.

(a)² Peter Molieroe, a French prisoner, was indicted for privately stealing in a C. P. iv.—27*

situation as when in a state of actual hostility. It has been said, that a prisoner at war cannot contract; his case would be hard indeed if that were true. Officers on their parole must subsist like other men of their own rank; but according to such doctrine they must starve; for they could gain no credit if deprived of the power of suing for their own debts. It has also been urged, that if the Plaintiff was under a protection, that circumstances ought to have been pleaded, and this is true of a formal protection under the great seal; but there may be a protection arising from situation, which need not be pleaded. If a prisoner of war is in confinement, he is protected as to his person; if he is on his parole, he requires further protection than what relates merely to his person. The contract in question was made by the permission of the King's officer, and therefore by the licence of the King, under whose authority the officer may be presumed to have acted. I will add one case to shew that a prisoner at war may sue and be sued. The son of the celebrated Mississippi Law was brought over here as a prisoner at war, and being on his parole was arrested for 10,000*l.* by the executor of a creditor, who swore that he was indebted as appeared by the testator's books; he was discharged however, not because he was a prisoner at war, but because the executor had not inserted in his affidavit that he was indebted "as he believed." If a prisoner of war can be sued, there is no reason why he should not sue. How is it with felons? They may be charged in execution, and yet their bodies are at the King's disposal. For these reasons I think the Plaintiff, being a prisoner at war at the time of making the contract, may maintain an action on that contract, and is protected by law.

ROOKE J. This question does not come before us upon demurrer, but on the single point whether the issue is rightly found. The defence has no foundation in conscience, in justice, or in public policy, and I do not feel disposed to assist it. An enemy under the King's protection may sue or be sued: that cannot be doubted. A prisoner at war is, to certain purposes, under the King's protection, and there are many cases where he can maintain an action. I will suppose that an officer of high rank on his [172] parole is possessed of a ring or a jewel of great value, on which he wants to raise money, and that a tradesman is so dishonest as to receive it from him, and refuse either to advance the money or return the pledge. Surely the Court would say that he might recover his ring or his jewel from the tradesman. The present Plaintiff has in fact done much the same thing. Under the licence of the King's officer he pledged his labour at St. Helena, in order to procure a more comfortable subsistence. Accordingly he worked his way over, and earned a reasonable compensation. That being the case, I see no reason why he should not recover, even if he were alien enemy born. But as my Lord has not thought proper to go so far, I speak to that point with diffidence; and shall rather avail myself of the distinction which has been drawn between the temporary and permanent character of alien enemy; laying in a claim however, to say, at any future day, that a person in the situation of the Plaintiff is like the officer who pledges his jewel; for this contract was made under the licence of those who had authority to license the contracting party.

Rule discharged.

ROTHWELL v. COOKE. Nov. 27th, 1797.

In an insurance on a ship at and from Hull to Bilboa, warranted to depart from England with convoy, the voyages from Hull to Portsmouth where she meets with convoy, and from thence to Bilboa, may be considered as distinct, and in case of a loss between the two latter places, an apportionment and return of premium may be demanded (a).

This was an action on a policy of insurance on the ship "Manning" at and from Hull to Bilboa, warranted to depart from England with convoy: the declaration also contained a count for money had and received.

jeweller's shop. Sir Michael Foster thought it improper to proceed capitally against him upon a local statute, and directed the jury to acquit him of privately stealing, but to find him guilty of simple larceny. *Fost.* 188.

(a) Vide *Penson v. Lee*, 2 B. & P. 330.

The cause was tried before Eyre Ch. J. at the Guildhall Sittings after last Easter term, when it appeared in evidence that the ship sailed from Hull to Portsmouth, and from thence departed with a convoy, which, not being direct for Bilboa, she afterwards left, and was captured; on this evidence the Plaintiff would have been nonsuited; but on his counsel insisting that he was entitled to a verdict for the premium, which had not been returned, under the count for money had and received, a verdict passed for the Plaintiff for the whole premium.

To set aside this verdict and enter a nonsuit, a rule nisi was obtained by the Defendant in Trinity term last, on the ground of the risk having commenced.

Le Blanc Serjt. in the same term shewed cause. I contend that there were two risks; one from Hull to the place where the convoy was to be met with, and another from thence to the port of [173] discharge. In *Stevenson v. Snow*, 3 Burr. 1237, 1 Bl. 315, 318, the premium was apportioned on this ground. In that case, though a usage was found by the jury, yet it was disclaimed by the Court as the foundation of their opinion. Lord Mansfield said, in the case of *Long v. Allen*, Park. 390. "My opinion has been to divide the risks." The doctrine of these cases was attempted to be controverted when this rule was first granted by the three cases of *Tyrie v. Fletcher*, Cowp. 666. *Loraine v. Tomlinson*, Doug. 585, and *Bermon v. Woodbridge*, Doug. 781. The first of these is distinguishable from the present as having been an insurance for a term of twelve months, and the ship captured at the end of two; the Court there recognised the case of *Stevenson v. Snow*, but thought the case under their consideration not within its principle. The second was also an insurance for time; in such cases there can be no division of risk, for if the principle were once admitted, no line could be drawn; since if the premium were apportioned for each month, it might as well be apportioned for each week or each day. The third, which was a policy at and from Honfleur to the coast of Angola, during the stay and trade there, at and from thence to St. Domingo, and at and from St. Domingo back to Honfleur, was decided on the ground of the risk having been considered by the parties, as one entire risk and not divisible, especially as there was no contingency mentioned on the happening of which the insurance could be put an end to. *Stevenson v. Snow* was also recognised in that case. Here two voyages are imported on the face of the policy; the risks are of different natures, one being without convoy, the other with. If this were not the case, the going into a particular port, as Portsmouth, would be a deviation from the original voyage from Hull to Bilboa.

Shepherd Serjt. in support of the rule. Two cases have been relied on, *Long v. Allen* and *Stevenson v. Snow*. In the first an express usage was found by the jury, which must have been supposed to have been known to the parties, and therefore incorporated into the contract. In the latter also a usage was found by the jury; and though the Court rejected it for uncertainty, yet Lord Mansfield says, in *Tyrie v. Fletcher* that "they argued from it that there being such a custom plainly shewed the general sense of merchants as to the propriety of returning a part of the premium in such cases." The principle of the cases of policies for time does not differ from the present; and Lord Mansfield says, in *Bermon v. Woodbridge*, "if you could apportion the premium in any case, it [174] would be in insurances upon time." On the face of this policy there are not two voyages, unless it be considered as a general rule that there are two voyages wherever the convoy is not appointed at the port of loading.

EYRE Ch. J. We will consider of this case. Either the voyage insured is to be considered as in effect two voyages with two distinct premiums, or one voyage only with one premium. Supposing there were two voyages; if the ship had been lost on the first, there ought to be a return of premium upon the second; but I cannot think that in such a case a return would have been demanded. *Bermon v. Woodbridge* is very strong against two voyages; the outward bound voyage might there have been considered as a distinct risk; and if it was there thought that no return should be made, it shakes the principle of *Stevenson v. Snow*. Before we decide in favour of a return, we must see distinctly that there were two voyages and two distinct premiums consolidated into one.

HEATH J. It is difficult to reconcile the cases on principle. One went on usage; in *Stevenson v. Snow*, on the other hand, usage was disclaimed, and yet the Court relied on the opinion of all mankind, which is usage.

ROOKE J. As these contracts are entered into every day, we ought to adhere to the decisions on the point. Where the Courts have decided against a return of

premium, they have distinguished the cases from *Stevenson v. Snow*. It has been the course of construction to divide such a policy as this into two voyages. If the ship does not depart from Portsmouth with convoy, the contract ceases as to the latter part, though it remains good as to the former. The word England here answers to the word Portsmouth in other cases. As the Courts have been anxious not to overturn *Stevenson v. Snow*, I should be unwilling to do what they have avoided. That case is probably considered as law at Lloyd's coffee-house.

Cur. adv. vult.

Early in this term the Court recommended the parties to compromise the matter. In consequence of which it was not mentioned again till this day, when the Court finding on inquiry that it had not been settled,

EYRE Ch. J. said, The verdict now stands for the return of the whole premium, and the question is, Whether it should stand for the whole, for none, or for a part? If for a part, I do not know how we are to settle it; it must depend on there being or not being [175] some rule to be found to direct us in making the decision. Certain it is, that if the ship had been lost in coming round to Portsmouth, the underwriters would have been liable; it is not therefore reasonable that they should have been so liable without retaining a proportion of the premium. You should inquire whether there is any rate of premium among the underwriters from Hull to Portsmouth, and whether the premium has ever been apportioned where there has been only one insurance, without distinguishing the different risks in the policy. If you can find any rule, I recommend you to adopt it. But if you cannot agree, we think the whole premium ought not to be returned; and therefore the present verdict must be set aside, and the case go to a new trial.

Per Curiam. Rule absolute.

ATKINSON v. ABRAHAM. Nov. 27th, 1797.

It is no ground for setting aside an award, that one of the Defendant's witnesses was re-examined by the arbitrator after the evidence was closed on both sides, and the Plaintiff's attorney gone, though by a different testimony from what he gave at first the arbitrator's opinion was influenced: Unless such re-examination was brought about by the management of the Defendant's attorney.

Williams Serjt. moved for a rule to shew cause why an award made in consequence of a reference in an action of trover for a ewe and lamb, at the last Lent assizes, before Thompson B. should not be set aside.

The ground of the application was this: After the evidence before the arbitrator was closed on both sides, and the Plaintiff's attorney was gone, one of the Defendant's witnesses was re-examined, and gave a testimony different from that which he had given before, and by which the arbitrator confessed his judgment was influenced.

Sed per EYRE Ch. J. Upon what ground in law is it that the second examination will impeach this award? This is clear, that if the arbitrator thought proper to ask the witness a question for his own information after the evidence was closed, that circumstance will not induce us to set aside the award. If indeed it appeared that there was any surprize in it; that the second examination had been brought about through the management of the Defendant's attorney, that might be a good ground of objection. Besides, this seems a matter of too little consequence to be opened again.

Per Curiam. Rule refused.

[176] BROUGHTON v. MARTIN. Nov. 28th, 1797.

The Court will discharge a Defendant out of custody who is in execution at the suit of a Plaintiff some time since deceased, on whose part no will has been proved, nor any administration granted, and whose family, on notice of a motion for the above purpose, declines interfering (a).

Shepherd Serjt. on a former day moved for a rule to shew cause why the Defendant should not be discharged out of custody, on an affidavit, stating that he had been

(a) Vide *Parkinson v. Horlock*, 2 N. R. 240.

three years in execution at the suit of Delves Broughton Esq. who died at Gibraltar sixteen months previous to this application, and that he had caused a search to be made in the Commons, the result of which was, that no will had been proved there, nor any administration granted.

At first the Court doubted; but afterwards granted a rule nisi, directing, at the same time, that it should be made part of the rule, that notice of the present motion should be served on the attorney of the Broughton family.

On this day Shepherd mentioned this matter again, and cited the case of *Wagstaffe v. Darby*, 1 Barnes, 366; and the attorney for the Broughton family attending and informing the Court that the relations of the deceased declined interfering, and had not taken out, and did not mean to take out, letters of administration,

The Court said they wanted nothing but precedent to warrant them in doing what was desired, as it was a reasonable thing to be done; and that as the Broughton family had received notice, and there was no probable ground to suppose that administration would be taken out, they thought they might make the

Rule absolute.

CROOKS, ONE, &C. v. HOLDITCH. Nov. 28th, 1797.

Bailable process was sued out previous to the passing of the 37 G. 3, c. 45, which regulates the form of the affidavit to hold to bail; this process was renewed four several times without any new affidavit, and the 4th renewal, on which Defendant was arrested, was subsequent to the passing of the above act; and held no objection to such process that it was founded on an affidavit not complying with the 37 G. 3, c. 45.

Cockell Serjt. shewed cause against a rule nisi for entering a common appearance, the affidavit to hold to bail having omitted to negative a tender in bank notes.

The affidavit was made on the 10th March 1796, on which a writ of attachment of privilege was sued out; but the Plaintiff not having been able to arrest the Defendant before the return of that writ, renewed his process four several times; the last process was taken out after the passing of the Bank Act, 37 G. 3, c. 45, and the Defendant was actually arrested on 5th July 1797.

Shepherd Serjt. in support of the rule. It does not appear on the face of the process on which the Defendant was arrested, that [177] any former process had issued. The præcipe was "attachment for William Crooks Gent. one, &c. against &c. Oath 17l. and upwards." The question is, Whether a new affidavit made according to the directions of the act, was not necessary, when the last process was sued out?

EYRE Ch. J. The continuances ought to have been by alias and pluries; and though these subsequent writs may, by mistake, have issued in the form of first process, yet in the nature of the thing, they must be considered as continuances. If the affidavit was regular at first, no new affidavit can be requisite. We cannot say that what once was regular, is irregular now, because an act of parliament has intervened. That act requires, that with respect to all holding to bail on affidavit, subsequent to the date of it, the affidavit shall express so and so, which cannot apply to regulate the form of an affidavit made before the passing of the act. We must adopt a construction which does not require impossibilities.

Per Curiam, Rule discharged.

FRANCISCO v. GILMORE. Nov. 28th, 1797.

A. captain of an India country trader contracts in India with B. for a crew according to the custom of the country; A. arrives in England with the crew, and then makes a voyage with them to the West Indies and back again; action by part of the crew for wages due on the West India voyage; and held on motion for a mandamus to examine witnesses in India, that the cause of action did not arise in India, within 13 G. 3, c. 63, s. 44.

The Defendant was captain of the "Eliza-Anna," an India country trader, and the Plaintiff one of her crew. It is the custom of the India country trade for the captains of ships to contract with a person called a Serang (or captain of an Indian crew) for a

number of seamen, for whom he pays the Serang at a certain rate per man per month; the captain is not answerable to the crew for their wages, but to the Serang alone, to whom the crew look for payment. In this manner the Defendant contracted with a Serang at Bengal for a crew; his ship was then taken up by the government of that country, and sent to England with rice; having landed her cargo here, she was sent with troops to the West Indies, and from thence back again to England with invalids. Being again arrived here, the Plaintiff, together with eighteen other seamen, quitted the ship, and commenced actions against the Defendant for wages; to which he put in bail, and soon after sailed for India, with the Serang and the rest of the crew on board.

Shepherd Serjt. on a former day moved, that a writ in the nature of a mandamus might issue in this cause, directed to the mayor and aldermen for the time being, being the judges of the mayor's court at Bombay in the East Indies, commanding them [178] the said mayor and aldermen to hold a court for the examination of witnesses on the part of the Defendant in this cause, and for receiving proofs in this cause pursuant to the directions made in the 13th year of the reign of his present Majesty (*a*), and to perform all such other matters and things as by the directions of the said statute are required, and that the depositions taken in manner aforesaid might be transmitted, under seal of the said Court, to one of the secondaries of this honorable Court, and that the same might be read and given in evidence in this cause, and that the trial of this cause might be put off until after the return of the said writ.

The grounds of the application were, that the contract with the Serang in Bengal was the cause of action, and that the Serang and many of the crew, who were natives of India, and resident there, were material witnesses in the cause.

The Court granted a rule nisi, but directed that notice should be given to the Solicitor of the East India Company of the situation of the Plaintiff and the other eighteen seamen.

Cockell and Marshall Serjts. now shewed for cause affidavits stating the circumstance of the West India voyage, which had not been disclosed by the original affidavits; and that the action was brought for wages earned during the voyage from London to the West Indies and back again; and they contended, that the cause of action arose in London, and not in India, and therefore did not come within the meaning of the act.

Adair Serjt. for the East India Company, said, that the Company, on application, always relieved the distress of persons in the Plaintiff's situation, and not only those who were in their own service, but frequently those left here by foreign ships.

In support of the rule, Adair and Shepherd insisted, that although the voyage to the West Indies was not in the contemplation of the parties when they left India, yet that as the Defendant had contracted with the Serang for each man at a rate per month, it was a general contract, not limited to any particular voyage; and [179] that the testimony of the Serang was indispensably necessary to ascertain whether the West India voyage came within the contract made in Bengal or not.

EYRE Ch. J. It may perhaps be true, that these persons were ill-advised in not applying to the East India Company, who might have taken them under their protection. If the Company had been apprized of the nature of their case, they never could have been treated as they have been. As it is, they have put themselves into the hands of the gentleman who conducts their cause; and the question for our consideration is, Whether the present application is such an one as we ought to grant for the furtherance of justice? One of the affidavits on which the rule was granted, states it to be the usage of the country trade of the East Indies for the captain to contract with a Serang, who undertakes to provide men at his own risk, and receives

(*a*) By 13 Geo. 3, c. 63, s. 44, it is enacted, "That when and as often as the India Company, or any person or persons whatsoever, shall commence and prosecute any action or suit in law or equity, for which cause hath arisen or shall hereafter arise in India, against any other person or persons whatsoever in any of His Majesty's courts at Westminster, it shall and may be lawful for such Court respectively, upon motion then made, to provide and award such writ or writs in the nature of a mandamus or commission, to the chief justice and judges of the supreme court of judicature for the time being, or the judges of the mayor's court at Madras, Bombay, or Bencoolen, as the case may require, for the examination of witnesses as aforesaid, and such examination being duly returned, shall be allowed and read, and shall be deemed good and competent evidence at any trial or hearing between the parties in such cause or action."

the payment stipulated by the captain. If this were such a contract, founded on this usage, it might be a contract to be proved by evidence in India. With respect to the residence of the witnesses in India, I really thought that the Serang was not only resident there, but had never left it; and if we had not thought so we never should have granted a rule to shew cause; but now it turns out, that he has not only been in England, but has lately quitted this country in company with the Defendant. The affidavits on which the rule was obtained did not inform us, what the voyage was on which the wages arose; we could not say with certainty that it was even a voyage out of the country trade. I took it for granted, because it is a case familiar to me, that the East India Company had chartered a country trader to come to England, and return to Bengal, which is not uncommon under some particular pressure or emergency. I thought that the contract in question might have been conducted in this manner, and that the Serang (always supposing him to have been resident in India) was the only person who could give evidence of it. Little did I dream of a case in which, under colour of a bargain not unusual respecting country ships, these poor men had been dragged to the West Indies, and that the wages now sued for arose on a voyage to and from the West Indies only. This part of the case was carefully kept back, and how the Defendant's agents could think themselves at liberty to suppress this fact I am at a loss to conceive. It is possible to suppose that a usage in the India country trade, or a contract made in India founded upon that usage, could be intended to extend to such a transaction as this, where the men have been [180] taken to a different destination from that originally in view, and kidnapped, as it were, to the West Indies, having had no idea that such a voyage was to be included in the contract made in Bengal? As soon as the Court is informed of these circumstances, it must see that it has not any jurisdiction whatever to grant the writ in question. The cause of action did not arise in India. The only ground on which we could put off the trial is the absence of a material witness; to do this, we must take the circumstances of the case into consideration, and inquire into the probability of the Serang's return to England; but here we learn that he is but just departed from this country in company with the Defendant himself, having been here in his power since the commencement of the action. Besides I much doubt whether we should ever get the mandamus executed even if we had the power to grant it; the Serang is a mariner, and probably is gone elsewhere beyond the reach of those to whom we might direct our writ. This is one of the grossest suppressions of the real case that I ever saw in a court of justice, and I think therefore that the rule should be discharged with costs, to mark the disapprobation of the Court as much as possible.

Per Curiam, Rule discharged with costs.

THE KING v. FULLER. 1797.

[Referred to, *Allen v. Flood*, [1898] A. C. 89.]

In an indictment on 37 Geo. 3, c. 70, it is sufficient to charge an endeavour to incite, &c. without specifying the means employed (*b*).—Under a charge that A. endeavoured to incite B. to mutiny, being a soldier, knowledge of B.'s being a soldier is implied. This word advisedly in such a case is equivalent to scienter.—Semb. That if one endeavour comprise two separate offences a count in an indictment charging that endeavour may contain those two offences.

Richard Fuller was indicted at the Old Bailey sessions in July last, on 37 Geo. 3, c. 70 (*a*).

(*b*) Vide *Rex v. Higgins*, 1 East, 5. *Rex v. Nield*, 6 East, 417. *Rex v. Collicott*, 4 Taunt. 300. *Peake v. Carrington*, 2 B. & B. 399.

(*a*) The preamble of that act states, "That whereas divers wicked and evil disposed persons, by the publication of written or printed papers, and by malicious and advised speaking, have of late industriously endeavoured to seduce persons serving in His Majesty's forces by sea and land from their duty and allegiance to His Majesty, and to incite them to mutiny and disobedience;" it then enacts, "that any person who shall maliciously and advisedly endeavour to seduce any person or persons serving in His Majesty's forces by sea or land, from his or their duty and allegiance to His

The indictment stated, That Richard Fuller being a wicked and evil disposed person, after the passing of a certain act of parliament made in 37 Geo. 3, intituled, "An act for the better prevention [181] and punishment of attempts to seduce persons serving in His Majesty's forces by sea or land, from their duty and allegiance to His Majesty, or to incite them to mutiny or disobedience," and whilst the said act continued and was in force, to wit, on, &c. at, &c. feloniously did maliciously and advisedly endeavour to seduce Matthew Lowe, he the said Matthew Lowe then and there being a person serving in His Majesty's forces by land, from his duty and allegiance to His said Majesty, contra formam, &c. contra pacem, &c.

The 2d count stated, That he feloniously did maliciously and advisedly endeavour to incite and stir up the said Matthew Lowe, he the said Matthew Lowe then and there being a person serving in His said Majesty's forces by land as aforesaid, to commit an act of mutiny, and to commit traiterous and mutinous practices, contra formam, &c. contra pacem, &c.

The prisoner was convicted; but objections being taken in arrest of judgment, and referred to the twelve Judges, they were argued in this term (absente Buller J.) in the Exchequer Chamber.

Gurney for the prisoner. 1st, The indictment does not state in what manner and by what means the prisoner endeavoured to seduce Matthew Lowe from his duty and allegiance, as charged in the first count, and to incite him to commit an act of mutiny, and to commit traiterous and mutinous practices as charged in the second count. 2dly, The indictment does not aver that the prisoner knew Matthew Lowe to be a person serving in His Majesty's forces by land. 3dly, The second count comprehends two distinct offences, which ought to have been charged in separate counts.

1st, The preamble of the act recites the mischief for which it provides a remedy; and states, that the mischief had been effected in two ways; by the publication of written or printed papers, and by malicious and advised speaking. In this case, which occurred only two days after the act passed, the mischief was attempted in the first mode, namely, by publishing and delivering two seditious hand-bills: those hand-bills then ought to have been set out in the indictment, the publication of which to Matthew Lowe was the act done, that constituted the endeavour charged. The prisoner had not sufficient notice, from this indictment, of the charge he was to encounter. He may have supposed that the evidence against him would consist of conversation, and have been prepared to repel that, when in fact it consisted of the publication of papers, which he was not prepared to repel. Or he might have been prepared to meet evidence of the publication of [182] papers, and have been surprised by evidence of conversation. Possibly also, the grand jury may have found the bill on evidence of malicious and advised speaking, and the petit jury have given their verdict on evidence of the publication of seditious papers: in which case the prisoner will not have had the advantage of the concurrent opinion of the two juries. By analogy to other cases it will appear, that the certainty which this indictment wants has been held to be necessary. In indictments for procuring money, &c. by false tokens, on 33 Hen. 8, c. 1, it is not sufficient to pursue the words of the act, and aver that the Defendant "did falsely and deceitfully obtain possession of money, &c. by means of a false token," but the indictment must state what he did obtain, and what false token he employed; and for this reason, that the Defendant may be apprised of the charge he is to meet. *Res v. Munoz*, 2 Str. 1127. On the same principle the same rule has been laid down in the case of indictments under 30 Geo. 2, c. 24, for obtaining money or goods by false pretences. *The King v. Mason*, 2 T. R. 581. In Hawk. P. C. lib. 2, c. 25, s. 57, it is said, "That an indictment finding that a person hath feloniously broken prison, without shewing the cause of his imprisonment, &c. by which it might appear that it was of such a nature that the breaking might amount to felony is insufficient; also indictments against persons for refusing to be sworn constables after they had been legitimo modo electi, have been quashed, for not shewing the manner of the election, that it might appear to have been such as

Majesty, or to incite or stir up any such person or persons to commit any act of mutiny, or to make or endeavour to make any mutinous assembly, or to commit any traiterous or mutinous practices whatsoever, shall, on being legally convicted of such offence, be adjudged guilty of felony, and shall suffer death as in cases of felony without benefit of clergy."

obliged the Defendants to have undertaken the office." *Rex v. Harper*, 5 Mod. 96. In *Dary v. Baker*, 4 Burr. 2471, which was an action on 32 Geo. 2, c. 24, for preventing bribery at elections, judgment was arrested because the declaration averred that the Defendant "did receive a gift or reward," without specifying what.

2dly, It never could be the intention of the Legislature to punish with death an act of this nature, unless the man who was guilty of it knew that the person whom he was endeavouring to seduce or incite came within the meaning of the statute. If it should be thought that a feeble presumption repels this objection as far as regards the second count, because it may be said that a man could not be incited to an act of mutiny, who was not in His Majesty's military or naval service, and known to be so by the prisoner; yet the 1st count, which only charges an endeavour to seduce Matthew Lowe from his duty and allegiance to His Majesty, [183] affords no presumption of that kind. Allegiance is equally due from all subjects, and therefore the prisoner may have done all that is charged in this count, without knowing Matthew Lowe to be a soldier. However, even as to the 2d count, the objection is fatal; for in capital cases the want of specific averments is not to be supplied by implication. The word "advisedly" means nothing more than deliberately, and cannot be held equivalent to the word "knowingly."

3dly, The act creates four distinct offences. 1st, Endeavouring to seduce a person serving in His Majesty's forces by sea or land from his duty and allegiance. 2dly, Endeavouring to incite such person to an act of mutiny. 3dly, Endeavouring to incite him to make or endeavour to make a mutinous assembly. 4thly, Endeavouring to incite him to commit any traiterous or mutinous practice. If two of these offences can be charged in one count, so may all four; or even forty, if the statute had created so many, however inconsistent they might be. Besides, this is a case in which the Judges will hold the Crown to a strict definite mode of charge; more so even than in the cases cited, as this is a capital felony: perhaps more so still, because this is a temporary statute, and a measure of extraordinary rigour.

Abbott on the part of the Crown. The first objection, which is the most material, I shall consider last, and proceed to the second. It is stated in both counts, that the prisoner did advisedly endeavour to seduce or to stir up Matthew Lowe being a soldier. Now the word advisedly is at least of as strong import as the word scienter, and that has been held sufficient in similar cases. *Hawk. lib. 2, c. 25, s. 67. Rex v. Thompson*, 2 Lev. 208. *Rex v. Lawley*, Fitz. 122, 263. 2 Str. 904, in which last case the words "knowing I. C. to have been indicted," were held equivalent to an averment that he had been indicted; for if he had not, the Defendant could not have known that he had been. And this furnishes another reason for supporting the last count; for a man cannot advisedly incite a soldier to mutiny, unless he knows him to be a soldier. So in a late case of *Rex v. Tilly*, O. B. S. June 1796 (a), where the indictment charged that the prisoner was aiding and assisting to one Idswell in an attempt to make his escape; that was held on a reference to the Judges, a sufficient averment of Idswell's having attempted to escape. In indictments for seducing artificers it is never usual to aver that the Defendant knew the person seduced to be an artificer. *The King v. Myddleton*, 6 T. R. 739. With respect to the 3d objection, I shall not argue that each of the four offences said to be created by the act would not be a felony. But suppose that the prisoner had endeavoured to incite Matthew Lowe to all the acts mentioned in the statute, and that such endeavour had been at one and the same time; in that case, as far as the prisoner was concerned, his act would have been single, for the subsequent conduct of the person incited is a distinct consideration. The prisoner is not charged as an accessory to any thing already committed, but only with an endeavour to incite to the commission of some future offence. If the endeavour was but one act, (and it must be so taken now,) the indictment is right, for it cannot charge the offence more accurately than it took place. If the act was general it cannot be made particular by the indictment. It is no objection, after verdict that an indictment contains several felonies, if each is distinctly charged. *Young v. The King*, in error, 3 T. R. 98. Though the offences in that case were charged in different counts, yet the doing so is only matter of convenience. But in truth this was but one endeavour, constituting but one act.

The 1st objection only remains to be considered. If it were necessary in cases of

this sort to state the various means employed, it would be impossible so to frame an indictment as to make it tally with the evidence. The case in Str. 1127, is the only one decided on 33 H. 8, c. 1, and on that was founded the decision in *The King v. Mason*, 2 T. R. 581. No one of the four cases referred to in Strange was on that statute, and therefore they are not in point: and the indictment in the principal case, as far as we can collect from the report in Strange, could not have been good, as it seems to have omitted a material word. The preamble of 33 H. 8, which is referred to in the enacting clause, mentions "privy tokens;" now an indictment, which is more comprehensive than the meaning of a statute, even though it pursues the words of it, is bad (a)¹. The same principle goes in answer to *The King v. Mason*; for all false pretences are not within 33 Geo. 2, c. 24, as appears by the opinion of Lord Kenyon in *Young v. The King*, in error. But there can be no supposable case of an endeavour to incite a soldier to mutiny, &c. which is not within 37 Geo. 3. As to *Dary v. Baker*, the declaration stated "gift or reward," whereas it should have averred which of the two it was. What is within the mean-[185]ing of "legitimo modo electus," Hawk. lib. 2, c. 25, s. 57, is a question of law, and the manner of election ought to be shewn since no forfeiture can arise but on a lawful election.

The words "mutiny," and "mutinous and traiterous practices, used in the 37 Geo. 3, are taken from 22 Geo. 2, c. 33, relating to the navy, and from the annual mutiny act, and the articles of war in pursuance thereof, which make those offences punishable with death in soldiers and sailors. The Legislature here studiously selected the word "endeavour," as being of the largest and most general import. It mentions no particular modes of attempt, and no circumstances accompanying the attempt, as necessary to constitute the crime. Nor is the body of the act to be restrained by the preamble, as it has no reference to it; but is rather to be extended to all cases within the mischief. *The King v. Robinson*, O. B. S. June 1796 (a)². To determine the offence laid in this indictment by the word "endeavour," not to be the offence mentioned in the statute, would be to alter, not to construe the statute. Certainly, "endeavour" does imply an act done; it holds a middle place between compassing and actual perpetration; it is an attempt to carry the operations of the mind into effect. There are many instances of indictments as large as the present. In conspiracy, which is an offence known to the law *eo nomine*, it is not necessary to state the means employed. *Rex v. Stirling*, 1 Lev. 125. *Rex v. Kinnorsley and another*, 1 Str. 193. This was again decided in *Rex v. Eccles*, M. 24 G. 3, where Willes J. referred to the case in Strange. In cases of subornation of perjury, though most of the old precedents state a promise of money. Tremain's P. C. from 168 to 174, yet most of the modern ones only state the endeavour to suborn. Cr. Circ. Comp. 587, 588. Cr. Circ. Ass. 329. So in averring the offence of aiding prisoners to escape, it is sufficient to say, "aiding and assisting." *Rex v. Tilly*. The form of charging an accessory before the fact is, "that he did incite, move, procure, aid, and abet." Cr. Circ. Comp. 124. *Lord Sancker's case*, 9 Co. 116. Indictments for seducing artificers, merely pursue the words of the statute (23 Geo. 3, c. 13). *The King v. Middleton*, 6 T. R. 739. So in maintenance under 32 H. 8, c. 9. Sav. 41. Co. Ent. 163 b. *Rex v. Price*, Tremain's P. C. 177. In forgery with intent to defraud, the fraud may be effected in various ways; yet in *Rex v. Powell*, 2 Bl. 787. Leach, 72, it was held sufficient to aver a general intent to defraud.

[186] At the Old Bailey Sessions in the December following, PERRYIN Baron delivered the unanimous opinion of the Judges as follows:

In this case three objections were taken in arrest of judgment.

1st, That the indictment does not state in what manner, and by what means the prisoner did endeavour to seduce, to entice, and to stir up Matthew Lowe from his duty and allegiance.

The 2d objection was, that it should have been averred in the indictment that the prisoner knew that Matthew Lowe was a soldier.

The 3d objection was, that the second count of the indictment comprehended two distinct offences, viz. an endeavour to seduce, entice, and stir up, to commit mutiny, and an endeavour to seduce, entice, and stir up to commit traiterous and mutinous practices.

(a)¹ Hawk. P. C. lib. 2, c. 25, s. 111.

(a)² Vid. Sessions Papers, 722.

The 1st objection, namely, that the indictment does not shew in what manner and by what means the prisoner did endeavour to seduce, to entice, and stir up, was supported by a supposed analogy to the rule, and the form of indictments in the case of false tokens and false pretences: and it was argued, that the statute upon which the present indictment is founded supposes a manner and means of endeavouring, by publishing papers and by malicious and advised speaking: and therefore that the means above should have been set forth.

The answer to this objection is, that an endeavour to seduce, to entice, and to stir up, though a conclusion from an infinite variety of facts and circumstances is but a conclusion of fact, is itself a fact, admitting of no definition or description; that the fact is fully expressed by the mere force of the word "endeavour," and can only be expressed by that word, like the words, "conspire, maintain, aid, and abet," which in indictments for the offences of conspiracy, maintenance, &c. do sufficiently express the offences charged in the indictment, without circumlocution, and without shewing in what manner and by what means the conspiracy, maintenance, aiding, and abetting &c. were produced. We are therefore of opinion that this objection is not sufficient whereupon to arrest this judgment.

The 2d objection was, that it should have been averred in this indictment that the prisoner knew that Matthew Lowe was a soldier.

The argument urged in support of this objection, that the prisoner could not be guilty of the offence charged unless he knew that the man upon whom he practised was a soldier, suggests one answer to this objection, viz. that knowledge is necessarily [187] included in the charge of endeavouring to seduce, &c. Another full and satisfactory answer is, that the word "advisedly" is in the indictment, which is at least equivalent to the word scienter. This objection therefore cannot hold.

The 3d objection is, that the second count of this indictment comprehends two distinct offences.

Probably it will be found to be a sufficient answer to this objection, that (though this charge might have been branched into separate offences) the whole may be but the parts of one fact of endeavour; which must be stated as it is. But in the circumstances in which this prisoner now stands convicted upon the first count of this indictment, to which no sufficient objection has been taken, and upon which therefore judgment must be pronounced against him, it is not absolutely necessary that the Judges should decide upon this last objection, and therefore I forbear to enter further into the consideration of it.

Upon the whole, we are of opinion that there is no ground to arrest the judgment, and that sentence should pass upon the prisoner.

THE KING v. BRADY, KIERMAN, AND ROOKE. 1797.

An excise officer seizing soap in the execution of his office at any distance from the sea, is within the protection of 24 Geo. 3, Sess. 2, c. 47, s. 15.

The indictment stated that the Defendants after the 1st day of October 1784, to wit, on, &c. with force and arms, at the liberty of Havering Alte Bower in the county of Essex, in and upon Charles Wakely, then and there being an officer of our lord the King, in the service of the excise of our said lord the King duly constituted and appointed, and then and there being on shore in the due execution of his office and duty, as such officer as aforesaid, in seizing and securing to and for the use of our said lord the King, a large quantity, to wit, 500 pounds weight of soap, which said soap was then and there liable to be seized by the said Charles Wakely as such officer as aforesaid; and then and there being in the peace of God, and of our said lord the King, unlawfully and violent did make an assault, and him the said Charles Wakely, so being then and there on shore in the due execution of his said office and duty in manner aforesaid, unlawfully and forcibly did hinder, oppose, and obstruct, to wit, at, &c. and other wrongs, &c. contra formam, &c.

[188] 2d Count. For assaulting the said Charles Wakely, and for opposing and obstructing him in the execution of his office generally.

3d Count. The same as the 2d, omitting the assault.

This came on to be tried at the Old Bailey Sessions in September 1797, before the

Lord Chief Baron and Ashhurst J. when the Defendants were found guilty on the following facts:

Two of the Defendants, Kierman and Rooke, had taken a quantity of soap out of a copper in the manufactory of an entered soap boiler near Rumford in Essex, without the presence of an excise officer, and were carrying it away in a cart, in order to conceal it, when Wakely an excise officer attempted to seize it; on which he was assaulted by the Defendants Brady, Kierman, and Rooke. Wakely had no warrant.

Several points having been reserved at the trial for the opinion of the twelve Judges, at the instance of Brady's counsel, they were this day argued (absente Buller J.) in the Exchequer Chamber.

Runnington Serjt. for the Defendant Brady. This indictment is framed on 24 Geo. 3, Sess. 2, c. 47, s. 15, the preamble (a)¹ of which shews that it was made to prevent smuggling. The 1st objection therefore is, that the offence charged in this indictment, being within the excise laws, does not come within either the letter or the spirit of an act to prevent smuggling. The customs and the excise have each their own system of positive law, within the letter of which a Defendant must be proved to have offended. Besides, nothing is said in the indictment with respect to the distance (b) from the sea, at which the offence was committed: "being on shore" are the words employed in all the counts. It is [189] true that this is an offence indictable at common law; but as the prosecutor has proceeded on 24 Geo. 3, Sess. 2, c. 47, and the trial has been had out of the county where the offence was committed under s. 17, no advantage can be taken of that circumstance. 2dly, Supposing this offence to be within 24 Geo. 3, Sess. 2, c. 47, yet s. 15 of that statute is virtually repealed as far as relates to the commodity in question, by c. 48, s. 10, of the same year, which imposes a penalty of 50l. on all persons obstructing an officer of excise in the execution of the powers given to him for securing the duties upon soap. That an act may be virtually repealed appears from *Rex v. Cater*, 4 Burr. 2026, and *Rex v. Davis*, Leach, 1 Ed. 252. [Heath J. There the statutes by which the former were held to be repealed, were passed in subsequent sessions; where both statutes are passed in the same session, the latter is only explanatory (a)².] 3dly, By 23 Geo. 2, c. 21, s. 34, and 5 G. 3, c. 43, s. 20, excise officers are directed to procure a warrant previous to their entering any place whatsoever for the purpose of seizing soap hid or concealed. Wakely therefore should have had a warrant in this case, and not having been clothed with the authority required, he was not obstructed "in the due execution" of his duty.

LORD KENYON Ch. J. EYRE Ch. J. and MACDONALD Ch. B. expressed themselves very clearly of opinion, that this last point could not be supported.

Knowlys for the prosecution. Smuggling is any attempt to defraud the revenue of any duties: and smuggling by land as well as by sea, were within the contemplation of 24 G. 3, Sess. 2, c. 47. The words used in s. 15 of that act are "officers of the custom or excise, &c. in the due execution of their duty," &c. This includes the whole range of that duty which belonged to excise officers before the passing of the

(a)¹ The preamble runs thus, "Whereas the laws heretofore made and now in force to prevent the clandestine importation and running of prohibited goods, and goods liable to the payment of duties into this kingdom, have not been sufficient to answer the good purposes thereby intended, that pernicious practice having of late been greatly increased and carried on by large armed vessels at sea, and by numerous gangs of smugglers upon land, with great violence, in defiance of those laws, to the great loss and prejudice of the public revenue, the detriment of the fair trader, and the endangering the lives of the officers of the revenue acting in the due execution of their duty," &c.

(b) By s. 15, "If any officer or officers of His Majesty's navy, or in the service of the customs or excise, being on shore or going on board, or being on board, or returning from on board any ship, boat, or vessel within the limits of any of the ports of this kingdom, or within four leagues from the coasts thereof, shall be hindered, opposed, obstructed, or assaulted, in the due execution of his or their office or duty by any person or persons whatsoever, either in the daytime or night," all persons so hindering &c. being convicted on indictment shall be sentenced to hard labour or imprisonment not exceeding three years.

(a)² Vide 2 Wils. 146.

act; and 10 Ann. c. 19, s. 19, having empowered officers to seize soap, this duty was then known to the Legislature. These laws were all made in *pari materia* for the benefit of the revenue. The words "on shore," used in s. 15, of 24 G. 3, Sess. 2, c. 47, are equivalent to "on land;" and so it was held by Wilson J. in the case of *The King v. England*, O. B. S. 1788, (only four years after the passing of the act;) on this objection being taken, who said, the words "on shore" were only inserted in contradistinction to "on board a ship," and to provide against the officers being obstructed in either situation. The above decision has often been cited and never hitherto called in question.

[190] At the Old Bailey Sessions in the December following, GROSE J. delivered the unanimous opinion of the Judges:

That the words "on shore," used in the 24 G. 3, Sess. 2, c. 47, s. 15, mean on land, and that an officer of excise seizing soap in the execution of his office at an inland place, at any distance from the sea, is within the scope and protection of that act.

Mr. Justice Buller was absent from the 10th of November to the end of the term, from indisposition.

The end of Michaelmas Term.

[191] CASES ARGUED AND DETERMINED IN THE COURT OF COMMON PLEAS, IN HILARY TERM, IN THE THIRTY-EIGHTH YEAR OF THE REIGN OF GEORGE III.

JONES v. CLAY. Jan. 29th, 1798.

If a party proceed against a Defendant by action and indictment for the same assault, the Court will not compel him to make his election (b).

Le Blanc Serjt. having on a former day moved for a rule to shew cause why the Plaintiff, who had proceeded against the Defendant by action and indictment for the same assault, should not be directed to make his election to pursue either the one or the other, the Court refused the rule, saying, the Defendant might apply to the Attorney General for a *nolle prosequi*, if there was any thing vexatious in the proceeding by indictment.

Le Blanc now stated, that the Attorney General having been applied to for the above purpose, had informed the Defendant's agents, that since he had been in office, it had been a rule with him never to grant *nolle prosequi* in such cases (a).

The Court doubted if such an application had ever been allowed, saying, that the fine to the King and the damages to the party were perfectly distinct in their nature, and that if they did what [192] was desired of them in this instance, they must lay it down as a general rule, that parties must always make their election.

Le Blanc took nothing by his motion.

GALTON *Demandant* v. HARVEY *Tenant*. Jan. 31st, 1798.

The Court will not permit the mise joined in a writ of right to be tried by a jury instead of the grand assize, though both parties desire it.

Cockell Serjt. having obtained a rule to shew cause why the mise joined in a writ of right between these parties should not be tried by a jury of the county of Dorset instead of the grand assize;

Williams Serjt. for the tenant consented; but stated that the attorney for the demandant had promised to make certain admissions at the trial in case the tenant would consent, and desired that the rule might be made absolute on those terms.

EYRE Ch. J. When this was first moved the Court felt an objection which I have not yet got over. You desire to alter the proceedings in a writ of right by consent. That form of action I hold to be *strictissimi juris* at the present day: and I do not feel any inclination to give assistance to a course of proceeding which goes to disturb

(b) Vide *Murphy v. Cadell*, 2 B. & P. 137.

(a) Vid. tam. *Rex v. Fiddling Esq.* 2 Burr. 719, where it appears to have been considered by the Court of K. B. as the usual course.

a possession of 50 or 60 years. If you will have a writ of right you must follow the course marked out by the law. This is the inclination of my mind at present, though I do not mean to say that if my Brothers should think it right to grant the rule that I shall oppose it (a)¹.

BULLER J. expressed himself of the same opinion, and seemed to think that other inconveniences might arise if the rule were granted, from the want of process to compel the witnesses to attend, and of power to prosecute them in case of perjury committed.

ROOKE J. of the same opinion (b).

Rule discharged.

GOODILL v. BRIGHAM. Feb. 1st, 1798.

Devise in fee to a feme covert, with a power to dispose of the estate without the controul of her husband; held that such a power was void, as being inconsistent with the fee given to her in the first instance, and that she could not convey without fine (a)².

Replevin for taking cattle.

Cognizance as bailiff of C. Rogers "because he says that one John Poad long before the said time when, &c. to wit on [193] &c. was seised in his demesne as of fee of and in the said farm and tenement with the appurtenances in which &c. And being so thereof seised he the said John Poad long before the said time when &c. to wit on &c. at &c. in due form of law made his last will and testament in writing, and thereby gave and devised unto his sister Esther Rogers her heirs and assigns for ever the said farm and tenement in which &c. with the appurtenances. And the said John Poad by his said will declared that his will further was that what estate and effects he had thereby given to his said sister should be fully vested in her notwithstanding her coverture, and that she might give sell and dispose of the same as she should think proper, and also give acquittances and other discharges so as not to be under the controul of her own husband the said C. Rogers, which said husband should not intercede or meddle with any of the estate or effects thereby given to his said sister. And the said John Poad afterwards and before the said time when &c. to wit on &c. at &c. died so seised of his said estate of and in the said farm and tenement in which &c. with the appurtenances, after whose death to wit on &c. the said C. Rogers and Esther his wife by virtue of the said will entered into the said farm and tenement in which &c. with the appurtenances, and became seised thereof in their demesne as of fee in right of the said Esther, and being so seised &c." It then stated, "that C. Rogers and Esther his wife by lease and release conveyed the premises to P. Merry in fee to the intent and purpose that C. Rogers might receive an annuity or rent-charge of 40l. for his life payable half-yearly with power of distress; that P. Merry by virtue thereof became seised of the premises in fee subject to the above annuity, and the said C. Rogers became seised in his demesne as of freehold for life of the said annuity; that 140l. for seven half-yearly payments were in arrear. Wherefore &c."

Plea in bar that Esther Rogers died before the first half-yearly payment of the annuity became due.

To this there was a general demurrer and joinder.

Shepherd Serjt. for the Avowant. The question is, Whether Esther Rogers could convey the premises in dispute without levying a fine, the estate by the words of the will having been given to her in fee, with a power to dispose of it without the controul of her husband? The distinction taken in the books is this: If a power be given to a married woman, and an estate be also given to her [194] by the same will, yet

(a)¹ See *Luke v. Harris*, 2 Bl. 1293.

(b) Vid. the marginal note to the case of *Crow v. Edwards*, Hob. 5, where it is said the Demandants and Tenants consent that two of the Knights in a writ of right shall be Esquires, although by law they ought to be Knights; yet is it good though against the law being by consent of the parties: Also Bro. Ab. tit. Trialles. 143, pl. 10. H. 4, 5. But the consent must appear upon the record. *Viscount Clare v. Linch*, Sir T. Raym. 372. *Deverew and another v. Walcott*, 2 Jo. 199.

(a)² Vide *Rouch v. Wadhams*, 6 East, 289, 297. *Roper v. Halifax*, 8 Taunt. 845, 861. *Ray v. Pong*, 5 B. & A. 561. *Mackintosh v. Barber*, 1 Bing. 50, 56.

if the power does not flow from the estate, she may convey without fine; though if the power arise from the mere possession of the estate it is otherwise. In Co. Lit. 112 a. it is said "If cestuy que use had devised that his wife should sell his land, and made her executrix and died, and she took another husband, she might sell the land to her husband, for she did it in auter droit, and her husband should be in by the devisor. It is true that the power there was to sell, but the power in this case being specifically given by the will is as distinct as if given for the purpose of sale; and Esther Rogers must be considered in the same light as any other person executing a power. 1 Roll. Abr. p. 329, pl. 10. Bro. Abr. tit. Cui in Vitâ. pl. 15. The disability of a feme covert to convey by deed is the same as to dispose by will: now in *Gibbons v. Moulton*, Rep. temp. Sir H. Finch 346, the Court held a power to will given to a feme covert to be distinct from an estate given to her by the same instrument. In *Daniel v. Ubley*, Sir W. Jones 137, Latch. 9, 39, 134, Ubley devised his house "to Agnes his wife to dispose of at her will and pleasure, and to give to such of his sons as she should think best:" Agnes having married again, and enfeoffed William the second son in fee, and made livery, the conveyance was held good: nor does it make any difference that a number of persons were pointed out in that case from whom the feme covert was to select one, and that in the present case Esther Rogers might select whom she pleased. Wherever the power of appointment is distinct from the estate, a feme covert may be considered as a feme sole. *Grigby v. Cox*, 1 Vez. 517. 1 Bro. Chan. Cas. 20. *Dighton v. Tomlinson*, Com. 194. The testator in this case has given a power to E. Rogers which she never could have derived from the mere possession of the estate. A power to a feme covert to make leases without her husband, or to convey a reversion after her own estate for life is good, because it gives a right to do that which she could not do without it. *Bayley v. Warburton*, Com. 494. Powell on Powers 34. *Doe v. Strachan*. So here an estate having been devised to a woman already married, who had no right to convey without her husband, unless by virtue of the power specifically given; she does in consequence of that power acquire a right to do something which by operation of law she would not have had. It is manifest that the testator intended to give an estate to E. Rogers free from the controul of her husband; but if the Court decide against this power she will not have an estate free from the controul of her [195] husband, for if a fine be necessary he must join in it, and in case of a child born he would be tenant by the curtesy. In order to give effect to the testator's intent, the Court may construe this devise to be to such uses as the wife may appoint, and until that appointment to herself and her heirs, or an estate to her for life, remainder to such uses as she shall appoint, remainder over to her heirs; in either of which cases she would take a fee-simple conditional, and might therefore convey without fine. Co. Lit. 216, and n. 119, ed. 15.

Le Blanc Serjt. contrâ. 1st, As to the intention of the devisor, it is manifest that he wished to relieve E. Rogers from the controul of her husband. Now the instrument in question was made for the benefit of the husband and immediately under his controul, being to secure an annuity to him for life. 2dly, The word "power" in law may be thus defined, viz. an authority given to one person to be exercised over the estate of another; but there is no case where an authority to be exercised over the estate of the donee has been construed to be a power. The party taking the estate under the power has always been held to be in by the conveyance of the donor. In the case put Co. Litt. 112, 1 Roll. Abr. p. 329, pl. 10, the wife would have a mere naked authority without any interest in the estate over which the power is to be exercised. It is true that though a certain interest be given to the wife, yet she may execute a power collateral to the interest, as in the case of a life-estate given to a feme covert, with power to dispose of it by will; the power there being collateral to the interest, since it extends to a part of the estate to which the interest does not. Thus in *Gibbons v. Moulton*, an annuity was given for the life of A. B. which might last longer than the life of the devisee, and therefore the devisee was enabled to dispose of the remainder. In *Daniel v. Ubley* it was the opinion of Jones, that the wife took an estate for life, with power to convey the remainder to such of the sons of the devisor as she pleased, or that she took a fee-simple conditional, in which last case as well as in the first the conveyance was good. Bro. Abr. tit. Cui in vitâ pl. 15. With respect to *Dighton v. Tomlinson*, the wife there had only an estate for life, with a power over that part of the estate which was not disposed of. The cases in Chancery are not of authority here, since that Court cures any difficulty arising from legal

disabilities. This is like the attempt in *Habergham v. Vincent*, 5 Term Rep. 92, to execute a devise of lands under a power without three attesting witnesses, or like a [196] devise of lands in tail with a restriction on the devisee from suffering a recovery. The devisor in this case has given to the wife as great an estate as possible, and superadded a power to dispose of it in a way which the law does not allow.

EYRE, Ch. J. It struck me on reading this case, that it would be very difficult to sustain the conveyance in question: and when it was admitted in argument that this was a devise in fee-simple with a power superadded I did not comprehend how that could be. My brother Le Blanc has argued the case very luminously and satisfactorily, and so as to convince me that a power is inconsistent with such an estate. If we trace back the nature of uses, it will be clear that this cannot be considered as a power. Powers are the modifications of the uses of that estate, which a man has to dispose of; and great latitude is allowed in making those modifications. If a man employ the proper means, he may create all kinds of powers that are consistent with, and within the extent of his fee-simple; and until his fee-simple is exhausted, I know of no power, no distribution, (provided it do not violate the rules of law,) which could not be supported: as far as that goes the doctrine of powers is very intelligible. The power which any one creates must be exercised over his own estate; but when it has been exercised over that estate to the extent of that estate, that is, when he has given away the whole fee-simple, and the whole use of the fee-simple too, it seems to me that he is *functus officio*. What remains for him to do? All which he does beyond that goes to say in what manner the fee-simple shall be enjoyed by the donee, and is matter of direction intended by the donor to controul all the rules of law. When a devisor gives an estate to a feme covert and attempts to relieve her from the disability arising from her coverture, his estate being exhausted, the law must controul her enjoyment of it. It is true that he may modify her enjoyment of the estate, as far as is within the use of the estate, as if he make a conveyance in fee to trustees, and direct that the wife shall have the estate to her sole and separate use, and make a subsequent declaration to such uses as she shall appoint, the uses will wait upon that declaration, and as soon as any step has been taken to execute the power, the uses will receive that direction from the appointment which he intended that they should receive. In that case the appointment under the power will enure as a limitation of those uses which he had a right to limit. But the present case seems quite beyond the scope of a power, and of all the rules of law which [197] have prevailed with respect to the execution of powers. The devisor has given a fee-simple to the wife to be enjoyed by her to her sole and separate use: what does the law say? The law says that a feme covert cannot take an estate to her sole and separate use. The devisor should have taken the necessary steps to carry his intent into effect: he should either have devised the estate to trustees with the uses waiting on what he might authorize her to do, or he should not have given her the whole fee: in either of which cases this power might have been well executed. This appears to be the state of the case on principle; and on authority there is nothing which goes to establish that where there is a direct conveyance of an estate in fee-simple any use can be grafted upon it; much less a use of this nature, the object of which is to enable a feme covert to do what by law she is disabled from doing. All powers which can be given, must be part of the use of the fee simple, and the moment that use is exhausted, there can be no such thing as annexing some new use, beyond all which the party himself had to give. I think therefore that the case is with the plaintiff.

BULLER, J. If by transposing the clauses of the will the Court can give effect to the whole will, they may do so, but they must be careful not to thwart the intention of the devisor, by giving a different interest from what he intended. If by transposing the clauses they could come to the conclusion that an estate for life only vested in the feme covert, they might hold the power of appointment good; for in that case, this would be a devise of an estate for life to E. Rogers with a power to dispose of the remaining interest being in another person. My brother Le Blanc's definition of a power is certainly correct. It is an authority enabling one person to dispose of the interest which is vested in another. Let us see then if it be possible consistently with the intention of the devisor to confine the interest of E. Rogers to an estate for life. Nothing can be more positive than the expressions of the will which describe the interest which E. Rogers is to take. The words are "to E. Rogers her heirs and assigns for evers," and not content with this the devisor adds, "that

what estate and effects he had given to his sister should be fully vested in her notwithstanding her coverture," &c. This devise is as explicit as possible, and creates in her a complete fee-simple. Then the power given is inconsistent with the estate, and we cannot reduce the latter to an estate for life, for we cannot vary the interest which [198] the devisor has given. Suppose by transposing the clauses we could construe this to be a devise to such persons and uses as E. Rogers should appoint; and for want of such appointment to her and her heirs. If the devise had stood thus, she could have taken nothing till her death, or till her appointment. Now the devisor clearly intended that she should take immediately: we cannot therefore make this construction without doing actual violence to the will. The devisor seems to have had two intentions which are inconsistent; one was, to give an estate in fee to E. Rogers; the other, to qualify it in such a manner as that her husband should have no power over it; which last is contrary to the rules of law: the Court will therefore carry into effect the first intention, and reject the other. How does this case differ from an attempt to create a power of disposing by will attested by one witness, or to devise an estate tail with a restriction on the devisee from suffering a recovery? In this as well as in the cases I have put, we can only say, the law will not allow of such a disposition.

ROOKE, J. A point has arisen from the circumstances of this case which has never before been determined in a court of law; from which I infer, that such an attempt has never before been made, or if made, has been deemed insupportable. The law says, that a married woman shall not alienate without fine. If a man would give a fee-simple to a feme covert, with a power to alienate without fine, he must do it by means of trustees. That has not been done in this case. When a man gives a fee-simple, he shall not be allowed to say, that such fee-simple shall not be subject to all the restraints which the law imposes upon it. The devisor having given a fee-simple, he could add nothing to it, and consequently the subsequent power is void. It has been said, that possibly by our decision we shall defeat the intention of the devisor; but if that intention be contrary to law, it does in fact defeat itself. It seems to have been his intention, that the object of his bounty should not act under the controul of her husband. On the facts of this case, however, it appears that she has acted under his controul, having conveyed an estate to her husband jointly with him, and without the intervention of any legal authority.

Judgment for the Plaintiff.

[199] BULL v. TILT. Feb. 1st, 1798.

A pardon if pleaded must be averred to be under the great seal (a).

Assumpsit for wages.

Pleas. 1st, Non-assumpsit. 2dly, That the Plaintiff before the time of the action commenced, was convicted of felony, and sentence of transportation passed upon him.

Replication joining issue on the 1st plea. As to the 2d plea, "that after the said conviction of the Plaintiff, and after the giving of the said judgment in the said plea mentioned to have been given against him as aforesaid, and before the suing forth of the original writ of the Plaintiff in this behalf, (to wit,) on, &c. at, &c. our sovereign lord the now king, in consideration of the opinion of the judges of our said lord the king in the Plaintiff's behalf, was graciously pleased to extend his gracious mercy unto the Plaintiff, and did then and there grant the Plaintiff his said Majesty's free pardon for the said crime, of which the said Plaintiff was so convicted, as in the said plea is mentioned. And this, &c. Wherefore, &c."

To this there was a special demurrer, "for that the said Plaintiff hath not in or by his said replication alleged or shewn in what manner the supposed pardon therein mentioned was granted, or that the same was under the great seal of Great Britain; and also for that the said Plaintiff hath not in or by his said replication set forth or shewn the letters patent, if any, by which the said pardon was granted, or brought the same into court here; and also for that the said replication is, in other respects, uncertain, insufficient, and informal."

Joinder in demurrer.

(a) *The King v. Maximilian Miller*, 2 Bl. 797.

Kirby Serjt. being called upon by the Court to support the replication, contended, that although the case of *The King v. Beaton*, 1 Bl. 479, was an authority to shew that a pardon is not good unless under the great seal, yet that it did not prove the necessity of averring that circumstance; but on the contrary, that it must be implied from the Plaintiff's averment of his having received a free pardon, that was under the great seal, since no other pardon is good (b).

EYRE Ch. J. I take it that every thing under the great seal must be pleaded sub pede sigilli, and that a pardon must be under the great seal is clear. However, that this may not be taken too [200] generally, I think it right to mention that under some statutes the king's sign manual actually carried into execution, and the conditions performed, may amount to a statute pardon. But these are exceptions not at all affecting this case.

Per Curiam. Judgment for the Defendant.

Palmer Serjt. for the Defendant.

SIR W. STAINES KNT. AND ANOTHER, Sheriff of Middlesex, v. JOHANNOT.
Feb. 3d, 1798.

Defendant before the action commenced quitted the kingdom, leaving another in possession of his house and goods; Plaintiff having served a summons to appear at the house, distrained the goods to compel an appearance; and held regular (a)¹.

The Defendant previous to the commencement of this action, which was on a bail-bond, quitted this country and resided with his family in Dublin, having left his mother in possession of the cottage and furniture which he formerly occupied. A summons to appear having been served at the cottage, and no appearance entered, a distringas issued, under which forty shillings were levied on the effects in the mother's possession.

Shepherd Serjt. on her part now moved for a rule nisi to stay the proceedings, and that the levy should be restored with costs: and cited *Webster v. M'Namara*, Trin. 32 Geo. 2, Imp. Pract. C. B. 619, 4th ed.; where a similar application by the wife of a person out of the kingdom was allowed.

The Court were of opinion, that as the Defendant had goods within the bailiwick by which he might be distrained, the proceeding was regular: but that at any rate the mother, who had no interest in the goods taken, could have no right to make this application. And Eyre Ch. J. added, that the case of *Webster v. Macnamara*, if law, differed from this, as the application there was not made by the wife on her own account, but on the part of her husband.

Shepherd took nothing by his motion.

DRISCOL v. PASSMORE. Feb. 6th, 1798.

[Referred to, *De Wolf v. Archangel Insurance Company*, 1874, L. R. 9 Q. B. 454.]

Insurance on a voyage from C. to D. on a representation that the ship was first to sail from A. to B. and from B. to C.; the voyage from A. to B. was performed, but that from B. to C., being unavoidably prevented, the ship returned to A., from thence proceeded immediately to C. and in performing the voyage from C. to D. was lost; and this was held a good commencement of the voyage insured (a)².

Assumpsit on a policy of insurance, with a count for money had and received. The Defendant paid five guineas into Court.

[201] The ship "Timandra" being about to sail on a voyage from Lisbon to Madeira, from Madeira to Saffi on the coast of Africa in ballast, and from thence back to Lisbon, with a cargo of wheat; the Plaintiff directed his broker to make three insurances, viz. one on three-fourths of the ship for the round voyage, one on three-

(b) Vide *Bullock v. Dadds*, 2 B. & A. 258, 270.

(a)¹ Vide *Greaves v. Stokes*, 1 Taunt. 485.

(a)² Vide *Driscoll v. Boyd*, post, 313. *Scott v. Thompson*, 1 N. R. 181. *Urquhart v. Barnard*, 1 Taunt. 450. *Tulloch v. Boyd*, 7 Taunt. 472. *Scott v. Thompson*, 1 N. R. 181.

fourths of the freight on the voyage from Lisbon to Madeira, and one (which was the insurance in question) on three-fourths of the freight from Saffi to Lisbon.—The two former were effected without any difficulty, but the broker was not able to get the third underwritten at the same time, on account of the distant period at which the risk was to commence: however, on a representation some time afterwards, that he had received intelligence of the ship's arrival at Madeira, and that she was about to proceed on her voyage immediately, this also was effected. When the "Timandra" arrived at Madeira, all the crew except two, being alarmed by reports of some Moorish cruisers being off Saffi, and of their having captured and ill-treated a Dane and an American, quitted the ship, and refused to return to it unless the captain would promise to sail immediately for Lisbon. Under these circumstances, the captain carried the ship back to Lisbon: but on his arrival there, the charterers insisted on his proceeding directly from thence to Saffi: which he accordingly did, and was captured in his return from Saffi to Lisbon. It was in evidence that the difference of season arising from this delay did not vary the risk.

This was tried before Eyre Ch. J. at the Guildhall sittings after Trinity Term, when a verdict was found for the Plaintiff.

A rule having been obtained in Michaelmas Term, calling on the Plaintiff to shew cause why the above verdict should not be set aside, and a new trial be had, on the ground of the voyage insured never having commenced,

Shepherd Serjt. shewed cause. I contend, 1st, That the voyage in which the ship was captured, was the voyage insured: since the previous voyage from Lisbon to Madeira, and from thence to Saffi, never having been abandoned, was virtually though not in fact performed. The "Timandra" sailed from Lisbon to Madeira with a cargo, and from Madeira to Saffi by way of Lisbon in ballast. If she had taken in a new cargo at Lisbon, and had sailed on a different object from that originally in view, it might have been considered as an abandonment. Here there was not only a probable cause for the ship's return to Lisbon, but the captain was under the necessity of returning for the benefit of his owners. Deviation to [202] avoid perils is justifiable, and the new course therefore which was taken may be considered as a continuance of the original voyage, since it is not necessary to return to the point from which a deviation commenced (*a*). Doubts occurred at the trial whether the captain had not returned to Lisbon without probable cause, and therefore abandoned the voyage; and whether, as the voyage from Lisbon to Saffi was performed at the instance of the charterers, the captain's intention to abandon the original voyage was not thereby proved: but both these questions have now been determined by the jury. 2dly, This was merely an insurance on a voyage from Saffi to Lisbon, which has been literally performed: and it was not necessary to perform the preceding voyages from Lisbon to Madeira, and from thence to Saffi, in order to make that good. I do not contend that this was an indefinite insurance on any voyage from Saffi to Lisbon, to be performed at any time: if the risk had been materially altered, (as if the ship had first gone to the East Indies, and a Spanish war had broken out,) the underwriters would have been released. It may be said perhaps that they speculated on the time when the risk was to commence: but there was no warranty in this case: it was represented that the voyage in question was to be performed after certain other voyages; and the representation was true, for it was originally intended that the "Timandra" should take that course, but by subsequent circumstances she was prevented from so doing. The policy therefore is not void for misrepresentation; nor was the risk of the underwriters at all altered, as the deviation was justified by necessity.

Adair and Le Blanc Serjts. in support of the rule. As to the last point made by the Plaintiff's counsel, we contend, that wherever a voyage is insured from A. to B. it must be understood either that the ship is at A. at the time of the insurance, or it must be stated how and when she is to arrive there: otherwise it will be an indefinite insurance on the first voyage which the ship shall make, from A. to B. with the same master, and the other requisites of the policy. Now if it be impossible to make an insurance on a voyage from A. to B., without stating whether the ship is at A. or when she will be there, that circumstance if stated becomes an ingredient of the risk insured; and this seems to have been the understanding of the underwriters in the present case, who refused to insure till they were informed of the ship's arrival at

Madeira. This was not an insurance on any voyage which the ship might make from Saffi to Lisbon, but on a voyage from Saffi to Lisbon, being part of a [203] voyage already commenced, from Lisbon to Madeira, from Madeira to Saffi, and from thence to Lisbon. Nor was it necessary for the underwriters to require a warranty that the "Timandra" should go the whole voyage, having a representation to that effect: and as the only difference between a warranty and a representation is, that a mere formal deviation from the one is fatal, and only a substantial one from the other, this policy is clearly void, for the deviation here was substantial. With respect to the first point, the voyage insured was abandoned; or rather as the latter part of the previous voyage was abandoned, the voyage insured never commenced. At Madeira the captain was to exercise his judgment whether it was more for the benefit of his owners to relinquish the voyage altogether, or to wait at Madeira till he could find the means of proceeding. He did exercise his judgment, and by returning to Lisbon, evinced that he thought it better to abandon. The voyage undertaken at the instance of the charterer was a new voyage: no recommencement of what had once been abandoned could make the underwriter liable.

EYRE Ch. J. At the time of the trial, I had considerable doubts on this case; but the discussion of to-day, and the opportunity which I have had of further considering the question, have in a great degree cleared them up. If I had continued to doubt I should be unwilling to interfere with a verdict of a special jury of merchants on a subject of this kind, unless I clearly saw that some principle of law had been mistaken; or unless I was bound by authorities to pronounce that verdict wrong. With respect to authorities there are none, for this is admitted to be a new case: we ought therefore to be fully satisfied, that upon some principle of law the verdict is wrong before we interfere by granting a new trial. It has been argued in support of the rule, that the voyage insured was the third branch of a specific voyage, specifically described in the policy; but I take the voyage insured to be a voyage from Saffi to Lisbon only. Now that the voyage so described did literally commence there can be no doubt, and I know no way in which that voyage could be restricted in point of commencement or connexion with any other voyage, but by representation or warranty. That point was ably put by my Brother Shepherd; If a man be asked to underwrite a voyage from Saffi to Lisbon, he naturally says, "Let me know what this voyage is, and at what time it is to commence, that I may judge of the risk. Is the ship now at Saffi, or where is she?" He will expect a [204] representation and that representation ought to be true: here the representation was, that the ship was bound from Lisbon to Madeira with a cargo, from Madeira to Saffi in ballast, and from thence to Lisbon. That representation was really true at the time that it was made, and the underwriter was to form his own calculation of the time when the "Timandra" would arrive at Saffi. If the insurance was made on a representation which was true at the time, it will be difficult to state a case where subsequent events, not happening through misconduct, and not totally disappointing the voyage, will discharge the underwriter. He formed his judgment of the case, knowing that all was executory, and that an alteration might arise of a kind that might increase his risk; upon the representation made to him he underwrote. The fact is, that the representation being true, a circumstance occurred under which the captain was distressed how to act, and respecting which there might have been different opinions: he resolved to go back to Lisbon; the charterer there called upon him to fulfil his engagements; he sailed accordingly, and arrived at Saffi; and in the course of his voyage home was captured. Then why have the jury done wrong in saying that the underwriters are liable? They were literally bound to insure a voyage from Saffi to Lisbon; tied up, indeed, as far as a representation of the projected voyage, executory in its nature, could tie it up, and that representation was true at the time that it was made. The voyage from Saffi to Lisbon might have been performed with as much ease after the circuitous voyage had taken place (unless a Spanish war had broken out) as in the direct course originally proposed. On what principle then can the underwriters be discharged? The voyage has in substance been performed: the ship was diverted from her intended course by circumstances for which no one was to blame, and having arrived at Saffi, took in the cargo which was the original object of the insurance.

HEATH J. I am of the same opinion. This is an insurance on a voyage from Saffi to Lisbon, which being a voyage to commence in futuro, it was necessary that

the agent of the insurer should give all the intelligence of which he was possessed to the underwriters. Now the captain's orders were to go from Madeira to Saffi, and from thence to Lisbon. Indeed it is not contended that there was any misrepresentation, but only that the voyage insured was never commenced; though the intention clearly was to have proceeded in the round voyage, had not the crew been [205] alarmed by reports of an enemy off the coast of Saffi. The question is not whether the captain meant to abandon, since he had it not in his power so to do, without the consent of the charterers; and at their instance he did proceed on the voyage as soon as he conveniently could. This is like all other cases of deviation justified by particular circumstances, and I see no reason to quarrel with the verdict.

ROOKE J. expressing some doubts with respect to the liability of the underwriters, founded on the circumstance of their having at the time of the insurance apparently taken into consideration the period at which their risk was to commence, since they refused to underwrite the "Timandra" till the broker informed them of her arrival at Madeira;

The case stood over till this day, when Eyre Ch. J. said, that the Court were now unanimously of opinion, that no new trial ought to be granted.

Postea to the Plaintiff.

PURTON v. HONNOR. Feb. 6th, 1798.

. [Referred to, *Wren v. Weild*, 1869, L. R. 4 Q. B. 736.]

An action on the case to recover damages against the lessor of the Plaintiff in a vexatious ejectionment is not maintainable (a)¹.

Action on the case to recover damages sustained by the Plaintiff in defending a vexatious ejectionment brought against him by the Defendant, in which the nominal Plaintiff had been nonprossed.

General demurrer to the declaration: and joinder.

Cockell Serjt. was this day to have argued in support of the declaration:

But the Court expressing themselves clearly of opinion on the authority of *Saville v. Roberts*, 1 Salk. 14, that such an action was not maintainable, he declined arguing the point; and the Court gave

Judgment for the Defendant.

DAHL v. JOHNSON. Feb. 8th, 1798.

Where bail is taken under a judge's order in this court, each of the bail is liable to double the sum ordered, as well as to double the sum sworn to in case of affidavit (a)².

The defendant being held to bail for 25l. by a Judge's order, in an action of assault, each of the bail entered into a recognizance for double that sum: the Plaintiff obtained a verdict for [206] 105l. and signed judgment for his damages and costs: accordingly a ca. sa. issued against the Defendant for 138l. 5s. and the bail were fixed.

Cockell Serjt. now shewed cause against a rule nisi, for staying all proceedings on their recognizance, upon payment by the bail of the sum of 25l. and costs; he contended, that whatever might be the practice of the King's Bench, as laid down in *Jackson v. Hassel*, Doug. 330, each of the bail was liable in the Common Pleas to the full extent of the recognizance, and cited *Culveray et Ur. v. De Miranda*, 1 Barnes, 74. *Mitchell and others v. Gibbons*, 1 H. Bl. 76, and *Fowlds v. Mackintosh*, 1 H. Bl. 233.

Le Blanc Serjt. in support of the Rule.—In *Calverac v. Miranda*, the bail only justified in the single sum ordered by the Judge, and to that extent each was held liable; the inference from which case is, that the bail are not liable beyond the sum ordered by the Judge. The cases of *Mitchell and others v. Gibbons*, and *Fowlds v.*

(a)¹ Vide *Sinclair v. Eldred*, 4 Taunt. 7.

(a)² Contra in *K. B. Clarke v. Bradshaw*, 1 East, 86. And see *Wheelwright v. Jutting*, 7 Taunt. 304. *Jacob v. Bowes*, 6 East, 312. *Wheelwright v. Simons*, 5 M. & S. 511. *Howell v. Wyke*, 1 B. & B. 490.

Macintosh differ from this: the former having been a proceeding on the bail-bond, where the Defendant not appearing, the Plaintiff had no other remedy, and the latter an attachment against the sheriff, whom the Court refused to relieve without his putting the Plaintiff in the same situation as he would have been in, but for the sheriff's default. In *Calverac v. Miranda*, the bail only justified to the single amount of the Judge's order, and there is no rule of Court altering that practice. Indeed it would be a great hardship on the bail, who have formed their opinion of the sum to which they may be liable from the Judge's order, that they should be held liable to a larger sum.

ELY Ch. J.—I think that this case cannot be argued on the nature of the contract which the bail may be supposed to have intended to enter into: such an argument would be used in opposition to the whole practice which regulates cases of bail. The bail always enter into a recognizance for double the sum sworn to, and no doubt they will be answerable to the extent of their recognizance for the damages sustained by the Plaintiff. There is an end therefore of that kind of reasoning which supposes that the parties were deceived in the contract into which they entered. I think the only question is, whether there has been such a mistake in this instance as should induce the Court to relieve the bail upon equitable terms! This must depend upon the notion, that when there is a Judge's order the bail are only to be bound in that sum which the order expresses. If there had been any settled practice of that kind I should not have thought [207] it unreasonable: but on the principles which govern us with respect to bail in general, I can see no difference between an order, and an affidavit to hold to bail. The order is introduced because from the nature of some particular cases it is impossible for the Plaintiff to swear to the precise sum due; instead therefore of ascertaining the sum by affidavit, it is left to the discretion of a Judge to say what it shall be. But when once that sum is ascertained, on what principle is it that the bail should not enter into the same kind of security as in common cases? What is to be done on affidavits, is to be done on a Judge's order; and I know no way of making our practice consistent but by holding it so. It was formerly a rule of the Court, that if the Defendant himself became bound, the bail should only enter into a recognizance for the single sum (*a*). This was a general rule, and extended as well to cases on affidavit, as to those on a Judge's order. Afterwards the Court thought it improper for the Defendant to become bound at all, and made a rule (*b*) accordingly. With that I am well satisfied; if it was right for the Court to make a further regulation that the bail should not be liable to more than the sum sworn to, they should have said so; but I cannot see that there is any distinction between this case and the case of bail taken on affidavit.

BULLER J. As the practice of this Court stands settled, the present case must be decided by it, for the reasons which my Lord has fully and ably laid down. I cannot however but think the practice of the King's Bench more reasonable. The bail there become bound in double the sum, but they are not separately liable to that extent; each may discharge himself on paying the single sum sworn to. A man should know the extent of his liability; if he consent to become bound for 50*l.* why go beyond that sum? if you do, he never can know the extent of his own liability. I do not think our practice good; but that consideration cannot affect this case: it may be matter for the deliberation of the Court, whether we should not alter the practice, retaining it indeed in part, and making each of the bail liable to the sum sworn to, but not in the double sum as is now the case. The bail look to see what the debt is, and it is reasonable that they should infer from thence the extent of their obligation. In the [208] present case, however, they must be held liable to the amount of their recognizance separately, not exceeding the sum recovered.

ROOKE J. The dispute on this motion arises from the alteration introduced by the Court, forbidding Defendants to become bound at all. I certainly have acted under a mistake; for when I have fixed the sum for which the Defendant was to be held to bail at 10 or 20 pounds, I have considered the bail as giving security for no

a) Vid. Cooke's Rules and Orders, C. B. 5 W. & M.

b) E. T. 36 C. 3. It is ordered that from and after the first day of the next term in all actions requiring bail, the Defendant shall not be permitted to enter into the recognizance: but the bail shall each of them enter into a recognizance in double the sum sworn to.

more. Formerly it was so, when the Defendant had his option to become bound with the bail: for if the Defendant was bound, the recognizance was only taken for the single sum. But does it follow from our having forbidden the Defendant to become bound, that when he has not his option, the bail should be bound in double the sum? That never was the case under the old practice, except when the Defendant did not choose to become bound.

The Court, with the consent of the parties, made

The rule absolute on payment of the amount of the recognizance by each of the bail with (a) costs.

MORRIS v. WALL. Feb. 12th, 1798.

If any part of the consideration of an annuity be paid in country bank notes, the dates and times of payment must be set out in the memorial under the annuity act (b).

Shepherd Serjt. on a former day obtained a rule calling on the Plaintiff to shew cause why the judgment signed on a warrant of attorney given to secure an annuity of 75l. should not be set aside, on the ground of the memorial having stated that part of 600l. the consideration-money, was paid "in notes on the Bank of England and country bank notes," without specifying the dates and times of payment of the latter. It now appeared however by the affidavit of the Plaintiff, that at the time of executing the deeds the Defendant had his option of being paid in cash or notes, and accepted the latter as equally convenient to himself.

Clayton Serjt. for the Plaintiff. If it be only necessary to state in the memorial that the consideration was paid in money, the Court may consider this as a payment in money. It is clear that by the word "money" the act (17 Geo. 3, c. 26), did not mean cash only, for s. 4 supposes a case where payment is made in notes. The policy of the act was to prevent goods at an exaggerated price being made the consideration of an annuity. But the question here is, Whether any symbol of money passing current and ac-[209]-cepted as money, be not money within the meaning of the act? In *Wright v. Reul*, 3 Term Rep. 554, bank notes were so considered. A bank note tendered and not objected to is a good tender in money. So a country bank note payable on demand, if taken as payment, is good payment. To go one step further, if a country bank note be accepted as a tender, but refused because not so much in amount as the party thinks himself entitled to, it may be a good tender pro tanto. Much inconvenience would arise from setting out the dates and times of payment of notes in these transactions, since the number employed must often be such as to occasion great prolixity.

Shepherd contra. No agreement between the parties to accept any thing as money can make any difference, since the object of the act is to prevent improvident agreements. The objection here does not arise from the dates and times of payment of the bank notes not being set out, but those of the country bank notes, which are not always payable on demand. They are the promissory notes of a banker; and in *Rumball v. Murray and another*, 3 Term Rep. 298, and *Berry v. Bentley*, 6 Term Rep. 690, it was held that promissory notes and bankers checks must be set out. In this case, if 5l. only was paid in bank notes, and the rest in country bank notes payable at a month, 600l. will not in fact have been paid.

EYRE Ch. J. If this question was open I should feel no difficulty in deciding it. I should be of opinion that the memorial need not be a memorial of the transaction, but of the deeds, and that the consideration expressed in the latter, was to be the consideration expressed in the former. If the consideration, which may be in notes, is not bona fide paid, then I should think the best and most consistent method of effectuating the intention of the act, would be for the party to take his remedy by application to the Court, on affidavit, to have the deeds set aside. But this question has been decided, and so decided, that I am bound hand and foot. There are two

(a) This application having been first made to the Chief Justice, who referred the parties to the Court, and declarations having since that time been delivered, the Court restrained the costs to be paid by the bail to the period of that application.

(b) Vide *Drake v. Rogers*, 2 B. & B. 19.

cases on the point, against which I cannot take upon myself to interpose my private judgment, sitting here and exercising a summary jurisdiction. I wish indeed that the question had been put upon the record, in the first instance, that a solemn decision might have been had, and a rule obtained, by which all the courts might be directed in the exercise of this summary jurisdiction. But when I see two determinations, that where the consideration is paid in notes, not of the Bank of England, they must be set forth in order that the Court may see [210] whether they are such notes that they can be considered as cash, I must submit, though I do it with reluctance.

BULLER J. I am of the same opinion.

ROOKE J. I am of the same opinion.

Rule absolute (a).

CALLILAND v. VAUGHAN. Feb. 12th, 1798.

The Court will not by putting off a trial or other indirect means compel a party to consent to a commission for the examination of witnesses in Scotland. Where contradictory verdicts have been found on a policy of insurance and a third action brought against another underwriter, the Court will not put off the trial to enable him to obtain a commission from a Court of Equity for the examination of witnesses in Scotland to the same facts which were given in evidence on the last trials: at least if he has obtained time to plead on the usual terms.

A policy having been effected on the life of the late Earl of Glencairn, with a warranty of good health, several actions were brought thereon in the King's Bench, one of which was tried in Easter Term last, when a verdict was found for the Defendant. A second action was afterwards brought in this court against another underwriter, and the evidence of the principal witness for the Defendant being impeached by new evidence on the part of the Plaintiff, he obtained a verdict. In both courts new trials were moved for and refused. The Plaintiff discontinued the remaining actions in the King's Bench, and brought them in this Court, of which this was one.

Adair Serjt. on a former day applied to the Court, on the part of the Defendant, to exercise its authority by granting imparlances from time to time, or by such other means as it should think proper, to compel the Plaintiff to consent, that a commission should issue out of this Court for the examination of witnesses in Scotland. He produced affidavits stating the importance of their evidence with respect to the state of the Earl of Glencairn's health, and contended that he was intitled to this indulgence as the evidence to be obtained was merely to supply the place of that which had been impeached upon the second trial. He said that the reason why he did not move to put off the trial in the usual way was, that he could not state any probability of the witnesses being able to attend at any future time.

The Court however not being satisfied that it was proper for them to compel a party, by indirect means, to do what they had no authority to compel him to do directly, and adverting to an important question which might arise, Whether any one giving his testimony under such a commission could be convicted of perjury? intimated that it would be better for the Defendant (if all the underwriters were willing to be bound by a third [211] verdict) to apply to the Court to put off the trial for the absence of material witnesses, till the Defendant could obtain a commission from a Court of Equity; at the same time saying, that if the Plaintiff should oppose the rule on the ground suggested by Adair, it must be discharged. Accordingly a rule nisi was taken in this way.

Cockell and Heywood Serjts. now shewed for cause an affidavit, stating, First, that the Defendant had already obtained an order for six days time to plead on an undertaking to plead issuably, and take short notice of trial; the Defendant therefore was bound by the terms of his own rule, and could not in violation of it apply to put off the trial: Secondly, That previous to the action's being discontinued in the King's Bench the underwriters had hurried the Plaintiff on by threatening a non pros. They contended that there was no fact to be brought forward by the additional witnesses which the Defendant was not as much aware of at the last trial as at the present time; and said that the Court of King's Bench had constantly refused commissions to examine

witnesses where great contradiction of evidence had been expected, as in cases respecting the sea-worthiness of a ship.

Adair and Shepherd Serjts. in support of the rule said, that the underwriters had hurried on the Plaintiff in the King's Bench for no other purpose than to compel him to make his election of discontinuing, or proceeding to trial; and that the Plaintiff's case would be ultimately expedited by this temporary delay, as all the underwriters would be bound by a third verdict if the additional evidence were procured.

EYRE Ch. J. The proposal made on the part of the underwriters to be bound by a third verdict was worth the Plaintiff's consideration. He probably has good reasons for refusing to accede to it. The proposal is at least strong proof that this motion was not made merely for delay, and that the Defendant had some hopes of obtaining evidence which might turn the verdict in his favour. The Plaintiff however thinks fit to stand upon his rights: he refuses to consent, and we are called upon for a decision. The question then is, whether the Court should, under the circumstances of this case, give the Defendant till next term to enable him to apply to a Court of Equity. The reasons ought to be very many, and very strong, to induce us to grant this favour. On the motion for a new trial here, it was proposed to the underwriters to consent to be bound by a third verdict, as the two [212] former were contradictory, but this was not acceded to. I lay no other stress on that circumstance, than as it proves that the underwriters chose to proceed in the most adverse way. From that moment, therefore, they should have set about procuring the necessary evidence for their defence. They understood their cause at that time as well as they do now; and yet they did not apply to a Court of Equity for a commission, as a large body of underwriters usually does. They first hurry on the Plaintiff in the King's Bench, and then obtain time to plead on the usual terms. After all that has passed it is impossible for the Court deciding adversely to put off the trial of this cause in order to give the Defendant the opportunity of applying to a Court of Equity, which he has lost by his own neglect.

BULLER J. Whether these underwriters ought to be satisfied with the last verdict, or whether they act wisely in persisting, are questions which the Court has nothing to do with. The Defendant does not now come in the ordinary course of justice, but is asking what he is not entitled to of right, and what, if granted, will be to the prejudice of the Plaintiff. I observe that the Defendant does not pretend to produce evidence of any new fact, of which the underwriters were not apprized at the time of the first trial; it seems that he has only got four or five witnesses more to prove the same thing. But that ought not to have any weight. I have always told a jury that if a fact is fully proved by two witnesses, it is as good as if proved by a hundred. I do not know that the Court of Chancery would grant a commission of this kind of course: I think not. Taking into consideration the circumstance of the Defendant having bound himself by the terms of the order not to delay the Plaintiff, I am of opinion that this rule should be discharged with costs.

ROOKE J. The Plaintiff having refused to consent to put off the trial, the case must stand on its own merits, and as the Defendant has entered into terms, he ought not now to be allowed to delay the Plaintiff. But I think it would be going too far to discharge the rule with costs.

EYRE Ch. J. said, that as the Defendant had not disclosed by his affidavit that he was under terms, he concurred in the opinion that the rule should be discharged with costs.

Rule discharged with costs.

[213] LEOMINSTER CANAL COMPANY v. COWELL AND ANOTHER. Feb. 12th, 1798.

A rent charged on the rates by a canal act as a compensation for damage done to land, is not within the 11 Geo. 2, c. 19, s. 22, so as to entitle an avowant to double costs; nor is any rent-charge (a).

Replevin of a boat taken belonging to the Company. Avowries, 1st, That by the 31 Geo. 3, c. 69, the Company was authorized to enter into the lands of any person, and set out such parts as they should think necessary for the canal; making a

(a) Vide *Johnson v. Lawson*, 2 Bing. 341. *Short v. Hubbard*, 2 Bing. 349, 352.

recompence for all damage done by a sum in gross or by an annual rent to be charged upon the rates; that a power was given to distrain the boats of the Company upon the canal in case such rent should be in arrear twenty-one days; that the Company entered into and damaged the avowant's lands; that the recompence was adjusted by an annual rent, and because that was above twenty-one days in arrear he distrained, &c. 2d, That after the passing of 31 Geo. 3, c. 69, a sum was due from the Company to the avowant for rent on account of land set out and damaged, and afterwards adjusted according to the provisions of the said act. These facts having been traversed and found for the avowant and judgment entered accordingly, Williams Serjt. on a former day obtained a rule to shew cause why the prothonotary should not be directed to review his taxation, he having allowed double costs.

Clayton Serjt. now shewed cause. The Canal Act gives a distress for rent, and says, if it is not redeemed it may be appraised and sold "in such manner as the law directs in cases of distress for rent." If this clause be coupled with 11 Geo. 2, c. 19, s. 22, it will entitle the avowant to double costs. This is a case between landlord and tenant; the rent *eo nomine* is to be paid to the owner of the land while the damage continues, and unless it is purchased there is a reversion of the land itself to him as soon as it shall cease. The benefit of 11 Geo. 2 is not confined to cases where the avowry pointed out by that act is used; a party is still at liberty to avow at length, though if he does, he must prove his title in omnibus. At any rate however the second avowry is general. The case of *Lyod Esq. v. Winton*, 2 Wils. 28, where double costs were not allowed, was a case of seizure for a heriot custom and not a distress for rent, and is therefore very distinguishable from the present.

Williams Serjt. *contra*. The first avowry is admitted to be under this canal act, but it is contended that the second is general. That however would be had on demurrer unless supported by this act, [214] for in a case between landlord and tenant the distress must be taken upon the premises; whereas here the boat was not taken on the avowant's premises, but on the canal. The 11 Geo. 2 was made to remedy the difficulty landlords had in setting out their title on the record, and only gives double costs in cases of avowries under that act. This is strongly shewn by the case in 2 Wils., where the Court refused to extend that act to an avowry for a heriot custom. The words "appraised and sold in such manner as the law directs in cases of distress for rent," does not apply to 11 Geo. 2, but to 2 W. & M. sess. 1, c. 5, which first enabled the party to sell what was a mere pledge at common law.

EYRE Ch. J. (stopping Williams). We need only look at the Leonminster Canal Act to be satisfied that this is not a distress for rent within the meaning of 11 Geo. 2; the distress intended to be protected by that act, is a distress for a certain rent directly reserved by a landlord on his grant or demise of land theretofore made. In that case the landlord may avow generally, and is entitled to double costs. But this is a distress for rent by the Canal Act charged on the rate; it is a mere rent-charge, with a power of distress given; and not at all like the case of rent reserved by tenure. A rent-charge is not within the 11 Geo. 2.

Per Curiam, Rule absolute (a)¹.

HOLSTEN v. CULLIFORD. Feb. 12th, 1798.

It is not sufficient to stick up a notice of declaration in the office if the defendant's last place of abode is known; for it ought to be served there (a)².

Clayton Serjt. shewed cause against a rule nisi for setting aside the interlocutory judgment in this case, and produced an affidavit of the clerk to the Plaintiff's attorney, stating, that he had stuck up the notice of declaration in the office, "not knowing where the defendant was to be found."

The Court (after conferring with the officer) said, that if the Defendant was not to

(a)¹ Vide also *Leonminster Canal Company v. Norris and another*, 7 Term Rep. 500, where the same point was contended and the same judgment given by the Court of King's Bench. A motion had also been made in this case similar to that in the King's Bench, on the ground of the insufficiency of the avowries; but was abandoned after the decision of that Court.

(a)² Vide *Losemore v. Cohen*, 1 N. R. 279.

be found after due search the notice of declaration ought to be served at his last place of abode, or at least it should be sworn on the part of the Plaintiff that the Defendant's last place of abode was not known.

Shepherd Serjt. for the Defendant.

Rule absolute.

[215] BURNSALL v. DAVY AND OTHERS. Feb. 12th, 1798.

A. devised all his freehold and leasehold estates to B. and the issue of her body "as tenants in common, but in default of such issue, or being such, if they should all die under twenty-one and without leaving issue" then over: held that all the limitations subsequent to that to B. being contingent, the remainders in the freehold were barred by fine and recovery, but that the leasehold vested in the remainder-man on the death of B. without issue (a).

This was a case from the Court of Chancery, the substance of which was as follows;—

David Burnsall deceased, being seised in fee of and lawfully entitled unto certain freehold and leasehold estates, by his will dated the 26th November 1791, duly executed and attested so as to pass his real estates, gave and devised as follows, that is to say, "I do hereby give, devise and bequeath all and every my freehold and leasehold estates and all other my estates whatsoever both real and personal (subject and chargeable as therein mentioned) after payment and discharge of all my debts legacies and my funeral and testamentary charges and expences and the expences in and about executing this my will unto my niece Mary Owstwick otherwise Ellard and the issue of her body lawfully to be begotten as tenants in common (if more than one), but in default of such issue or being such if they shall all die under the age of twenty-one years and without leaving lawful issue of any of their bodies, then I devise the same unto my cousin Peter Davy and the issue of his body lawfully to be begotten as tenants in common (if more than one) but in default of such issue or being such if they shall all die under the age of twenty-one years and without lawful issue of any of their bodies or in case neither he nor any such lawful issue (if any) shall take upon himself or themselves the surname of Burnsall in virtue of an act of parliament or other legal method to be made or taken for that purpose within the space of two years after coming into the possession of the same estates and property by virtue of this my will, that then and in either of such cases happening the same estates and property shall actually go, and I for that purpose hereby give devise and bequeath the same to Stephen Ganton his heirs executors or administrators for ever, but recommend and hope that he they or some or one of them will take upon himself herself or themselves my said surname of Burnsall."

Power was given by the will to Mary Owstwick otherwise Ellard at any time or times during her life, and to Peter Davy at any time or times during his life, when and as they should respectively come into and be in the actual possession of the said estates and property to grant the freeholds upon building leases for seventy years, and to grant either the freeholds or leaseholds upon other leases for twenty-one years.

[216] David Burnsall afterwards died without altering his said will, leaving the said Mary Owstwick otherwise Ellard (who was then the wife of the Plaintiff) his niece and heiress at law, and the said Peter Davy and Stephen Ganton him surviving.

Mary Owstwick the niece is since dead, without ever having had any issue, but she and her husband before her death, and within two years after the death of the testator, took upon themselves the surname of Burnsall, in pursuance of the said testator's will, and by the authority of His Majesty's letters patent, granted to them for that purpose; and soon after the testator's death entered upon the freehold estate and suffered recoveries, and levied fines thereof to the use of such persons and for such estates as the said Joseph Ellard and Mary his wife should appoint. And for default of appointment to the use of Joseph Ellard, for the joint lives of himself and

(a) Vide *Doe v. Cooper*, 1 East, 229, 234. *Seale v. Barter*, 2 B. & P. 490. *Doe d. Lifford v. Sparrow*, 13 East, 359. *Doe d. Wright v. Jesson*, 5 M. & S. 95, 102. *Merest v. James*, 1 B. & B. 484, 488.

his wife, and after the decease of either to survive for his or her life, with remainder to the heirs and assigns of Joseph Ellard in fee.

The questions for the opinion of the Court were, 1st, What estate and interest the said Mary Owstwick otherwise Ellard took under the testator's will, and the recoveries and fines in the testator's freehold estates? 2dly, What estates the said Mary Owstwick otherwise Ellard took under the testator's will, in the said testator's leasehold estates? 3dly, What estate the Defendant Peter Davy took under the said will in the testator's freehold estates? 4thly, What estate the Defendant Peter Davy took under the said will in the testator's leasehold estates?

This case was argued in Easter Term last by Palmer Serjt. for the Plaintiff, and Williams Serjt. for the Defendant.

Palmer Serjt. Mary Owstwick took an estate tail in the freehold, and an absolute estate in the leasehold property. It is manifest that both kinds of property were intended by the deviser to go together to the same description of persons; it is therefore only necessary to establish, that an estate tail in the freehold passed, and an absolute estate in the leasehold will follow of course. The interest of P. Davy in the freehold being contingent, is at all events barred by the recovery, whether M. Owstwick took an estate for life or in tail. If she took an estate tail the contingency is manifest. But suppose it to be an estate to M. Owstwick for life, remainder to her children for life, still the interest of P. Davy would not be absolute on the determination of those estates; for if [217] one of the children had arrived at the age of twenty-one or had left issue, P. Davy could not have taken any thing. If we were merely contending for the freehold, we need only cite the decision between these parties, 6 Term Rep. 34; it is for the purpose of the leasehold only, that it becomes necessary to discuss what estate M. Owstwick took. The prefatory words "all my freehold and leasehold estates" are not sufficient to give an estate in fee to the children; for though great stress has been laid upon such words, where a question has arisen between the devisee and the heir at law in cases where all has been devised by such prefatory words, and something remained undisposed of by the particular clauses of the will, yet in this case every thing has been devised away, and the only question is, Whether A. or B. shall have a particular part of it. The only cases where the word "issue" can be construed to be a word of purchase, are, 1st, where an express estate for life is given to the ancestor, remainder to his issue and the heirs of such issue; in which case the term "issue" denotes some individual, because the subsequent words of limitation are inconsistent with the ancestor's taking the whole estate. 2dly, Where a personal estate is given to the ancestor for life and to his issue without any disposition over: but there is no instance of such a construction being put upon the word "issue" in cases of freehold estates without subsequent words of limitation. The Courts have construed such words as appear to give an estate for life only, as giving an estate of inheritance, where the property would otherwise go to a different family from that which was intended to take, *Roe v. Grew and others*, 2 Wils. 322, *Robinson v. Robinson*, 1 Burr. 38, and in *Doe v. Applin*, 4 Term Rep. 82, where the devise was to W. D. of a freehold estate for life, and after his decease to and amongst his issue, and in default of issue then over, the Court went so far as to reject the words "and amongst" in order to effectuate the general intention, and held that W. D. took an estate tail. On the same ground the Court in this case may, if necessary, reject the words "tenants in common." In *Doe v. Applin*, Lord Kenyon thought that the general intention would fail for want of limitation to the issue. Here if the word "issue" be understood fully, that is including all descendants, it must be considered as a word of limitation: if it be considered as designating one or more persons only it must be confined to issue born in the life of the deviser, *Cook v. Cook*, 2 Vern. 546. But the same word cannot be construed to mean two things in the same breath: if the issue of M. O. would [218] take by purchase, the words "lawful issue of their bodies" must be confined to issue to be born within a limited time, to the exclusion of their general descendants. But to say that it is an estate for life to M. O. and then over, would be directly contrary to all the cases where the general intention of the testator has been adopted, notwithstanding particular words which seem to contradict it.

Williams Serjt. contra. I shall contend that M. Owstwick took an estate for life with contingent remainders to her children in tail, and that the remainder over to Peter Davy was a vested remainder. This is with a view to the freehold, and if I

can establish a right to that the leasehold will follow of course. The general intention of the testator may be effected, without giving an estate tail to M. O., for if she take an estate for life with cross remainders to her issue in tail, the remainder to Peter Davy will not take effect till all her issue is extinct. The words of the will are "as tenants in common if more than one." Now, cross remainders may be intended here, for, if on the face of the will they appear necessary to the intention of the testator, the Court will imply them. In *Doe v. Wainwright*, 5 Term Rep. 427, Lord Kenyon said, "No technical precise form of words is necessary to create cross remainders." Here the intention is manifest from the words "if they shall all die under the age of 21 years, and without leaving lawful issue of their bodies." The ground of the decision in *Doe v. Applin* was, that no cross remainders could be implied: and there Mr. J. Buller said, that in rejecting the words "and amongst," the Court would be going farther than they had gone in any former case. In the next place, the issue of M. O. would have taken an estate tail, in which case Peter Davy took a vested remainder. In *Luddington v. Kime*, 1 Ld. Raym. 203. 1 Salk. 224. 3 Lev. 431, it was held, that where the mesne estates are particular estates, the remainder limited over may vest. In this case the testator gives an estate "to the issue of the body of M. O. as tenants in common, if more than one;" now it is clear that if the will had stopped there, the children could have taken only an estate for life, and the remainder to Peter Davy would be vested: and the subsequent words only subject that remainder to be divested by issue. But admitting the subsequent words to be words of inheritance, it is impossible that they should give a fee: for even supposing that the devise had been to the issue of M. O. and their heirs, the subsequent words, "without lawful issue of their bodies" would [219] restrain the general expression of heirs, to heirs in tail. 19 H. 6, 74 b. cit. Dougl. 266, in notis, and if that be the case, where a fee is expressly given, a fortiori it will be so where the estate given is not so large. The case of *Doe v. Laming*, 2 Burr. 1100, is much stronger than this, for "heirs" is a more technical expression than "issue," and yet the Court there in order to effectuate the general intention of the testator restrained the estate of the first taker to an estate for life. So in *Doe v. Reason*, cit. *Doe v. Holmes*, 3 Wils. 245, Ryder Ch. J. said, that "after the death of the tenant for life, the issue (which in a will is a word that operates as effectually to make an estate tail as the words heirs of the body do in a deed) are to take as purchasers, for the devise is to the issue of the body of the niece, and to the heirs of such issue." The words used by the deviser in this case "without leaving lawful issue" are sufficient to give an estate tail; nor does the addition of the words "if they shall all die under the age of twenty-one years" make any difference, for the remainder could not take effect till failure of issue. *Soule v. Gerrard*, Cro. Eliz. 525. Moor, 422. *Brownsword v. Edwards*, 2 Vez. 248. If the children were to take an estate in fee, why should the testator have limited over to Peter Davy, and have required him to obtain an act of parliament in order to take the name of Burnsall, since if they were once possessed of a fee they might dispose of it to a stranger to that name? Such a construction would defeat his apparent intention of giving the estate over to a collateral relation who should take his name, on failure of issue of the children of M. O. At all events, whether the children of M. O. would have taken an estate in fee or in tail, Peter Davy is equally entitled to the leasehold. In *Doe v. Lyde*, 1 Term Rep. 596, it was laid down as a general principle, that "where there is an express limitation of a chattel, by words, which if applied to a freehold would create an express estate tail, the whole interest vests absolutely in the first taker, and a limitation over of such a chattel is too remote to take effect. But where there is no such express legal limitation the Court will consider the intention of the testator." The recovery in this case certainly could not affect the leaseholds, for they did not pass to make a tenant to the præcipe.

Palmer in reply. No doubt a remainder limited to a person in being, after preceding limitations to persons not in being, may open and let in those persons when they come in esse; but the idea of vesting and afterwards divesting would destroy the distinction between vested and contingent remainders. As long as it is uncertain whether the party will ever take any thing, the remainder is contingent, but a vested remainder takes effect immediately, in interest, and will take effect in possession by lapse of time; it may open, but continues vested because certain. The remainder to Peter Davy was therefore contingent, since if any of the children had arrived at the age of twenty-one, he could have taken nothing. The case of *Doe v.*

Wainewright proves nothing, for cross remainders were there created, though not in technical language. Indeed the distinction with respect to cross remainders is this, between two the presumption is in favour of them, between more than two, against (a)¹ them. If the Court can imply cross remainders in this case, they might have been implied in *Doe v. Applin*. It is not disputed that if the estate had been limited to the issue of M. O. and their heirs, the word "heirs" might be qualified to mean heirs in tail; but here no such qualification can take place, as no such words of limitation are added. There is no case where the Court has enlarged the estate of the second taker for the purpose of effectuating the general intention of the testator; if in *Robinson v. Robinson* they could have done so, they might have effectuated the intention of the testator more completely.

EYRE Ch. J. Technical rules are not to be relied upon in explaining the intention of testators: and yet cases of intention are much embarrassed by authorities. If this case were stripped of all authorities I would inquire what was the intention of the testator, as it appeared from the circumstances of his family, and the words of the will: and next I would examine the rules of law, to see how far the intention of the testator was consistent with them. An anxiety to effectuate what has been considered as the leading intention of testators has introduced all the difficulty in this kind of cases. It often happens that a testator means to limit his estate in a way which the law does not allow. The only words in this case which raise any difficulty in my mind are these "if they shall all die under the age of twenty-one years;" if they were omitted it would be a simple case. There were two branches of the testator's family on whom, being the principal objects of his bounty, he intended to settle his property in succession, and on failure of whom he intended that it should go over to Peter Davy. He devises first, to Mary Owstwick, and secondly to the issue of her body: if the first taker died without issue he meant that the [221] estate should go to another person; again, if the first taker left issue, and they all died without issue, the objects of the testator's bounty in his own family being gone, the property was to go over. This being clearly the intention, how is it to take effect? If it were not for the words "if they shall all die under the age of twenty-one years," I should be of opinion that this must be construed to be an estate for life to M. O. remainder in tail to her issue as purchasers, with cross remainders to every one of that family, and then over to the next branch. But I am at a loss to know what to do with those words. If I were perfectly satisfied with the rejection of the word "amongst" in *Doe v. Applin* (a)² I would reject them, and consider this as a devise over in case the issue of M. O. should die without leaving lawful issue of any of their bodies.

BULLER J. I incline to think that it will be impossible to reject the words "if they shall all die under the age of twenty-one years." There is a circumstance attending this will which might give reason to suppose that the testator had something of a legal understanding. Suppose that he knew for how long a time he could tie up his property? By the words of the will the estate is given to Mary Owstwick, and the heirs of her body as tenants in common if more than one; now "tenants in common" can only apply to the issue, for she and one of the issue could never take as tenants in common; the power of leasing given to M. O. while in possession confirms me in my opinion that she was to take an estate for life only, and that the whole estate was to go to her issue after her death. Possibly the testator reasoned thus: "I will give an estate for life to M. O. with an estate tail to her children till they arrive at twenty-one, and then a fee, at which time the law will give them a fee by means of a common recovery." If this construction be right the remainder to Peter Davy is contingent; for it does not solely depend on the determination of the preceding estate. If a child of M. O. had attained the age of twenty-one, and afterwards died without issue, the estate would have gone to Peter Davy, for the contingency must happen before the estate can vest at all. With respect to the leasehold property it is perfectly clear, that it cannot be touched by fine or recovery.

The Court took till this term to consider of their opinion, when the following certificate was sent to the Lord Chancellor: We are of opinion, 1st, That under the will of this testator Mary Owstwick otherwise Ellard took an estate for life in the testator's freehold estates with contingent remainders to the other persons mentioned

(a)¹ *Pery and Others v. White, in Error*, Cowp. 780.

(a)² *Vid. Doe et Bean v. Halley*, 8 T. R. 7, n. (c).

in the said will, which contingent remainders were barred [222] by the fines and recoveries levied and suffered by Mary Owstwick, by force whereof Mary Owstwick became seised of an estate in fee in the said estates.

2dly, That Mary Owstwick took an estate for life in the said testator's leasehold estates.

3dly, That under the said will Peter Davy took an estate for life in remainder in the said freehold estates on the contingency therein expressed, which estate with all the subsequent limitations were afterwards barred by the fines and recoveries suffered by Mary Owstwick.

4thly, That under the said will Peter Davy became absolutely entitled to the testator's leasehold estates on the death of Mary Owstwick without issue.

12th Feb.

JAS. EYRE. J. HEATH.
F. BULLER. G. ROOKE.

SHAW v. EVERETT. Feb. 12th, 1798.

To assumpsit on a bill of exchange the Court will not allow a Defendant to plead the general issue, and that the bill was given on a stock-jobbing transaction contrary to 7 Geo. 2, c. 8 (b).

Le Blanc Serjt. shewed cause against a rule nisi for pleading several matters to assumpsit on a bill of exchange, viz. 1st, The general issue. 2dly, That the bill was given on a stock-jobbing transaction contrary to 7 Geo. 2, c. 8. He contended that any thing which went to impeach the consideration of the note might be given under the general issue, and that the only object of this application on the part of the Defendant was to get over the time in which a notice of trial might be given for the next sittings, by introducing a long replication.

And the Court being of this opinion,

Discharged the Rule (a)¹.

Adair Serjt. for the Defendant.

Mr. J. Heath was absent from the 29th of January to the end of the Term from indisposition.

The end of Hilary Term.

[223] CASES ARGUED AND DETERMINED IN THE COURTS OF COMMON PLEAS AND EXCHEQUER CHAMBER, IN EASTER TERM, IN THE THIRTY-EIGHTH YEAR OF THE REIGN OF GEORGE III.

M'COLLAM v. CARR. April 26th, 1798.

The jurisdiction of the Court of Conscience does not extend to contracts made on the high seas; nor will the Court allow a suggestion for double costs under 23 G. 2, c. 33, where the original debt being above 40s. has by a balance of accounts been reduced below that sum (a)².

Assumpsit for seaman's wages. The declaration contained two counts, one on a special contract, and another for work and labour generally. At the trial the Plaintiff attempted to prove that he had been pressed out of the ship with the collusion of the Defendant, but failed to establish that fact. The Defendant had paid him a certain

(b) Vide *Lechmere v. Rice*, 2 B. & P. 12. *Thyatt v. Young*, Id. 72. *McConnell v. Hector*, Id. 549.

(a)¹ In this term in a case of *Angerstein v. Vaughan* a similar rule for pleading, 1st, the general issue, and 2dly, alien enemy, to a declaration on a policy of insurance was discharged by the Court; Shepherd Serjt. for the Plaintiff; Heywood Serjt. for the Defendant. Vid. *Feron v. Lould*, 2 Bl. 1326. *Fiebl v. Serres*, 1 N. R. 121.

(a)² Vide *Bateman v. Smith*, 14 East, 301. But see *Clark v. Askew*, 8 East, 28. *Horn v. Hughes*, 8 East, 347. *Harsant v. Larkin*, 3 B. & B. 256, 261. *Cook v. Johnson*, 2 Price, 19.

sum as wages up to the period of his quitting the ship, but having made a small mistake in calculating the time, the Plaintiff obtained a verdict for 11. 2s. on the last count.

Shepherd Serjt. now moved for leave to enter a suggestion on the Roll, under 23 Geo. 2, c. 33, that the Defendant was resident in Middlesex, and liable to be summoned to the County Court. He contended, that as the principal part of the debt had been actually paid, and was not merely to be done away by a set-off, the Plaintiff had no demand on the Defendant beyond the sum of 11. 2s. at the time when he commenced his action.

[224] EYRE Ch. J. Does the Court of Conscience try contracts made on the high seas, by considering them as if made in the parish of Saint Mary le Bow in the Ward of Cheap? These actions though transitory as to the superior Courts are not so as to the Court of Conscience: clearly therefore, the cause of action in this case did not arise within the jurisdiction of that Court. Besides the action arises on a contract, part of which has been satisfied by money on account. Is there any case where the ultimate balance of an account only being under 40s. the Court has allowed a suggestion (a)¹? I should pause upon such a case since the most intricate point in accounts between merchant and merchant might by this means come to be decided before a County Court. It seems to me that the original demand ought to be under 40s.

Shepherd took nothing by his motion (b).

VAUX v. ANSELL. April 26th, 1798.

An annuity memorial stating that the consideration money was paid to A. B. and C. "some or one of them" is bad: though it appear that the money was paid on the day on which the deed was executed by them all.

A rule nisi for setting aside an annuity having been obtained on a former day on the ground of the following defect in the memorial, viz. that the consideration money was stated to have been paid to A. B. and C. "some or one of them";

Adair Serjt. now shewed cause, and contended, that as it appeared by the indorsement on the deed that the money was paid on the same day on which the deed was executed by all three parties, it might be presumed that they were all present at the time of payment, and therefore payment to any one of them was a payment to all.

The Court however observed, that as the payment appeared to have been made on the same day only, and not at the same time when the deed was executed by all the parties, it could not be presumed that they were all present at the time of payment.

Adair then offered to produce an affidavit of that fact;

But the Court were clearly of opinion that a defect of this kind in an annuity memorial could not be remedied by a subsequent affidavit.

Rule absolute.

Shepherd Serjt. in support of the rule.

[225] BURBIGE v. JAKES. April 27th, 1798.

Evidence of a house situate in the parish of M. will support an averment of a house "at S." S. being extraparochial, and both places usually going by the name of S.(a)².

This was an action on the case for raising the footpath on each side of the Plaintiff's house, by which the water was collected immediately in front of it. The declaration stated that the Plaintiff was possessed of a messuage "at Sheerness in the county of

(a)¹ See *Fitzpatrick v. Pickering*, 2 Wils. 68; *Gross v. Fisher*, 3 Wils. 48.

(b) An application of the same nature having been made under similar circumstances in *Bell v. Martin*, in Trinity Term following, both these points again arose, when the Court adhering to the above determination refused a rule to shew cause. *Pitts v. Carpenter*, 1 Wils. 525. *Haward v. Hopkins*, Doug. 449.

(a)² And see *Wilson v. Gilbert*, 2 B. & P. 281. *Bowditch v. Mawley*, 1 Campb. 195. *Kirtland v. Pounsett*, 1 Taunt. 570.

Kent." At the trial it was proved, that the house was situate in the parish of Minster, which is contiguous to Sheerness; that Sheerness is extraparochial; but that both places usually go by the name of Sheerness. A verdict having been found for the plaintiff, Shepherd Serjt. now moved for a rule nisi to set it aside and enter a nonsuit on the ground of the variance between the declaration and the evidence, arguing that though Westminster usually goes by the name of London, yet that it is not sufficient so to lay it in pleading.

The Court (absente Eyre Ch. J.) were of opinion that as the house was not stated to be in the parish of Sheerness it was well enough, since it appeared to be within the district of Sheerness.

Shepherd took nothing by his motion.

WEBB v. MATTHEW. May 3d, 1798.

The Court will not permit a Defendant to justify bail after an action for an escape commenced against the sheriff, who has neglected to take a bail bond (a).

The bail having been rejected, in this action, in which no bail-bond had been taken, the Plaintiff brought escape against the Sheriff.

Cockell Serjt. for the Defendant, now moved to justify new bail, which was opposed by

Marshall Serjt. on two grounds: 1st, That the new bail were described in the notice as added, whereas both the former bail having been rejected, there was no bail in the cause to which they could be added (but this objection was immediately overruled by the Court): 2dly, That if the new bail were allowed, it would afford an answer to the action against the Sheriff which had been commenced on sufficient ground: he cited *Fuller v. Prest*, 7 Term Rep. 109.

Cockell contended, that *Fuller v. Prest* did not apply, as in that case the application was made on the part of the Sheriff, who came to ask a favour: but that here the Defendant not being implicated [226] in the Sheriff's misconduct should not be prevented from defending the action.

The Court said, that as an action for an escape had been commenced against the Sheriff, if bail were now permitted to be put in, the proceedings in that action must be stayed: and that this motion therefore ought to be considered in the same light as an application on the part of the Sheriff to stay proceedings against him in the action for the escape. That as the Sheriff had neglected to do his duty, he ought not to be relieved, for the Court could not too strongly mark his conduct in omitting to follow the directions of the statute (23 H. 6, c. 9). If there was any reason for making a private engagement it ought to have been made to the Plaintiff.

Bail rejected.

NORTON v. FAZAN. May 5th, 1798.

[Considered, *Cooper v. Lloyd*, 1859, 6 C. B. N. S. 521.]

Defendant's wife having committed adultery, he left her in his house with two children bearing his name, but without making any provision for her in consequence of the separation; she continued in a state of adultery; held, that the husband should be liable for necessities furnished to her unless it appeared that the Plaintiff knew or ought to have known the circumstances under which she was living.

Assumpsit for necessities sold to the Defendant's wife and children.

Some time previous to the delivery of the goods, the Defendant having discovered that his wife kept up an adulterous intercourse with another man, separated himself from her, leaving her in possession of the house which he had inhabited, together with two children bearing his name. In this house she was living in a state of adultery, at the period when the goods in question were delivered. The Defendant had made no regular provision for his wife. The cause was tried before Eyre Ch. J. at the Sittings at Westminster in Easter Term, who was of opinion that if the Plaintiff knew or ought to have known that the separation proceeded from the adultery of the wife, the jury

(a) Vide *Birn v. Bond*, 6 Taunt. 554. *Morley v. Cole*, 1 Price, 103.

should find for the Defendant; if not, that the Plaintiff was entitled to recover. Verdict for the Plaintiff 2l. 10s.

Clayton Serjt. now moved for a rule calling on the Plaintiff to shew cause why the verdict should not be set aside and a nonsuit be entered. He contended, that whether the Plaintiff had notice of the adulterous intercourse or not was immaterial, and cited *Morris v. Martin*, 1 Str. 647. *Manwaring v. Sands*, 1 Str. 706, and *Govier v. Hancock*, 6 Term Rep. 603, and that as the separation was notorious, and the adultery committed during the separation, the Defendant was discharged.

[227] EYRE Ch. J. If the Defendant in another action brought against him by some other tradesman shall be able to establish the notoriety of his wife's situation, he may defend himself. But as the case stands at present this woman appears to have been living in a house in which she was placed by the Defendant himself, together with two children bearing the husband's name, both of whom were born in wedlock. It is true that she had an adulterous intercourse with another man, but that was not proved to be known to this tradesman. If the Defendant can bring it home to any other tradesman who shall be in the same situation as the present Plaintiff, that he did know or ought to have known the circumstances under which the wife was living, the Defendant may perhaps be able to prevent another verdict passing against him.

BULLER J. Every case on the facts is peculiar to itself, and this is so different from every other case which has been decided in Westminster-hall that I consider it as anomalous. The verdict is clearly and strictly right. The wife committed adultery for a considerable time while she was living with her husband; he voluntarily yielded his bed to the adulterer, and made no provision for her. Then what colour of defence is left? Knowing of her criminal conduct and having made no provision for her, he must maintain her as before.

HEATH J. I am of the same opinion.

ROOKE J. I am of the same opinion.

Clayton took nothing by his motion (a)¹.

GREEN v. REDSHAW. May 5th, 1798.

If an affidavit to hold to bail is entitled, it is bad. The Court will never allow a supplemental affidavit except to explain an ambiguity in the original affidavit (a)².

The affidavit to hold to bail in this case was entitled "William Green Plaintiff against James Redshaw Defendant," but in the body of the affidavit it was stated, that James Redshaw, without adding the word "Defendant," was indebted &c.

A rule nisi for entering a common appearance having been obtained on the ground of the affidavit being entitled.

Clayton Serjt. now shewed cause, and contended that as the affidavit was positive that James Redshaw was indebted, the title alone would not vitiate it, and that none of the cases went that length.

But the Court thought the objection good, saying that it was in consequence of a decision of this Court that the Court of King's [228] Bench had made a rule (a)³ that no affidavits to hold to bail should be entitled.

Clayton then applied for leave to file a supplemental affidavit; and cited *Hollis v. Brandon* (ante, p. 36).

Sed per EYRE Ch. J. The Court will never receive a supplemental affidavit unless to supply something which is ambiguous on the face of the original affidavit; and which the Court for its own satisfaction wishes to have explained; and on this ground proceeded the offer of leave to file a supplemental affidavit in *Hollis v. Brandon*. But if it were allowed in this case, it would be making that right which was wrong at the time when it was done; and would be in the nature of an amendment.

Per Curiam. Rule absolute.

(a)¹ 1 Lev. 5.

(a)² Vide *Sterenson v. Danvers*, 2 B. & P. 109. *Garnham v. Hammond*, 2 B. & P. 298.

(a)³ Vid. *Clarke v. Cawthorne*, 7 Term Rep. 321, and Reg. Gen. Trin. 37 Geo. 3, B. R. 7 Term Rep. 454.

MADDOCKS v. HOLMES AND OTHERS. May 8th, 1798.

The Court will not restrain a Defendant from pleading the Statute of Limitations on setting aside a regular interlocutory judgment.

Shepherd Serjt. having moved for a rule nisi to set aside a regular interlocutory judgment which had been signed in this case for want of a plea, on the terms of paying the costs, pleading *instante*, taking short notice of trial for the Sittings after Term, and giving judgment as of the Term;

Marshall Serjt. said he was instructed to oppose this motion in the first instance unless the Defendants should be restricted from pleading the Statute of Limitations, and cited *Willett v. Atterton*, 1 Bl. 35, to shew that the Court never let in that plea where they set aside a regular judgment (a)¹.

But the Court said, that the plea of the Statute of Limitations was not necessarily unconscientious, and that of late it had been considered as a fair plea in the King's Bench (b), though formerly it had been thought otherwise.

Rule absolute on the terms proposed.

[229] GRINDLEY AND ANOTHER v. BARKER AND OTHERS. May 10th, 1798.

[Adopted, *Curtis v. Kent Water Works*, 1827, 7 B. & C. 332. Applied, *Wilkinson v. Malin*, 1832, 2 Cr. & J. 655.]

If a power of a public nature be committed to several, who all meet for the purpose of executing it, the act of the majority will bind the minority. A condemnation by four out of the six triers of leather appointed under 1 Jac. 1, c. 22 (the whole number being met for the purpose of trying,) must be considered as the condemnation of all six (a)².

Trespass for seizing, detaining and converting certain hides of leather, the property of the Plaintiffs.

Plea, justifying the seizure and detainer for that after the making of 1 Jac. 1, c. 22, entitled an act concerning tanners curriers shoemakers and other artificers occupying the cutting of leather to wit on &c. John Barker John Pym Robert Pownds and John Matthison (the Defendants) and also Henry Matchwick John Thomas Woolley Thomas Slack and Thomas Mead being substantial honest and expert persons and being freemen of some of the companies of cordwainers curriers saddlers or girdlers within the city of London that is to say the said John Barker being a freeman of the company of curriers &c. &c. (averring the companies to which each belonged) were duly appointed according to the form of the said act of parliament by William Curtis, he the said W. C. then being Lord Mayor of the City of London, and the aldermen of the said city for the time being, searchers to view and search all and every tanned hide skin or leather which should be brought as well to the market at Leadenhall, as to any other fair or market therefore usually appointed within three miles of the said city, of whom the said Thomas Mead was then and there duly appointed a sealer, and were afterwards on &c. duly sworn before the said W. C. and the said aldermen to do their office truly; and that afterwards and while they continued such searchers as aforesaid to wit on &c. the said hides of tanned leather abovementioned were offered and put to sale by the Plaintiffs, the said Plaintiffs then and there using the mystery of tanning in the market of Leadenhall in the said act mentioned being within the jurisdiction of the said city: And the Defendants further say, that the said hides had not after the tanning thereof been well and thoroughly dried, according to the intent and meaning of the said act: wherefore the said Defendants so appointed and sworn as aforesaid on &c. at the market of Leadenhall aforesaid and within the jurisdiction of the said city by virtue of their said office seized and carried away the said hides of tanned leather above-mentioned, and detained them in their custody until they might be duly tried in manner and form as is directed by the said statute as it was lawful

(a)¹ See also *Forbes v. Ld. Middleton*, 2 Str. 1242.

(b) *Rucker and another v. Hannay Bart.* 3 Term Rep. 124.

(a)² Vide *Cook v. Loveland*, 2 B. & P. 31, 35.

for them to do: and the Defendants say that within a reasonable and convenient time [230] after the said seizure to wit on &c. they the said Defendants gave notice to Brook Watson Esq. he the said B. W. then being Lord Mayor of the said city, of their having so taken and seized the said hides for the cause aforesaid, in order that the said Lord Mayor might in due manner appoint triers for the trying of the same according to the directions of the said statute to wit at &c. which is the said trespass, &c. And this &c. Wherefore &c.

Replication tendering issue on the fact of the hides not being well dried. New assignment, that after the seizure of the said hides of leather and within six days after notice thereof had been given to the said Mayor of the said city to wit on &c. the said Mayor according to the form of the said act did in due manner elect and appoint six honest and expert men to wit Joseph Lacey, George Murray, Edmund Sylvester, Samuel Norris, Samuel Brooks and William Webster, the said J. L. and G. M. then and there being of the better sort of the company of cordwainers, the said E. S. and S. N. then and there being of the better sort of the curriers of London, and the said S. B. and W. W. then and there being of the better sort of tanners using Leadenhall market, and no one of them being of kin or affinity to the said Plaintiffs as triers for the trying, amongst others, of the said hides so seized as aforesaid; which said six persons according to the said act of parliament upon their corporal oaths taken before the said Mayor did on the second market day holden upon the Tuesday for leather next after the said seizure in the afternoon of the same day being the ——— day &c. to wit at &c. inquire straightly examine and try whether the said hides were sufficiently serviceable or not according to the intent and true meaning of the said act: And the said Plaintiffs say that upon such inquiry examination and trial the said S. B. and W. W. differed from the said four other persons so appointed triers as aforesaid with respect to the verdict which ought to be given concerning the said hides and the said S. B. and W. W. then and there refused to find the same insufficient or unserviceable, and the said hides were found and returned insufficiently dried and accordingly condemned by the said J. L. E. S. G. M. and S. N. only without the concurrence of and in opposition to the said S. B. and W. W. and no other trial finding or adjudication hath been had or given in relation to the said hides. Of all which premises the said Defendants afterwards and before the commencement of this action to wit on &c. at &c. had notice. And the said Plaintiffs further say that they brought this action not only for the trespasses in the introductory part of the plea mentioned and thereby attempted to be justified [231] but also for that the said Defendants after the said S. B. and W. W. had refused to find the said hides of tanned leather to be insufficient or unserviceable, and also after the said Defendants had such notice as aforesaid, to wit, at &c. kept and detained the said hides for a long space of time, to wit &c. and converted and disposed of the said hides to their own use in manner and form as the said Plaintiffs have above thereof complained against them. Which said trespasses above newly assigned are other and different &c. wherefore &c.

Pleas to the new assignment; 1st, Not guilty; 2dly, That the Defendants being such searchers as aforesaid, and having so as aforesaid seized the said hides, so as aforesaid offered to sale by the said Plaintiffs in the market of Leadenhall in the City of London by virtue of the said statute afterwards and after the same had been so as the said Plaintiffs have above alledged found by the said triers appointed as aforesaid and the said Plaintiffs had by reason thereof forfeited and lost the same, the Defendants kept and detained the same in order that the said hides so forfeited, being leather seized within the City of London, by virtue of the said statute might be brought to Guildhall in London there to be prized by indifferent persons in manner and form as is by the said statute directed; as it was lawful for them to do, to wit, at &c. which are the same supposed trespasses &c. and this &c. wherefore &c.

General demurrer and joinder.

This demurrer was twice argued; first in Hilary Term last by Shepherd Serjeant for the Plaintiffs, and Le Blanc Serjeant for the Defendants, and now in this Term by Cockell Serjeant for the former and Adair Serjeant, for the latter.

Arguments for the Plaintiffs. The only question arising on these pleadings is, Whether the condemnation by four only of the triers was sufficient to warrant the detention of the leather? This will turn principally on the construction of 1 Jac. 1, c. 22. By the preamble it appears that the former statutes upon this subject had been too sharp and rigorous, and that the Legislature intended that the goods of the

subject should not be condemned unless by the concurrent opinion of the three branches of the trade, viz. the tanner, the currier, and the cordwainer, or at least by a majority composed of persons in those three branches of the trade. The object of the act as we may collect from s. 6 and 25, was to keep the three branches of the trade distinct, and thus to prevent any bad leather being brought into the market, by making [232] each of them a check upon the others. Where the act has given powers to any number of persons, it has cautiously expressed whether those powers were to be executed by the whole number only, by a majority, or by any particular individuals. Thus by s. 15, it is directed that "so much of the hide, &c. as shall be insufficiently tanned or dried shall be cut out by the oversight discretion and direction of the triers hereafter in this act to be appointed, upon the oaths of the said triers." So offences against s. 21 are to be tried "by the wardens of the curriers and the wardens of the Company whereof the party grieved shall be;" in which case it can never be contended that a majority of the curriers only would be sufficient. But in s. 24, it is provided that curried leather shall be searched and allowed "by the curriers of London for the time being or such persons as they shall thereto assign." So the same expression is used in s. 27. And in s. 29, it is directed that "the Master and Wardens of the cordwainers, curriers, girdlers, and saddlers, or the more part of the said Master and Wardens of every of the said several mysteries shall make true search," &c. Thus too s. 31, having directed that eight persons should be appointed as searchers and sealers generally, it is added in s. 32, "that the said searchers or any of them" may seize. The 33d sect. of the act by which the triers are appointed, following up the idea of the preamble which had expressed that the trade had been oppressed by some laws that were too rigorous, enacts that to the end there might be an indifferent trial, the triers should be selected two from each branch of the trade, and very much assimilates them to a jury; they are not to be of kin or affinity to the owner of the leather, and they are upon their corporal oaths "to inquire, straightly examine, and try." Nor is it unreasonable to suppose that the Legislature intended all six to be unanimous, when the common law has in the case of a jury required the unanimity of twelve. This too is strengthened by the words at the end of s. 35, which directs that the persons appointed for trial of the leather shall do their duties therein without delay, "upon pain that every of them making default therein shall for every such several default forfeit and pay 5l." This provision was probably added in contemplation of the triers not coming to an agreement. Supposing however that a majority of the triers may decide, still as the Legislature has anxiously composed this tribunal of the three branches of the trade whose united skill and experience would best ensure a just verdict; that majority must [233] be composed of one at least of each of those three branches; whereas upon the present pleadings it appears that the condemnation in question was made by the two curriers and the two cordwainers, exclusive of the two tanners. There is no instance in which the majority of a number of persons appointed to try a fact can determine the question. In the Courts of Law though a majority of the judges decide, still they decide upon a question of law and not of fact, which makes a material distinction. Nor is there any analogy between this and the case of corporations; whose acts are either legislative or ministerial, relate to their own interests only and do not take away the rights of other persons, as the act of the majority in this instance does. In the case of elections the majority must of course bind the rest. Generally speaking however where any number of persons are appointed to do a particular act, they must all join. Thus in *The King v. Hobbes, Noy, 47*, where a commission made out to six, four, or two, was executed by three, the execution was held void, and Co. Litt. 181 b. was there cited (a). It is observable also that where any number of persons are appointed by act of parliament, the majority of whom are intended to act, it is always so expressed.

(a) Shepherd Serjt. mentioned a case which he said had been decided in K. B. about three years back, of ——— v. *Bland*; that was an action on a bond given by the Defendant as security for a collector of the rates in St. Andrew's, Holborn; the local act had directed that the collector should be nominated by the commissioners, five of whom should be a quorum; the collector was elected by three, and it was held on a motion for a new trial that the surety was not liable, as the collector was not duly appointed. But Eyre Ch. J. said, that if the appointment had been made by three, at a board consisting of five, he should have thought the appointment good.

Arguments for the Defendants. Three points are to be considered in this question. 1st, What is the general rule of law respecting authorities of this nature? 2dly, Whether any particular intent can be collected from this act to control the general rule of law? 3dly, Whether, if a majority can decide, one of each class composing the tribunal must not concur in the decision? 1st, There is no instance except that of a petty jury where unanimity is required in the exercise of a discretionary authority, and according to Dyer, 218, in marg. and Hale P. C. 297, n. (c), it was not formerly required even in that case. So unanimity is not required from a grand jury, though twelve must concur. Besides, the triers in this case cannot be resembled to a jury as they are not assembled in the same manner, they are judges as well as jurors, there is no challenge and no means of keeping them together in order to make them agree. They most resemble [234] the homage of a Court Baron where the suitors are judges and jury, and the verdict of the majority binds. Where a ministerial act is to be done, or a naked authority to be executed, the concurrence of all those to whom the authority is committed, is required. Nor is the distinction between the two species of authorities, viz. those which are discretionary and those which are merely ministerial, without good reason. In the latter case, where unanimity is required, the law provides the means of compelling it; as in cases of private trusts, by the interference of the Court of Chancery, and of public ones by mandamus from the King's Bench; but there are no legal means of obliging men to act contrary to their judgment. By analogy to the case of elections it may be contended that this judgment is the judgment of all the six triers; for there a majority has no other way of over-ruling the opinion of the minority but by voting on the opposite side; if they give a mere negative they must be taken to have virtually consented. *The King v. Forcroft*, Burr. 1017, and *Ree v. Withers*, Pasch. 8 Geo. 2, B. R. cited by Wilmot J. Burr. 1020. In the new assignment it is stated that the two refused to concur and that the four found a verdict, and in the plea to the new assignment it is averred that the hides were found "by the said triers appointed as aforesaid" to be insufficient. If therefore consistently with the allegation of the Plaintiff this verdict can be considered as the finding of all the triers it must so be taken; and on the authority of the above cases it is clear that if four find, and two refuse, the finding must be held the finding of the six. It has been decided in the case of a corporation, *Attorney General v. Davy*, 2 Atk. 212, that a majority may act, though nothing be mentioned in the charter, of the major part: and in *The King v. Beeston*, 3 T. R. 592, and *Witwell v. Gartham*, 6 T. R. 398, which were not cases of corporations, the acts of a majority were held sufficient. In the former of these cases arguments ab inconvenienti were admitted, and in the latter Mr. J. Lawrence stated it as a general principle, that, "where a body of persons is to do an act, the majority of that body will bind the rest." 2dly, The rigour complained of in the preamble does not relate to any mode of trial, but to certain acts which by former statutes were required to be done, and which could not be done. No argument can be drawn from s. 15, for as the word "triers" is there used generally, the same construction which applies to the clause in question will apply to that. Admitting that [235] all the clauses, where the major part is not mentioned, must be understood in the same manner, a strong argument in favour of the Defendant may be drawn from s. 22, for the act required to be done is to be done by the wardens of two companies, who are select parts of two corporate bodies; and where an act is to be done either by a corporation or a select part of it, it is clear that a majority will bind: and though in this particular case it appears that the judgment cannot be given by the wardens of the curriers only, because the wardens of each company are to be considered as one arbitrator, and where there are two arbitrators, both must join; yet the opinion of the wardens of each company must be determined by the majority. So the acts to be done under sections 24 and 27 are to be done by select parts of corporate bodies, and the same observation will therefore apply. The reason why "the more part" was mentioned in section 29, was not to give a power to the majority which they had not before, but to obviate a doubt which might arise, whether every one of the persons there mentioned would not be liable to a penalty if he did not go out four times in every year to view, &c. Nothing therefore appears on the face of the act to shew an intention in the Legislature to control the general rule of law: nor has the particular clause by which the triers are constituted, kept in view the trial by jury as has been contended, having omitted one of its most leading features, the right of challenge. 3dly, Though the triers are made

to consist of equal numbers of each of the three trades, yet this appears to have been done with no other object than to compose a tribunal whose members should be acquainted with every state in which the leather might be when it came to be tried. The members belonging to one trade are to assist those of the other two by their information, and then the whole is to give one general verdict for the public: if it were otherwise it would be in the power of the members of either of the three trades to control the acts of the other two, in order to favour the members of their own trade, whose wares might come before them to be tried.

Reply. *The King v. Foxcroft* differs from this case: for the electors being met were bound to vote for some person if they meant to exercise their franchise; whereas here the triers being met to try a particular question, four gave an opinion in the negative and two in the affirmative. In *The King v. Withers* some of the electors voted for two persons when there was but one vacancy, [236] and therefore their votes were thrown away. The construction of 9 Geo. 1, c. 7, in *The King v. Beeston*, was expressly made with reference to the 43 of Eliz. the poor laws being all in pari materia. And the judgment of the Court in *Wittnell v. Gartham* did not proceed on the words of the statute, but on three other grounds: viz. The intent of the founder, the resemblance of the body to a corporation, and usage.

EYRE Ch. J. The true question in this case lies in a very narrow compass; it is this: What is the operation in law of a judgment of four out of six triers, six being the number constituted to be the triers, and the six being assembled to inquire and try; whether it is to be deemed the finding and judgment of the body, or merely the finding and judgment of the four individuals who concurred? If it is the mere finding of the four who concurred, then this leather is not found insufficient, but if the operation of law on the finding of four who are the majority of the body duly assembled, be, that their judgment is the judgment of the whole, and therefore the judgment of the triers; then the leather must be taken to have been found insufficient, and the Defendants are justified. On the first argument I thought this question would turn on two general heads of inquiry. 1st, What the general rule of law was in the case of bodies of men entrusted with powers of this nature; whether they must all concur, or whether the decision of the majority would bind the whole? 2dly, Supposing the latter to be the general rule, whether that general rule is to be controlled by the intent of the legislature as collected from the scope and provisions of this act?

With respect to the first question, I think it is now pretty well established, that where a number of persons are entrusted with powers not of mere private confidence, but in some respects of a general nature, and all of them are regularly assembled, the majority will conclude the minority, and their act will be the act of the whole. The cases of corporations go further: there it is not necessary that the whole number should meet; it is enough if notice be given; and a majority, or a lesser number, according as the charter may be, may meet, and when they have met, they become just as competent to decide as if the whole had met. With a view to this case, those who have met resemble the six triers who have authority to decide: and then a question arises, how they may act when they have met. The case in *Atkyns* shews the opinion of a great Judge, Lord Hardwicke, who was much conversant with this subject in one part of his judicial [237] life, that the majority of persons assembled will conclude the minority, and an act done by them will be the act of the whole body. And that part of the Law of Corporations applies to this case; that with regard to powers not merely private, which are to be exercised by many persons, provided a sufficient number be assembled, the act of the majority concludes the minority, and becomes the act of the whole body. If that be so, the argument drawn from the word "triers" being used generally, in the 33d and 46th sections, will not stand much in our way: because the judgment of four triers in this case is the judgment of all, as much as if all had concurred. There is nothing then in the general rule of law to prevent this finding from being held good. But the question is still open, whether on the construction of this particular statute, it does not appear that not only all the persons must be assembled, but that every one of them should concur, or at least that one of each class should concur. There was something very plausible in that last argument, but I am now clearly satisfied, either that all must concur, or that a majority may decide for the whole. There is nothing in the act which necessarily leads to a construction, that the majority must be composed in any particular manner. With regard to the general question, it has been argued

most weightily, that as the leather might be seized in all the stages of the manufacture, it was right that the authority which was to determine should be delegated to persons of all the different trades, in order that the body might be aided and assisted by the united experience of all the branches, whenever the inquiry should come before them. But it struck me that when the body was so constituted and had assembled, and could have the assistance of the united experience of all, the necessity of all concurring in the final judgment was not so apparent, and might be attended with inconvenience. It is indeed a truth, that in a body composed of three classes of trade, those who are of the particular trade of which the owner of the goods happens to be, may feel an inclination to favour the members of their own trade, and may hesitate to condemn, when they themselves might be liable to condemnation the next time. And this might be attended with a great deal of inconvenience, since the searchers are obliged to execute a public duty, and the validity of their acts must depend upon the judgment of the triers (a). It seems better that when all the knowledge which each class can afford has been communicated, the [238] whole should be governed by the majority. This case has been compared to the case of juries, and in many respects it is analogous; but in an abundance of particulars it is unlike. On the abstract question it has often been debated, whether there is policy and good reason on the side of the rule which requires unanimity in a jury. However good therefore the rule may be found in practice when applied to juries, yet if it be doubtful in theory we ought not to force the analogy, and apply the rule to other cases where it may be found inconvenient. It is impossible that bodies of men should always be brought to think alike: there is often a degree of coercion, and the majority is governed by the minority, and vice versâ, according to the strength of opinions, tempers, prejudices, and even interests. We shall not therefore think ourselves bound in this case by the rule which holds in that. I lay no great stress on the clause of the act which appoints a majority to act in certain cases, because that appears to have been done for particular reasons which do not apply to the ultimate trial: it relates only to the assembling the searchers; now there is no doubt that all the six triers must assemble; and the only question is, what they must do when assembled? We have no light to direct us in this part, except the argument from the nature of the subject. The leather being subject to seizure in every stage of the manufacture, the tribunal ought to be composed of persons skilful in every branch of the manufacture. And I cannot say there is no weight in the argument, drawn from the necessity of persons concurring in the judgment, who are possessed of different branches of knowledge, but standing alone it is not so conclusive as to oblige us to break through a general rule; besides, it is very much obviated by this consideration, that when all have assembled and communicated to each other the necessary information, it is fitter the majority should decide than that all should be pressed to a concurrence. If this be so, then the reasons drawn from the act, and which have been supposed to demand, that the whole body should unite in the judgment, have no sufficient avail, and consequently the general rule of law will take place; viz. that the judgment of four out of six being the whole body to whom the authority is delegated regularly assembled and acting, is the judgment of all.

BULLER J. The first question to be considered in this case is, what is the legal effect and understanding of the facts disclosed upon this record, and I think this point has been extremely well [239] argued by my Brother Adair, whose argument, together with the authorities which he has cited, has convinced my mind, that sitting here, we must pronounce this to be the finding of all the six triers.

This is a case in which six persons are united together as one body, and are required by the act to form an opinion. They are not permitted to say we will form no opinion, but they must decide whether the leather be sufficient and serviceable or not. Four of them expressly decide that it is not: the other two do not agree in that finding, but they do not dissent: and I take it that in such a case, where the law compels persons convened under an oath to form an opinion, if any of them do not pronounce against the opinion of the majority, they find for it. If that be so, it puts an end to this case; for if it is to be understood, upon this record, that this judgment has the effect of a judgment of the six triers, no question remains to be considered.

But upon the act two questions arise: 1st, Whether all the six triers must concur

in their judgment, or whether a majority are sufficient to decide? 2dly, If a majority can decide, what that majority must consist of? Now it seems to me, that upon the first question the authority of Co. Litt. 181 b. if we went no further, is decisive; because it is there said in express terms, that in matters of public concern the voice of the majority shall govern. It is to be remembered, that not a single case, not a dictum has been quoted on the other side of the question, and that this stands wholly uncontradicted. In the next place, I think there is great weight in some of the cases which have been mentioned, and that the conclusion to be deduced from them goes much further than has been admitted. *Witnell v. Gartham* was said to have been decided upon three different grounds: 1st, Upon the founders intent; 2dly, On a resemblance to the case of corporations; and 3dly, Upon usage. One thing is clear from this authority, that a deed which speaks in general terms, giving a power to a certain number of persons, does not necessarily import that all these persons shall concur, because if that were necessarily the legal construction of the deed, usage would be laid out of the question. Then we have got thus far upon this case, that a deed which gives a power to a certain number of persons may admit of two constructions; either that all must join in the act, or that the majority may do it; in no other way could usage be admitted; usage being admitted, it certainly had its effect in that case. The case therefore is open to the argument of inconvenience, which was slightly touched upon: [240] for if the act admits of two constructions, certainly the argument of inconvenience applies. Now if it be necessary that all should concur, one man may destroy the determination of five, though that one may be the least qualified of the whole six to judge; and the consequence will be, that if the defect be in the tanning of the leather, and by the tanners and the cord-wainers opinions it be pronounced insufficient, yet if one currier declare it to be sufficient, the judgment of the others will not avail. Why, that is unreasonable upon the face of it, and therefore such a construction cannot be adopted. It seems to me therefore upon the whole view of the case, that the majority of the six must decide. With respect to that majority being composed in any particular way, I can see nothing in the statute which warrants such an idea.

HEATH J. I am of the same opinion, and as the case has been so fully entered into, I shall very shortly deliver the reasons on which my opinion is founded. In the first place, a question has been made whether or no a power requiring in the exercise of it skill and discretion, being delegated to a certain number of men, ought to be exercised by all, or whether it is sufficient that it should be exercised by the majority of them? I do not think that either of the three cases cited at the bar, either the case out of *Atkyns*, or the two cases out of the Term Reports, directly go to prove the proposition contended for by the Plaintiffs; because those decisions might have been maintained upon other grounds, for I observe that in all the three cases the powers in question were new powers delegated to bodies of men, in which by several statutes and the common law the acts of the majority conclude the minority; it might therefore be considered that the new power ought to be exercised exactly in the same way as the old power would be. However, we find some dicta of very great respectability, viz. of Lord Hardwicke, and the Judges who presided in the King's Bench, to shew that as well upon common law and common reason as upon the particular circumstances of the cases before them, the act of the majority concluded the minority. Then the question has been argued upon the different clauses of the statute, and it seems to me, that a very good answer has been given to these clauses. All must concur in trying, and then though they be of different opinions, some of one opinion, some of another, yet all having tried, the majority shall bind.

[241] Though we have no particular decisions directly in point, yet there are some usages and some received opinions which are equivalent to decisions.—We know very well that in all commissions of oyer and terminer and gaol delivery, and of the peace, where a quorum is constituted, and it is necessary that a quorum should be present to do the acts for which they are appointed, yet if the quorum are in the minority, the majority shall conclude the minority. For these reasons I concur in opinion with his Lordship and my Brother.

ROOKE, J. I might rest satisfied with deciding on the particular circumstances of this case, and if I did, I should agree, that after the authority of *The King v. Foxcroft*, four having absolutely found in this case, and the two others having only refused to concur, will amount to a finding by the whole body. But as that might lay a

ground for further litigation, I think it right to be more explicit. I think the words of the statute are at least doubtful, and I am warranted in so thinking since the counsel have not confined themselves to contending that the whole body must concur, but either the whole body or one of each class. The latter construction seems extremely questionable, since the act makes no mention of the three classes which in s. 24 appoints triers for the country, though they are to examine and try in the same way as those in London. The authority given to the triers in the present instance is general to examine and try whether certain goods are serviceable or not, and is committed to them for the advancement of public justice, and as a public trust. Now the decisions are numerous (and may be found in *Viner*, title *Authority*, letter B.) to shew that a different construction prevails with respect to private authorities and authorities for the advancement of public justice. So also *Lambard* in his *Justice of the Peace* states expressly that where a precept for keeping the peace is made jointly to twain, one alone may serve and execute that precept; following the rule laid down in *Co. Litt.* 181 b. If this be the case and we are not bound by the strict words of the act, (which it seems agreed we are not,) but are to give the clauses such a construction as will best advance the ends of public justice, there can be very little doubt how we ought to decide. We shall not advance public justice by saying that though a majority of the triers who have had the advantage of all the information to be derived from the whole six who compose the tribunal, are of opinion that the leather is unserviceable, still any one man shall have it in his power to prevent [242] a finding by holding out against the rest. All six must undoubtedly try; but does it not therefore follow that they must all decide the same way. Each man is after due examination and inquiry to decide according to the best of his judgment, and the question is to be determined by the opinion of the majority.

Judgment for the Defendants.

DA COSTA v. DAVIS. May 11th, 1798.

If the condition of a bond be to render a person in execution who has once been discharged, it is void. Condition to do one of two things; one becomes impossible, no reason for not performing the other.

Debt on bond for 1460l. dated 20th July 1797, and given by the Defendant and one J. G. Kohn to the Plaintiff to procure the release of one Edward May, who was in execution at the suit of the Plaintiff. The condition was that if the obligors or the said Edward May should pay to the Plaintiff 730l. and interest, on or before 10th January 1798; or if default should be made in such payment, then if the obligors should, on the 12th January 1798, surrender the said Edward May to the Plaintiff, at the house of one Thomas Wright, between the hours of twelve and two, so that he might be again taken in execution, the bond should be void.

Plea. That before and at the time of making the bond, May was a prisoner in the Fleet, charged in execution at the suit of the Plaintiff and several others: that a little before the making of the bond, May requested the Plaintiff to discharge him from the said execution at his suit, and offered the bond in question as a security for his debt to the Plaintiff; which bond was accordingly given, and May was discharged from the execution at the Plaintiff's suit; but that the other creditors having refused to discharge him, he continued a prisoner, whereby the obligors were prevented from surrendering him at the time and place in the condition mentioned; that the obligors, before the day, gave notice to the Plaintiff that they could not surrender May according to the condition, but that May was then in the Fleet, and would be there on the 12th January, between twelve and two, and that the obligors would then and there render the said May, so that he might be again taken in execution; and that the obligors on the 12th January were in the Fleet, and attended there between twelve and two, and then and there had the body of the said May, and were ready to surrender and deliver him up to the Plaintiff, so that he might be again charged in execution, but that [243] neither the Plaintiff or any person on his behalf was there to receive him. And this, &c. wherefore, &c.

General demurrer and joinder.

Le Blanc Serjt. for the Plaintiff contended, that no excuse for non-performance of the condition was shewn by the plea.

Williams Serjt. contra insisted, that the condition to surrender had been substantially performed, and cited *Freshwater v. Eaton*, 1 Str. 49, where the condition of the recognizance was to surrender the principal to the keeper of the Palace Court; a writ of error in the King's Bench having been brought, and the judgment below affirmed, a surrender to the Marshal of the Marshalsea was held a good performance of the condition of the recognizance.

The Court was of opinion on the authority of *Tigers v. Aldrich*, 4 Burr. 2482, that the first part of the condition was void, being to render a prisoner in execution who had been once discharged, and therefore as the other part had not been performed, the bond was forfeited. Besides that where the condition of a bond is to do one of two things, shewing that one could not (a)¹ be performed, is no good reason for not having performed the other.

Judgment for the Plaintiff.

WHITELOCK Administrator, &c. AND OTHERS v. HEDDON AND OTHERS.
May 12th, 1798.

[Referred to, *Pearce v. Currington*, 1873, 42 L. J. Ch. 518. Discussed, *Villar v. Gilbey*, [1907] A. C. 149.]

Testator devised "all his freehold, leasehold, &c. estates" to A. in fee, provided that if B. shall have "any son or sons," then "to such male issue as B. shall have when A. attains twenty-one," but A. to have the rents and profits of the estates till he attains twenty-one; by a subsequent clause he gave "all the residue of his real and personal estates whatsoever, not before disposed of, to A. his heirs, &c. for ever;" B. had one son who died before A. attained twenty-one, and a second who was born three weeks after that period; held that the first son took nothing, but that the second took an estate in tail male (a)².

This was a case sent under the direction of the Lord Chancellor, for the opinion of the Judges of this court, which stated: that Thomas Whitelock (the testator) being seised of a leasehold estate for three lives, under the Archbishop of York, and a small freehold estate, made his will the 31st August 1778, by which after giving to his son John Whitelock an annuity of 20l. for life, charged on his freehold, leasehold, and fountainhold estates at Monckton Mains and Baldersby in the county of York, and also a further annuity of 20l. for life, after the death of Mrs. E. Beckwith charged on the same estates, and also an [244] annuity of 10l. for life to his daughter E. Heddon wife of W. Heddon of Baldersby, Yeoman, charged on the same estates, and for her separate use; he devised as follows: "Item I give devise and bequeath unto my grandson John Heddon son of W. Heddon of Baldersby aforesaid Yeoman all my freehold leasehold fountainhold lands tenements hereditaments and estates whatsoever to him his heirs and assigns for ever, save and except as hereinafter mentioned, that is to say, provided that in case my said son John Whitelock shall have any son or sons begotten and born in lawful matrimony then I give devise and bequeath all my said freehold leasehold fountainhold lands tenements hereditaments and estates whatsoever hereinbefore given and devised to my grandson John Heddon to such male issue as my said son John Whitelock shall or may have at the time of my said grandson John Heddon attaining the age of twenty-one years, but I will order and direct that in case my said son John Whitelock shall have any male issue then I order and direct that the said John Heddon shall receive the rents and profits of my said freehold leasehold fountainhold lands tenements hereditaments and estates whatsoever until he shall attain the said age of twenty-one years as above mentioned." He next proceeded to give several legacies to his grandchildren, the Heddons, to some of his friends, and to the poor of Bishop Monckton in the county of York, and then devised thus: "Item as to all the rest and residue of my real and personal estates of what nature or kind soever not hereinbefore disposed of I give devise and bequeath the same to my grandson John Heddon his heirs executors administrators and

(a)¹ Unless it become impossible by the act of the obligee. Com. Dig. Condition (K. 2), or by the Act of God. *Laughter's Case*, 5 Co. 21 B.

(a)² Vide *Doe d. Mellor v. Moor*, post, 559.

assigns for ever." Thomas Whitelock the testator died 28th December 1780, leaving John Whitelock his only son and heir at law. The devised estates were taken possession of for the use of John Heddon the first devisee, till he attained the age of twenty-one years, and when that period arrived, viz. 21st May 1792, he entered on those estates. After the death of Thomas Whitelock the testator, and before John Heddon attained the age of twenty-one, John Whitelock had a son born named John, who died when five weeks old, and before John Heddon attained twenty-one. At the time of John Heddon attaining the age of twenty-one, the wife of John Whitelock was ensient with a child which was born 3d August 1792, being something less than three months after John Heddon attain[245]-ing the age of twenty-one. This child was christened Thomas, and died 24th January 1795.

The question for the opinion of the Court was, Whether the above-named John Whitelock the first son of the Plaintiff John Whitelock, or the said Thomas Whitelock the second son of the said Plaintiff John Whitelock, or either of them, were or was entitled to any and what estate under the will of the said Thomas Whitelock their grandfather in the estates thereby devised?

Le Blanc Serjt. for the Plaintiff. The words of the will, "at the time of my said grandson John Heddon attaining the age of twenty-one years" are not descriptive of the persons who are to take, but only of the time at which they are to take. If this be true, then an interest vested in the eldest infant John Whitelock as soon as he was born. At any rate however the second son T. Whitelock, who was in ventre sa mere at the time of John Heddon's attaining his age of twenty-one, comes within the description of the above words. *Doe d. Clarke v. Clarke*, 2 H. Bl. 399. *Doe d. Lancashire v. Lancashire*, 5 T. R. 49. *Miller v. Turner*, 1 Vez. 85 (a) (the Court said that point need not be contended, as it was now fully settled). However it is immaterial which of the sons did take; I only contend that if either took, the estate given was a fee. The testator devised all his estates to his grandson by his daughter, but foreseeing that his son might have a son, he meant to substitute that son, if any such there should be, in the place of the first devisee, who was then living. Now if the sons of the son shall not be held to have taken a fee, they will have a less estate than the son of the daughter. Besides a devise "of all my estate or estates" will carry a fee unless the Court sees words to narrow the construction. As to the supposed words of limitation which are superadded; "male issue" may be construed either as words of purchase or limitation, according to the intent of the testator, and the residuary clause may have been dictated by unnecessary caution. Though the Plaintiffs will only be entitled to the freehold on the idea that either John or Thomas Whitelock took a fee, since nothing has been done to bar the remainders, yet if an estate-tail in the freehold passed either to John or Thomas Whitelock, the leasehold will have vested absolutely in them, and the Plaintiffs will be entitled to that part of the estate; unless indeed the nature of the tenure under the Archbishop of York may make a difference. If "male issue of John Whitelock" [246] be construed to mean all male descendants of John Whitelock, so long as there shall be any, then the first and other sons must take successively as tenants in tail male, or all the sons must take as joint-tenants with several inheritances in tail male.

Shepherd Serjt. for the Defendants. John Whitelock took only an estate for life. The express words of the will give to John Heddon an estate in fee; and when the testator uses the same words of description in the provisional devise to the son of John Whitelock, which he employed in the devise to John Heddon, he only meant to denote the premises, and not the quantity of the estate. If it should be held that the son of John Whitelock was intended to take a fee, then the residuary clause must be rejected altogether as having nothing to operate upon. There is no case where the word "estate" or "estates" has been held to give a fee, unless accompanied by other expressions demonstrative of such an intention. In *Denn d. Moore v. Mellor*, 5 T. R. 563, it was held that the word "hereditaments" would not give a fee, and an expression of Mr. J. Buller, which was thought to convey a contrary opinion, was there commented upon. But it has been contended that the sons of John Whitelock by force of the words "male issue" were to take an estate-tail. Those words are only synonymous to "son or sons" before used, and though such a construction will give a better estate to the children of the daughter than to those

of the son, yet that appears to have been the testator's intention; 1st, From the circumstance of his having given to John Heddon the rents and profits at all events, till he attained the age of twenty-one; and 2dly, From his having made him residuary devisee.

EYRE Ch. J. I apprehend that upon the question submitted to us we shall have no difficulty in saying that John Whitelock the first son took no estate at all. I cannot read the will in the way which has been suggested by my Brother Le Blanc, in order to give him a vested interest, before John Heddon attained the age of twenty-one: because I see nothing in the will which affords any sufficient ground for such a construction. Indeed that which is to be collected from the words of the will, warrants a contrary inference, the testator having declared that John Heddon should have the rents and profits until he should attain the age of twenty-one. With regard to the estate which Thomas Whitelock took, if it had been asked of the testator when he was making the disposition in question, what interest he meant that such a son being in [247] ventre sa mere at time of John Heddon attaining the age of twenty-one, should have, I think it very probable that he would have said, that such a son should take an estate in fee; and probably he would not have thought of the limitation over. This question however has not been asked of the testator, and it is but conjecture what answer he would have made if it had been asked; we therefore must consider what he has said, and must put a reasonable construction on his words, with reference, where they are capable of different constructions, to the rest of the will. He has said clearly, that he meant to give an estate in fee-simple to his grandson John Heddon; but that if his son John Whitelock should have a son or sons, then he meant to give a benefit to such of them as should be living at the time when John Heddon should attain the age of twenty-one. It is most evident that he meant all the sons of John Whitelock who should be living at the time when John Heddon should come of age, to have a benefit of some kind or other: And the words "such male issue" must be construed to be so far synonymous to son or sons, as that in some manner they should all partake of this benefit. Now there are but two ways in which this can be effected, either by their taking as joint-tenants, or in succession in tail male. In the strict acceptation of the words "such male issue" taken with reference to the words "son or sons" before used, they mean no more than son or sons; but when I consider that these sons were the sons of his own son, who it appears were to have the benefit of his bounty in preference to the son of his daughter, and that this word "issue" is a collective term, capable of being descriptive either of person or interest, or both, I think it reasonable to understand the word "issue" in its largest sense, so as to deem it descriptive of an estate in tail male to the sons of John Whitelock, as many as there should be in order of succession. This is what the words will bear. As to the argument, that a fee is conveyed to the sons of John Whitelock by the word "estates," I take the rule to be, that it may convey a fee if the Court sees, on the whole context of the will, that the testator intended that it should do so; but that, in its strict technical sense, it does not convey a fee. I apprehend therefore that we shall certify, that Thomas Whitelock took an estate-tail in the freehold.

BULLER J. The first question here will be on the sense of the word "estate" as used in this will. There are many cases in which this word has received different interpretations. *Noscitur a sociis*. Look to the words which accompany and are connected with it. [248] What I said in a former case with respect to the word "hereditaments" has been mis-stated. I never said that it would in all cases carry a fee; but that, accompanied with other words, it might carry a fee. Lord Kenyon thought it never could, and that was the only point in which we differed. Now if the word "estate" will not pass a fee in this case, the whole dispute with respect to the freehold is at an end; for whether Thomas Whitelock took an estate-tail, or for life, will make no difference; though I concur in opinion with my Lord, that the words used will give an estate in tail male.

HEATH J. I am of the same opinion. The word "estate" must be taken according to the context. There is a case in *Eq. Cas. Abr.*(a) where a man having devised the residue of his goods, leases, mortgages, estates, debts, ready money, and other goods whereof he was possessed, the word "estates" was confined to personal estate, being coupled with chartels. It may give an estate for life, in tail, or in fee, according as

(a) 1 vol. p. 178. *Wilkinson v. Merryland*, Cro. Car. 447.

the intention of the testator appears. Here I think it carried a fee-tail, from the manifest intent of the testator to prefer the line of the son to that of the daughter.

ROOKE J. I am of the same opinion. The word "estate" or "estates" may or may not give a fee-simple, according to the context. There is no expression in this will to shew, that it was the testator's intention to describe, by the word "estates," the quantity of interest which was to pass, but only the premises; and I think it does appear that he meant to give an estate-tail, it having been his manifest intention to give an inheritance to the son of his son, in preference to the grandson by his daughter.

In Trinity Term, the following certificate was sent to the Lord Chancellor.

We are of opinion, that John Whitelock, the first son of the Plaintiff John Whitelock, was not entitled to any estate under the will of Thomas Whitelock his grandfather: and that Thomas Whitelock, the second son, took an estate in tail male in the estates which the testator held in fee-simple: and that, in respect to the leasehold estates for lives, he and his heirs male took as special occupants during the lives of the cestui que vies.

12th June 1798.

JAS. EYRE. J. HEATH.
F. BULLER. G. ROOKE.

[249] ABLETT AND OTHERS v. ELLIS. May 14th, 1798.

It is not necessary to give bail in error on a judgment in debt, unless it appears that the action was brought on a specific contract (a).

The Plaintiff having declared in debt for a sum certain, for work and labour done, goods sold and delivered, money had and received, and on an account stated, "which the Defendant had agreed to pay;" the Defendant let judgment go by default, and sued out a writ of error, but did not put in bail in error. The Plaintiff then proceeded against the bail to the action; and Shepherd Serjt. having obtained a rule to shew cause why the proceedings against them should not be stayed pending the writ of error,

Le Blanc Serjt. shewed cause, and contended, that as the declaration stated an agreement to pay a certain sum, the Defendant by letting judgment go by default, had admitted that agreement, and was therefore bound to put in bail in error by 3 Jac. 1, c. 8.

Shepherd contra cited *Girling v. Baker*, Yelv. 227; *Biddleston v. Whytel*, 3 Burr. 1545; and *Trinder v. Watson*, 3 Burr. 1566; and insisted that the form of action was not sufficient to bring a case within the statute, which ought to be construed strictly.

EYRE Ch. J. The effect of obliging this Defendant to give bail in error will be to convert all those actions which for a century past have been actions of assumpsit, into actions of debt; and the same mischief will again arise which first occasioned their being turned into assumpsit. To bring a case within the statute of James, the Court must see distinctly that a specific contract has been entered into; and though I think that the statute should be construed liberally, yet it does not appear to me that, on a fair construction, this form of declaring can be considered within the meaning of it.

BULLER J. The cases seem to have gone on a wrong principle, where it has been said that the Court ought to construe the act strictly. If that be the true construction, it ought to appear that the contract is for a specific sum payable at a certain time. But I should have thought it better for the Court to say, that this act which is a remedial law, should be construed liberally to prevent the mischief recited in the preamble: "Forasmuch as his Highness's subjects are now more commonly withholden from their just debts, and often in danger to lose the same, by means of writs of error, which are more commonly sued than heretofore they have been."—However we must not overturn the cases.

[250] HEATH J. We must adhere to the rule which has been laid down; and indeed I cannot but think that the decisions have been conformable to the intention of the Legislature, as the act in question passed soon after the determination of

(a) Vide *Trier v. Bridgman*, 2 East, 359. *Webb v. Geddes*, 1 Taunt. 540.

Slade's case (4 Co. 92 b.), where it was held that an action of assumpsit would lie in in cases like the present.

ROOKE J. of the same opinion.

Rule absolute (b).

FOX AND ANOTHER v. MONEY, Widow. May 14th, 1798.

The Defendant must take advantage of an irregularity in the writ, before appearance (vide *Davis v. Owen*, post, 342. *Rogers v. Jenkins*, post, 383. *Downes v. Witherington*, 2 Taunt. 243).

Shepherd Serjt. having obtained a rule to shew cause why the proceedings in this case should not be set aside for the following irregularity in the writ, viz. that it was tested the 22d May, instead of the 22d April.

Cockell Serjt. shewed for cause, that the Defendant had not appeared; and therefore, not being in Court, was not competent to make the objection.

Shepherd contra insisted that the Defendant was bound to object in the first instance.

And the Court (absente Eyre Ch. J.) being clearly of that opinion, made
The rule absolute.

DOE EX DEM. GERTRUDE BARONESS DACRE v. MARY JANE ROPER DOWAGER LADY DACRE. May 15th, 1798.

Devise to the testator's seven sisters share and share alike; on the death of any of them, her share to go to her first and other sons in tail; and in default of such sons, to her daughters as tenants in common. In case of any of the seven sisters dying without issue, or such issue dying under twenty-one, the surviving sisters to take her share; and if all the sisters should die without issue, or such issue die under twenty-one, then over. Held, that the words "in default of such sons" did not make the remainder to the daughters contingent, which took effect notwithstanding the birth of a son (S. C. Judgment affirmed 8 T. R. 112. And see *Doe d. Lifford v. Sparrow*, 13 East, 359. *Goodright v. Jones*, 4 M. & S. 88).

This ejectment was tried before Eyre Ch. J. at the Sittings for Westminster after Easter Term 1797; when the Jury found a special verdict, setting forth (as far as is material to be stated) as follows:

John Trevor being seised in fee, by will dated the 5th of April 1743, devised his capital mansion house called Glynde in Sussex, with the lands, &c. &c. and all his estates in Sussex, to his kinsman Dr. R. Trevor in fee. He then gave to his sister Mrs. Rice, during her life, an annuity of 300l., to be paid half-yearly out of his estates in Middlesex, Denbigh, and Flint; to Elizabeth Forster, [251] formerly his nurse, an annuity of 50l. for her life charged on the same estates; to his nephew George Rice and his niece Lucy Rice, children of his sister Mrs. Rice, a legacy of 1000l. each; and to his cousin Robert Trevor, brother of Dr. Richard Trevor, a like legacy of 1000l. charged in default of his personal estate upon his said estates in Middlesex, Denbigh, and Flint. He then devised "all his manors, messuages, titbes, lands, tenements, and hereditaments lying and being in the said counties of Middlesex, Denbigh, and Flint, or elsewhere not before disposed of, subject to the charges before mentioned, unto and amongst his dear sisters Grace Trevor, Mary Trevor, Ann the wife of the Honourable G. Boscawen, Margaret Trevor, Ruth Trevor, Gertrude Trevor, and Arrabella Trevor, during their natural lives respectively share and share alike, and from and after the decease of any of them, then the part or share of her or them so dying, to go to the first and other sons of such of them, so dying, and the heirs of his and their bodies successively, and in default of such sons then to and amongst the daughters of his said sisters so dying as tenants in common, and not as joint-tenants and the heirs of their respective bodies issuing, but in case any of his said seven sisters last-mentioned should die, without leaving any issue of her body begotten, or that such issue should die before he or she should attain his or her age of twenty-

one years, and without issue, then he gave her share to and amongst the survivors or survivor of his said seven sisters and their issue, to go and descend in like manner as before is mentioned as to the shares, parts, or proportions before given to them respectively." Then having given the overplus of his personal estate, plate, and jewels, after debts and legacies paid, to be divided amongst his said seven sisters, he proceeded thus: "And I do further will and appoint that in case all my said seven sisters shall happen to die without issue, or leaving issue, such issue shall all die before he, she, or they shall attain the age of twenty-one years and without issue, that then my said estate in Middlesex and Wales (subject as aforesaid) shall go to and be enjoyed by such person or persons who shall then be entitled to my estate in Sussex hereinbefore devised."

The testator died the 9th September 1743. On the 27th of July 1744, Gertrude Trevor, one of the seven sisters, married the Honourable Charles Roper, and had issue two sons, Trevor Charles Roper (afterwards Baron Dacre) and Henry Roper (who died), and also a daughter Gertrude (now Baroness Dacre, and lessor of the [252] Plaintiff). The Honourable Charles Roper died leaving Gertrude a widow. Ruth and Margaret, two of the seven sisters, died without issue, whereby the other five sisters became each seised for life of one-fifth of these estates. On 2d of March 1773, Trevor Charles Roper the son of Gertrude, one of the seven sisters, married Mary Jane Fludyer, and previous to such marriage a recovery was suffered of the one-fifth of which his mother was seised for life, with remainder to him in tail, and the same was settled on the issue of that marriage, with remainder to his wife for life, remainder to himself in fee; which remainder passed by his will to his wife the Defendant. (So that as to that one-fifth the Plaintiff laid no claim.) Afterwards by the death of Mary Trevor, unmarried and without issue, in March 1780, her one-fifth became divided among her four surviving sisters Grace, Ann, Gertrude, and Arrabella, each taking thereby one-fourth of her one-fifth part. In July 1780, Gertrude Roper died; whereby as well her one-fifth of the whole, of which a recovery had been suffered on her son's marriage, as her one-fourth share of her sister Mary's one-fifth, descended to Trevor Charles Roper her son. Afterwards, in 1789, Arrabella Trevor died unmarried; whereby her one-fifth part of the whole, and her one-fourth part of her sister Mary's one-fifth, became divided among her only surviving sister Grace, Mr. Boscawen the son of Ann Trevor, and Trevor Charles Roper, son of Gertrude Trevor, in thirds. By which means Trevor Charles Roper (then Lord Dacre) became seised in tail (besides the one-fifth of which the recovery had been suffered) of one-fourth of one-fifth, being his share of Mary's fifth part, and of one-third of one-fifth, and one-third of one-fourth of one-fifth, being his share of Arrabella's part. On the 3d of July 1794, Trevor Charles Roper Baron Dacre died without issue, leaving the Defendant the Dowager Lady Dacre his widow, (who was without doubt entitled to one-fifth of the whole estate, of which the recovery was suffered and settlement made previous to her marriage with him, and to whom by will he had devised the premises in question,) and the lessor of the Plaintiff the Baroness Dacre, his only sister.

The lessor of the Plaintiff, under the words "in default of such sons," claimed the one-fourth of one-fifth, one-third of one-fifth, and one-third of one-fourth of one-fifth of the whole estate, being the late Lord Dacre's share of his aunts Mary and Arrabella's shares, which came to him on their deaths after the recovery suffered, and of which, at the time of his death, he was seised in tail.

[253] This case was twice argued, once in Trinity Term last by Williams Serjt. for the Plaintiff, and Shepherd Serjt. for the Defendant, and again in this Term by Le Blanc Serjt. for the former, and Cockell Serjt. for the latter.

Arguments for the Plaintiff. It will be contended on the other side, that as the words "in default of such sons" introduce the limitation to the daughters, that limitation is contingent, and the contingency having happened by the birth of a son, all the subsequent remainders are destroyed. But those words do not create a contingency, being only a continuation of the preceding limitation to the sons, and mean the same as if the testator had said "on failure of the preceding limitation." This construction is warranted by the general intent of the testator appearing on the face of the will. The survivorship between the seven sisters being to take place only in case of the death of any of them without leaving any issue of their bodies begotten, or the death of such issue before he or she shall attain the age of twenty-one and without issue, shews that the testator had it in contemplation, that all the issue of

his seven sisters, both male and female, would take, independent of any contingency; and the limitation to Dr. Trevor, being to take place only in case there should be no issue of any of the sisters, proves the same intent. Moreover the testator by his will has excluded his sister Rice; but if the words in question should be held to make the remainders over contingent, the cross-remainders to the sisters, and the reversion to Dr. Trevor, would be put an end to by the birth of a son of any one of the seven sisters, and the excluded sister would take with the others as co-heiress. Indeed the very situation of these words, placed as they are between the two limitations, shews that they were intended to connect them, and to give to the daughters on failure of issue male. The Court will do in this case what they have usually done, namely, construe the subsequent words by the preceding limitation, *Tuck v. Frencham*, Moore, 13. Dyer, 171. 1 Anderson, 8. Co. Litt. 21 a. note 126, ed. 15. *Clarton v. Glazier*, cited by Mead J. Moore, 124, and in Cro. Eliz. 16, by the name of *Glover and Clatche's case*. Now the preceding limitation being to the sons in tail general, the subsequent words, "in default of such sons," may be read, "in default of the preceding limitation." Where a testator in creating a remainder has used shortness or incorrectness of expression, the Court will not on that account construe the remainder to be contingent. *Nicholas Lee's* [254] case, 1 Leon. 285. 3 Leon. 106. *Holcroft's case*, Moore, 486, and 520. *Holt v. Burley*, 2 Vern. 651. Besides there are many cases in which the Court has even added words with a view to effectuate the apparent intention of the testator. *Spalding v. Spalding*, Cro. Car. 185. *Erans v. Astley*, 3 Burr. 1570. *White v. Barber*, 5 Burr. 2703. Ambl. 701. The word "default," in law, means failure, whether there have been sons, and such sons have died, or whether there have been any sons. Thus if issue die without leaving issue, they are said to have died without issue. In a formedon the writ always supposes the donee to have died without issue, and it is no variance if it appear that there has been issue, and that issue has since failed. There is however one case in modern times which seems to militate against the lessor of the Plaintiff, namely, *Keene (a)* [255] *ex dem. Pinnock v. Dickson*, K. B. Mich. 1783. The

(a) *Lewis d. Ormond v. Waters*, 6 East, 342. *Goodright v. Jones*, 4 M. & S. 88-91. A note of that case to the following effect was read by Mr. Justice Buller, in his judgment. *Keene ex dem. Pinnock & ux v. Dickson*, B. R. M. 23 Geo. 3.

In ejectment between these parties, tried before Lord Mansfield at the Guildhall Sittings after Easter Term 1783, a special verdict was found, stating (as far as is material) as follows:

Henry Dakings being seised in fee of the premises in question, on the 5th Aug. 1747, devised the same to his brother P. D. for life, and after his decease to his niece Grace Pinnock for life, then to trustees to preserve contingent remainders, and after the decease of P. D. and Grace Pinnock "in trust, and to and for the use and behoof of the first son of his niece Grace Pinnock, lawfully to be begotten, and the heirs of the body of such first son lawfully issuing, and for want of such issue to the second, third, fourth, fifth, and sixth, and all and every other the son and sons on the body of his said niece to be begotten, and the heirs of the body of such son and sons lawfully issuing, according to the seniority of age and priority of birth, the elder and the heirs of his body to be always preferred and take place before the younger and the heirs of his body, and for want of such issue male then to the use and behoof of all and every the daughter and daughters of his said niece Grace Pinnock thereafter to be begotten; and for default of such issue then to the use and behoof of Richard Corbin, and the heirs of his body lawfully to be begotten; and for default of such issue to the use and behoof of the second son of Gawin Corbin deceased, and the heirs of his body to be begotten for ever." Provided that R. Corbin, and the second son of G. Corbin, and the heirs of their respective bodies, in whom the estates should become vested, should take the testator's name. Henry Dakins the testator died 1st October 1748, leaving his brother P. D. and Grace the wife of one Philip Pinnock, his niece and heir at law. P. D. entered, and on 1st May 1749 died; after whose decease Philip Pinnock and Grace his wife became seised. Philip Pinnock and Grace his wife had issue one son, Dakins Pinnock, who was born after the death of the testator and died an infant, and three daughters, namely Elizabeth, born in the lifetime of the testator, and Mary and Grace, born after the decease of the testator. Dakins Pinnock the son, and Elizabeth the daughter, died without issue in the lifetime of Philip and Grace Pinnock; Grace Pinnock the mother, died 1st August 1769, leaving Mary and

words used in that case do not indeed materially vary from those now in question. But it is to be observed, that it was the interest of both parties in that case to glance at the words "want of such issue male," because a vested remainder would have defeated the estate of both. Lord Mansfield saw that the remainder-man was interested, and ordered that he should be heard; but his case was never fully argued, no authorities were cited, nor was the Court reminded of any arguments from the tenor of the will. Besides, as the reason for putting a strict construction upon the words "want of such issue male," in that case, was in order to give effect to the manifest intention of the testator, the Court may consider that case as an authority for construing similar words according to the intent of the testator in this case.

Arguments on the part of the Defendant. The remainder over to the daughters is only a contingent devise, in the event of there being no son; and the birth of a son rendered such remainder void. It has been contended, that if this construction should prevail, the cross-remainders and ultimate limitation will be defeated; but as they are made to depend on an uncertain event, no argument can be drawn from them. No case has been cited to shew, that the words "default" and "want" are synonymous; the extensiveness of the word "issue," with which they have been connected, is the reason why the cases, in which either of them have been used, have been decided in the same way. If the words "in default of such sons," shall be held to mean, "if such sons be not born, or, if born, when they die," the estate-tail, before [256] given to the sons, will be restrained to an estate for life; since in the event of the sons dying, the daughters would have a right to take. The Plaintiff therefore must insist, that the words "default of such sons," mean "default of such issue;" which will hardly be assented to by the Court. All that was decided, in *Tuck v. Frensham*, was, that the testator intended to use the word "heirs" in the same sense in both clauses of the

Grace: Philip Pinnoek died 1st March 1778. Mary, on 1st June 1774, married James Dickson, and died in the lifetime of Philip Pinnoek, her father, leaving Mary, the Defendant, her only daughter and heir at law. Grace Pinnoek, the only surviving daughter of Philip and Grace, intermarried with George Pinnoek the lessor of the Plaintiff. Grace the lessor of the Plaintiff and Mary the Defendant are co-heiresses at law to the testator.

The case was first argued by Graham for the Plaintiff, and Wilson for the Defendant; after which Lord Mansfield desired that it might stand for a second argument, and that the remainder-man might be heard; accordingly it was again argued by the Solicitor General for the Plaintiff, Pigott for the Defendant, and Bower for the Remainder-man. For the Plaintiff it was contended, that the daughters took only estates for life, or that if any thing more was necessary to satisfy the intention of the testator, they took joint estates for life, with remainders in tail to their children: for the Defendant it was insisted, that the daughters took an estate-tail: and for the Remainder-man, that on the birth of a son, the estate-tail vested in him, and then the remainder over vested also.

LORD MANSFIELD. No case exactly the same as this has ever been decided, or perhaps ever will be; but the case of (1) *Briddon v. Page*, which occurred last week, was very like it. In my private opinion I think that the whole was a blunder; but that conjecture is not a foundation for a judicial determination. We cannot supply a limitation to the issue of the daughters, for the words are express. The estate is given to the sons and the heirs of their bodies generally, and "for want of such issue male," (which must mean sons,) over. If therefore the estate is to go over for want of sons, the contingency on which the daughters were to take has not happened, for there was a son who took, so no want of sons, and the event in which the daughters were not to take has happened. I am satisfied with this construction, because it effectuates the intention of the testator, as the daughters will take in fee.

WILLES J. On such an embarrassed will it is difficult to find out a right construction. It is clear that the line of Corbin was not to take until after a general failure of issue of the Pinnoeks. The estate to the daughters is a joint-tenancy. Co. Litt. 182. *Cook v. Cook*, 2 Vern. 545.

Judgment for the Plaintiff for one moiety, and for the Defendant for the other moiety.

(1) Vid. post, p. 261.

will. The same observation applies to the case in the margin of Dyer. In *Ives v. Legge*, 3 T. R. 488, in the note, where the remainder over was held to be vested, the words were large enough to comprehend the issue of the children, which the word "sons" is not. Even the word "issue" has been restrained to "children." *Doe v. Perryn*, 3 T. R. 484. The interest of the remainder-man in *Keene v. Dixon* was taken into consideration; for Lord Mansfield desired that he should be heard by his counsel, and considered it in his opinion, though he clearly thought that the words "for want of such issue male" created a contingency. Mr. J. Buller, alluding to that case in *Doe v. Perryn*, 3 T. R. 495, seems to have thought that the principal point decided.

EYRE Ch. J. I think that we do not want the authority of cases at this time of day to establish the rule of law on which we are to proceed to be this: that, in the construction of a will, whether the words used be technical or not technical, or even of vulgar and common parlance, the Court is to put that sense upon them, in which, on a fair consideration of the whole context, they collect that the testator intended to use them. In this case, the words on which the difficulty arises are by no means technical; they may import many things, according to the subject-matter; and we are to inquire in what sense the testator meant to use them. If we can discover that, the next consideration will be, whether the words will bear that sense; or whether we are tied down by any rule of law to understand them in any other; though indeed I can hardly put such a case. Taking a general view of the whole will, the intent of this testator appears to me to be obvious. He meant to make provision for each of his seven sisters and their children; and he meant, that if either of his sisters or her children should fail within a given time, that there should be a survivorship in favour of the other sisters and their children: and he also intended, that if neither of his sisters should have children, or if the children should all die under twenty-one and without issue, another branch of his family should take. In some event or other, he meant, not only [257] that the sons should take an estate-tail, but also that the daughters should take such an estate, failing the sons. Then let us consider in what sense the testator supposed that he had used the words which constitute the limitation to the daughters. Immediately after the disposition to the daughters, he says, "In case any of my said seven sisters last mentioned shall die without leaving any issue of her body begotten, and that issue shall die before he or she shall attain his or her age of twenty-one years, then I give her share to my surviving sisters." He gives an interest to the surviving sisters in the event of one sister dying without either son or daughter; and expressly says therefore, that there shall be no survivorship if any of the daughters should have issue either male or female. Did he not then suppose that he had used words sufficiently strong to give an estate-tail to the daughters in the event of the sons dying without issue? Next comes the limitation to Dr. Trevor, which was to take place in the event of every one of the sisters dying without either sons leaving issue, or daughters leaving issue, and such issue dying under twenty-one. Did he not then understand, that by the original devise, and by the clause of survivorship, he had given over every share of each sister, to the sons first and their issue; and that limitation failing, to the daughters and their issue? Would he have confined the clause of survivorship to the death of the sons and daughters of his sisters, under 21 and without issue, if he only meant to give a contingent limitation to the daughters in the event of no son being born? Or would he have clogged the limitation to Dr. Trevor with the existence of persons to whom he had not given any interest? The next consideration is, whether the words will bear that construction which the testator palpably intended to give them. I do not feel disposed to go all the lengths which some of the cases on wills would warrant. I am for assisting, to a reasonable extent, testators, who are not always assisted by the best advice, and whose state of mind often partakes of the state in which their bodies are; and whose advisers, if they have a little knowledge of law, frequently make a strange mixture of technical and common words. When I have got at the testator's meaning, I will, if possible, give such a construction to his words as may carry his meaning into execution; but if he has not expressed his will in such words as can bear out his meaning, then the will must take its effect according to the construction which the words will bear, and his intention will be defeated. In short, I will depart from the technical sense of words to effectuate the [258] intention of testators as far as possible, without violating the rules of law. The words used in this case are, "in default of such sons." It is impossible to say, without reference to the context, what the meaning of these words is. I do not know a larger

or looser word than "default." Abstracted from other words, what does it mean? In the expressions "judgment by default," and "a juror making default," we understand it differently. In its largest and most general sense it seems to mean, failing. It has been argued, that the birth of a son would satisfy the words, and shew that there was no default, and consequently defeat the remainder. Is there any reasonable ground for so confining the word "default," as to make the mere birth of a son destroy the contingency contrary to the plain sense of the testator, who clearly meant the default of such a son as would take the benefit of his devise; whereas a son dying in the lifetime of his mother could take nothing? By the word "default," the testator meant to denote the failure of that son at some time or other. Without referring to the context, natural death is the circumstance which he may first be supposed to have pointed at: if there should be sons, and they should die, then the daughters should take. But if we look to the context, it will appear that he meant failure of those sons to whom an interest was given by the former part of the devise (a). "Such" is a word of reference, and may be referred either to the individual person, taken abstractedly from any thing connected with him; or it is powerful enough, where the intent appears, to include every circumstance added to the description of the person in the former part of the devise. The most obvious meaning of "such son," in a provision of this nature, is, that son to whom, and to whose issue, he had given an estate in the former instance. Whatever the daughters were to take, they were to take when the provision to the sons should be spent. If there were no sons there could be no issue: there might be sons, and there might or might not be issue. A conveyancer might have thought right to add words to include every possible event: though *Holcroft's case* sufficiently shews that this was not necessary. But I do not intend to incur myself with cases. Decisions upon other words something like those in question, in other wills, where the whole context of those other wills must be gone into, can afford very little assistance. The case of *Spalding v. Spalding*, which I mentioned in the course of the argument, is not in point; but the principle, that the whole context of the will must be looked into to effectuate the [259] intent of the testator, is applicable to this case. There the question was, whether a former estate, expressly given, should be defeated? here it is, whether a new limitation shall take place? Yet if we adhere strictly to the words "default of sons," it will have the effect of giving an estate-tail to the daughters, in preference to the issue of a son. That indeed would be a most violent construction, because it would disappoint an express limitation; whereas here the question depends on the construction of the particular words creating the limitation; but as applied to the apparent intent of the testator, it is equally violent and improper. I think therefore that we are bound by every rule to say, that this testator meant to use the words "in default of such sons," in the sense of "failing the limitation to the sons;" and that the daughters did take; which disposes of this question.

BULLER J. The difference which prevails between me and the rest of the Court lies in a very narrow compass. I agree that a testator may express his intention by what words he pleases, and the Court is so to expound his expressions that every word may stand if possible. The Court is to pronounce according to the apparent intent of the testator, but that intent must be found in the words of the will, and is not to be collected by conjecture dehors the will, or as my Lord Chief Justice expressed himself in a late case, as the question has not been asked of the testator, it is but conjecture what would have been his answer. I hold that if there are repugnant or inconsistent clauses, the Court must take the whole will and find the meaning as far as they can; but if the words are sensible, and there are none used but what may stand, then they must all so stand, and the will must be construed according to the plain meaning of those words, without any ingenious conjecture whether the testator meant more or not. In this case it has not been argued that any part of the will is inconsistent, or that every word may not stand. It has been contended, that the words "in default of such sons" mean, either, if there are no sons, or if there are sons and those sons die, and that the words are capable of either of those interpretations. But I think that the testator could not mean that where the sons died the estate should go over,

(a) In *Lee's case*, 1 Leon. 285, where a devise was to William, and if he depart this world not having issue, then that the land should be sold, and William had a son John, and died, and John afterwards died without issue: it was held that upon the death of John the lands were subject to be sold. Vid. etiam, *Goodwin v. Clark*, 1 Lev. 35.

because I find on the face of the will that if there was a son, that son should take an estate in tail general, and consequently his issue should take after him. The words however may be construed "if there be no sons;" and where there are two constructions, one of which is sensible and [260] the other not, you must take that which is sensible and reject the other. Thus stands the first argument. Then it was argued that on the authority of cases we must make the words bend to the intent. But all the cases which have been cited depend on the ground of the will being repugnant or inaccurate. Thus in *Tuck v. Frensham*, the first limitation to heirs male, and the subsequent remainder over in case the devisee should die without heirs generally, being inconsistent, it was necessary for the Court to take the whole together, in order to discover the real meaning of the deviser, and then to put a suitable construction on his words. So in the case of *White v. Barber*, the will was very inaccurate, and the Court were obliged to take a liberty with it in order to make sense. In *Spalding v. Spalding*, the devise over was inconsistent with the preceding limitation. With respect to the case of *Evans v. Astley*, the proviso that the devisees and their "descendants" should take the name and arms of the deviser, was inconsistent with a mere estate for life. My distinction is, that in incorrect wills the Court may take liberties, but that if the words are correct they have no power to make any alteration. In this case, as the testator has spoken plainly, it is no matter what he would have said if he had been asked. Indeed if he had been told what would become of his estate, he might have given different answers. He would not have acted unreasonably if he had said, that without any wish to continue the estate in his family for ever, he should be satisfied if in case either of his sisters should have a son, the estate were secured to him. Besides we must recollect that in great families when a son is born, very little regard is paid to the daughters. Or he might have said, "if there should be a son, he will have the power of cutting off the entail, and I will not trouble myself to make any further disposition." But whatever answer he might have given, the Court cannot alter the words of the will, and can only say quod voluit non dixit. Besides, if there can be a doubt, we must recollect that by the construction contended for we shall disinherit the heir at law, a circumstance which it is not usual to lay out of the consideration of the Court. The case of *Hay v. Coventry*, 3 T. R. 83, may be cited to shew, that where the words of a will are such that the Court cannot help believing in their own private opinion, that it was the intention of the testator to give a fee, yet if the words used are not sufficient for that purpose, the Court cannot make any alteration. There are two other cases, however, which more immediately apply to the point in dis[261]pute. (Here Mr. Justice Buller referred to his own notes of the cases of *Denn ex dem. Briddon and Wife v. Page and another (a)*, and *Keene ex dem. Pinnoke and Wife v. Dickson*.) In both those cases the Court was of opinion that the

(a) *Denn ex dem. Briddon and Wife v. Page and another*, B. R. M. 23 G. 3, S. C. 11 East, 603.

In ejectment tried at Derby, 1783, the jury found a verdict for the lessors of the Plaintiff, subject to the opinion of the Court, on a case which (as far as is material) stated, that the testatrix devised lands to S. Nash, son of T. and M. Nash, for life, remainder to trustees to preserve contingent remainders, remainder to the first and other sons of S. Nash, and the heirs male of his and their bodies; "for default of such issue, to the use and behoof of all and every the daughter and daughters of the body of the said T. Nash, on the body of the said M. his wife begotten and to be begotten, and for default of such issue to the use and behoof of the right heirs of the said T. Nash for ever;" that S. Nash died leaving a daughter, Mary, one of the lessors of the Plaintiff; that Jane, a daughter of T. Nash, on the death of her brother S. Nash, entered into possession of the premises in question, suffered a common recovery, and conveyed to the Defendants.

The question for the Court was, whether Jane took an estate for life or an estate-tail?

Balguy for the lessors of the Plaintiff contended, that the words "default of such issue" could not be held to carry an estate in tail-male, and if they were construed to convey an estate in tail general, a greater estate would by that construction be given to the daughters, than had before been given to the sons.

Hill Serjt. contra insisted that the words "for default of such issue," after the limitation to the sons, could not be confined to the mere failure of sons, but extended

word "such" could only refer to that issue which had been before mentioned, viz. to the sons. Looking at these cases, then, I do not feel myself at liberty to reject any word of the will before us. The clauses are sensible throughout, and the plain construction of the limitation, "in default of such sons," is, that the daughters shall take in case there be no sons.

HEATH J. It seems admitted both by the Bar and the Bench, that the clear intention of a testator will control the literal construction of his words. It must be admitted that the words here express a condition on which the limitation over to the daughters of the sister shall take place: but it is easy to conjecture by what slip these words were used: and the question is, whether such a slip shall defeat the apparent intention? It has been held in cases of remote antiquity, that a limitation which in form appears to be conditional shall be construed to be absolute if most suitable to the intention of the testator. The words in *Holcroft's case* are very strong, and yet it was resolved that the devise should take effect as a limitation. So in *Andrews v. Fuller*, Str. 1092, which was decided in later times, the Court observed that it was no unusual thing for words of condition to be taken as words of limitation where there is a remainder over. And it was laid down as a principle in *Ives v. Legge*, 3 Term Rep. 489, that the Courts will not construe a remainder to be contingent, where it can be taken to be vested. In *Keene ex dem. Pinnock v. Dickson*, no intention of the testator could be collected, and therefore the words were construed according to their literal meaning. Now the question here is, whether the intention of the testator cannot be collected to be, that from and after the death of such sons the daughters should take? This intention is strongly shewn by the different devises in the will, and the limitation over to the Trevor family. If the construction contended for by the Defendant should take effect, the consequence would be that the heir at law would be admitted, and the limitation over entirely defeated, and that which was the clear intention of the testator would not take place. For these reasons I am with the lessor of the Plaintiff.

ROOKE J. On looking at this will I cannot but think that the testator meant, that in case the sons and the issue of such sons should fail, the daughters should take; and that he could not intend that on the birth of a son all the subsequent limitations should be defeated. The words, "default of such sons," may either mean if there be no sons, or if there be sons, and those sons shall die. By a former part of the will an estate-tail is given to the sons. Now a subsequent provision is not to be construed to

to the failure of sons of those sons. *Wyld v. Lewis*, 1 Ark. 432. *Evans ex d. Brooke v. Astley*, 3 Burr. 1570.

LORD MANSFIELD Ch. J. This question does not admit of much argument, nor of cases to be cited, for every case must depend upon its own circumstances. The rule of law is clear, that a grant by words of purchase without further limitation enures for life only. When wills came to be in vogue, it pleased the Judges to consider them in their construction with analogy to the rule of law respecting deeds, and not with analogy to the Roman appointment, and therefore they held that such a grant enured for life only. There is hardly an instance where the words of a devise are restrained to a life-estate only, in which the intention of the testator is not contravened, for common men are ignorant of the difference between land and money. This being so, the Courts have been astute to find out, if possible, from other parts of the will the intention of the testator. The question then is, whether there be enough here on the face of the will? for we must not go into conjecture. I conjecture that this was a blunder, and that another limitation was intended, but I do not know of what nature, whether to heirs general or special. Is there then any authority for supplying the defect, and making the will anew? Had the words been "if they die without issue," an estate-tail would have been implied; but here the words are "for default of such issue," viz. that issue which is before mentioned. The Court has no power to strike out the word "such," and if they did, what are they to supply it with? are they to give an estate in tail general, or in tail male? There is no intention therefore apparent on the will to direct the Court.

BULLER J. of the same opinion.
Judgment for the Plaintiffs (1).

(1) And see *Doe d. Orpe v. Frost*, 1 B. & C. 638, 643.

revoke a former provision, but must, if possible, receive such a construction as is consistent with it. I cannot say that the words, strictly taken, mean if there shall be no son: the expression, "default of such sons," is as vague as default of such issue, which imports on the general failure of issue; so here these words cannot be taken merely to mean if no sons shall be born, [263] but when sons shall fail; and this construction is consistent with the preceding limitation, and in this way all the provisions of the will may stand. But if there be any doubt on this construction, we are still warranted by the case of *Spalding v. Spalding* to insert the words "heirs of their bodies;" and though the Court might not think themselves warranted in *Keene v. Dickson* to alter the words, yet that case does not much move me, as the words were not the same as they are here: indeed I have long been tired of looking into cases on wills. I think, however, that it is not necessary to supply any words, as the expression, "default of such sons," may either apply to having sons and those sons dying, or to not having sons at all; and therefore the Court is bound to give that construction which is consistent with the other clauses of the will.

Judgment for the Plaintiff.

WEBB, ONE, &C. v. PRITCHETT. May 15th, 1798.

In an action on an attorney's bill the Nisi Prius Roll is good *primâ facie* evidence that the action was not commenced till the expiration of a month after delivery of the bill.

This was an action by an attorney to recover the amount of a bill delivered for business done in his profession, and was tried before Lawrence J. at the last Spring assizes for Worcester.

At the trial it was insisted that the Plaintiff could not recover without producing the writ, in order to shew that a month had expired after the delivery of his bill before the action was commenced, as he had no right of action till the expiration of that month. The writ not being produced, the learned Judge nonsuited the Plaintiff, giving him leave to apply to the Court to set the nonsuit aside, and enter a verdict for the amount of his demand, 12l. 8s., if they should think the nonsuit wrong.

Accordingly Williams Serjt. on a former day having obtained a rule nisi for that purpose,

Marshall Serjt. now shewed cause, and contended that the 2 Geo. 2, c. 23, s. 23, having enacted that an attorney shall not declare till a month after the delivery of his bill, it becomes necessary in this, as in other cases where the action is not to be brought before or after a certain day, to shew its actual commencement; he added that a King's Bench record, in which the day is stated in the memorandum, may be taken as good *primâ facie* evidence at Nisi Prius of the time at which the action was commenced; but that as a record in this court only begins with [264] the placita of the term, there is nothing from which the day on which the action was commenced can be inferred.

EYRE Ch. J. (stopping Williams Serjt.). The only question here is, whether the Nisi Prius Roll is such *primâ facie* evidence as will, if uncontradicted, satisfy the 2 Geo. 2, c. 23? That act declares that no action shall be brought by an attorney upon his bill, till that bill has been delivered a month. At the trial the Plaintiff proves that his bill was delivered on a certain day, and then produces the record to shew that the action was commenced after the month had expired. We all know that the record is made up of the term in which issue is joined. That which is *primâ facie* evidence of the action being properly commenced may be contradicted by the Defendant, whose business it will be to shew by a copy of the writ, that it was really commenced before the time. Were it not therefore for the very respectable authority by whom this nonsuit was directed, I should think this a very simple case. The record shews the commencement of the action, and sometimes indeed to the Plaintiff's peril, if he has not had the precaution to enter a special memorandum (a); as where the record is of the term generally, it relates back to the first day of the term (b). If

(a) *Dodsworth v. Bowen*, 5 T. R. 325.

(b) *Pugh v. Robinson*, 1 T. R. 116.

then the record in some instances operates against the Plaintiff, why shall it not also operate in his favour?

BULLER, HEATH, and ROOKE of the same opinion.
Rule absolute.

RIBBANS v. CRICKETT AND ANOTHER. May 18th, 1798.

It being contrary to 7 & 8 W. 3, c. 4, for a candidate to furnish provisions to any voters after the teste of the writ, an inn-keeper cannot recover against a candidate for provisions so furnished at his request. Payment of money into court is an admission of a legal demand only (a)¹.

The Plaintiff in this case was an inn-keeper, and the Defendants two of the candidates at the last election of representatives in Parliament for the borough of Ipswich. The action was brought on a bill for provisions furnished to the voters of the borough, at the request of the Defendants, consisting of three description of charges; viz. 1st, For provisions furnished before the teste of the writ; 2dly, For provisions furnished after the teste of the writ to voters resident in the borough; 3dly, For provisions furnished to voters not resident in the borough. The De[265]-fendants paid into court sufficient to cover the charges of the first and last descriptions. At the trial before Ashhurst J. at the last Bury Spring assizes, the Defendants contested the amount of the bill, and endeavoured to prove that the Plaintiff had charged for provisions furnished to persons not voters, but having failed to establish that defence, a verdict was found for the Plaintiff.

A rule having been obtained to shew cause why this verdict should not be set aside and a new trial be had on the ground of a part of the cause of action being contrary to 7 W. 3, c. 4.

Le Blanc and Heywood Serjt. shewed cause and argued, first, that as it did not appear that the provisions were furnished to the voters "in order" that the Defendants might be elected, the case was not within the statute, for that those words though used at the end of the second division of the clause must be construed to run through the whole (a)². Next if it did come within the statute, that bribery was only *malum prohibitum*, and however criminal in the candidate, would not vitiate a contract entered into with another person; and resembled the case of money lent to play with, which may be recovered by action, though the play be contrary to an express statute. *Barjeau v. Walmesley*, 2 Str. 1249. *Robinson v. Bland*, 2 Burr. 1080. Lastly, that part of the provisions were furnished to voters resident at a distance from the borough, (which had never been considered in the decisions of the committees of the House of Commons to be within the meaning of the statute,) and the verdict being good as to that part of the demand, therefore the Plaintiff might apply the money paid into court to any other part which he might think proper.

Shepherd Serjt. for the Defendants insisted that the words "in order," &c. used in 7 & 8 W. 3, related only to the latter part of the clause (to which the Court agreed). He next argued that no person employed to carry into effect *malum prohibitum* was entitled to recover; and instanced the cases of persons selling goods for the purpose of being smuggled, and of insurances upon illegal voyages. He cited *Faikney v. Reynous*, Burr. 2069. *Petrie v. Hannay*, 3 Term Rep. 418. *Steers v. Lashley*, 6 Term Rep. 61. [266] *Booth v. Hodson*, 6 Term Rep. 405, and *Mitchell v. Cockburne*, 1 H. Bl. 379, and inferred from those cases that as the demand arose out of an illegal transaction

(a)¹ And see *Godsall v. Boldero*, 9 East, 72, 79. *Johnson v. Hudson*, 11 East, 180. *Bensley v. Bignold*, 5 B. & A. 335, 339.

(a)² No person, &c. after the teste of the writ, &c. shall before his election, directly or indirectly, give, present, or allow to any person or persons having voice or vote in such election, any money, meat, drink, entertainment, or provision, or make any present, gift, reward, or entertainment, or shall at any time hereafter make any promise, agreement, obligation, or engagement, to give or allow any money, meat, drink, provision, present, reward, or entertainment, to or for any such person or persons in particular, or to any such county, city, &c. or to or for the use, &c. of any such person, place, &c. in order to be elected, or for being elected to serve in parliament for such county, city, &c.

it could not be supported. As to the money paid into court, he said that the Plaintiff could not be allowed to retain it for the illegal demand, and recover for the legal one.

EYRE Ch. J. It seems to be the opinion of the whole Court that if the Defendants think proper to insist on their objection, they must do it with success. This action is apparently founded on a contract to disobey the law, being to provide entertainment for voters during an election. The defence set up proves the principle of the contract, for the point contested at the trial was, whether or not the Plaintiff had abused the confidence reposed in him, by squandering the provisions among persons who were not voters? Then how shall an action be maintained on that which is a direct violation of a public law? The contract is bottomed in *malum prohibitum*, of a very serious nature in the opinion of the Legislature, as appears by the preamble of 7 & 8 W. 3, c. 4; how then can we enforce a contract to do that very thing which is so much reprobated by the act? I am perfectly aware that great difficulties may arise from construing this act rigidly, but perhaps still greater will arise if it be not so construed. It is true that a voter who comes from a distance may have reason to complain if he is not provided with necessaries; but it is also obvious that if the candidate can supply him, he may supply himself. If any exception is to be allowed for voters not resident, the whole mischief complained of in the act will necessarily follow. It will be impossible for the candidate to make a distinction between those voters who reside at a distance, and those who live within half a mile of the place of voting. The Legislature has drawn a strict line which is not to be departed from: it says, that after the teste of the writ no meat or drink shall be given to the voters by the candidate; and that being the case, this Court cannot give any assistance to the Plaintiff consistently with the principles which have governed the courts of justice at all times, and with the cases which have been cited this day. Persons who engage in this kind of transactions must not bring their case before a Court of Law. With regard to the money paid into court, it is to be observed, that such payment is only an admission of a legal demand, and we cannot allow it to be applied to an illegal account.

Per Curiam. Rule absolute.

[267] WILSON v. SAUNDERS. May 18th, 1798.

If goods prohibited from being sold in this country by 11 and 12 W. 3, c. 10, are taken out of a warehouse, and put on board a vessel as if for exportation, but in fact with a view to be reloaded, they are liable to be seized, though no actual attempt to reload them has been made.

Trespass for seizing goods under the following circumstances. The Plaintiff purchased at the India sale a quantity of Bandanno handkerchiefs (which are prohibited to be used in this country by 11 & 12 Will. 3, c. 10), and sent them down with the usual forms, under the care of a Custom-house officer, to the Custom-house at Aldborough, where they were put on board the "Experiment" cutter by the Custom-house officers, the Plaintiff having entered them for Hamburgh, and the cutter having cleared out for that port, though she had only a licence to fish between Flam borough Head and the Isle of Wight, under 24 Geo. 3, c. 47. The Plaintiff had given security for the goods "being exported and not reloaded" according to the directions of 11 & 12 Will. 3, c. 10, s. 2. The Defendant who was Captain of the "Argus" revenue cutter seized the vessel and goods after the former had proceeded some way down the river, but while she was within the limits of the port of Aldborough, and a tide-waiter of that port being on board at the time.

The cause was tried before Heath J. at the Summer assizes for Suffolk 1797, when a verdict was found for the Plaintiff with liberty to the Defendant to move to set it aside in the ensuing term.

Accordingly Le Blanc Serjt. having in Michaelmas term obtained a rule to shew cause why the verdict should not be set aside and a new trial had, because the "Experiment" cutter, having been found acting in a manner not warranted by her licence, was to be considered as having no licence;

Shepherd Serjt. in the following term was proceeding to shew cause on the above ground, when the Court said, that if the goods were *bonâ fide* delivered for exportation, the Plaintiff's case was clear; but that if there was no *bonâ fide* intention to export them, it might be a question whether they were not seizable under 11 & 12

Will. 3, c. 10, s. 2, in the same manner as if they had been found exposed in a shop for sale: and directed him to speak to that point.

Shepherd. Supposing it were manifest that these goods were meant to be relanded, yet I submit that neither could they be seized, nor would the Plaintiff's security be forfeited, until some [268] attempt had been actually made to accomplish that purpose. If the goods had been carried out to sea with the avowed intention of being relanded, and the vessel on board which they were put had been lost in a storm before any attempt towards relanding had been made, clearly the security would not have been forfeited, which shews that the forfeiture does not attach on the intention. Besides, the mere putting goods on board a vessel which has a licence to fish between certain points only, does not of itself raise a presumption that the goods are to be carried to any place beyond those points; for the vessel in contravention of her licence may go to Hamburgh or any other port, though she can never return to this country without being subject to forfeiture.

EYRE Ch. J. See how this case would stand if it were put in pleading. The officer's *prima facie* defence would be, "I seized these goods because I found them on board such and such a vessel, and not in a warehouse approved by the commissioners of the customs, according to 11 & 12 Will. 3, c. 10, s. 2." To this the Plaintiff would answer, "True it is that the goods were not in such a warehouse, yet I am by law allowed to export them; and I have a right to take them out of the warehouse for exportation, provided I give a bond to export and not reland them;" and would aver that he took them out of the warehouse for exportation, and that he gave a bond, &c. The Defendant might deny that the goods were taken out of the warehouse in order to be exported, and on this an issue would be joined. The question for the jury would then be, whether, when a person goes through the necessary ceremonies which belong to a fair exportation, and puts his goods on board a vessel colourably bound for Hamburgh, but in fact a cutter licensed to fish between Flamborough Head and the Isle of Wight, together with all the circumstances which belong to this case tending to prove that they were not meant to be exported, he can be considered as having taken them out of the warehouse in order to export them? My opinion is, that if it could be demonstrated that he had no intention to export them, and that he meant to put them on board a vessel, in order to be carried one, two, or three leagues only from the shore, proof of that intention would defeat the allegation that they were taken out of the warehouse for the purpose of exportation. The circumstance of actual relanding need not be shewn, for the case would be vitiated by the original intention with which the goods were taken out of the warehouse. I think that the circumstances of the case afford a presumption [269] on this one point, which ought to be submitted to a jury. There may have been reasons of necessity sufficient to justify the Plaintiff in having acted in the manner which he has done; and he will have an opportunity of insisting upon them at a new trial. I am anxious that the principle of these laws should be a little understood, and that an idea should not be entertained, that if all the form and ceremonies prescribed by the act are complied with, the substance may be evaded with impunity.

Per Curiam. Rule absolute.

At the Spring assizes following the cause again came on to be tried before Ashhurst J.—and it being left to the jury to determine whether the goods were put on board the cutter with the intention of being exported, a verdict was found for the Defendant.

In consequence of which Shepherd Serjt. in this term obtained a rule nisi for a new trial on two grounds: 1st, That the goods at the time of the seizure were in *custodiâ legis*, having been sent down to Aldborough, under the care of a Custom-house officer, having been put on board the vessel at Aldborough by Custom-house officers, and an officer having been on board at the time when they were seized: 2dly, That the goods were in a course of exportation, no act towards relanding them having been done.

But the Court, after hearing Shepherd on this day, were clearly of opinion, That the goods were not in the custody of the law, for that the owner after giving security in London according to the statute was at liberty to export them as he thought fit; that the practice of sending down an officer with the goods was not required by the 11 & 12 W. 3, but had been adopted from 6 G. 3, c. 40, s. 6, which relates to the exportation of East India goods to Africa; and that the officer who was on board at

the time of the seizure was placed there for the general protection of the revenue, not to watch these particular goods. As to the second point, that there was no distinction between an intention to export the goods, and their being in a course of exportation: and that if it could be demonstrated that all intention to export them was abandoned, the bond of security might be put in suit, though all the forms necessary to exportation had been complied with.

Rule discharged.

[270] EDMONSON v. POPKIN. May 18th, 1798.

The Court set aside a warrant of attorney, and judgment given to secure a loan, which was sworn to be usurious, in order to bring the question of usury before a jury; but refused to order a bill of exchange to be delivered up, which had been given to procure the Defendant's release out of execution on the judgment (a)¹.

Heywood Serjt. moved for a rule to shew cause why a warrant of attorney given to secure an usurious loan, and the judgment entered up thereon should not be set aside, and why a bill of exchange, given by the Defendant for the purpose of procuring his release out of execution on the judgment, should not be ordered to be delivered up: he cited *Machin v. Delaval*, Barnes, 52, 3d edit., and said, as to the latter part of the rule, that taking such a bill of exchange was a contempt of the Court.

But the Court thought that the rule ought to be confined to the warrant of attorney and judgment, as they were not to decide the question of usury in a summary way: and that they would not have interfered at all, but in order that the question of usury might be tried, which would be shut out if the judgment were allowed to stand.

Accordingly a rule nisi for setting aside the warrant of attorney and judgment was granted, and afterwards

Made absolute.

BOWRING v. EDGAR. May 18th, 1798.

A note for securing the weekly allowance to a prisoner under the Lords' act, need not be stamped.

The Plaintiff having given the Defendant, who was a prisoner in execution, a note for his weekly allowance on a six-penny stamp, Le Blanc Serjt. obtained a rule calling on the Plaintiff to shew cause why the Defendant should not be discharged out of custody, under the Lords' act (32 Geo. 2, c. 28) contending that as the last stamp act (37 Geo. 3, c. 90) had increased the stamp of 6d. imposed by 31 Geo. 3, c. 25, to 8d.; the stamp on the note given by the Plaintiff must be considered as a nullity: and cited *Pittman v. Haines*, 7 Term Rep. 530, where the Court of King's Bench held that such a note as the one in question ought to be stamped.

Williams Serjt. in shewing cause insisted that no stamp was necessary; for that by 31 Geo. 3, c. 25, the duty is imposed upon those notes only where "the sum expressed therein or made payable thereby shall amount to 40s.;" whereas the sum expressed in the note in question was only 3s. 6d.: and added, that the [271] sum owing under this note never could amount to 40s. since it is provided by the Lords' act, that if the allowance be not paid weekly the Defendant may apply for his discharge, even in the time of vacation.

The Court inclined to this opinion, but ordered the matter to stand over that they might have an opportunity of conferring with the other Judges.

Early in the next term, Eyre Ch. J. said, that a conference had taken place between the Judges, who were of opinion that no stamp was necessary.

Per Curiam. Rule discharged (a)².

(a)¹ Vide *Hindle v. O'Brien*, 1 Taunt. 413.

(a)² *Tekell v. Casey*, 7 T. R. 670.

OSBORN v. TATUM. May 19th, 1798.

A rule was discharged, because the affidavit on which the rule nisi was obtained, was not entitled in any Court; the words "in the" only being prefixed.

Shepherd Serjt. having on a former day obtained a rule nisi, for setting aside an execution on a judgment entered on a warrant of attorney,

Cockell Serjt., who was now to have shewn cause, took the following preliminary objection, viz. that the affidavit on which the rule nisi had been obtained was not intitled in any court, the words "in the" only being prefixed, without "Common Pleas."

Shepherd contra insisted, that the title was not a necessary part of the affidavit; as it appeared from the jurat, that it was sworn before one of the Judges of this court; and that, even if it were necessary, still the objection came too late, as the rule had been enlarged for ten days, on the application of the other side.

The Court however held it to be a sufficient objection, and discharged the rule; though without costs, in consequence of its having been enlarged.

Rule discharged.

CHETWIND v. MARNELL, Executor of General Brome. May 19th, 1798.

The Court will not make a rule on a Plaintiff who brings an action on a bond, to allow an officer of the stamp duties to inspect the bond, because the Defendant suspects it to be forged.

An action having been brought on a bond of the testator, the Defendant craved oyer of the bond, pleaded non est factum, and now moved for a rule calling on the Plaintiff to shew cause, why he should not allow the bond to be inspected in his hands by an officer of the stamp duties.

[272] Marshall Serjt. stated the ground of this application to be a suspicion that the bond was forged; and contended, that there could be no objection to the Court's granting the rule, as the instrument would remain in the Plaintiff's hands, and he would not be compelled to produce it if indicted for forgery.

Sed per EYRE Ch. J. This case was before me at Chambers; but I thought it would be a violent measure to order the Plaintiff to produce an instrument which might be the means of convicting him of a capital felony. The Defendant has already pleaded non est factum, and therefore the Plaintiff will be obliged to produce the bond, if he means to succeed in his action. But as he may think better of it, we ought not to put his life in danger by the exercise of a summary jurisdiction.

Marshall took nothing by this motion.

IN THE EXCHEQUER CHAMBER.

CAMDEN AND OTHERS v. ANDERSON, IN ERROR. May 19th, 1798.

The exclusive right of trading to the East Indies granted to the East India Company by stat. 9 & 10 W. 3 has never been put an end to, and any infringement of it is a public wrong. Though such parts of that act as inflicted penalties, &c. were repealed by 33 Geo. 3, c. 52, and though the latter act says, that no acts or parts of acts thereby repealed shall be pleaded or set up in bar of any action, &c. it is competent to underwriters who have subscribed policies on ships trading to the East Indies, in contravention of 9 & 10 W. 3, to avail themselves of the illegality of such trading, in an action brought on the policies (a).

A writ of error having been brought in this court, on the judgment given in the King's Bench between these parties, the case was twice argued; in Trinity Term 1797, by Parke for the Plaintiff in error, and Giles for the Defendant; and in

(a) Vide *Farmer v. Russell*, post, 296. *Payton v. Popham*, 9 East, 408. *Bensley v. Bignold*, 5 B. & A. 335.

Easter Term 1798, by Wood for the former, and Rous for the latter: but as the grounds of argument were nearly the same as those taken in the King's Bench, and most of them were noticed in the judgment of the Court, the account of them is here omitted.

The Court took time to consider of their opinion, which was this day delivered by

ESPEY Ch. J. who, after stating the special verdict, (for which with the arguments and judgment in the King's Bench, see 6 T. R. 723) proceeded thus:—The case of the Plaintiffs in this action is *prima facie* plain and clear; for a consideration in money, the Defendant Anderson has assured the Plaintiff's ship the "Albemarle" against capture in the voyage described in the policy stated in the declaration. The ship was captured by the enemy in the course of that voyage, by which a loss is incurred, which the Defendant has undertaken to make good. The defence is founded upon a principle of law, which is paramount to all obligation by which the parties to a contract can bind themselves, and is powerful enough to control [273] it, and to render it null and void in law. That which is unlawful in itself and which is a public wrong, cannot be the ground of an action. The Defendant insists, that the voyage insured was in an illicit and a clandestine trade; that, as such, it was unlawful, and could not be the subject of an assurance. The principle has been admitted, in the course of the argument at the bar; the application of it to the particular case only has been controverted. The Plaintiffs in the action insist, that the provisions of the statute of 33 Geo. 3 preclude the application of it to this case; admitting that which upon this special verdict it is impossible to deny, that this ship "Albemarle" was engaged in an illicit and clandestine trade. This act of 33 Geo. 3, c. 52, is very voluminous, having for its object the continuing in the East India Company the possession of the British territories in India, together with their exclusive trade, the establishing further regulations for the government of the said territories, and several other purposes therein mentioned. The provisions which respect the exclusive trade are to be found in the 129th and the subsequent sections to the 150th section inclusive; two sections only, viz. the 148th and 149th, which are provisos respecting other matters, being interposed rather inconveniently, as breaking the thread of the subject, and particularly the connection between the 147th and the 150th sections, which should be taken together in order to understand the 150th section upon which this question turns. The 129th section recites, that "various statutes have been heretofore made for securing to the said United Company their sole and exclusive right of trading to the East Indies and parts aforesaid, during the continuance of such sole and exclusive right, and to restrain all illicit and clandestine trade to, in, and from the East Indies and parts aforesaid: and that the limitations and provisions in the said act contained, concerning the future conduct of the said trade, require that some alterations should be made in the said statutes; and that it might be convenient that such provisions as should be deemed necessary for securing to the said Company the full benefit of such sole and exclusive right, subject to the provisions and limitations contained in the said act, and for restraining all clandestine and illicit trade to, in, and from the said East Indies and parts aforesaid, should be reduced into one act of parliament." It is here stated very distinctly what the object was which the Legislature had in view and meant to provide for in this part of the act: they have said, that the limitations and provisions in this act contained, concerning the future conduct of the East India trade, require that some alter-[274]ations should be made in the statutes for securing the exclusive trade, and for restraining the illicit and clandestine trade; and they have said that it would be convenient that such provisions as should be deemed necessary for securing the exclusive trade, and for restraining the clandestine and illicit trade, should be reduced into one act of parliament: they proceed accordingly to make those alterations, and to reduce those provisions into this act. The 129th section proceeds to enact in the terms of former existing laws, that ships, &c. of unlicensed persons, trading within the limits of the East India Company, should be forfeited. The succeeding sections enact, that persons going to those parts are to be deemed to have traded unlawfully, are to be liable to fine and imprisonment, may be arrested and sent to England for trial, with various other regulations in the terms of the former existing laws. For the purpose of effecting the reduction of the provisions for securing the exclusive trade, and for restraining the clandestine and illicit trade, into this act, the 146th section repeals so much of the 9 & 10 W. 3, c. 44, as inflicts any penalty or forfeiture

for illegally trading to the East Indies; the whole of the statute of 5 Geo. 1, c. 21; so much of an act of the 7 Geo. 1, c. 21, as relates to the punishment or prosecution of persons illegally trading to the East Indies; the whole of the statute of 9 Geo. 1, c. 26; so much of the statutes 3 Geo. 2, c. 14, and 17 Geo. 2, c. 17, as create any penalty or forfeiture; and so much of 10 Geo. 3, c. 47, as subjects any persons concerned in the illicit trade to, in, or from the East Indies to any penalty; parts of some other statutes not immediately relating to the exclusive trade, and therefore not necessary to be enumerated; and, lastly, so much of 26 Geo. 3, c. 57, as makes offences against any law for securing the exclusive trade of the Company, and forfeitures and penalties for illicitly trading, prosecutable in the East Indies.

Mr. Wood, of counsel for the Plaintiffs, arguing upon the effect of the repeal of part of the statute of 9 & 10 Will. 3, insisted, that though the free trade of the East India Company was left untouched, so much of the statute of King William as granted an exclusive trade was repealed. This was a very material point for him to maintain; but it is wholly unfounded; it will be found to be warranted neither by the letter nor the spirit of the statute of 33 Geo. 3. The 81st sect. of the statute 9 & 10 Will. 3, enacts, that after the 29th September 1698, such persons or corporations as had power to trade to the East Indies should have the sole trade; and provides, that the East Indies should not be visited by any other of the King's subjects during the time this trade was to continue. It then pro-[275]-ceeds to impose penalties on such others of the King's subjects as should trade there. The section therefore consists of at least two if not three different branches; the first makes the trade exclusive in the Company; the second is a prohibition to the rest of the King's subjects; the third imposes penalties. The repeal of a part of this statute by 33 Geo. 3 does not import to be a repeal of the whole section; it does not even import to be a repeal of the prohibition; it repeals in terms so much only of the statute as inflicts any penalty or forfeiture, which is the third branch of the section. It is clear therefore that so much of this statute as grants the exclusive trade is not within the letter of the repealing clause of 33 Geo. 3; and it is equally clear that it is not within the spirit of it. The whole operation of this part of the statute was meant to be confined to the regulation and re-enacting in one act the provisions made to secure the exclusive trade, and to restrain the illicit and clandestine trade; it was not necessary to any effect, which this part of the statute of 33 Geo. 3 was to produce, that the exclusive trade should be touched by the statute. Parliament in its justice could not meddle with it during the term for which it was to continue. It had been purchased by the East India Company. There is an apparent absurdity in the notion, that this could be the subject of any of the repealing clauses; its existence in full, absolute and indefeasible right is the foundation of the whole of this parliamentary regulation. If parliament had meant to make the exclusive trade granted by the statute of King William the subject of its repealing clause, would it have passed over wholly unnoticed the several statutes which have from time to time continued to the Company their exclusive trade down to and beyond the present hour, and above all would it have omitted to re-grant it, when it was re-enacting all the provisions for securing it? If it was touched by the repealing clause, for any thing I can see to the contrary, it is gone for ever; for certainly it is not re-enacted, unless we are to say, that being repealed by implication it shall also be re-granted by implication. But I waste too much time upon so plain a proposition. I state it as clear, that the statute of 33 Geo. 3 has left the exclusive trade of the East India Company untouched. The consequence is of importance in this argument; it lays the 150th section of this statute, which has been the subject of so much elaborate discussion, quite out of the case. A statement of this section, and a short examination of it, and a comparison of it with its context will make this most manifest. The 150th section is in these words: "And for obviating any doubts which might otherwise [276] arise how far any of His Majesty's subjects may, notwithstanding the aforesaid repeal of the several acts or parts of acts, be entitled to recover any debts due to them in Great Britain or in parts beyond the seas, or otherwise to enforce the execution of any contracts or agreements by reason of any pretext to be set up by any other person or persons that such debts were contracted, or that such contracts or agreements were made contrary to the restrictions or prohibitions in the said acts or some of them contained; be it further enacted that it shall not be competent or lawful to or for any Defendant or Defendants in any suit or action now depending or hereafter to be brought in any

court either in Great Britain or in the East Indies to plead or set up any act or acts in the whole or in part repealed by this act in bar of any such suit or action or of any judgment or recovery to be obtained therein, but that the Plaintiff or Plaintiffs in all and every such suits or actions as well in law as in equity shall have the same remedy to recover, and be entitled to the like judgment, verdict, decree, and execution as if the said acts or parts of acts so repealed had never been made." I need not remark, that this is a very ill penned clause; with its context however it does not appear to me that it would be very difficult to expound it. For the purpose of introducing some alterations and of re-enacting in this act the substance of the provisions of former laws imposing certain penalties and forfeitures, the whole of some of those laws and such parts of others of them as impose penalties and forfeitures were repealed, but with two provisos; the 1st, that such repeal should be no bar to prosecutions for offences in respect of which those acts and parts of acts repealed had imposed penalties; the 2d, that such repeal should be a bar to a defence in a civil action, on the ground, that the contract which was the subject of that action, was contrary to the restrictions or prohibitions in the said acts or parts of acts so repealed. This last proviso in the 150th section contains no general provision, making the illicit and clandestine trade lawful, but contrasting actions for debts and upon contract with offences; it provides, that the repeal shall have all the effect it can have in the former case to enable a creditor to recover his debts (in which respect it has been called, not improperly, an Act of Grace); and that it shall have no effect at all in the latter case, to prevent an offender from being punished for his offence. If therefore the trade of the interloper is made unlawful, illicit, and clandestine, only by the acts and parts of acts repealed, [277] then by force of this proviso no advantage is to be taken by way of defence in a civil action of this illegality; but if it is unlawful and clandestine upon other and higher grounds, as it will be found to be, this proviso affords no protection against the defence of illegality, and must be laid entirely out of the case. These Plaintiffs, if they should be driven from this which has been considered as their strong hold, may still insist that the exclusive trade of the Company is no more than their private right, the infringement of which may perhaps give a right of action to the Company, as for a civil injury over and above the several parliamentary provisions which have been made for securing it, but can have no further effect, and particularly cannot taint with illegality transactions and contracts which are collateral to it. Suppose for instance, a printer were to bring his action against his employer for printing a pirated copy of a work protected by the statute of Queen Ann. The employer perhaps could not object by way of defence against this action, that the printing as an infringement of the private right of the author was unlawful, and the contract void in law. When this point was suggested, in the course of the argument Mr. Rous answered, that the exclusive trade of the Company was a public regulation of the national commerce, and this was a very good general answer; but I will enter a little further into the discussion of it. This exclusive trade of the East India Company is now so interwoven with the general interests of the state, that it is no longer to be considered as the private right of a corporation, but is become a great national concern, and the infringement of it is a public mischief and a public wrong, and as such is prohibited by the common law. The principle, and the effect of that prohibition, as applied to the present case, may be collected from the case of a bond given to the sheriff to indemnify him against the voluntary escape of his prisoner, which is pronounced to be void by the common law. That case is put in *Beaufage's case*, 10 Co. 100, and is recognized in the books of the best authority in our law, viz. *Yelv. Dyer, Hobart, and Plowden*. The references are in the margin of 10 Co. fo. 100 (a). If we consider it in one single point of view, as it regards the public revenue of the state, it will be found to be no less the right of the public than of the East India Company. That parliament has so considered it may be collected from the preambles of the statutes made for the protection of this trade. The preamble of the statute 5 Geo. 1, c. 21, recites it to be of great importance to the welfare of this kingdom, that this [278] trade should be regulated according to the acts of parliament relating thereto, and the royal charters or grants made in pursuance thereof. This statute recites some of the provisions of 9 & 10 W. 3, and that it is provided by that act and by subsequent laws that the merchandize to be laden upon ships bound from the East Indies should be brought

(a) *Yelv.* 197. *Dyer*, 324, pl. 32, 33. *Hob.* 14. *Plowd.* 64 b. 67 b. 68 b.

to Great Britain, and that several of His Majesty's subjects have presumed to trade to the East Indies in foreign and other ships, intending there to load goods, and to bring them into Europe, and land them in foreign parts out of his Majesty's dominions, to the great prejudice of the trade of this kingdom, and the diminution of His Majesty's customs and other duties. It recites a proclamation issued to prevent these practices, and that evil disposed persons had still gone on to procure foreign commissions, and under colour thereof, or otherwise, had fitted out and manned several English and other ships, and had sent them to trade in the East Indies; and after this preamble, it introduces the provisions of the act, with these memorable words: "Now to the intent that such collusive, fraudulent, and illegal trade and practices may be prevented, and that so considerable and beneficial a branch of trade may be secured to this kingdom; be it enacted, &c." The preamble of the 7 Geo. 1, c. 21, is yet stronger: "Whereas it is of importance to the welfare of this kingdom that the trade to and from the East Indies be carried on in such manner as that the British nation may have and enjoy the full fruits and advantages thereof: And whereas by virtue of several acts of parliament and letters patent the whole trade to and from the East Indies is now solely vested in the United Company, &c. notwithstanding which, and the prohibitions, injunctions, and penalties contained in such acts and letters patent, several evil-minded persons, subjects of His Majesty, preferring their own private gain to the good of their country, have not only clandestinely traded to the East Indies, but by colour of commissions from foreign governments, have fitted out ships and engaged British seamen to serve on board the same, and sent them to the East Indies, to the diminution of His Majesty's revenue, and of the naval force and commerce of this kingdom: Now to the intent that such wicked, mischievous, and destructive practices may be prevented for the future, and that the trade aforesaid may be more effectually guarded and successfully carried on," &c. The statute then proceeds to make several provisions, upon which I shall only observe here, that they are calculated to prevent the evil of the clandestine trade in general, and that the circumstance of the [279] foreign commission is considered only as one of the modes in which that trade was carried on. If we find an action brought upon a contract for a few bags of tea, or a few tubs of foreign spirits bought or sold in the course of a contraband trade, we say without hesitation, this is a contract against law, and no action can be maintained upon it, and if the action were founded upon a policy of assurance upon a ship, or goods, employed or carried in the course of that contraband trade, we should not hesitate to say, that no action lies upon such a policy; and surely it must be a reproach to law and justice if we were now to countenance an action upon this policy, the object of which is, to assure to these Plaintiffs the safety of a ship engaged in a trade so illicit and clandestine as this trade has been declared by parliament to be, under such aggravated circumstances of fraud and collusion, in the manner of carrying it on, as are described in this special verdict, and which it might have been reasonably supposed no man who had a regard for his reputation as a merchant, or had any sense of truth and private honour, would have suffered to have stood against him upon the public records of one of the King's supreme Courts of justice. Let this judgment be affirmed.

Judgment affirmed.

In this Term Baker John Sellon of the Inner Temple, Esq. was called to the honourable degree of Serjeant at Law, and gave rings with this motto,

"Respite quid moneant Leges."

The end of Easter Term.

[281] CASES ARGUED AND DETERMINED IN THE COURT OF COMMON PLEAS, IN TRINITY TERM, IN THE THIRTY-EIGHTH YEAR OF THE REIGN OF GEORGE III.

WEBB v. HERNE AND ANOTHER, Sheriff of Middlesex. June 15th, 1798.

In escape against the sheriff, if the Plaintiff aver in his declaration, that J. S. was arrested "under a writ indorsed for bail by virtue of an affidavit now on record"

he must produce the affidavit in evidence, though the latter part of the averment was unnecessary (a)¹.

Escape against the sheriff. The Plaintiff in his declaration stated that J. S. was arrested "under a writ indorsed for bail, by virtue of an affidavit now on record," and gave the sheriff notice to produce the writ, which not having been complied with, he called the attorney, who at the trial proved from an entry in his book that such a writ had been issued. Though this was not the next best evidence, no objection was taken on that head; but it was contended for the Defendant, that the words "by virtue of an affidavit now on record" being a substantive allegation, must be proved; and the Plaintiff not being able to produce the affidavit, Eyre Ch. J., before whom the cause was tried, nonsuited him.

Shepherd Serjt. now moved for a rule nisi to set aside the nonsuit, and contended that it was not necessary to produce the affidavit, for had the sheriff enabled the Plaintiff to shew the writ itself, it would have sufficiently appeared that it was indorsed for bail.

[282] BULLER J. I remember a case in Lord Mansfield's time where it was held unnecessary to produce the affidavit, but the declaration there differed from the present one, since it only stated generally that a writ was sued out "indorsed for bail £———" (a)².

EYRE Ch. J. If I had understood this to have been such a case, I should have left the evidence to the jury: but it appeared to me that there was a substantive allegation of the existence of an affidavit, which must be proved.

Shepherd took nothing by his motion (b).

PARKIN v. RADCLIFFE. June 15th, 1798.

It seems that a custom for the homage to assess a compensation in lieu of a heriot, to be paid by an incoming copyholder on surrender or alienation, is not good. If the lord set up a custom to have the best live or dead chattel as a heriot, quære if the tenant can modify that custom by pleading another, that the homage shall assess a compensation in lieu of the heriot (a)³?

Replevin of a cow.

Avowries. 1st, For that the said cow at the time of taking the same, was the property of the Defendant. 2d, For that the place in which, &c. was a parcel of a certain tenement situate in the township and manor of Marsden, and held of that manor, of which manor the Defendant at the time of the taking was lord, and because a heriot, that is to say, the best beast of the Plaintiff was due, and not delivered to the Defendant for the said tenement, the Defendant well avowed, &c. 3d, For that the place in which, &c. was parcel of a certain customary tenement situate in the township and manor of Marsden, within which manor from time whereof, &c. there had been divers customary tenements demised and demiseable by copy of the Court Rolls of the manor by the lord of the manor and his steward for the time being, to any persons willing to take the same in fee-simple, or otherwise at the will of the lord according to the custom of the manor, and that within the manor, there was, and for all the time aforesaid had been a certain ancient and laudable custom used and approved of, that is to say, that the lord of the manor for the time being from time whereof, &c. had been used and accustomed to take and have upon the admission of every customary tenant of the manor to every such customary tenement to which such tenant had been admitted, upon the surrender or alienation of any former tenant of such customary tenement, the best chattel, [283] alive or dead, of such tenant so admitted as aforesaid, upon such surrender or alienation, after such his admission to the same tenement, for and in the name of a heriot for such customary tenement: that the tenement of which the place in which, &c. was parcel, was from time whereof,

(a)¹ S. C. 2 Esp. Rep. 671. *Arundell v. White*, 14 East, 216, 224.

(a)² See *Croke v. Dowling*, E. 22 G. 3, Bull. N. P. 14, last ed. and *Rogers v. Ilcombe*, Taunton, Lent Ass. 1785, Esp. N. P. 535.

(b) See *Savage v. Smith*, 2 Bl. 1101. *Bristow v. Wright*, Doug. 665, 3d ed. also what is said by Buller J. in *The King v. Holt*, 5 T. R. 446, and *Peppin v. Solomons*, 5 T. R. 497.

(a)³ S. C. post, 393.

&c. parcel of the said manor and a customary tenement ; that the Defendant was lord of the manor ; that in 1786 one J. H. had been admitted tenant of the said customary tenement ; that in 1792 J. H. surrendered into the hands of the Defendant to the use of the Plaintiff and his heirs ; that the Plaintiff was admitted, and entered, and was still seised thereof ; and because at the time when he was so admitted, and from thence until and at the said time when, &c. he was possessed of the said cow as of his own proper cow, the Defendant well avowed the taking the said cow as the best living chattel at the time of the Plaintiff's admission, for and in the name of a heriot : and this, &c. wherefore, &c. 4th, The same as the last, only stating the custom for the landlord to take "the best beast," instead of "the best chattel alive or dead."

Pleas in bar. 1st, Issue on the first avowry. 2d, That the heriot was not due as alleged in the second avowry, and issue thereon. 3d, Traverse of the custom in the third avowry. 4th, Traverse of the custom in the last avowry. 5th, That in the said manor in the third avowry mentioned there had been from time whereof, &c. a certain other ancient and laudable custom used and approved within the same, that is to say, that at the Court Baron of the lord of the said manor for the time being, held in and for the said manor, the homage of the said Court Baron from time whereof, &c. had been used and accustomed to assess upon their oaths a reasonable sum of money to be paid upon the admission of every customary tenant, to any customary tenement to which such tenant had been admitted, upon the surrender or alienation of any former tenant, after such his admission, in lieu of such heriot by the said custom in the said avowry claimed, and which same sum of money so assessed ought to be paid to the lord of the manor by such customary tenant, and ought to be accepted by such lord in lieu of such heriot by the said custom in the said avowry claimed. 6th, To the last avowry the same custom as in the preceding plea. 7th, To the third avowry, that within the said manor there was another custom that every customary tenant upon his admission should pay to the lord, in lieu of such heriot by the said avowry claimed, such reasonable sum of money as [284] should be agreed upon between such lord and customary tenant ; and if they should disagree about the same, then such reasonable sum as should be assessed by the Court Baron at the homage ; and that when the said sum of money so agreed upon or assessed had remained unpaid after reasonable request and demand, the lord of the manor for the time being, from time whereof, &c. had been used and accustomed to take a reasonable distress for the same. 8th, The same plea to the last avowry.

Replication tendering issue on the traverses in the third and fourth pleas, and demurring to the fifth, sixth, seventh, and eighth.

Rejoinder joining in issue and demurrer.

Cockell Serjt. in support of the demurrer. 1st, The customs stated in the pleas in bar are unreasonable and uncertain, and therefore bad. There is no criterion shewn by which the homage may judge how to assess a compensation for the heriot, whereas some rule ought to appear by which the rights of the lord and the tenant may be preserved. There is a case mentioned in Noy, 2, by the name of *The Yelmester Custom*, reported in Noy, 3, by the name of *Crabb v. Bales*, and recognized in 1 Rolle, 48, under the name of *Crabb v. Bevis*, where a custom that a copyholder for life might nominate one or two that should have the copyhold lands after his death for a fine to be assessed by the homage, if they could agree with the lord, was adjudged to be good. But this seems to be answered by *Bill's case*, 4 Leon. 238, where the same custom was held good, only with this qualification, viz. that the sum assessed should not be "lesser than had used to be paid where the lord would assess a reasonable fine." 2dly, Supposing the customs to be good, yet as it is admitted on the pleadings that the lord has a right to the heriot, though subject to a compensation to be assessed by the homage, it should have been stated either that some compensation had been assessed, or that some step towards an assessment had been taken.

Clayton Serjt. contra. We have a right to modify the custom stated by the Defendant, by setting up another custom on our part ; for a heriot not being due of common right, but the mere creature of custom, ought to be regulated by custom. No cases have been cited to prove this custom unreasonable or uncertain ; nor is the discretion of the homage more arbitrary in this case than in all cases where juries are to decide. The case in Noy is of no slight authority, having been recognized in 1 Rolle, 48, and in *Perkins v. Titus*, 3 Mod. 134. Certainly the custom here is not [285] more unreasonable than that which was held good in *Wallis's case*, Cro. Jac. 555.

As to the second point, it is the business of the lord whose tortious act is complained of, to set out what is necessary to his own justification.

EYRE Ch. J. My difficulty is, how to incorporate the two customs. The landlord pleads a custom to have the best live or dead chattel as a heriot; the tenant answers that he is not entitled to the best live or dead chattel, but to a sum of money by way of compensation. This is pleaded two ways, first, as a sum of money to be assessed absolutely by the homage; secondly, as a sum to be agreed upon by the landlord and tenant, and on failure of an agreement then to be assessed by the homage. Either of these pleas is an absolute denial of the custom that the lord should have the best live or dead chattel. This compensation is pleaded to be in lieu of a heriot; but since it is stated not to depend upon the will either of lord or tenant, but to take place in all cases, it cannot be in lieu; it ought therefore to have been stated in the name of a heriot, and as an inducement to a traverse. If the Plaintiff had said, true, there is such a custom, but if the tenant prefer to pay a sum of money in lieu, then he shall pay such a sum as the parties shall agree upon, that would have been a modification of the custom, and the money would have come in lieu of the original right of the landlord, but here the original right is stated in two contradictory ways (a)¹.

BULLER J. I am not quite clear that the customs stated on these pleas may not stand together, as well as those in *Kenchin v. Knight* (1 Bl. 49. 1 Wils. 253, B. R.). No answer however has been given to the argument advanced against the goodness of the custom set up by the pleas in bar, viz. that there is no rule to direct the jury in assessing the amount of the compensation. I think the custom bad.

HEATH J. All the members of the homage are liable to pay this compensation, and are therefore interested in the assessment. Suppose a custom that the parishioners of a certain parish should assess a compensation to be paid to the rector in lieu of tithes; it would be void as unreasonable and uncertain. In the case in Leonard the landlord could never be injured by the assessment, and he might be put in a better situation.

ROOKE J. I have not the same difficulty with respect to the custom. A heriot is not due of common right as tithes are, but is the mere creature of custom. The lord has no right but by cus-[286]-tom, which is the life of copyhold. This is a claim of the first impression, for the lord does not claim from the out-going tenant, but from the in-coming tenant, who is to have his best beast taken from him: and yet I conceive that it may be good and reasonable that the in-coming tenant should pay such a sum of money by way of acknowledgment to the landlord, as the homage shall assess. However I incline to think that the plea in bar is not well pleaded.

The Court then offered a second argument, which being declined by the parties who meant to go to trial on the issues joined, the Court said that as they were all of opinion, though on different grounds, that the demurrer must prevail, they should give

Judgment for the Defendant.

STOCK v. MAWSON. June 18th, 1798.

The creditors of a bankrupt entered into a deed of composition to receive 8s. in the pound in full discharge of their debts, and agreed to release every thing beyond that to the bankrupt and join in a petition to the Chancellor, to supersede the commission; one of the creditors having two distinct debts due from the bankrupt, for one of which he held bills to the full amount, received his dividend of 8s. in the pound on both debts, and then recovered the full value of some of the bills: Held that the bankrupt was entitled to sue for the money so obtained on the bills in an action for money had and received (a)².

This was an action for money had and received. The circumstances were as follow. A commission of bankrupt having issued against the Plaintiff, and an assignment of his effects having been executed under that commission, the creditors, of whom the

(a)¹ Vide *Bland v. Moseley*, cit. 9 Rep. 58. *Spooner v. Day and Another*, Cro. Car. 432, and *Murgatroid v. Law*, Carth. 117.

(a)² Vide *Thomas v. Courtney*, 1 B. & A. 1, 4. *Watkins v. Flanagan*, 1 Bing. 413, 418.

Defendant was one, entered into a deed of composition with the Plaintiff, wherein, after reciting the commission and assignment, they agreed to accept 8s. in the pound "upon the amount of their respective debts, and in full discharge thereof," to be secured by the promissory notes of three sureties, and in consideration thereof "to release and discharge the said William Stock, his heirs, executors, and administrators, estate and effects, of and from the debts to them due and owing from him," and to join in a petition to supersede the commission. The deed then went on with a general release "of all actions, suits, debts, sums of money, accounts, reckonings, damages, claims, and demands whatsoever, both in law and equity," and relinquished and gave up to the Plaintiff, his executors, administrators, and assigns, "all and singular the stock in trade, household goods, plate, china, linen, and furniture, book debts, and other debts and sums of money due, owing, or belonging to him, from any person or persons whomsoever, and all bonds, bills, notes, and other securities for the same; and all other the estate and effects whatsoever of the said William Stock, whereof or wherein he the said William Stock, or any person or persons in trust for him or for his use, was or were seised or possessed or interested on the day of the date and issuing forth of [287] the said commission, and on any day since, and all benefit and advantage whatsoever to be made, had, or derived thereby or therefrom." At the time when this deed was executed the Plaintiff was indebted to the Defendant in two different sums of money on two different accounts, viz. 111*l.* 19*s.* 5*d.* and 110*l.* 5*s.* 5*d.*, for securing the latter of which he had given the Defendant bills to the full amount. The whole 221*l.* 4*s.* 10*d.* was proved, and a dividend of 8*s.* in the pound received by the Defendant on that sum: after which he called upon the acceptors of the bills and obtained on one of them 20*s.* in the pound and different sums upon the others, considering himself indeed as a trustee for the Plaintiff, to the amount of all which he received above 12*s.* in the pound on any of the bills, but retaining that sum for which the present action was brought.

The cause was tried before Rooke J. at the Guildhall sittings after Easter term, when a verdict was found for the Plaintiff for 116*l.* A rule having been obtained on a former day to shew cause why this verdict should not be set aside and a new trial had,

Le Blanc and Shepherd Serjt. now shewed cause. This question will depend on the construction of the deed. It will be contended that the deed being substituted in the place of a commission of bankruptcy, the parties must stand in the same situation under the former, as they would have done under the latter; whereas the rules which apply to an adverse proceeding under a commission, cannot be any guide to the court in construing the terms of a deed executed between the parties. The commission was done away, and the parties were placed in a new situation; since the creditors obtained the security of three solvent persons for a certain definite sum; a security which they could not have had under the commission. The bills in question were either accommodation bills, or drawn for value in the hands of the acceptors, in either of which cases the Defendant has violated his agreement to leave the Plaintiff in full possession of his estate. If they were accommodation bills, a debt has been created against the estate of the Plaintiff, which would not have existed if the acceptors had not been called upon, and if on the other hand they were drawn for value, payment of those bills by the acceptors is a discharge of a debt which they owed to the Plaintiff's estate. Besides the Defendant has committed a fraud on the other creditors, who expected to be put upon an equal footing with him, and who perhaps might not have [288] executed the deed if they had supposed that he was to receive twenty shillings in the pound on any of his debts.

Adair and Palmer Serjts. in support of the rule. It is clear that under the bankrupt laws, the great object of which is to establish an equal division among the creditors, the Defendant would be allowed to retain what he has received to the amount of 20*s.* in the pound; *Ex parte Wildman*, 1 Atk. 109: now the deed in question being substituted in their place, he ought to be entitled to the same advantage. The object of this deed is the mutual benefit of the creditors and the insolvent; the latter is instantly put in the situation which he might hope to attain, after a long delay, under the bankrupt laws; the former have the payment of a certain sum secured to them, in consideration of which they agree to release all demands upon the bankrupt, though not on any other persons. Indeed, should the estate of the insolvent produce more than 8*s.* in the pound, still the creditors bar themselves by this deed, from

claiming any further sum out of that estate. This question depends upon two clauses in the deed, viz. that of release and that of restitution; now release to the drawer is no release to the acceptor, who by his acceptance of the bill has made himself the original debtor; *Dingwall v. Dunster*, Doug. 247: and by the clause of restitution nothing could be restored to the bankrupt but what he had lost by the transfer to the assignees, of which the securities in the hands of the Defendant were no part. Admitting, however, the acceptor to have been discharged, the money in question has been received by the Defendant to his use, and not to that of the Plaintiff.

EYRE Ch. J. The only difficulty in my mind is, whether Stock has a right to bring this action for money had and received to his use. I am inclined to think, that on the true construction of the deed of composition, it must be considered as a discharge of every body; the consequence of which is, that the acceptors of the bills who have been called upon, have paid the money in their own wrong, and ought to recover it back. A solution of this difficulty was attempted by my brother Le Blanc in arguing on the relation between the acceptor and the drawer. If the bills were accommodation bills, the acceptor would have a right to call on the drawer; it seems, therefore, that the money received by the Defendant was in fact part of the estate of the Plaintiff, and ought under the deed to be returned to him in order to enable him to satisfy the acceptor: if the bills were [289] not accommodation bills, the money received by the Defendant was more immediately the estate of Stock, because he has so much less in the acceptors hands in consequence of the transaction. This case has been argued on an analogy which does not in fact exist, viz. between the effect of this deed, and the proceedings under a commission of bankruptcy, though a commission happened to be the foundation of the agreement. A commission is a transaction between creditors only, the estate of the bankrupt is completely taken out of him, and he has no interest but in the actual surplus of that estate after all debts paid: here, on the other hand, the insolvent had an interest in every thing beyond 8s. in the pound. It is on the ground of uncertainty that the rule has been allowed to prevail, that a bill holder may prove against every body who is a party to the bill, for until the dividends are ascertained, it is impossible to know what satisfaction he will have. But here a certain liquidated sum is given, and the creditor thinks it for his interest to consider the whole as the debt of the drawer, and to accept 8s. in the pound as a satisfaction: this is the substance of the instrument; by this the debt is discharged and gone, and the effects are absolutely released. Suppose that the Plaintiff had paid 20s. in the pound, there can be no doubt, but that he would have become the purchaser of the bills, and would be entitled to take them out of the hands of the holder and use them according to the relation in which he might stand to the acceptor. If it be so on payment of 20s. in the pound, can we distinguish the present case from that? The creditor has thought fit to accept 8s. in the pound in lieu of 20s., and though this could not be pleaded on a parol agreement, yet on a deed it may, and the discharge is as effectual as if 20s. in money had been paid. I am therefore of opinion that this case has been argued on the ground of an analogy which does not exist, and admitting every thing advanced to be true with respect to the rule where debts are to be proved under different commissions, yet even there if a party has proved his debt under one commission, and taken a dividend, he cannot prove the whole debt under another. The business is generally managed by not taking a dividend under any commission till the debt has been proved under all, and there is no possibility of setting the matter right, but by calling the parties to an account. Here the debt is not only reduced to 8s. in the pound, but actually discharged, so as to entitle the Plaintiff to stand in the [290] place of the Defendant. The difficulty however recurs whether it does not lie with the acceptor to bring this action, and whether the money in dispute must not be considered as his: if my Brothers can satisfy me on this point, I shall have no hesitation on the rest of the case.

BULLER J. The nature of the contract and deed on which this question arises decides the case. Stock was indebted to several persons: the creditors sued out a commission, but for the purpose of avoiding expence, and getting as great a satisfaction as possible, they came to an agreement that Stock should provide security for 8s. in the pound, and that they would give up the remainder of their debts and make him a new man. If there was any sort of surprise by one creditor upon another, it is no new case to say that it was a fraud: one creditor is induced by another, to come into the composition, and they all agree by deed to take an equal dividend; now this is

not effected by one of them reserving a secret advantage. It is said that the Defendant has not taken more than 8s. in the pound out of Stock's effects, but I say that he does get the surplus out of Stock's effects. These were part of the bills which by agreement the Defendant was to restore, they came into his hands from Stock, and were to be delivered back to him, on payment of 8s. in the pound. By the mode of stating this account, the Defendant decides against himself; to give a foundation for the argument, he should have pursued this method: he should have said, I have 1113l. 19s. 5d. due to me on one account, and 1107l. 5s. 5d. on another; he should not have added the two together, but should have claimed a dividend on the former sum only, and have treated the latter as a debt satisfied by the bills which he held in his hands; by not doing this he has committed a fraud on the rest of the creditors, who expected to be put on an equal footing with him, and had a right to know his situation. Whether an agreement by parol to accept a smaller sum in satisfaction of a larger can be pleaded or not, I do not know: it was formerly considered that it could not, and was so decided in *Coke (a)*. I think however that there are some late cases to the contrary, and one in particular in Lord Mansfield's time, who said, that if a party chose to take a smaller sum, why should he not do it? There may be circumstances under [291] which such an agreement might not only be fair but advantageous; it may be of more importance to a man to take 10s. to-day than 20s. to-morrow. If we look to the deed it is impossible to say that the word "bills" in the deed does not extend to the bills in this case. What other bills are there? Supposing (as we must) that these bills were drawn for value, until the acceptors pay them they are indebted to the drawer to their amount, and if Stock pays 8s. in the pound in satisfaction of his debt, is he not to have the bills in order to recover from the acceptors? If indeed they were accommodation bills only, then unless they are to be delivered up to the Plaintiff, the acceptors will be bound to pay, and will have an action against Stock, who will thus be called upon for more than 8s. in the pound. Whichever way the case be stated, the Defendant has received more than 8s. in the pound.

HEATH J. I am of the same opinion, and shall bottom myself on the clear intention of the parties. There were three descriptions of persons parties to the transaction, viz. the debtor, the creditors, and the sureties; and it was agreed that the creditors should take 8s. in the pound in discharge of all debts. Now in order to induce the sureties to guarantee the payment of the 8s. in the pound it was necessary to take an account of the Plaintiff's property; in taking which account they must have considered what was in the hands of the acceptors of the bills. If the acceptors were intended to hold the money subject to further demands, the sureties would not have guaranteed to that extent. It is said that the Defendant has only pursued his remedy against third persons: but in my opinion he has taken a double remedy against the estate of Stock; 1st, against his effects in his own hands, and 2dly, against his effects in the hands of the acceptors. My Lord's observations have satisfied me that there is no analogy between this case and the proceedings under a commission of bankruptcy. But a question has been made whether this action will lie for money had and received to the use of the Plaintiff. Now what is a bill of exchange? It is nothing but an order on the drawee to pay so much out of the effects of the drawer in his hands, and the acceptance is evidence in law that the acceptor has such effects, if therefore a person receives any thing out of those effects, he receives what belongs to the drawer who may recover it in this form of action.

ROOKE J. I am of the same opinion.

Postea to the Plaintiff.

[292] FISHER v. M'NAMARA. June 18th, 1798.

A prisoner after judgment against him may, notwithstanding the allowance of a writ of error, be charged in execution.

The Plaintiff in this case was proceeding after the allowance of a writ of error to charge the Defendant, then in custody on mesne process, in execution.

(a) *Pinnel's case*, 5 Co. 117, where it was held that payment of a lesser sum at the time and place mentioned in the condition cannot be a satisfaction for a greater; but if paid before the day or at another place it may. Vide also *Cumber v. Wane*, Str. 426.

This was opposed by Marshall Serjt.

But the Court said that if the Defendant were not charged in execution she would be supersedeable (*a*)¹, and that the Plaintiff therefore was only doing that which for his own security he was obliged to do.

FULHAM v. BAGSHAW. June 18th, 1798.

The Court will not allow a Plaintiff to sign judgment because the Defendant refuses to pay for half the paper books delivered to the Judges; this case being within the rule. Hil. 35 Geo. 3.

Marshall Serjt. opposed the arguing a demurrer in this case, on the ground that the Defendant's attorney had refused to pay for two of the paper books delivered to the Judges according to the rule of Court. Mich. 6 G. 2, Imp. C. B. 352, ed. 4.

The Court at first doubted, but upon inquiry finding that the Court of King's Bench (*a*)² had considered a subsequent rule (*b*) (which had also been adopted in this court) ordering that no judgment should be signed for non-payment of issue money, as controlling the former rule, said they should follow the same construction, and held the money to be paid for the paper books as coming within that rule, and therefore refused to allow judgment to be signed without argument.

Shepherd Serjt. *contra*.

[293] QUICK & UX. v. SIR W. STAINES KNT. Sheriff. June 18th, 1798.

If an executrix use the goods of her testator as her own, and afterwards marry, and then treat them as the goods of her husband, she shall not be allowed to object to their being taken in execution for her husband's debt (*a*)³.

This was an action of trover for household goods brought by the husband and wife in right of the wife as executrix of her former husband M'Pherson, under the following circumstances: M'Pherson died about nine months previous to the action being brought, having made his widow his executrix, who continued in possession of his goods, and about three months after his death married the Plaintiff Quick. During those three months she used the goods as her own, and after her marriage with Quick the goods were treated by them both as his. The Defendant having taken these goods in execution at the suit of a person who was a creditor both of M'Pherson and of Quick, but who claimed them upon the present occasion to satisfy the debt of the latter, received notice from the Plaintiffs that the effects which he had taken were the unadministered goods of M'Pherson.

EYRE Ch. J., before whom the cause was tried at the Westminster sittings after Easter term, being of opinion that a devastavit had been committed on the part of the executrix, by putting the effects of M'Pherson into the hands of her second husband, directed a nonsuit against the Plaintiffs, with liberty to move to set it aside and enter a verdict in their favour. Accordingly a rule nisi for that purpose having been obtained on a former day,

Shepherd Serjt. now shewed cause. It cannot be denied that the executrix has such a property in the goods of her testator as to enable her to sell and make a good title, though she may render herself liable for a devastavit. Now the executrix in this case having first treated the goods as her own, and the Plaintiff Quick having since her marriage with him treated them as his, is sufficient to shew that she had given them up to him, which must have the same effect as if she had sold them. If by her conduct she did not make these goods her own, what period of time can be

(*a*)¹ But a Plaintiff may shew for cause against a supersedeas issuing, that the Defendant has sued out a writ of error before the end of the two terms limited by the practice of the Court, 2 Wils. 380, *Garrett v. Mentall*, C. B. R. H. 26 Geo. 3.

(*a*)² *Fuller v. Osborne*, 6 T. R. 477.

(*b*) Hil. 35 Geo. 3. It is ordered, that after the first day of next term no judgment shall be signed for non-payment of issue money, but that the issue money shall remain to be taxed as part of the costs in the cause.

(*a*)³ And see *Bouerman v. Radenius*, 2 Esp. Rep. 651.

stated at which the effects of a testator in the hands of an executor are to be considered as converted to the use of the executor? In *Farr v. Newman*, 4 T. R. 621, the Court seemed to consider that if any thing had been done by the executor to raise such a presumption the goods might be considered as his own: and Lord Kenyon was of opinion, that till the contrary be shewn the goods must be considered as the property of him in whose hands they are found. Here perhaps it may be contended, that a claim is made by the [294] executrix, but it must be remembered that she claims against her own acts.

Le Blanc and Clayton Serjts. in support of the rule. An executor does not take an absolute property in the goods of his testator, but such an one only as will enable him to fulfil the duties of his office. In this case M'Pherson died, leaving his widow in possession of his goods in that house in which they had lived: she never removed them, but they continued in the same house until and after her intermarriage with another person. At what period then did she take possession of the goods as her own? An executor may convey to another the goods of his testator for money, and inasmuch as third persons cannot know in what manner that money is applied, creditors cannot follow the goods. But an executor cannot devise the goods of his testator, nor are they forfeited by his attainder, nor are they liable to the bankrupt laws. *Howard v. Jemmet*, 3 Burr. 1369. If an executor pay the debts of his testator to the amount of the value of the goods, he continues in possession of them as becoming the purchaser. The old form of the action of trespass by an executor against a person who takes the goods of the testator, shews the law; for the gravamen is "the delaying of the execution of the will," F. N. B. 87, E. In *Ridder v. Punter*, Cro. Eliz. 291, a term in the hands of the husband in right of his wife as administratrix, was held not to be extendible for his debt, though it had continued in his hands and had never been granted; and in *Farr v. Newman*, though the alteration of property was as great as in this case, yet it was held that the goods were not liable for the husband's debt. Indeed it would be hard if the act of marriage alone were to make the executrix liable to a devastavit. It was said by the Court in *Farr v. Newman*, that if the sheriff had any doubt to whom the goods belonged, he should have summoned a jury de proprietate probandâ; and though it has been contended that the present case differs from that, since that was an action between two creditors, whereas this is an attempt by the executrix to disaffirm her own acts, yet that argument is answered by the opinion of Lord Kenyon, 4 T. R. 647, viz. that it is too late to say that the possession of goods is in all cases conclusive evidence of property.

EYRE Ch. J. I was not aware at nisi prius that the case of *Farr v. Newman* had been decided in so solemn a manner, though if I had, it would have made no other difference than to make me wish that this case should be put upon the record. The first ob-[295]jection to the authority of that case, as applying to this, arises from the form of the action, which was not the same as here; and the second, from the difference of the parties. It is one thing whether a creditor shall insist that an executor has been guilty of a devastavit, and another, whether the executor shall take advantage of his own wrong, and justify his own misconduct by saying that the goods are not his but his testator's. The case of *Whale v. Booth and others*, cited 4 T. R. 625, is directly in the teeth of *Farr v. Newman*. I think however that this question may be decided on a principle which will leave the latter case altogether untouched, viz. that the executrix had taken the goods to her own use. On that ground I shall have no difficulty in deciding: but we will look further into this question.

Cur. adv. vult.

On the next day the opinion of the Court was delivered by

EYRE Ch. J. We have looked into the case of *Farr v. Newman* and the authorities there cited, and the Court adheres to the opinion, that this nonsuit ought not to be set aside. We proceed on a ground which does not at all interfere with the case of *Farr v. Newman*; as to which I shall say nothing either one way or the other. The ground of our decision is that originally taken, viz. that a devastavit has been committed by the executrix, who before her marriage had converted the goods. I allow that it would be hard (as it was argued) if the mere act of marriage had worked a devastavit; and we do not hold that. But when in consequence of the marriage the effects were permitted to come into the hands of the husband and to be used by him, then at least, if not before, a clear devastavit was committed, since that conduct amounted to a conversion of the goods. We think that where the executrix herself or her husband have

converted the goods, it does not lie in the mouth of either of them to say that they are not the property of the husband, in a case between the executrix and one of his creditors. We do not say any thing with respect to the question, as between creditors of the original testator pursuing the assets with legal diligence, or the executrix in respect of those assets, and creditors of the executrix or the husband of the executrix, whether they shall or shall not have a preference against a creditor of the executrix. That question will be fit to be considered when it arises, and then we shall decide it, with a proper respect for the case of *Farr v. Newman* contrasted with the case of *Whale v. Booth*, 4 Term Rep. 625 n. before Lord Mansfield, [296] with the other cases to be found in the books upon the subject, and with the general principles of law relating to the goods of testators and intestates, and the nature of a claim made on their representatives in respect of those goods. It may be a difficult question, but it is not now to be touched.

Per Curiam. Rule discharged.

FARMER v. RUSSELL AND ANOTHER. June 19th, 1798.

[Referred to, *Sykes v. Beadon*, 1874, 11 Ch. D. 194; *Gordon v. Chief Commissioner of Metropolitan Police*, [1910] 2 K. B. 1092.]

If A. receive money of B. to the use of C. it may be recovered by C. in an action for money had and received, though the consideration on which B. paid it be illegal (*b*). Quær. Whether the case would be varied if A. were a party to the contract between B. and C. ?

Assumpsit against the defendants, who were common carriers.

The first count in the declaration was on a special agreement not to deliver the goods in question without receiving the money for them; the other counts were general, among which was one for money had and received. At the trial it was proved on the part of the Plaintiff that he had agreed to carry certain goods called medals, and to deliver them to a person at Portsmouth; that they were taken by the carriers on delivery, the meaning of which term is, that the carriers are to receive 2d. in the pound for commission, and are not to deliver the goods without receiving payment for them. It appeared, however, that these medals were in fact counterfeit halfpence sent to Portsmouth for the purpose of being distributed among the sailors: but no other knowledge of the contents of the boxes in which these goods were packed could be brought home to the Defendants, than what might be implied from the circumstance of one of the boxes having been accidentally opened in the presence of a clerk of the Defendants, who saw the counterfeit halfpence (*a*). The Defendants had received money from the person at Portsmouth, and had accounted to the Plaintiff for the whole of it except 13l., the subject of the present action. Rooke J., before whom the cause was tried at the Guildhall sittings after Easter term, told the jury, that if the counterfeit halfpence were sent as an imposition on the public, the contract between these parties was illegal, and no action could arise out of it, and that the carriers did not seem to him wholly exempt from crime, as they appeared to be acquainted with the nature of the goods. Accordingly a verdict was found for the Defendants, with leave to move to set it aside, and enter a verdict for the Plaintiffs, if the Court should be of that opinion.

[297] A rule nisi for that purpose having been obtained by Cockell Serjt. on the authority of *Tenant v. Elliott*, ante, p. 3.

Adair and Shepherd Serjts. now shewed cause. Admitting that there was no direct evidence to prove that the Defendants knew the nature of the goods committed to their care, still in legal construction this was not money received to the use of the Plaintiff. This case may be distinguished from that of *Tenant v. Elliott*, as the contract was founded not only on *malum prohibitum*, being contrary to act of parliament,

(*b*) Vide *Lacaussade v. White*, 7 T. R. 535. *Howson v. Hancock*, 8 T. R. 575. *Cannan v. Bryce*, 3 B. & A. 179. *Bensley v. Bignold*, 5 B. & A. 333. *Bate v. Cartwright*, 7 Price, 540, 542. *Nockels v. Crosby*, 3 B. & C. 814, 819.

(*a*) This fact was stated in the report of Mr. Justice Rooke, but some doubts were afterwards expressed by him with respect to its having been proved.

but also on *malum in se*, being contrary to common honesty, and a fraud on all mankind; whereas the contract in *Tenant v. Elliott* was only made illegal by positive law. A Plaintiff must recover on his own strength, not on the innocence of the Defendant. If A. pay money into the hands of B. to be paid to C. for the assassination of a particular person, or as the price of perjury, it will never be contended that C. can recover it: it is not sufficient to shew that B. ought not to keep the money, but it must also be shewn that C. is entitled to receive it. It is to be observed that in all the cases where money paid on illegal contracts has been recovered back, the actions have been brought in disaffirmance of the contract, as in *Jaynes v. Wilby*, 1 H. Bl. 65; whereas here the action is brought in support of the illegal transaction. Neither were the Plaintiffs in those cases in *pari delicto*, whereas here the Plaintiff was a principal in the fraud. If this money had been paid into the hands of a banker on a general account, it might not have been competent to him to object to the grounds on which that money was paid: but in the present case the money was paid for the specific purpose of completing the illegal contract, and was received in the course of carrying it into effect.

Cockell Serjt. *contrâ*. This might have been a different case if the contract had been executory, for there the Defendant would have stood in the situation of a stakeholder: but here the party who had a right to object to the contract has affirmed it by his own act. Suppose money to be paid into the hands of the Plaintiff's clerk, for the Plaintiff's use, shall he be allowed to say, "this money was paid into my hands for your use, but being the consideration of an illegal contract, I shall put it into my own pocket." The authority of *Tenant v. Elliott* is decisive, and cannot be distinguished in principle from this case.

EYRE Ch. J. If I could be satisfied that the Defendant in this case ought to be considered as insuring the performance of an illegal contract, I should be of opinion that a demand necessarily connected with an illegal contract, and tending to facilitate the [298] execution of it, would be vitiated by that contract; but my doubt is, whether he can be so considered. The question therefore is, whether the Defendant is competent to state the transaction with the party at Portsmouth, and make any use of it! It seems to me that the Plaintiff's demand arises simply out of the circumstance of money being put into the Defendant's hands to be delivered to him. This creates an *indebitatus*, from which an *assumpsit* in law arises, and on that an action on the case may be maintained. It was on this ground that the Court proceeded in *Tenant v. Elliott*, and I find myself under a difficulty in making any distinction between that case and the present. The illicit trading there was as much *malum in se* as the transaction here. For it was held in the Exchequer-chamber, in *Camden and others v. Anderson* (ante, 277), that violating a prohibition of a species of commerce in which the interest of the country was concerned, was not merely *malum prohibitum* but *malum in se*, and I am well satisfied with that decision. Now *Tenant v. Elliott* had the same foundation as *Camden and others v. Anderson*, viz. an insurance on trade to the East Indies carried on by a subject of this country in violation of the East India Company's charter. In *Tenant v. Elliott*, the Court were of opinion that though the insurance was clearly void, yet that the broker into whose hands the money was paid had nothing to do with the illegality of the contract. The obligation on him arose out of the fact of the money having been received by him for the use of a third person, which created a promise in law to pay; and it was well said by my Brother Buller, that even the man who had paid over money to another's use could not dispute the legality of the original consideration. The case therefore is brought to this, that the money is got into the hands of a person who was not a party to the contract, who has no pretence to retain it, and to whom the law could not give it by rescinding the contract. Though the Court will not suffer a party to demand a sum of money in order to fulfil an illegal contract, yet there is no reason why the money in this case should not be recovered notwithstanding the original contract was void. The difficulty with me is, that the contract with the carrier cannot be connected with the contract between the Plaintiff and the man at Portsmouth, and in that view I think the verdict is not to be supported. However, I incline to a new trial on another ground. It does not clearly appear that the Defendant was not himself a party to the original contract, for [299] there was a circumstance in the report which gave much countenance to the idea that the carrier knew what he was doing, viz. that he was lending his assistance to an infamous traffic. In that case

the rule *melior est conditio possidentis* will apply; for if the contract with him be stained by any thing illegal, the Plaintiff shall not be heard in a court of law.

BULLER J. I think the knowledge and participation of the Defendant is not made out by the evidence reported; nor indeed if it had been, would it have made any difference in the case of an action for money had and received, which is not founded on the illegal contract, but on a ground totally distinct from it; *Walker v. Chapman*, cited Doug. 471, ed. 3. It seems to me that all the confusion in this case has arisen from the Plaintiff having proved too much at the trial. He should have shewn that the Defendant had received so much money to his use, and it was immaterial whether the money were paid on a legal or an illegal contract. The cases come up to that point; *Alcinbrook v. Hall*, 2 Wils. 309, which was the case of money lent to pay a bet at a horse-race, and *Falkney v. Reynous*, Burr. 2069, of money lent to pay differences in a stock-jobbing bargain, where the Defendant was privy to the transaction. And it has been said that if money be lent to pay differences in the Alley, the party lending it with full knowledge of the purpose to which it is to be applied may recover. Here the money having been paid by another to the Plaintiff's use, the illegal contract is out of the question. I am unable to distinguish this case from that of *Tenant v. Elliott*.

HEATH J. I am of the same opinion. In *Tenant v. Elliott*, the Defendant was employed as agent to negotiate an illegal insurance, and was privy to the whole transaction, and yet the money there was considered as coming into his hands, to the use of another person. I look upon the matter in the same light as if the money had been paid into the hands of a banker who could never be allowed to say that it was paid in on an illegal consideration. In the case of a stake-holder, the Court would inquire into the transaction; but the distinction is, that whether the consideration be good or bad, a man may recover his own money, though not that of another person. The case of *Barjeau v. Walmsley*, Str. 1249, where a party was allowed to recover (a) money lent to another to game withal, is very strong.

[300] ROOKE J. I agree with my Lord and my Brothers, that there ought to be a new trial in this case, though I cannot agree with them in the reasons on which they are inclined to direct it. The Plaintiff is to recover on his own merits, not on the demerits of the Defendant. If he has no merits, or if he discloses a case of foul fraud on his own part, I think he ought not to be heard, however great the demerits of the Defendant may be. The Plaintiff in this case is concerned in a traffic not merely forbidden, but fraudulent and indictable; viz. the uttering counterfeit tokens, and counterfeit halfpence. He endeavours to carry on this traffic with complete security to himself as to payment. He knows he cannot recover payment as for goods sold and delivered, and therefore contracts with the Defendants to carry the goods, and to engage to receive the money for them on a commission of 2d. in the pound. By these means he secures himself as to the payment, and the Defendants become his agents to sell for ready money; they are instruments of fraud in the hands of the Plaintiff, and being such instruments, they behave dishonestly to their principal: shall then the Court assist such a principal to recover his money out of the hands of his agents? or shall it not rather say, if you will employ agents in a fraudulent transaction, you must rely on the fidelity of your agents, for the Court will not assist you? A distinction has been taken between the Defendant's being privy to the fraudulent transaction, and not being privy to it. I thought at the trial that there was evidence of the Defendants' knowledge, and I told the jury so. In that, I probably made some mistake; because neither my own note, nor the memory of counsel, supply me with a fact, which yet makes an impression on my memory; viz. that some of the goods were ill-packed, and the packages broken, so that the Defendants must probably have known the contents. To clear up this matter, if the Court think the point of law in the Plaintiff's favour (supposing the Defendants to have no knowledge of the contents of the packages), it may be right to send the parties to a new trial. But on the best consideration I can give this case, I do not think that this fact, found one way or the other, can vary the ground on which the cause should be decided. The ground on which I form my opinion is this; that the Plaintiff ought not to be heard to make a claim in a court of justice, founded on a transaction for which he ought to be indicted. He disclosed the [301] whole

(a) Vid. etiam, *Wettenhall v. Wood*, coram Lord Kenyon, Espin, Cas. N. P. 22.

transaction by his own witnesses in establishing his own case, on the 1st count, against the Defendant for not receiving ready money; and having disclosed it, I think the Court ought not to shut its eyes against it, but to notice the transaction as fully as if disclosed in a declaration or on a special verdict. The distinction as to the knowledge or ignorance of the Defendant, if allowed, will produce this strange consequence; that if he be innocent, he shall be answerable in this action; but if guilty, he shall be free: his innocence shall work a loss to him, his guilt shall be his indemnity. This is so monstrous a doctrine, that though it may be technically accounted for, on the ground of mutual privity in a foul transaction, I cannot assent to it, if I can discover a principle, by which it may be rejected. I cannot agree that a Plaintiff shall be heard, if he alone is party to a foul fraud: and that he shall be rejected, only when the Defendant is as bad as himself, and when both are mutually concerned in the fraud. I think that a man who has been guilty of an indictable offence ought not to have the assistance of the law to recover the profits of his crime; and that whether his agents be innocent or criminal, privy or not privy, his claim against those agents is equally inadmissible in a court of law. In this case the Plaintiff does not come into court with clean hands; he alleges his own turpitude, and is indictable for his fraud. Suppose a Plaintiff to state in his declaration "I have beaten A. according to the terms of my agreement with B., B. has lodged the money he contracted to give me, in the hands of the Defendant, and the Defendant refuses to pay it over to me;" I think the Court would reject his demand. *Tenant v. Elliott* is not precisely in point; it proceeds on a general principle, to which the circumstances of that case may be applicable: but to which the circumstances of the present case form an exception. It is not there stated whether the circumstances which support the objection were proved on the part of the Plaintiff, or on the part of the Defendant. The assured did not by that contract secure himself at all events against loss, though he broke the law by ordering the insurance in question. Neither the broker nor he could enforce payment from the underwriter: whereas here is a contract to secure the Plaintiff against loss in a fraudulent traffic, and the Defendants (whether privy or not to the fraud) are the agents to secure him by dealing for ready money only. If the Plaintiff will em-[302]-ploy an agent in such a transaction, he must rely on the honesty of his agent, and I think the law ought not to assist him.

EYRE Ch. J. If it be possible to mix the original transaction with the contract on which the action is brought, I agree with my Brother Rooke in all his conclusions (a).

Rule absolute for a new trial (b)¹.

Vid. tamen *Sullivan v. Greaves*, Park Ins. 8.

M'MASTER v. KELL. June 19th, 1798.

The Court has no power to discharge a Defendant out of execution, on the ground of a commission of bankruptcy having since been sued out against him by the Plaintiff (b)².

Adair Serjt. on a former day obtained a rule, calling on the Plaintiff to shew cause why the Defendant should not be discharged out of the custody of the warden of the Fleet, as to the execution wherewith he stood charged at the suit of the Plaintiff in this action, on the ground of the Plaintiff having since sued out a commission of bankruptcy against him. The facts were these. The Defendant was charged in execution by the Plaintiff in Trinity term 1797, for 609l.; on the 22d of May last a commission of bankruptcy issued on the petition of the Plaintiff, under which the Defendant was declared a bankrupt; the Plaintiff was the only person who proved under the commission, and was chosen sole assignee.

Clayton Serjt. shewed cause, and contended that a petition to the Great Seal had never yet been held to be a satisfaction of a debt, and though in *Burnaby's case*, 1 Str. 653, charging a debtor in execution was held such a satisfaction to a creditor, as to

(a) Vid. *Steers v. Lashley*, 6 T. R. 61. *Booth v. Hodgson*, 6 T. R. 405.

(b)¹ The Defendants afterwards paid the money into Court.

(b)² Vide *Percy v. Powell*, 3 B. & P. 6. *Baker v. Ridgway*, 2 Bing. 43.

prevent him from petitioning on that debt (a)¹, yet that the converse did by no means follow.

Adair Serjt. in support of the rule, cited *Ex parte Ward*, 1 Atk. 153, and *Ex parte Lewes*, 1 Atk. 154.

EYRE Ch. J. Suppose the Lord Chancellor should think fit to supersede the commission, then we shall have discharged the debtor, because a commission has issued against him, and the Lord Chancellor will have superseded the commission because the party has been charged in execution. There is no instance of such an application to a Court of law, and I am not disposed to make a precedent. Indeed I do not know that the principle has ever been recognized as one upon which a Court of law can act; it is much fitter for the Court of Chancery to interfere, since that Court [303] may either supersede the commission, or direct the bankrupt to be discharged out of custody. I wish it to be understood that this rule is discharged, on the ground of a want of jurisdiction in this Court.

Per Curiam. Rule discharged.

SANGSTER v. BIRKHEAD. June 20th, 1798.

If the lessee of a house at a rack-rent underlet it at an advanced rent, he is liable to contribute to the expences of a party-wall, built under the 14 G. 3, c. 78; nor is the operation of the statute at all varied by any covenants to repair entered into between the landlord and his tenant (a)².

Replevin of goods and chattels.

Avowry for rent in arrear, and issue thereupon.

One Woodward and his wife being seised in fee of a house in London, by lease, bearing date 29th of March 1777, demised it to the Defendant for a term of twenty-one years, which expired at Lady-day 1798, at the yearly rent of 44l. deducting the land-tax. The Defendant demised the house for eighteen years and ten months from the 1st of May 1779 to one Robert Sugden at the yearly rent of 60l., also deducting the land-tax. In this lease amongst the other usual covenants on the part of the lessee, there was one to make "all needful and necessary reparations and amendments whatsoever," in which no exception was made as to accidents by fire, nor was there any covenant on the part of the lessee to insure. The lease was assigned by Sugden for a valuable consideration, and after several mesne assignments came on the 19th of May 1787 to the present Plaintiff; in May 1795 a fire having happened in the adjoining house, by which that house was entirely consumed, and the roof of the Plaintiff's injured, the owners of the site of the adjoining house being desirous to rebuild, had the party wall examined by four surveyors, and delivered a certificate to the Plaintiff according to 14 Geo. 3, c. 78, s. 38, that the wall was, by the opinion of the said surveyors, condemned as decayed and ruinous. It was accordingly rebuilt and the Plaintiff called upon for a moiety of the expence. This he paid, and deducted out of the rent due to the Defendant, who distrained for rent in arrear to that amount.

This cause came on to be tried before Rooke J. at the Guildhall sittings after Easter term, when the surveyors gave in evidence, that they had condemned the wall as ruinous and decayed; that it was probably built soon after the fire of London; that they could not decide whether it were originally ill-built, or had received some injury from external violence, but that it was not [304] injured by fire. A verdict was taken for the Defendant in order to ascertain the sum due, subject to the opinion of the Court.

Adair Serjt. having on a former day obtained a rule nisi for setting aside that verdict and entering one for the Plaintiff,

Shepherd Serjt. now shewed cause. The first question is, whether the Defendant can be considered as the owner of the improved rent within the 14 Geo. 3, c. 78, s. 41 (a)³?

(a)¹ Vid. etiam, *Cohen v. Cunningham*, 8 T. R. 123.

(a)² Vide *Robinson v. Lewis*, 10 East, 227. *Lambe v. Hemans*, 2 B. & A. 467.

(a)³ By 14 Geo. 3, c. 78, s. 41. It is enacted, that the person at whose expence any party-wall shall be built, agreeably to the directions of that act, shall be reimbursed by the owner or owners who shall be entitled to the improved rent of the adjoining building in the proportion therein mentioned. That the first builder shall leave at

the second, whether under the terms of the lease the Plaintiff was not bound to repair the wall at his own expence, or whether he is relieved from the performance of his covenant by 14 Geo. 3, c. 78? First, the object of the act was to throw the burden on those persons who derive a benefit from the improved rent; such as the lessee of a ground rent on a building lease; it was never intended to apply to persons who having taken a lease at a rack rent, afterwards underlet at a rent somewhat higher. The Defendant is not the owner of the improved rent, but of an increased rent only. It seems to have been the opinion of Lord Kenyon and Buller J. in *Southall v. Lealbetter*, 3 T. R. 458, that persons who take leases at a small rent, and afterwards improve them so as to create a new estate, should be liable. But a person who takes a house in the city of London at a rack-rent, and afterwards underlets to one who wants to come into his business, and therefore gives a better rent for the house, is not the owner of the improved rent within the meaning of the act; if he were, there might be six different owners of the improved rent of the same house. In *Peck v. Wood*, 5 T. R. 130, the distinction taken, was between the improved rent and the ground rent. Secondly, supposing the Defendant to be the owner of the improved rent within 14 Geo. 3, c. 78, still the Plaintiff is bound by his covenant to repair, and is not exempted from the performance of those covenants by the act. [The Court said they could not meddle with that question, as the Legislature certainly never meant to incumber itself with the covenants which parties might make with each other (*b*).]

Adair contra was stopped by,

[305] EYRE Ch. J. I dare say that the leading object of the Legislature was to make the owner of the improved rent liable, as opposed to the ground landlord. But though that may have been the leading object, yet the expressions of the act being such as they are, we must deal with them as well as we can, and find an owner of the improved rent in all cases, though there should be no ground rent reserved. Here the original landlord made a lease for twenty-one years to a person who again underlet the premises. Who then is the person to be considered as the owner of the improved rent, but the man who on all the subsisting leases has the best rent? But, whether he be the person or not, I have much doubt, as the question now stands, if the Defendant can avail himself of the objection which he has taken. I think that it was intended by the Legislature that the tenant should pay a moiety of the expence to the person building the wall, and reimburse himself by deducting the amount out of the rent of his immediate landlord, leaving it to him to make his claim on such other persons as he may think liable. That appears to me the best construction for putting the business in a practicable shape. I should incline to that opinion, even if it were made out that the covenant on the part of the tenant to repair, included this case: for though the conduct of the tenant might be a breach of covenant, it would be fitter that the damages should be settled in an action of covenant, than to break in on the rules established by the statute. It is easy to see, that this is an ill-penned law, and its meaning is left uncertain; but in the present case I do not know how to determine, who is the owner of the improved rent, if it be not the person who takes the best rent. Possibly it may be said that Woodward and the Defendant should pay in certain proportions; let them however settle that in such actions as they may think fit to bring. I know no way of executing this law, if we enter into all the derivative claims of different landlords (*a*). If the tenant pays the money, let him reimburse himself, and leave the other parties to dispute among themselves.

BULLER J. I agree in opinion with my Lord, and think his construction of the act clear and intelligible. There are three parties in this business, the man who built the wall, the tenant, and the tenant's immediate landlord. The owner of the adjoining house pursued the directions of 14 Geo. 3, c. 78, which gave him a right to call on the Plaintiff for a moiety of the expence; that being settled, how does the case stand between the tenant and [306] his landlord? I agree that we must consider

the adjoining building an account of the sum to be paid by such owner; whereupon it shall be lawful for the tenant or occupier of such adjoining building to pay such proportionable part of the expence to the first builder, and to deduct the same out of the rent which shall become due from him to such owner or owners under whom he holds, until he be reimbursed the same.

(*b*) Vid. tam. *Barrett v. Duke of Bedford*, 8 T. R. 60.

(*a*) *Beardmore v. Fox*, 8 T. R. 214.

whether the landlord be the owner of an improved rent : but in this case he has an improved rent, since he receives more than the person of whom he took the premises. And if the landlord has the improved rent he certainly is liable, though there be only one year of the term to come. As to the question, whether the expence can be apportioned, that does not arise here ; but if any thing could be found to warrant an opinion thrown out by Lord Mansfield in *Stone v. Greenwell* (Mich. T. 24 Geo. 3, B. R. referred to 3 T. R. 461), that the parties might be liable to a rateable proportion in some cases, it would tend much to the advancement of justice. The building a party-wall is certainly a great improvement to the premises, and every person interested in the fee and receiving a benefit from it ought to contribute.

HEATH J. I think the construction which has been put upon this statute is the true and necessary construction. The Legislature seems to think that there must be an owner of an improved rent in respect of every house ; and we need not look further than the landlord immediately above the tenant who pays.

ROOKE J. I do not know how any other construction can be put upon this act, than that which has been suggested. The words of the statute are, that "it shall be lawful for the tenant or occupier of such adjoining building or ground to pay one moiety, &c. ;" this Plaintiff was the tenant, it was therefore lawful for him to pay, and he was to reimburse himself by deducting the rent due from him to his landlord, if that landlord was the owner of the improved rent ; but not if he was only the owner of the ground rent.

Rule absolute.

WALKER v. CONSTABLE. June 20th, 1798.

A sale of lands though by auction, is within the statute of frauds. If the abandonment of a contract be made the ground of an action, it is not competent to the plaintiff to shew that a contract has existed and been abandoned, without proving the specific contract. The net sum only, without interest, can be recovered in an action for money had and received (*a*).

This was an action on the case. The first count in the declaration stated that the Plaintiff had contracted with the Defendant for the purchase of an estate, had paid a deposit of 860l., and had incurred a considerable expence in examining the title ; that in consideration of the premises, and that the Plaintiff and Defendant had agreed that the said contract should be at an end, and [307] the said intended purchase be abandoned, and that the Plaintiff would receive back his aforesaid purchase money, the Defendant undertook to pay interest on the deposit money from the time of its being advanced to the time of its being repaid, and also the costs and expences of examining the title. There was also a count for money had and received.

Plea ; general issue.

At the trial of this case before Eyre Ch. J., at the Guildhall sittings after Easter term, the Plaintiff not having produced a written contract in support of his declaration was nonsuited, on the ground of its being a contract for the sale of lands within the statute of frauds (29 Car. 2, c. 3, s. 4).

Adair Serjt. on a former day obtained a rule to shew cause why the nonsuit should not be set aside, and a verdict be entered for the Plaintiff, contending, first, that sales by auctions were not within the statute [But the Court said that the cases (*b*) on that subject only applied to sales of chattels] ; secondly, that it was competent to the Plaintiff to prove that a contract had existed and been abandoned, without producing the specific contract in evidence.

The Court, however, were of opinion that the contract itself must be shewn, before it could be proved to have been abandoned ; but granted a rule to shew cause on the suggestion of

(*a*) S. C. 2 Esp. Rep. 659. And see *De Havilland v. Bowerbank*, 1 Campb. 50. *Hinde v. Whitehouse*, 7 East, 558, 564. *Marshall v. Poole*, 13 East, 98. *Tappenden v. Randall*, 2 B. & P. 472. *Emmerson v. Heelis*, 2 Taunt. 38, 43. *Kenworthy v. Schofield*, 2 B. & C. 945.

(*b*) Vid. *Simon v. Metivier* or *Motivos*, 1 Bl. 599. 3 Burr. 1921, and *Stansfield v. Johnson*, coram Eyre Ch. J. Esp. Cas. N. P. 101, 651.

BULLER J., that the Plaintiff might perhaps be entitled to recover interest under the count for money had and received.

Adair having again mentioned the case this day,

The Court were of opinion, on the authority of *Moses v. Macferlan*, 2 Burr. 1005, that in an action for money had and received the Plaintiff could recover nothing but the net sum received without interest.

Per Curiam. Rule discharged.

STEEL v. RORKE Administratrix, &c. June 21st, 1798.

[Followed, *In re Turner*, 1864, 33 L. J. Ch. 233. Referred to, *Van Ghelue v. Nerinckx*, 1882, 21 Ch. D. 193.]

An outstanding judgment against a testator or intestate, not docketted according to the directions of 4 & 5 W. & M. s. 20, cannot be pleaded by an executor or administrator to an action on simple contract.

Assumpsit for goods sold and delivered to the Defendant's intestate. Plea: Judgments and bonds outstanding. Replication: That the judgments were not at the time of suing out the [308] writ docketted and entered according to the provisions of 4 & 5 W. & M. c. 20. Rejoinder: "Protesting that the said replication, and the matters therein contained, are not sufficient in law for the Plaintiff to have or maintain his action thereof against the Defendant, nevertheless that the Defendant before and at the time she so pleaded her said plea as aforesaid, had notice of the records of the said several judgments so obtained as aforesaid, and each and every of them in the said replication mentioned, being in the said court of our said Lord the King, before the King himself, in manner and form as she the Defendant hath above in those respects in pleading alleged, and which still remain, and each and every of them remains in the said court of our said Lord the King, before the King himself, at Westminster aforesaid, in their and each of their full force and effect, not reversed, annulled, set aside, or in any-wise paid off or satisfied." To this there was a general demurrer and joinder therein.

Heywood Serjt. in support of the demurrer. The case of *Hickey v. Hayter, administratrix*, 6 T. R. 348, which puts judgments not docketted on a footing with simple contract debts, is decisive in favour of the Plaintiff. The only argument which can be advanced in support of this rejoinder is, that the object of the statute was to insure notice to executors and administrators of judgments in force against them; if therefore that notice be obtained by any other means it will be sufficient. The words of the statute however are positive "that no judgment not docketted and entered shall have any preference against heirs, executors, and administrators, in the administration of their ancestors', testators', or intestates' effects." The plea states that the Defendant is bound to pay debts which he is not bound to pay; for there is no lien on the effects created by the judgments; the executor, therefore, cannot take advantage of them as if there had been. Besides, the docketting is not required for the sake of executors and administrators only, but of all persons, such as the creditors or residuary legatee who may be interested in knowing what judgments there may be outstanding against the estate.

Shepherd Serjt. contra. Before the statute, executors and administrators were bound to retain assets in their hands for the payment of all outstanding judgments, though they had received no notice of any being signed; for it was their duty to search for them. The only object of the statute, as appears by the pre-[309]-amble (a), was to remedy the difficulty which they lay under in discovering such judgments. The Legislature, therefore, after directing the form in which the docket and entry shall be made, enacts that executors and administrators shall not be bound to take notice of any judgments unless docketted and entered accordingly. But in this case

(a) Whereas great mischiefs happen and come as well to persons in their life-times, but more often to their heirs, executors, and administrators, and also to purchasers and mortgagees, by judgments entered upon record in Their Majesties courts at Westminster against the persons Defendants, by reason of the difficulty there is in finding out such judgments, &c.

the only question is, whether the administratrix having received actual notice of the judgments, is not bound to give them a priority. Lord Kenyon, in *Hickey v. Hayter*, says, that if the Defendant had had notice of the judgment debt, perhaps she would have been warranted in paying it before the bond debts. The words of the statute only say that such judgment shall not have any preference against executors and administrators; but if they receive actual notice, surely they may be at liberty to set it up. At any rate as this is the first time that the question has arisen, and the Defendant, in her plea has stated more outstanding specialty debts than the assets will pay, the Court will allow her to amend by striking out the judgments which are not docketted.

EYRE Ch. J. I think on principle that the rejoinder is bad; but I have no objection to allowing the Defendant to amend. The statute declare that judgments not docketted shall have no preference against heirs, executors, and administrators. Why are executors and administrators allowed to plead outstanding judgments? because they have a preference, and it is for that reason that they are allowed to plead them, in order to prevent a devastavit. But it is said that an executor is at liberty to set up judgments not docketted. Certainly he may pay them, and when he has paid them, they are like other simple contract debts, which when paid may be given in evidence under the title of *plene administravit*. But if the law has allowed executors and administrators to plead debts of a superior nature to debts of an inferior nature, only because they are bound to pay them; when the law has said that certain debts shall not be debts of a superior nature, unless certain ceremonies are observed, they will no longer stand in that class, and there is no reason why they should be set up against a demand on simple contract. The case is too clear to admit of a question.

[310] BULLER J. My Brother Heywood stated the substance of a plea of outstanding debts very accurately: it is this, "I the Defendant am bound to pay other debts before I pay you the Plaintiff;" and the only question is, whether he be bound to pay or not? But no man ever heard of a plea in an action on simple contract, stating that the testator owed so much more on simple contract, and therefore the Defendant meant to give a preference to others before he paid the Plaintiff. If then the Defendant was not bound to prefer, the rejoinder is bad. My Brother Shepherd seems to consider the statute in a more limited way than the words will bear. The object of the Legislature was more general. The preamble states that mischiefs happen as well to persons in their lifetimes, but more often to their heirs, executors, and administrators, and also to purchases and mortgagees. This case is clear on the words of the statute, and the decision in the King's Bench is directly in point. Mr. J. Grose and Mr. J. Lawrence were there of opinion that the situation of judgments not docketted was reduced to that of simple contract debts, and I agree with Lord Kenyon that no notice is sufficient but that which the statute has required.

HEATH J. I am of the same opinion. The object of the statute was not only to protect executors and administrators, but also creditors: for there cannot be a greater instrument of fraud than a judgment not docketted. If a party means to act honestly he should follow the directions of the act.

ROOKE J. I am of the same opinion.

Leave given to strike out such part of the plea as relates to the judgment in question, and to state what is really due on the bonds, but not on the penalties.

TINGREY, Widow, v. BROWN. June 21st, 1798.

The administratrix of an executor cannot sue for the double value of lands held over after notice to quit under a demise from the testator, contrary to 4 G. 2, c. 28, without taking out administration de bonis non; even though the tenant has attorned to her.

Debt for double the yearly value of lands held over contrary to 4 G. 2, c. 28. The first count of the declaration stated a demise by one Judith Tingrey (who was possessed for a long term of years) to the Defendant, of the premises in question, for twenty-one years; that she died, having by her will made Francis Tingrey her sole executor, who proved the will, and took execution upon [311] himself, "by reason whereof he the said Francis then and there became entitled to the said demised premises, subject to the said lease;" that he died intestate, and that the Plaintiff took out administration

of his effects, "by virtue whereof she became, and was, and is entitled to the said remainder of the said demised premises for the said term, which is yet unexpired, and so demised to the Defendant as is aforesaid; of all which premises the Defendant afterwards (to wit) on, &c. at, &c. had notice, and then and there attorned to and became the tenant to the Plaintiff for the residue of the said term." It then stated that after the expiration of the Defendant's term, and notice in writing to quit, he continued to keep possession, whereby, &c.

To this count there was a general demurrer and joinder.

Williams Serjt. was to have argued in support of the demurrer, but Le Blanc Serjt. being called upon by the Court to begin on the part of the Plaintiff, contended that as this was not a debt due to the testator, it was not necessary for the Plaintiff to clothe herself with the character of administratrix de bonis non. That it did not appear but that all the debts had been satisfied by Francis Tingrey, in which case this lease would have passed to his personal representative the Plaintiff. He observed also that the Defendant admitted by the demurrer that he had attorned to the Plaintiff, and therefore as this statute says that the landlord shall bring the action, that landlord must be the person to whom the tenant has attorned.

EYRE Ch. J. Is not every thing unadministered which has not been reduced into the actual possession of the executor, and converted by him? Most certainly in any case in which the Plaintiff means to make title, she must take out administration de bonis non. It is not incumbent on those who resist, to shew that there are debts of the testator unsatisfied, but the Plaintiff must shew that there are no debts, and that the executor possessed himself absolutely in his own right.

Per Curiam. Judgment for the Defendant.

KNOWLYS AND ANOTHER v. READING. June 24th, 1798.

If a Defendant be arrested by process of K. B. and removed by habeas corpus to C. B., he may put in and justify bail in either court.

The Defendant was arrested by original in the King's Bench; but before declaration was removed by habeas corpus to the Fleet, and a declaration in the Common Pleas was delivered. [312] After which the Plaintiff's attorney received a notice of bail being put in, and of their intention to justify on the 26th in the King's Bench; but on the 25th he received another notice of bail being put in in this court, and of an intended justification here on this day.

Runnington Serjt. now opposed the justification, and urged that the bail ought to be put in in the King's Bench, as there was no writ in this court; and contended that if they were received here and an action were brought on the bail-bond, the Defendant could not plead *comperuit ad diem*.

But the Court were of opinion, that as the Plaintiff was at liberty to declare in either court, if bail were offered here they ought to be received.

Bail allowed.

TRINITY TERM, 38 GEO. 3 (a).

It is Ordered, that upon all Writs of Distringas returnable on the last day of Term the Plaintiff shall be at liberty, at the rising of the Court, to move to increase issues on the alias or pluries Distringas, to be issued thereupon on the following day, in case no appearance shall have then been entered. And also that in like cases where a Distringas shall be returnable on the last day of Term and Issues thereupon levied, the Plaintiff shall be at liberty, at the rising of the Court, to move for leave to sell such Issues to pay the Costs of such Distringas or Distringas's. And it is further Ordered, that where a Rule to bring in the Body shall expire on the last day of Term, the Plaintiff shall also be at liberty, at the rising of the Court on that day, to move for an Attachment for not bringing into Court the Body of the Defendant, and that such Attachment may be accordingly issued on the following day, provided Bail shall not then be perfected, or the Defendant rendered in discharge thereof.

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| JAS. EYRE. | J. HEATH. |
| F. BULLER. | G. ROOKE. |

[313] CASES ARGUED AND DETERMINED IN THE COURT OF COMMON PLEAS, IN MICHAELMAS TERM, IN THE THIRTY-NINTH YEAR OF THE REIGN OF GEORGE III.

DRISCOL v. BOVIL. Nov. 9th, 1798.

Insurance on a voyage from A. to B., from B. to C. and from C. to A. The voyage from A. to B. is performed, but that from B. to C. being unavoidably prevented, the ship returns to A.; from whence the captain writes to his broker in London, requesting him to obtain the opinion of the underwriters as to his proceeding directly to C. if the charterer should insist upon it; and is answered by him that he thinks the policy at an end. At the instance of the charterer the captain does proceed to C., and on his return from thence to A. the ship is captured. Held that the voyage insured was never abandoned (a)¹.

This was an action on a policy of insurance on three-fourths of the ship "Timandra," from Lisbon to Madeira, from Madeira to Saffi, and from Saffi to Lisbon; being the insurance on the round voyage mentioned in the case of *Driscoll v. Pussmore*, ante, p. 201.

At the trial before Eyre Ch. J. at the Guildhall sittings after Trinity term, the same facts appeared in evidence as in *Driscoll v. Pussmore*, with the addition of a letter written by the Plaintiff on the 18th of August from Lisbon, (after his return from Madeira to that place,) to his broker in London; which contained the following passage: "Should the merchant here, who chartered the vessel, insist on her proceeding to Saffi to fulfil the charter, I want to know if it is agreeable to the underwriters that the vessel may proceed to complete her voyage, as by recent accounts the risk is not so great. I expect your immediate an-[314]-swer respecting their determination on this business. I hope they will be satisfied that the return of the vessel to this port is much more in favour of them, than of me or any other person concerned. By the next packet that sails from hence I shall be able to inform you whether she is to proceed to Saffi or not; but the opinion of the underwriters either one way or the other is necessary." The broker in his answer to this letter gave his opinion that the policy on the round voyage was at an end, and informed the Plaintiff that he had effected a new policy on the voyage from Saffi to Lisbon. A verdict was found for the Plaintiff.

Le Blanc Serjt. on this day moved for a rule to shew cause why a new trial should not be had, and contended that although the deviation made by returning to Lisbon might possibly be justified by necessity (a)², still that it appeared by the Plaintiff's letter that the original object of the voyage had not been kept constantly in view: for it long depended on the will of the charterer whether the vessel should proceed or not; and that the Plaintiff himself was manifestly desirous of abandoning the voyage.

BULLER J. This certainly is not a verdict against law. The question before us is a mere question of fact. This motion seems to have been made on two grounds; first, that the deviation was not justified by necessity, though little reliance had been placed on that; secondly, that the voyage insured was abandoned. Now whether the deviation were justified by necessity or not, rests on one plain fact; namely, that on receipt of the intelligence of some Moorish cruisers being off Saffi, the crew refused to proceed. What then could the captain do but return? As to the abandonment of the voyage, it seems to me that the Plaintiff has acted with great prudence and circumspection, but that he has never abandoned. The terms of his letter expressly prove that he had not formed any conclusion as to what he should do, and that he did not think himself at liberty to form one. He asks the broker, what the underwriters will say, if the merchant shall still insist on his completing the voyage. Does he then determine to proceed at any hazard? On the contrary he wishes to know the sentiments of the underwriters, and reserves to himself the power of determining what part he shall take. I think the verdict clearly right.

(a)¹ S. C. Ante, 200. *Scott v. Thompson*, 1 N. R. 181. *Blackenhagen v. L. A. Company*, 1 Campb. 454.

(a)² Vid. *Lavabre v. Wilson*, Doug. 290, 3d ed. where Lord Mansfield says "that it is incumbent on the insured to pursue a voyage of necessity directly, in the shortest and most expeditious manner."

[315] HEATH J. I am of the same opinion. As to the necessity of the deviation there can be no doubt. And with respect to the last point, if the Plaintiff intended to abandon, that intention should have appeared in clear terms, or in unambiguous conduct. He seems to have taken all necessary caution, first by consulting the charterer and then the insurer, but it does not appear that he ever came to the determination of abandoning the voyage.

ROOKE J. I cannot distinguish between this case and that of *Driscoll v. Passmore*; and though I at first entertained some doubts on the latter, I am now perfectly satisfied that the decision was right. The letter given in evidence in this case does not prove any intention in the Plaintiff to abandon; for it appears that he considered himself liable to continue the voyage, provided the charterer should insist upon it.

Le Blanc took nothing by his motion.

HILL AND ANOTHER v. SECRETAN. Nov. 9th, 1798.

A. being indebted to B. without any order from him consigns goods to C. to be held for B. and indorses the bill of lading to C.; resolved that B. had an insurable interest in the goods so consigned (a)¹.

Action on a policy of insurance on goods on board the "San Bernardo" from St. Andero to London. The declaration averred that the Plaintiffs were interested to the amount insured.

At the trial before Eyre Ch. J. at the Guildhall sittings after Trinity term, it was proved that the house of De la Torré in Spain consigned 29 bags of wool to the house of Dubois and Son in London, and indorsed the bill of lading to them; but that with the bill of lading came a letter annexed, directing Dubois and Son to hold 15 bags for a house at Halifax and the remainder for the Plaintiffs at Exeter, which was the subject of the present insurance. It appeared also that De la Torré was indebted to the Plaintiffs in the sum of 500l., but that they had given no orders for these goods. The ship was captured by the French, but afterwards retaken. The jury found a verdict for the Plaintiffs.

Shepherd Serjt. now moved for a rule to shew cause why the verdict should not be set aside and a new trial be had, insisting that the Plaintiffs had no insurable interest in the goods as the bill of lading was not indorsed to them, and as De la Torré would still be liable for his debt to the Plaintiffs, if the goods should not reach them.

But the Court were clearly of opinion that as the goods were consigned to Dubois and Son to hold for the Plaintiffs, the former [316] were to be considered as trustees for the latter from the time the goods were put on board the ship; that the circumstance of the Plaintiffs being creditors of De la Torré raised a good consideration for the consignment, and therefore no doubt could be entertained of the Plaintiffs having an insurable interest (a)².

Shepherd took nothing by his motion.

WOLFF AND OTHERS v. HORNCASTLE. Nov. 14th, 1798.

[Discussed, *Elsworth v. Alliance Marine Insurance Company*, 1873, L. R. 8 C. P. 624.]

A. having consigned a cargo to B. and drawn bills on him to the amount of it, in favour of C. his general agent, sends these bills together with the bills of lading to C., desiring him to transmit them to B. "that B. may have an opportunity of insuring:" he also draws a bill for 300l. on C., which is accepted; B. refuses to take to the cargo or accept the bills drawn on him: C. then effects a policy in his own name, and informs A. thereof, who approves of his conduct. In an action by

(a)¹ *Murray v. Shedden*, 10 East, 540. *Robertson v. Hamilton*, 14 East, 522. *Williams v. Everett*, 14 East, 582, 594.

(a)² Lord Kenyon, in the case of *Anderson v. Edie*, Guildhall sittings, Trinity term 35 Geo. 3, Park Insur. 432 a. was of opinion that a creditor has an insurable interest in the life of his debtor, since the means by which he is to be satisfied may materially depend upon it, and at all events the death must in some degree lessen the security.

C. stating himself in the first count to be the agent of A. and averring interest in him; in the second averring interest in himself: held, first, that the policy was good within 28 G. 3, c. 56; secondly, that C. had an insurable interest to the amount of 300l. (a).

This was an action upon the case on a policy of insurance, dated the 9th of January 1797, and made by the Plaintiffs by their names and firm of Messrs. Wolffs and Dorville, as well in their own names as for and in the name and names of all and every other person or persons to whom the same did, might, or should appertain in part or in all, upon goods on board the ship The "Fahrsund's Wharf," Peter Nicolay Mohr, master, at and from Fahrsund to London, at a premium of six guineas per cent. The Defendant underwrote the policy for 200l., there was a total loss by perils of the sea. The first count of the declaration averred that the insurance was made by the Plaintiffs as the agents of one Jochum Brink Lund, and for his use and benefit, and that the Plaintiffs at the time of making thereof were persons residing in Great Britain, and did effect the policy as such agents, and that the style and firm of Messrs. Wolffs and Dorville inserted in the policy was at the time of making thereof the usual style and firm of dealing of them the Plaintiffs, and that Jochum Brink Lund was interested in the goods to the amount insured. The second count averred the interest in the goods to be in the Plaintiffs, and that they made the said insurance for and on their own account.

The Defendant paid the premium, viz. 12l. 12s., into court upon a plea of tender, which was admitted.

The cause was tried at the Guildhall sittings after Michaelmas term last, before Eyre, Ch. J. when a verdict was found for the Plaintiffs with 187l. 8s. damages, and 40s. costs, subject to the [317] opinion of the Court on a case, stating, That Jochum Brink Lund was a merchant resident at Fahrsund in Norway, and had contracted with certain persons in London, carrying on trade under the firm of the Cudbear Company, to supply them with a quantity of moss: that the Plaintiffs were the general agents of the said Jochum Brink Lund in London: that the said Jochum Brink Lund having, on the 12th November 1796, shipped 574 sacks of moss at Fahrsund in Norway, on board the said ship called the "Fahrsund's Wharf," consigned to the said Cudbear Company in London, and upon their account and risk transmitted to the Plaintiffs the invoice and bill of lading of the same, in a letter as follows: "The ship 'Fahrsund's Wharf' is now loading with a cargo of moss; she will be ready to sail in the course of eight or fourteen days, and usually takes in fifty-six tons; please to hand the enclosed to the Cudbear Company, that these friends may have an opportunity to secure themselves by insuring the moss cargo, the season being so far advanced:" that the goods were by the said bill of lading to be delivered to the said Cudbear Company or order; that on the 10th of December 1796 the said Jochum Brink Lund drew a bill of exchange on the said Cudbear Company for the amount of the said cargo, 1112l. 8s. 2d., at three months sight, in favour of the Plaintiffs, and remitted the same to the Plaintiffs to procure acceptance thereof, and to place to his credit; and at the same time advised the Plaintiffs of his having drawn on them for 300l., which bill for 300l. was by the Plaintiffs accepted and afterwards paid: that the Cudbear Company, after having received through the hands of the Plaintiffs the bill of lading and invoice of the said cargo, and having the said bill for 1112l. 8s. 2d. presented to them by the Plaintiffs for acceptance on the 9th of January 1797, refused to accept the said bill or take to the cargo, or insure the same, and returned the bill of lading and invoice to the Plaintiffs: that the Plaintiffs thereupon caused the above insurance to be made on the said 9th of January 1797 without any order so to do, and on the next day by letter informed their correspondent Jochum Brink Lund, that the Cudbear Company had refused to accept the bill or take to the cargo, or make any insurance, and that they the Plaintiffs had made such insurance as aforesaid. On

(a) Vide *Bell v. Gibson*, post, 345. S. C. 8 T. R. 275, 552. Judgment reversed, *Lucena v. Cranford*, 3 B. & P. 75. S. C. 2 N. R. 269, 313. *Hibbert v. Martin*, 1 Campb. 538. *Conway v. Gray*, 10 East, 536-547. *Stirling v. Vaughan*, 11 East, 619, 631. *Routh v. Thompson*, 13 East, 274. *Bell v. Janson*, 1 M. & S. 201. *Parker v. Beasley*, 2 M. & S. 423. *Robertson v. Hamilton*, 14 East, 522, 529. *Hagerdon v. Oliverson*, 2 M. & S. 485, 488.

receipt of which letter the said Jochum Brink Lund, on the 28th day of January 1797, wrote a letter to the Plaintiffs, containing, among other things, as follows: "it is very well you have taken the precaution to insure the moss [318] cargo, hoping the Cudbear Company at the arrival of the ship will repay the premium; in the mean time I have credited you the amount of it in your account. On the 10th instant Captain P. N. Mohr sailed again, but on account of stormy and contrary winds was obliged to take harbour on the west coasts of Norway in Rasvog, without any damage, intending with the first fair wind to proceed on his voyage; not doubting at his safe arrival you will settle it with the Cudbear Company in such a manner that they, without any further objection, will take and pay the cargo as per invoice. In want of complying with the above I shall be necessitated to commence a lawsuit against the said company, to which I will furnish you with the necessary documents." That the said Jochum Brink Lund was at the time of the said insurance being effected indebted to the Plaintiffs in 1400*l.* and upwards: that the said ship the "Fahrsund's Wharf," with the said cargo on board, was afterwards lost by perils of the sea in the voyage insured from Fahrsund in Norway to London.

The question reserved for the opinion of the Court was, whether the Plaintiffs were entitled to recover? if not, a verdict to be entered for the Defendant.

Le Blanc Serjt. for the Plaintiffs. Two objections are made to the Plaintiffs' recovery. To the first count which avers the interest to be in Lund, and that the Plaintiffs made the insurance as his agents and for his use and benefit, and that at the time of making it they resided in Great Britain and effected the policy as such agents, the Defendant objects that the policy was not made by the order of Lund, nor by the Plaintiffs as his agents, and therefore is void under 28 Geo. 3, c. 56. To the second count, which avers the interest to be in the Plaintiffs, he objects that they had no insurable interest, or, what is stronger, that they made the insurance on Lund's account, and not on their own. 1st, It appears that the Plaintiffs were the general agents of Lund in this country, it was therefore their duty to take care of his interest. No express order was given to the Plaintiffs by Lund to insure on his account, because he thought that the consignees, the Cudbear Company, would take to the cargo and insure. This appears by his letter, in which he directs the bill of lading to be handed to the Cudbear Company, that they may have an opportunity of securing themselves by insurance. On the Cudbear Company refusing to take to the cargo, the Plaintiffs insured for Lund their principal, and immediately wrote him word of their having so done: Lund directly approved of their [319] conduct, and adopted their acts. Previous to 25 Geo. 3, c. 44, it was complained of as a great inconvenience that policies being made in blank, no name appeared by which any judgment could be formed of the character of the persons interested in the risk. By that statute it was therefore enacted, that no policy should be made without inserting the name or names of the person or persons interested therein, or the name or names of the person or persons who should effect the same as agent or agents of the person or persons interested, &c. After this act, many policies were effected in the names of agents, without its being stated that they acted as agents, and great inconvenience having arisen from this circumstance, it was found expedient to repeal that statute by 28 Geo. 3, c. 56, the object of which is, that the name of some person residing in Great Britain shall appear on the policy, without requiring that he shall be described as agent. Then do not the Plaintiffs come within the meaning of this act? They are persons residing in Great Britain; they are the general agents of the person interested; they are the persons to whom the consignees returned the bill of lading; they are the persons to whom the owner of the cargo intimated the propriety of making an insurance, and whose acts in having insured he afterwards approved. The 28 Geo. 3, having been made in order to remove the inconveniences occasioned by 25 Geo. 3, the Court will not put a strict construction on it, so as to defeat the Plaintiffs' title to recover. 2dly, If it were necessary for the Plaintiffs to have recourse to the second count, their right to insure on their own account might easily be established, since, on receiving the bill of lading from the owners, they accepted a bill for 300*l.* which created a lien on the goods to that amount.

Shepherd Serjt. for the Defendant: 1st, The material question is, whether the Plaintiffs have effected a policy within 28 Geo. 3? It is clear that this case is not within the words of that statute. The persons whose names are to be inserted are, the person interested, the consignor, or the consignee (none of which characters apply

to the Plaintiffs); the person residing in Great Britain who shall receive the order, or the person who shall give the order for effecting the insurance. Now this case states that the Plaintiffs had not received any order at the time when the policy was effected; the question therefore is brought to this, whether the subsequent approbation of Lund be equivalent to a previous order? But whether the policy were well or ill effected must depend on the facts existing at the time when the policy was made; and as the Plaintiffs [320] had then received no order they made an unauthorized insurance. Lund might have resolved to litigate the question with the Cudbear Company, and have disowned the act of the Plaintiffs, in which case they would have been entitled to a return of premium, no risk having been run. If a subsequent acquiescence be held tantamount to a previous order, it will be in the power of any person residing in England to effect a policy without order, and afterwards to set up an acquiescence, or demand a return of premium, according as the risk may turn out. I contend that the agent must have such an order at the time of insurance as will bind his principal. Now in this case, if the Plaintiffs had averred that they effected the policy by order, they could not have supported the averment. There is no doubt that subsequent acquiescence in the case of a general agent may be evidence of a previous order, but the fact of a previous order is absolutely negatived by this case. 2dly, It is expressly stated in the case that the Plaintiffs did not insure on their own account, but that they wrote to Lund to inform him that they had effected a policy on his account, and he agreed to credit them for the premium. However, had this not been the case, they could have had no insurable interest, for Lund desired them to hand over the bill of lading to the Cudbear Company, and drew on the Company in favour of the Plaintiffs to the amount of the goods. The Plaintiffs therefore accepted the bill for 300l. drawn by Lund upon them on the faith of the consignees accepting the bill drawn for the value of the goods, not on the faith of the goods arriving.

BULLER J. This is an action on a policy of insurance made on goods on board the "Fahrsund's Wharf" at and from Fahrsund to London. The policy is made in the names of Wolf and Dorville, as well in their own names as for and in the name and names of all and every other person or persons to whom the same did, might, or should appertain in part or in all. This policy in its frame is very much like those which we used to see some years before the legislature interposed in the 25th Geo. 3, only I remember that the words "as interest may appear" were then usually added. The ship sailed on her voyage with the goods on board; the premium was paid; it was a real *bonâ fide* transaction; and no fraud has been suggested; a loss has happened, and the underwriter now chooses to say, that for want of a strict compliance with the 28 Geo. 3, he shall be excused from paying the money. Time was, when no underwriter would have dreamed of making such an objection: if his solicitor had suggested a loop-hole by which he might escape, [321] he would have spurned at the idea. He would have said it is not a fair policy? have I not received the premium? and shall I not now, when the loss has happened, pay the money? This would have been his answer, and he would have immediately ordered his broker to settle the loss. If however the Defendant can bring his case within the statute, he has a right to do so, and we are bound to give him judgment. But has the Defendant brought his case within the meaning of the statute? has he even brought it within the words of the statute? And even if he had brought it within the words and not within the meaning, I should be clearly of opinion for deciding against him? and in so doing I should follow the directions of the statute, which in the last clause says, "every policy and policies of insurance made and wrote contrary to the true intent and meaning of this act, shall be null and void." The objection is that the statute requires the names or style and firm of dealing of the persons interested, or the names or style and firm of the consignors or consignees of the goods insured, or the names or style and firm of the persons residing in Great Britain, who shall receive the order for and effect the policy, or of the persons who shall give the order or directions to the agents immediately employed to negotiate or effect the policy to be inserted in the policy. Now it is material to go back to a time previous to the passing of this statute, in order to see what was the real meaning of the Legislature. My Brother Le Blanc very properly went into a review of the 25 Geo. 3, though that act has been since repealed. By putting the two acts together we may learn the true spirit and meaning of the last; what it was those who introduced it wished to be effected; and I might add from

recollection what it was they professed. The inconvenience recited by 25 Geo. 3 was the making policies in blank, and therefore it was enacted, that where they were made by persons residing in Great Britain, the names of the persons interested should be inserted therein, or the names of the person who should effect the same as agents for the persons interested, and in case of persons residing out of Great Britain, the name of the agent. Under this act it happened that many persons not understanding the meaning of these provisions, and not complying literally with them, lost the benefit of their policies (a)¹. The Legislature therefore thinking that they had drawn the string too tight, recited in 28 Geo. 3, "that it had been found by ex [322]-perience that great mischiefs and inconveniences had arisen to persons interested in ships and to persons using commerce, from the 25 Geo. 3, c. 44, and that it was expedient that other and more convenient provisions should be made for the regulating insurances on ships, &c. than those contained in the said act," &c. Now we are bound to say that this second statute must receive the most liberal construction that the words will bear. From the language of the two statutes, as well as the consideration that we are construing a contract *uberrimæ fide*; viz. a policy of insurance, we must avoid bearing harder upon the Plaintiffs than is absolutely necessary. Let us see then whether the Plaintiffs do or do not come within any of the descriptions of persons in the last statute. These descriptions are four: the consignor and the consignee, the person receiving and the person giving the order. It is perfectly clear that the Plaintiffs are not the consignors: but I am by no means prepared to say that they are not the consignees. It is true that the goods were originally consigned to another person, but the case must be considered as it stood at different periods: though the Cudbear Company were clearly the consignees at first, it does not follow that they continued to be so. What is a consignee? A consignee is a person residing at the port of delivery, to whom the goods are to be delivered when they arrive there. Lund does not trust the Cudbear Company without securing himself: he therefore sends the bill of lading to the Plaintiffs, who are his general agents, in order that he may be secure of being paid for his goods. Certainly if the Cudbear Company had received the goods, they would have been the consignees, but they refused to receive them; then who was entitled to receive them? It cannot be pretended that nobody had the right, and the captain could not keep them: then to whom could the right belong but to the persons who had the bill of lading and were the general agents of the consignor? From the moment that the Cudbear Company refused to have any thing to do with the goods, the Plaintiffs became the consignees. If this be so, there is no objection to the policy, and I am satisfied that I do not carry this construction too far when the justice of the case is with the Plaintiffs. But there are two other characters mentioned in the statute. The next is the person who receives the order to insure. Let us see therefore whether these Plaintiffs had not an order to make insurance. The goods were originally intended for the Cudbear Company; but they were sent, accompanied with a letter [323] which stated in the clearest terms that Lund intended that they should be insured. The Cudbear Company having refused to take the goods, could the Plaintiffs, who were the general agents of Lund, could any man of sense read his letter, and doubt of his intentions? In giving his reasons he says that the season is so far advanced, that he does not think it safe to send the goods without their being insured. The Plaintiffs must therefore have been blind if they had not seen that it was his intention to have them insured. Then what was his interest? Why that they should be insured. It is agreed that a general agent has a right to exercise his discretion for the benefit of his principal: he must act on the spur of the occasion, and if nothing else had passed, I have doubts whether the consignor would not have been liable to pay the premium. But the Plaintiffs take the opportunity to inform the consignor of their having made the insurance, and he highly approves of their acts (a)², which brings the case within the maxim that *omnis rati habitio retrahitur & mandato priori equiparatur*. I am clear therefore that the Plaintiffs were the persons who received the order to make this insurance within the description of the act of parliament. But there is still another character to be considered; the statute mentions, in the last place, the person who gives the order to make insurance. Now, in my opinion it is impossible to state a case that comes more directly within the act

(a)¹ *Pray and Others v. Edie*, 1 Term Rep. 313.

(a)² *Vid. French v. Backhouse*, and *French v. Foulston*, 5 Burr. 2727.

of Parliament than this. Who were the persons immediately concerned, who immediately employed the broker, who gave the immediate order for insurance, but the Plaintiffs? It appearing therefore that they come within the words of the act of Parliament, the case stands clear of all objections, and is in law, conscience, and justice with the Plaintiffs. With respect to the second count, I hold that the Plaintiffs had a clear right to insure to the amount of 300l., for which they were interested in the goods. My Brother Shepherd considers them as standing without interest in the goods, because they had only a debt against Lund. I agree that a debt which has no reference to the article insured, and which cannot make a lien on it, will not give an insurable interest. But a debt which arises in consequence of the article insured, and which would have given a lien on it, does give an insurable interest. The case is not at all altered by the goods not having arrived. There is no more common trans-[324]-action in the city of London than to raise money on the security of a bill of lading and policy: these Plaintiffs, having advanced their money on that security, must, if the goods had arrived, have received 300l. out of them; the goods being lost, the policy of insurance stands in the place of them, and the Plaintiff is entitled to receive that sum under the policy. By my note it appears that the Chief Justice, when this case was first moved, delivered a clear opinion in favour of the Plaintiffs: on the whole therefore I think the case is most decidedly with them.

HEATH, J. I am of the same opinion. But as my Brother Buller has entered so fully into the case, I shall speak more shortly than I should otherwise have done. This statute was made to prevent unlawful gaming. It is therefore enacted that no persons shall recover under policies of insurance, but those who have either an interest as principals, or have acted as agents. In the first place then I think that the Plaintiffs were clearly the consignees of the goods: for the bills of lading were sent to them, and they had a right to take possession. The statute also says, that if the names of the consignor or consignees be not inserted, that of the person giving or receiving the order for the insurance shall be inserted. While the ship is in safety, where is the difference whether the agent insure without order, and the principal afterwards approve of the insurance, or first receive the order and then insure? On the second count it is equally clear, that the Plaintiffs had an insurable interest. It is true that if the Cudbear Company had altered their minds and taken to the cargo, that the Plaintiffs would have had no interest, but if they had a contingent and reasonable expectation of interest, it was sufficient to entitle them to insure, according to what was held in *Le Cras v. Hughes* (E. 22 Geo. 3, B. R. Park on Insur. 269), viz. that a certain expectation of receiving property captured for the emolument of the captors, from the Crown, would give an insurable interest.

ROOKE J. I agree in opinion with my Brothers. I think that the Plaintiffs may be considered as consignees of these goods, and I also think that they may be considered as having received orders from the principal to insure, what they did having been subsequently adopted by him. But there is one ground on which I have no doubt, namely that the Plaintiffs come within the last description of persons mentioned in the statute. They are the persons who gave the immediate order, in consequence of which [325] the policy was effected. The act of 28 G. 3, was made to remedy the inconveniences which were experienced under the 25 G. 3, and therefore we are bound to give it a liberal construction. I think the Plaintiffs clearly entitled.

Postea to the Plaintiffs (a).

WEDDALL v. BERGER. Nov. 17th, 1798.

Bail were allowed to justify after the rule on the sheriff had expired, on payment of the costs of the opposition. If a man carry on his business at a lodging in one place, and keep a house at another, notice of bail describing him as of the former place is sufficient.

Le Blanc Serjt. moved to justify bail, but Runnington Serjt. opposed the justification, on the ground of the rule to bring in the body having expired yesterday, and that the sheriff was therefore in contempt.

(a) See *Crawford v. Hunter*, 8 T. R. 13.

But the Court overruled the objection and allowed the bail to justify on the defendant undertaking to pay the costs of the opposition (a)¹.

Runninton then objected to the notice, because one of the bail was described therein as of Coppice Row, whereas it appeared that he had only a lodging in that place where he carried on his business, but that his house was in Southampton Row.

The Court however held the description sufficient, saying he was most likely to be found at the place where he carried on his business; that he had been found accordingly and was a house-keeper.

Bail allowed.

MADDOCKS AND ANOTHER v. BULLOCK. Nov. 13th, 1798.

If a Defendant surrender himself it is a sufficient performance of the condition of the bail bond, without putting in bail. But he must give notice of such surrender (a)².

The Defendant in this case having been arrested, a bail-bond was taken by the sheriff; bail above were not put in, but before the return of the writ the Defendant surrendered himself; no notice however having been given to the Plaintiff of the surrender, he took an assignment of the bail-bond and proceeded against the bail.

A rule nisi having been obtained by Cockell Serjt. on a former day for cancelling the bail-bond and staying proceedings thereon; Williams Serjt. was now proceeding to shew cause against the rule, [326] on the authority of *Harrison v. Davies*, 5 Burr. 2683, where it was held that the Defendant's surrender was no performance of the condition of the bail-bond, but that he must put in bail: however, on a question from the Court, he admitted that the above case had been overruled in *Jones v. Lander*, 6 T. R. 753, and *Stamper v. Milbourne*, 7 T. R. 122 (a)³, but added, that there was a difference in this case, no notice having been given of the surrender.

The Court said that as no notice had been given, the costs of the proceeding must be paid up to the present time, and with that term made the

Rule absolute.

WILLIAMS, Executor of Elizabeth Breedon, v. BARTHOLOMEW. Nov. 19th, 1798.

[Adopted, *Doe v. Crago*, 1848, 6 C. B. 98.]

If A. tenant for life subject to forfeiture, remainder over to B., lease to C. for a term, and afterwards apprehending that he has forfeited, acquiesce in B.'s claiming and receiving the rent from C., his executor may, on shewing that he acquiesced under a false apprehension recover from C. the amount of the rent erroneously paid to B. (a)⁴.

Covenant for rent. The declaration stated that by indenture dated the 2d February 1789, E. Breedon demised certain premises to the Defendant, to hold from the 29th of September 1788, for the term of twenty-one years, determinable at the decease of E. Breedon, at the yearly rent of 130l.; that E. Breedon died on the 30th October 1793, having made the Plaintiff her executor; and that on the 29th of September 1793, five years rent amounting to 650l. became due from the Defendant to E. Breedon in her lifetime. Breach, that Defendant had not paid this sum to E. Breedon in her lifetime, or to the Plaintiff since her death.

Pleas. 1st, That the Defendant in the lifetime of the said E. Breedon, to wit, on the 29th of September 1793, paid to the said E. Breedon the sum of 650l. being the amount of five years rent of the said term in the said declaration mentioned, ending on that day according to the form and effect of the said indenture, and the Defendant's covenant therein; concluding to the country. 2d, That the premises in question were

(a)¹ But the Court will set aside an attachment obtained against the sheriff after the bail has justified, with costs, though the rule to bring in the body has expired before the justification. *Thorold v. Fisher*, 1 H. Bl. 9.

(a)² Vide *Hamilton v. Wilson*, 1 East, 383. *Plimpton v. Howell*, 10 East, 100.

(a)³ See however *Hamilton v. Wilson*, 1 East, 383, where it was held that it is optional in the sheriff to accept a surrender before the return of the writ.

(a)⁴ Vide *Rogers v. Pitcher*, 6 Taunt. 201, 208.

settled on E. Breedon by way of jointure, at the time of her marriage with S. Breedon, as to the use of the said E. Breedon, for her life, and so long as she should continue sole and unmarried, from and after the death of the said S. Breedon, remainder to his right heirs; that on the 24th of November 1776, S. Breedon died, and that on the 5th of November 1786, E. Breedon intermarried with W. Williams the father of the present plaintiff, whereupon her interest in the premises determined; And this, &c. wherefore, &c.

[327] Replication, taking issue upon the first plea, and traversing the marriage with W. Williams, stated in the second plea; and on this also issue was joined.

This case came on to be tried before Heath J., at the Berkshire Summer assizes at Abingdon, when it appeared that the premises were settled on E. Breedon as stated in the second plea; that after the death of S. Breedon she clandestinely married W. Williams at the chapel of the Savoy; but continued to receive the rent for some years, until Dr. Breedon the remainder-man being informed of the marriage, and that she had forfeited her estate thereby, claimed the rent of the Defendant, who accordingly paid it to him for the five years in question, with the knowledge and acquiescence of E. Breedon. It was proved in answer to the second plea, that at the time of the intermarriage of E. Breedon with W. Williams, he had another wife living. A question being raised, whether these facts would support the first issue, Heath J. was of opinion that they would not, and accordingly under his direction a verdict was taken for the Plaintiff, but if the Court should be of opinion that payment by the Defendant to Dr. Breedon under the above circumstances proved the first issue, then a verdict on that issue to be entered for the Defendant.

A rule nisi having been obtained for this purpose on a former day,

Le Blanc and Shepherd Serjts. now shewed cause. The only question here arises on the first issue, it having been clearly proved under the second, that the marriage of E. Breedon with W. Williams was void. The payment in this case was made to Dr. Breedon under a mistake; not as agent to E. Breedon, nor under the idea of her having directed it. Had Dr. Breedon been steward to E. Breedon the payment might then have been considered as made to her: but, this was an adverse payment to a person who claimed the rent as his own upon false grounds. If tenant in fee make a lease and die, and A. B. enter and receive the rents before the heir at law is aware of his title, the tenant shall not defend himself in an action for rent brought by the heir at law, by saying that he has already paid the rent to A. B.

Williams Serjt. for the Defendant. It is true that payment of rent by the tenant to a person who claims adversely without the knowledge of the party having the right to it cannot be supported. But I contend that the circumstances of this case amount to evi-[328]-dence to be left to a jury, that the rent was paid by the direction of E. Breedon, which would make it a payment to herself. The payment to Dr. Breedon under an idea on all sides that he was entitled to the rent, amounts to an agreement on the part of E. Breedon, that it should be paid to him. Where a mortgagee or obligee agrees that the mortgagor or obligor shall pay the interest to a scrivener, it is a good payment, though he has neither the custody of the mortgage, nor the bond, *Whitlock v. Waltham*, 1 Salk. 157. Suppose E. Breedon had said to the Defendant, "I have forfeited the estate, and you must pay the rent to Dr. Breedon;" the payment would have been protected: now if her conduct amount to a confirmation of the payment, it must have the same effect, according to the maxim that *omnis rati-habitio retro-trahitur et mandato priori æquiparatur*. This cannot be called a voluntary payment by the tenant, for if Dr. Breedon had distrained and avowed in replevin for rent in arrear, what plea in bar could the tenant have set up? Nor was it a payment by mistake, having been made with the knowledge of the lessor, to whom all the fault and laches must be imputed.

BULLER J. If money be paid to A. by the direction of B., it is a good payment to B.; but I can never agree that if money be paid to A. simply with the knowledge of B., it will be a payment to B. Suppose that one disseises another of an estate and continues in possession of the rents and profits with the knowledge of the disseisee, will any body say that the disseisee, shall not recover against the tenant? Knowledge will not do, there must be consent, direction, and authority. Here there clearly was no order. This poor woman thought that she was not entitled to the rent; Dr. Breedon therefore obtained it in spite of her, in consequence of her persuasion, that she was not entitled. If she allows Dr. Breedon to receive the rent under the idea

that she has no right, how can we conclude from that circumstance, that she would have done the same if she had been apprised of her right? It has been argued, that if Dr. Breedon had distrained and avowed in replevin, the tenant could have made no answer; but I see no difficulty in that. Every tenant is bound by his attorney; the Defendant might have pleaded that he did not hold as tenant to Dr. Breedon; and if Dr. Breedon had said "You have attorned to me;" the Defendant might have answered "I did that on your misrepresentation, who claimed as remainder-man;" and might have shewn, that Mrs. Breedon was still alive and entitled. [329] If Mrs. Breedon had ordered the Defendant to pay the money to Dr. Breedon, the payment could never afterwards have been questioned. The tenant in that case would have had nothing to do with any transaction between Mrs. Breedon and Dr. Breedon, be the title what it might: if he had obeyed the order of Mrs. Breedon, it would have been a payment to her agent. The next question then is, whether there be any thing in Mrs. Breedon's conduct which amounts to a confirmation of the payment? Now, to constitute that, some act must appear to have been done by her with knowledge of her own situation. Here a right to the rent was insisted upon by Dr. Breedon; and Mrs. Breedon, being deceived both in point of law and fact, acquiesced in the payment of that rent to another to which she was entitled. Her right, therefore, stands as it did before Dr. Breedon, whose claim was clearly adverse, received any rent at all.

HEATH J. I continue of the opinion which I held at the trial. It does not seem to me that the Defendant was under any peculiar difficulty. He might have had recourse to a bill in equity to be indemnified. What was said by my Brother Shepherd struck me very much. Suppose a lease made, and a person claim as heir at law, to whom the rent is paid; and afterwards the true heir at law is discovered, will it be said that he shall not recover?

Rooke J. The tenant having taken a lease from Mrs. Breedon, must answer for the defect of rent. She made a mistake, and thought her title at an end when it was not; the mistake was afterwards discovered, and her executor is therefore now warranted in recovering the rent from the tenant.

Rule discharged.

WILLIAMS, Executor of Elizabeth Breedon, v. BREEDON. Nov. 19th, 1798.

[Not followed, *R. v. Virrier*, 1840, 12 Ad. & E. 331.]

Where a general verdict has been given on two counts, one of which is bad, and it appears by the Judge's notes that the jury calculated the damages on evidence applicable to the good count only, the Court will amend the verdict by entering it on that count, though evidence was given applicable to the bad count also (a).

Trespass. The 1st count was for cutting down, felling, throwing down, grubbing up, prostrating, and destroying the timber-trees and other trees, and the underwood and coppices of underwood of Elizabeth Breedon deceased, in her life-time, of the value of 300l., and the bushes and boughs thereof coming, taking, and carrying away, and converting to the use of the Defendant. [330] The second count was for seizing, taking, and carrying away the goods and chattels, viz. wood, timber, underwood, bushes, and boughs of the said Elizabeth deceased, in her life-time, of the value of other 300l.

Plea. Not Guilty.

At the trial before Heath J., at the Berkshire Summer assizes at Abingdon, it was proved that the Defendant (the remained-man mentioned in the last case, and who had acted on an idea that Elizabeth Breedon had forfeited her interest in the premises by a supposed marriage with one William Williams) cut down the wood in question; and the several sums of money for which he sold the different parcels being ascertained; the jury found a verdict for the Plaintiff with general damages to that amount, but if the Court should be of opinion that the action was not maintainable, then a verdict to be entered for the Defendant.

(a) Vide *Kightly v. Birch*, 2 M. & S. 533.

However, Williams Serjt. on a former day having obtained a rule to shew cause why the judgment should not be arrested :

Le Blanc now shewed cause against that rule. Admitting that an executor cannot maintain this action for trees cut down in the life-time of his testator (a)¹, under the first count of this declaration, yet as it appears by the report that the evidence on which the verdict of the jury was founded applies to the second count only, the Court may rectify any mistake by entering a verdict on that count.

Williams Serjt. in support of the rule, contended that as evidence was produced at the trial of the fact of cutting down the trees, and the jury had given general damages, the Court could not apply those damages to the second count only, and that if therefore the first count was bad, the judgment must be arrested.

BULLER J. As evidence was given at the trial of the fact of cutting down, if there had been no other evidence to shew on what ground the damages were given by the jury, it certainly would not be competent to the Court to alter the verdict. But in this case there was evidence to shew that the damages given by the jury were compounded of the different sums for which the parcels of wood cut down by the Defendant were sold. This circumstance, therefore, does entitle the Judge to alter the *postea*, and the [331] Court must consider the case in the same light as if a verdict had been found for the Defendant on the first count, and for the Plaintiff on the second.

Per Curiam. Rule discharged (a)².

BELL v. STONE. Nov. 19th, 1798.

A letter written to a third person calling Plaintiff "a villain," held actionable, without proof of special damage (a)³.

Action on the case for defamation. The first count of the declaration, after stating that the Plaintiff was a land-surveyor, averred that the Defendant, intending to injure him in his reputation and hurt him in his profession, wrongfully and maliciously wrote and published a certain scandalous, malicious, and defamatory libel, in the form of and as a letter addressed to one N. B. to whom the Defendant was indebted in a large sum of money, in which letter was contained, of and concerning the Plaintiff, the following matter: "After the communication I had with your son in your absence, I but little thought you would have been made the dupe of one of the most infernal villains that ever disgraced human nature; but I suppose you were deceived by those whom you thought well of, and whom he will deceive if they will give him an opportunity; I am told they are respectable, and how they can be connected with him is the most astonishing thing to me; Mr. H. writes me you called upon him (meaning the Plaintiff) on the subject of your account, for which the villain gave you his note at five months;" that the Defendant in further prosecution of his said malice sent the said letter to the said N. B., to the great hurt, prejudice, and injury of the Plaintiff, and to his great discredit and disgrace. There were other counts on words spoken in derogation of the Plaintiff's professional character, and of his ability to pay his debts. The conclusion, referring to all the counts, stated that the Plaintiff suffered special damage in consequence of publishing the said libel and speaking the said words, viz. that he was arrested by the said N. B. for the sum which he owed to him, and that he lost his business, &c.

Plea. The general issue.

This came on to be tried at the Bedford Summer assizes, when, the Plaintiff having failed in proving the special damage laid, Macdonald Ch. B. was of opinion that the letter on which the first [332] count proceeded, unsupported by proof of special damage, was not actionable, and directed a verdict for the Defendant. The counsel

(a)¹ Vid. *Emerson v. Emerson*, 1 Vent. 187, and also *De Mason v. Dixon*, Sir William Jones, 174, where Hyde and Jones Js. held that the 4 Ed. 3, c. 7, did not give trespass to an executor for a *clausum fregit* or trees cut in the life-time of his testator. Vid. etiam what was said by Lord Kenyon, 3 T. R. 549.

(a)² *Eldowes and Another v. Hopkins and Another*, Doug. 376. *Grant v. Astle*, Doug. 730, also *Spencer v. Goter*, 1 H. Bl. 78.

(a)³ Vide *Mailand v. Goldney*, 2 East, 426. *Home v. Bentinck*, 2 B. & B. 130, 135.

for the Plaintiff, however, contending that the letter itself was actionable, the Chief Baron asked the jury what damages they would give supposing the Plaintiff entitled to a verdict in point of law. The jury answered 1s.

Sellon Serjt. on a former day obtained a rule to shew cause why the verdict for the Defendant should not be set aside, and a verdict be entered on the first count for the Plaintiff for 1s., on the ground that though the words in the first count might not be actionable, if only spoken, yet that being committed to writing, they were so.

Le Blanc Serjt. was this day to have shewn cause,

But the Court expressing themselves clearly of opinion that any words written and published, throwing contumely (a)¹ on the party, were actionable, Le Blanc declined arguing the point, and the

Rule was made absolute (b).

LE GREW v. COOKE. Nov. 20th, 1798.

If Defendant bring money into Court on a plea of tender, Plaintiff may take it out, though he reply that the tender was not made before action brought (a).²

Assumpsit. The Defendant pleaded as to all but 30l. non-assumpsit, and as to that sum a tender, and brought the money into court. The plaintiff replied an original sued out on a particular day, and that the money was not tendered before that day, but took the money out of court.

A rule having been obtained on a former day, calling on the Plaintiff to shew cause why the replication to the plea of tender should not be struck out, on the ground of the Plaintiff's having admitting the tender by taking the money out of Court.

Le Blanc Serjt. now shewed cause. In an action on the case, where the cause of action does not arise from the non-payment of a particular sum at a particular day, the plea of tender admits the sum tendered to be due to the Plaintiff, and only denies his right to damages beyond that sum. But to the sum tendered the Plaintiff will be entitled, even though he should be nonsuited or a verdict pass against him, because the Defendant has admitted so much to be due to him: nor will the Court retain that money in their hands which must belong to the Plaintiff, in order to [333] secure the Defendant's costs. *Cox v. Robinson*, 2 Str. 1027. Cas. temp. Hard. 206, S. C.

Cockell and Shepherd Serjts. contrâ. It is said in 1 Crompton's Prac. p. 150, that "If a tender be pleaded with a *toujour prist*, and the money brought into court, if the Plaintiff would go for further damages he must not take the money out of court, but take issue on the tender, or reply a request and refusal; and if such issue is found against him he will be barred of his action: but if he take the money tendered out of court, judgment is given for the Defendant to go quit:" and a case in this court of *Cliff v. Jones*, T. 5 Geo. 1, C. B. is there cited. This doctrine is perfectly agreeable to the opinion of Lord Holt, in the cases of *Horn v. Lewin*, 1 Lord Raym. 643, and *Burton v. Souter*, 2 Lord Raym. 744. And the reason why a party should not take money out of court when he traverses the tender, is given in *Hill v. Williams*, Barnes, 358, 3d ed., namely, that the replication to the tender is a refusal to accept the money.

BULLER J. This is a point of practice which I had thought as clearly settled as any point ever was; and I am much deceived if it has not been more than once before the Court of King's Bench. It is perfectly certain, that whatever may become of this action, the Plaintiff will be entitled to the money tendered: and if that be the case, by what right can the Court retain it, as a security for the Defendant's costs, on the chance of a verdict being given in his favour? I agree that if the Plaintiff be negligent and do not take the money out of court until after a verdict has passed for the Defendant, that the Court will lay hold of it to secure the Defendant's costs (a)³;

(a)¹ 5 Co. 125 b.

(b) *Sir John Austin v. Col. Culpepper*, Skyn. 124. 2 Show. 313. *Harman v. Delaney*, 2 Str. 899. *Fitzgib*, 253, 4. *Villers v. Monoley*, 2 Wils. 403. *King v. Sir Edward Lake*, Hardres, 470.

(a)² Vide *Vaughan v. Barnes*, 2 B. & P. 392.

(a)³ Vid. *Rathbone v. Stelman*, Cooke's Cas. Prac. C. B. 54, and *Maddox v. Paston*, id. 117, where money having been paid into court on the common rule and verdicts

and if it could be shewn that the Plaintiff was now in that situation, the Court would not let him take out the money without doing justice to the Defendant. It being once admitted that the Plaintiff will be entitled to the money tendered at all events, the application must fall to the ground. The reason given in *Barnes* against allowing the Plaintiff to take the money out of court is absurd; that case is therefore *felo de se*, and the present application rests upon no other foundation than the opinion of a writer, who has indeed in general reported the [334] practice of the Court with accuracy, but whose assertion in this case is unsupported by authority, and contradicted by reason.

Per Curiam. Rule discharged (a)¹.

WILLIAMS v. WATERFIELD. Nov. 20th, 1798.

The Court allowed the Defendant to justify bail after an attachment issued against the sheriff, but gave leave to the Plaintiff to oppose them without prejudice (b).

Shepherd Serjt. having moved to justify bail; Le Blanc Serjt. objected, that an attachment had already issued against the sheriff because bail were not put in in time, and that if he now opposed the bail without success, it would not be competent (a)² to him afterwards to oppose setting aside the attachment against the sheriff, whereas if he did not oppose the bail, and the Defendant should afterwards succeed in a motion to set aside the attachment, the Plaintiff might have had bail.

BULLER J. It was the practice in the King's Bench in these cases, and it seems to me to be the most convenient mode, for the Defendant to move for a rule to shew cause, why on putting in bail, the proceedings against the sheriff should not be stayed, and to have the bail ready to justify when that rule should be disposed of. But though that may be the better course in future, it must not affect this case.

Per Curiam. Leave given to the Defendant to justify his bail, and to the Plaintiff to oppose them without prejudice.

[335] DICKENSON, Executor, &c. v. BOYNE. Nov. 21st, 1798.

The Court set aside a judgment and warrant of attorney given to secure an annuity for a defect in the memorial, without costs, because it was the case of an executor.

Shepherd Serjt. moved to make a rule absolute for setting aside a judgment and warrant of attorney, given to secure an annuity on the ground that a clause of redemption contained in the deed was not inserted in the memorial.

found for the Defendants, they were allowed to take it out of court in part of their costs.

(a)¹ In an *Anonymous case*, M. 11 Ann. Cooke's Cas. Prac. C. B. 5, an executor Defendant having paid money into court on the common rule, was allowed to take it out again after a nonsuit; but it was said that if Defendant had not been executor or administrator, the Plaintiff should have had the money: and accordingly a similar application in *Lane and others v. Wilkinson*, T. 13 Geo. 1, id. 36, where the Defendant was neither executor nor administrator, was refused. And in *Elliot v. Callow*, Salk. 597, the Plaintiff, after a nonsuit, was allowed to take money out of court which had been paid in on the common rule. But it was there said that if money be paid into court on a plea of tender, and Plaintiff takes issue on the tender which is found against him, the Defendant shall have the money. Vid. also 21 Ed. 4, 25, pl. 15. Co. Litt. 207 a. *Harrold v. Clotworthy*, Cro. Jac. 126, and *Benskin v. Herick*, Style, 388, where that was held to be the law.

(b) Vide *Morley v. Cole*, 1 Price, 103, 107.

(a)² But in *Boldero v. Gray*, Cowp. 769, where the same objection was started to the practice then prevailing, of an exception to bail being a waiver of the bail-bond, the Court of K. B. resolved, that as the sheriff after he has been ruled must give notice that he will put in and perfect bail before he can discharge himself, so a similar notice should be given in order to stay proceedings on the bail-bond, and then Plaintiff may oppose the bail in Court, without its being any waiver.

Le Blanc Serjt. on the part of the Plaintiff, admitted the law (a)¹ to be against him, but observed that as this was the case of an executor who could not be aware of the nature of the deeds, it would be hard to oblige him to pay costs.

And the Court being of that opinion made the

• Rule absolute without costs.

ENGLAND v. KERWAN. Nov. 21st, 1798.

Where bail are regularly put in and excepted to, the Defendant need not describe them in his notice of justification.

Bail having been regularly put in and excepted to, the Defendant's attorney gave a notice of justification to the Plaintiff's attorney to the following effect: "Take notice that J. R. of, &c. will be added to the bail already put in, and that the said J. R. and John Binford of whom you have already had notice, will on, &c. justify, &c." John Binford was fully described when originally put in, though no description was added to his name in this notice.

Shepherd Serjt. opposed the justification, insisting that a description of John Binford should have been inserted in the notice.

Le Blanc Serjt. contra, contended, that when bail are regularly put in, no description need be inserted in the notice, and that the Defendant therefore had done all that was requisite in describing the added bail.

The Court finding on describing to the officer, that where bail are regularly put in and excepted to, it is not the practice (a)² for the Defendant to insert any description in his notice of justification,

Admitted the bail.

[336] THE KING v. DAVIS, ONE, &C. Nov. 22d, 1798.

It is no objection to a prisoner being discharged under the Lord's act, that his creditor is dead. An attorney in custody on an attachment for not paying over money received by him in the course of a suit, may be discharged under the Lords' act. The Court cannot under the words of 37 Geo. 3, c. 8, s. 2, moderate the sum to be paid to a prisoner on his being remanded, but a note must be signed for the full sum directed by that act. Such note cannot be signed by the creditor's attorney, if his client be dead.

The Defendant having been imprisoned under an attachment for non-payment of money to the Plaintiff, in a cause of *M'Intosh v. Munday*, which he had received as attorney, was this day brought up to be discharged under the Lords' act.

Runninton Serjt. in opposition to his discharge, 1st, produced an affidavit that by accounts of the state of M'Intosh's health, very lately received from Bath, there was every reason to believe that he was no longer alive; and urged that if he were dead, there was no one to whom notice could be given according to the provisions of the act; 2dly, he contended, that as the Defendant was imprisoned by attachment, he was not dischargeable (a)³ under the statute.

But the Court over-ruled both objections, saying as to the last, that an attachment for non-payment of money is an execution (b).

Runninton then applied to the Court to remand the prisoner on payment of a less sum than 3s. 6d. per week, insisting that the Court was authorized so to do, both by the words of 32 Geo. 2, c. 28, s. 13, which directs the Court to discharge the prisoner, unless the creditor will sign a note "to pay and allow weekly a sum not exceeding 2s. 4d.," and by the case of *Hill v. Wadmore*, Barnes, 387, ed. 3, where the Court said that they had power to moderate the allowance, and remanded the Defendant upon

(a)¹ Vid. *Ex parte Ansell*, ante, 62, and the authorities there cited.

(a)² 1 Crompton's, Pr. 61. Tidd, Pr. 138.

(a)³ Sed vid. *Rex v. Stokes*, Cowp. 136, where it was held that a party in custody upon an attachment for non-payment of costs may be discharged under the Lords' act. Vid. etiam *Rex v. Pickerill*, 4 T. R. 809, and *Rex v. Wilkinson*, 7 T. R. 156.

(b) *Rex v. Myers*, 1 T. R. 265. *Bonafous v. Schoole*, 4 T. R. 316.

the Plaintiff's allowing him 6d. per week; he added, that there was strong reason for the Court to exercise their power in this case, where the ground of imprisonment was, that the Defendant had received money as attorney in a cause, and retained it in his own hands when he ought to have paid it over.

The Court rejected the application, being of opinion that the words of the last act (c) which extend the allowance to 3s. 6d. per week, do not leave any discretionary power in the Court.

[337] When the discharge was about to take place, the attorney concerned for M^rIntosh gave a note for the weekly allowance of 3s. 6d. signed by himself.

Sed per BULLER J. The note must be given by the party in the suit, though in some cases it may be signed by his attorney; here it has been stated that the party himself is dead.

Per Curiam. Let the prisoner be discharged.

HOGAN v. PAGE. Nov. 23d, 1798.

Proceedings on a single bond stayed by the Court on payment by the obligor of principal and costs without interest (b).

Le Blanc Serjt. moved for a rule nisi to stay proceedings on a single bond on payment of 105l., together with the costs of the action.

Cockell Serjt. for the Plaintiff, stated, that the only question was, whether the Plaintiff was entitled to interest on which they wished to take the opinion of the Court.

The bond was in this form:

Know all men by these presents, that I R. Page am held and firmly bound unto M. Hogan, master of the ship "Cornwallis," in 105l. of good and lawful money of Great Britain, to be paid to the said M. Hogan, his executors, administrators, and assigns, in consideration of being found in a passage by the said M. Hogan, and on the same ration as the seamen of the said ship, with all medical assistance during the said voyage to England, for which payment to be well and truly paid, I bind myself, my executors, and administrators, firmly by these presents. Sealed, &c. and dated 13th May, 36 Geo. 3.

The Court were clearly of opinion, that no interest ought to be given, and made the

Rule absolute (a).

ROBERTS v. GIDDINS. Nov. 23d, 1798.

An affidavit to found a rule for staying proceedings on a bail-bond, should be entitled in the action against the bail.

Clayton Serjt. before shewing cause against a rule for staying proceedings on the bail-bond, objected to the affidavit on which the rule nisi had been obtained, because it was intitled in the action against the bail, whereas it is the usual practice for these [338] motions to be made in the original action; which practice he said, had been adopted in order to save expence to the parties.

Sed per BULLER J. The action on the bail-bond is depending: then why should not this affidavit be read? Where indeed, no action against the bail is commenced, as if

(c) 37 Geo. 3, c. 85, s. 2, makes it lawful for the Court to discharge the prisoner, unless the creditor, his executors, administrators, or assigns, insist upon such prisoner being detained in prison, and shall "agree in the manner mentioned in the last act with respect to the allowance not exceeding 2s. 4d. per week, to pay and allow weekly a sum not exceeding 3s. 6d. as any such Court shall think fit unto such prisoner," to be paid at the times, and subject to the regulations mentioned in the last act.

(b) Vide *Hilhouse v. Davis*, 1 M. & S. 169, 173.

(a) Secus, in the case of a bond conditioned for the payment of a lesser sum; on which interest must be paid from the day of the date: though no interest be reserved in terms, nor any day certain for payment expressed. *Farquhar, Bart. v. Morris*, 7 T. R. 124.

a motion be made to cancel the bail-bond, the affidavit must be intitled in the original action; for unless it be intitled in some action, no perjury can be assigned upon it.

Per Curiam. Let the affidavit be read.

Cox v. KITCHIN. Nov. 24th, 1798.

Where no point has been saved at the trial, the Court will not set aside a verdict on a question of law, if the justice and conscience of the case be with it. It seems that a woman living apart from her husband in a state of adultery, is liable on her own contracts, though she has no separate maintenance (c).

Indebitatus assumpsit, for goods sold and delivered, and work and labour done. Plea, General issue.

The cause was tried before Rooke J. at the Westminster sittings in this term, when it appeared, that the Defendant was the wife of one Wells who was then living, but that for the last four or five years she had gone by the name of Kitchin, having lived during that time as mistress with a person of that name (a); that she kept an hotel, and that the action was brought by the Plaintiff as a carpenter, for materials found, and work done, in fitting up the hotel. The learned Judge directed the jury, in case they should be of opinion that the Defendant was living in a state of open adultery at the time of the contract made, to find a verdict for the Plaintiff, for as the husband under those circumstances would not then be liable, he thought that the wife must be liable herself (b)¹. A verdict was accordingly found for the Plaintiff. No point was saved for the opinion of the Court.

Williams Serjt. on this day moved for a rule to shew cause why the verdict should not be set aside, and a new rule be had on the authority of *Gilchrist v. Brown*, 4 T. R. 766, where it was decided on demurrer, that a replication to a plea of coverture was bad, because it was destitute of the principle on which all the [339] modern cases had proceeded, where femes coverts had been held liable; viz. a separate maintenance.

BULLER J. This case comes before the Court under very different circumstances from those of the case cited. The question there arose on demurrer, whereas this is a motion to set aside a verdict. Motions for new trials are governed by the discretion of the Court. Where the Judge at Nisi Prius has thought fit to save a point; the Court has been in the habit of considering itself in the situation of a judge, at the time of the objection raised. But this case comes before us without any point saved, and therefore we must look to the general justice of the case before we interpose by granting a new trial; nor is it necessary that we should nicely examine whether the Defendant be strictly liable in point of law. The leading reported decision on the subject of granting new trials is that of *The Dutchess of Mazarine* (1 Salk. 116. 2 Salk. 646). There can be no doubt but that was a case of a verdict against law: yet the Court said, that as the justice and conscience of the case were clearly with the verdict, they would not interpose (b)². Here it is perfectly clear, that the husband was not liable: that point

(c) Vide *Fallick v. Barber*, 1 M. & S. 108. *Carstairs v. Stein*, 4 M. & S. 192. *Farrant v. Olmius*, 3 B. & A. 692. *Campbell v. Twemlow*, 1 Price, 81.

(a) In *Norwood v. Stevenson*, T. 11 & 12 Geo. 2, B. R. Bull. N. P. 136, and in *Hudson v. Brent*, sittings after Hil. T. 26 Geo. 3, coram Lord Mansfield, Esp. N. P. 124, it was held that if a man cohabits with a woman, allows her to assume his name and passes her to the world as his wife, though in fact he is not married to her, yet he is liable to her contracts for necessaries.

(b)¹ It was taken for granted by the Judges on both sides in *Manby and Another v. Scott*, 1 Lev. 4, that the wife could never be charged; though they differed as to the liability of the husband. And in *Hatchett v. Baddley*, 2 Bl. Rep. 1082, Blackstone J. held, that although the husband were not bound to pay the debt, it did not follow as a legal consequence that the wife should be compelled alone: and he was of opinion in that case, that the debt could not be recovered of either.

(b)² Vid. etiam *Smith v. Bramston*; *Smith v. Frampton*: *Anonymous*, Pas. 8 Will. 3, B. R. and *Smith v. Page*, 2 Salk. 644. *Sparks v. Spicer*, 2 Salk. 648. *Dunkly v. Wade*, 2 Salk. 653. *Goslin v. Willcock*, C. B. 2 Wils. 306. *Sampson v. Appleyard*, C. B. 3 Wils. 272. *Allen and Another v. Sir John Peshall Bart.* 2 Black. 1177. *Doe v. Williams*, Cowp. 622. *Farewell v. Chaffey and Others*, 1 Burr. 53. *Dr. Burton v. Thompson*,

was solemnly decided in the Court of King's Bench in a case which was tried before me at Taunton (c); there it appeared that the wife had been turned out of doors by her husband, and afterwards committed adultery, but, before the cause of action accrued, had ceased to live in a state of adultery, and had offered to return; and the Court held, that in consequence of the woman having once gone off with an adulterer, the husband was discharged for ever. Here therefore the husband is not liable; and if the wife be not, she stands in a most miserable condition. How is she to find the means of supporting herself? How is she to procure even a joint of meat for her daily subsistence? She can obtain no credit, unless she be liable for her debt: her situation would be melancholy in the extreme. But whether she be strictly liable or not, it appears that she has [340] lived as a feme sole, that she has represented herself as such, and has obtained credit under that character. The defence therefore is dishonest and unconscientious, and on that ground I think that the Court ought not to interpose.

HEATH J. On the last point I agree with my brother Buller, viz. that as the Defendant has lived and contracted as a feme sole she ought to be liable for her debts.

ROOKE J. I am of the same opinion.

Williams took nothing by his motion (a)¹.

LLOYD v. JOHNSON. Nov. 24th, 1798.

Plaintiff was employed to wash clothes for Defendant who was a prostitute, knowing her to be such; and held that the use to which the clothes might be applied, could not bar Plaintiff of an action for work and labour (a)².

Indebitatus assumpsit for work and labour done, and on the common money counts. Plea, Non assumpsit.

At the trial before Rooke J. at the Westminster sittings in this term, it appeared by the evidence of a servant maid of the Defendant, (who was also a daughter of the Plaintiff), that the Defendant was a prostitute, and that this action was brought to recover the amount of a bill delivered for washing done by the Plaintiff's wife. By the bill of particulars it was shewn that the articles washed, consisted principally of expensive dresses, and that there were also some gentlemen's night-caps; the witness swore that the former were for the purpose of enabling the Defendant to appear at public places, and that the latter were worn by those persons who slept with her mistress. She also proved that the Plaintiff and his wife had full knowledge of the Defendant's situation, and of the purposes to which the articles in question were applied. The learned Judge, on an objection taken to the Plaintiff's recovery under these circumstances, was of opinion, that no such immorality in the contract on the part of the Plaintiff had been proved, as ought to defeat the action. Verdict for the Plaintiff.

Cockell Serjt. now moved for a rule to shew cause why the verdict should not be set aside and a nonsuit be entered, and cited *Crisp v. Churchill*, E. 34 Geo. 3, coram Eyre Ch. J., where in an action for use and occupation of a lodging, it being set up that the Defendant was an infant and a prostitute, the Chief Justice was of opinion that those circumstances were no bar to the action, as both an infant and a prostitute must have a lodging; but it being [341] shewn that the lodging was let to the Defen-

2 Burr. 664. *Forcroft v. Duke of Devonshire*, 2 Burr. 936. *Emondson v. Machell*, 2 T. R. 4. *Wilkinson v. Payne*, 4 T. R. 468.—But if the Court had considered the verdict in the present case to be clearly wrong in point of law: Qu. whether a new trial would not have been granted? For in *Wilson v. Rastall*, 4 T. R. 753, it was said by the Court, that there was no instance in which a new trial had been refused, where the verdict had proceeded upon the mistake or misdirection of the Judge. Also *Calcraft v. Gibbs*, 5 T. R. 20, where Lord Kenyon said, Where there is any ground of objection to the law delivered by the Judge, on which the verdict has proceeded, if such objection be well founded, it is immaterial what the nature of the cause is.

(c) *Covier v. Hancock*, 6 T. R. 603.

(a)¹ Vid. *De Gallion v. L'Aigle*, post, Nov. 27th, and the cases there cited, 357.

(a)² Vide *Bowry v. Bennet*, 1 Campb. 348. *Webb v. Brooke*, 3 Taunt. 6.

dant for purposes of prostitution, and with a knowledge on the part of the Plaintiff of that fact, he held that the action was not maintainable (a)¹.

BULLER J. What do you mean by the expression of clothes used for the purposes of prostitution? This unfortunate woman must have clean linen, and it is impossible for the Court to take into consideration which of these articles were used by the Defendant to an improper purpose, and which were not. As to the case before my Lord Chief Justice, I suppose the lodgings were hired for the express purpose of enabling two persons to meet there, which would certainly be unlawful. Here the Plaintiff's wife was employed generally to wash the Defendant's linen, and the use which the Defendant made of it cannot affect the contract.

HEATH and ROOKE, Justices, being of the same opinion,
Cockell took nothing by his motion.

WHITE v. DENT. Nov. 24th, 1798.

Plaintiff cannot sign judgment for want of a plea, without demanding one; though Defendant has not taken the declaration out of the office (c).

The Plaintiff having filed his declaration, the Defendant appeared, but never took the declaration out of the office: when the time for pleading was out, the Plaintiff signed judgment without having demanded a plea.

A rule nisi having been obtained to set aside this judgment for irregularity,

Clayton Serjt. now shewed cause, and contended that if the Defendant does not take the declaration out of the office no demand of a plea need be made, for if the Defendant pleads without having taken the declaration out of the office, his plea is a nullity (a)².

Shepherd Serjt. contra urged, that the Defendant is not bound to take the declaration out of the office till he actually pleads.

The Court, on inquiry of the officers as to the practice, having found a difference of opinion, said, that although the Defendant must take the declaration out of the office before he pleads, yet that as he may take it out the very hour before he pleads, the Plaintiff ought not to sign judgment without demanding a plea.

Rule absolute without costs (b)¹.

[342] DAVIS, ONE, &C. Assignee of the Sheriff, v. OWEN AND THOMAS.
Nov. 24th, 1798.

Though there be not 15 days between the teste and return of a capias, yet it is amendable. If a capias per continuance be teste'd on the same day as the original capias, a new original capias may be sued out to warrant it, though such new original bear teste before the cause of action accrued. Taking out a summons before a Judge to stay proceedings on the bail-bond, is a waiver of an irregularity in the notice of declaration (b)².

An attachment of privilege at the suit of the Plaintiff, returnable on the Morrow of All Souls, having issued against the Defendant Owen and one Michael Hughes, Owen on the 8th November put in bail with the Filazer, and immediately gave the Plaintiff notice thereof. Hughes left the kingdom. The Plaintiff finding that the Defendant Owen had by mistake put in his bail with the Filazer instead of the Prothonotary (with whom in attachments of privilege bail should be put in) waited till the expiration of the time for perfecting bail, then took an assignment of the bail-

(a)¹ Vid. etiam *Girarday v. Richardson*, Espin. Cas. N. P. 13, where the same point was ruled by Lord Kenyon, at the Westminster sittings after Easter term, 33 Geo. 3.

(c) Vide *Park v. Renelle*, 8 T. R. 465. *North v. Lambert*, 2 B. & P. 218.

(a)² R. T. 12 W. 3, B. R. R. M. 10 Geo. 2, B. R. *Keeling v. Newton*, B. R. 1 Wils. 173.

(b)¹ Vid. *Nott v. Oldfield*, B. R. 1 Wils. 134.

(b)² Vide *Tabrum v. Tenant*, post, 81. *Pinero v. Wright*, 2 B. & P. 236. *Inman v. Huish*, 2 N. R. 133. *Walker v. Hawkey*, 5 Taunt. 854. *Kenworthy v. Peppiat*, 4 B. & A. 288.

bond, and sued out a *capias ad respondendum* upon it against the present Defendants, teste'd the 6th November, returnable the 18th November, with a copy of which the Defendant Thomas was served: but Owen not having been served with it, the Plaintiff sued out a *capias per continuance*, also teste'd 6th November, with a copy of which Owen was served. A notice was delivered to the Defendant Thomas of a declaration against him only. On the 20th November bail in the original action were put in for the Defendant Owen with the Prothonotary.

A rule nisi was obtained on a former day to set aside the proceedings on the bail-bond for irregularity, on three grounds: 1st, Because there were not fifteen days between the teste and return of the original *capias*: 2dly, Because the *capias per continuance* was teste'd on the same day as the original *capias*, whereas it should have been teste'd on the return-day of such *capias*: 3dly, Because the writ was joint against Owen and Thomas, and the notice of declaration several against Thomas only.

Marshall Serjt. this day shewed cause, and contended, 1st, that the *capias* was amendable (*a*)¹, *Curly v. Ashley*, C. B. 3 Wils. 454. 2 Bl. 918, S. C. *Bourchier v. Wittle*, 1 H. Bl. 291. 2dly, That a *capias per continuance* may bear teste on any day; or that if necessary a new original *capias* may be sued out, bearing teste such a day as will warrant the *capias per continuance*, in the same manner as an original *capias ad satisfaciendum* may be sued out, where a Defendant has been taken on a *capias ad satisfaciendum* issued into [343] a different county from that in which the action is brought (*a*)². 3dly, That if there were any irregularity in the notice of declaration, the Defendant had waived it by taking out a summons before a Judge to stay proceedings on the bail-bond, on the usual terms. He stated that the Plaintiff would not have taken an assignment of the bail-bond for the Defendant's mistake in putting in bail, but to prevent the expence of being obliged to proceed to outlawry against Hughes, who had fled the kingdom.

Le Blanc Serjt. contra, insisted, 1st, that the power of amendment being discretionary in the Court, they would not exercise that power in favour of the Plaintiff in a case of such sharp practice as the present. 2dly, That it is absurd for the *capias per continuance* to bear teste on the same day as the original command, and that if such a new original *capias* as was suggested by the other side were sued out, it would bear teste before the cause of action accrued. 3dly, That no irregularities, which could be taken advantage of when the parties went before the Judge, were waved by that application, the object of which was the same as that now before the Court.

BULLER J. The first objection is of no weight, for it clearly appears by authorities that the Court will alter a *capias* so as to make fifteen days between the teste and return. Here a mistake was committed by the Defendant in putting in his bail; and in strictness I cannot say that the assignment of the bail-bond was irregular, but as the Plaintiff had notice that the bail were put in, I think it was such sharp practice on his part, as to justify the Court in finding some means to prevent him from getting his costs by it. The second objection is to the *capias per continuance*, but an original *capias* may be sued out to warrant that; and it will be no objection to such original *capias* that it will bear teste before the cause of action accrued (*b*). I have often talked with the late Mr. Justice Gould on this subject, who went great lengths in amending writs of *capias*, and his reason was, that as a writ of *capias* never appears on the record, it is of no consequence whether it bear teste before or after the cause of action accrued; and if a *latitat* may be sued out (as it certainly (*c*) may) before the cause of action accrues, and a *capias* may not, the courts of King's Bench and Common Pleas are not on an equal footing. As to the third objection, it [344] has been held that taking any step in a cause, as appearing (*a*)³, is a waiver of any irregularity. Now it does seem that the taking out a summons in this case was a step; for unless the

(*a*)¹ Vide tamen *Williams v. Faulkner*, Barnes, 409, ed. 3. *Atkinson v. Taylor* 2 Wils. 117. Barnes, 427, S. C. *Holt v. Hawkes*, Barnes, 420, ed. 3, and *Whale v. Fuller*, 1 H. Bl. 222.

(*a*)² *Shaw v. Maxwell*, 6 T. R. 450.

(*b*) 1 Crompton's Pr. 25. Imp. P. R. C. B. 154, ed. 4. Sed vide 1 Sellon's Pr. 83, ed. 2.

(*c*) *Johnson and Another v. Smith*, 2 Burr. 962, 7. *Foster v. Bonner*, Cowp. 454, and *Best v. Wilding*, 7 T. R. 4.

(*a*)³ *Foe and Another v. Money*, widow, ante, 250, and post, 383.

Defendant was served with a writ in consequence of which he was obliged to appear, why should he go before a Judge to be relieved? By so doing he allows that he has been served with process to which he ought to be answerable. The only thing to be considered is, on what terms the Court should stay proceedings on the bail-bond. Now as the practice on the part of the Plaintiff has been so exceedingly sharp, I think the order should be to stay proceedings on the bail-bond without costs, the Defendant Owen undertaking not to plead in abatement that Hughes, who has fled the kingdom, is not joined in the declaration.

And in this way the Court made

The rule absolute.

DYER, *Demandant, v. BULLOCK AND OTHERS, Tenants.* Nov. 24th, 1798.

The 8 & 9 W. 3, c. 31, s. 1, which directs the form to be pursued in a writ of partition, applies only to cases where the tenant does not appear.

Shepherd Serjt. having obtained a rule to shew cause why proceedings on a writ of partition should not be stayed, on the ground of a notice of the writ, with a copy thereof, not having, according to the directions of the 8 & 9 Will. 3, c. 31, s. 1, been served forty days before the return.

Le Blanc Serjt. shewed cause, and observed that the 8 & 9 Will. 3, c. 31, s. 1, only applies to cases of signing judgment (a)¹ by default for want of appearance, whereas here the tenants had appeared.

Shepherd admitted the construction of the statute to be against him,

And the Court being of the same opinion,

Discharged the rule.

WYATT AND OTHERS v. SMEE. Nov. 24th, 1798.

An affidavit to hold to bail, stating "that J. S. has made no tender to pay in notes of the Bank of England" excludes the possibility of any other person having tendered for him, and sufficiently complies with 37 Geo. 3, c. 45, s. 9.

Le Blanc Sjt. moved for a rule to shew cause why the Defendant should not be discharged out of custody on filing common bail, on an objection to the affidavit to hold to bail, in which it was [345] sworn that "no tender was made by the said J. Smeë to pay in notes of the Bank (vid. 37 Geo. 3, c. 45, s. 9) of England," whereas it should have been sworn generally that no tender was made; for though J. Smeë might have made no such tender, yet it might have been made by some other person for him, consistently with the affidavit.

BULLER J. If any other person had made an offer for the Defendant, it would have been an offer by the Defendant.

Le Blanc took nothing by his motion.

BELL AND OTHERS v. GILSON. Nov. 26th, 1798.

[Held overruled, *Esposito v. Bowden*, 1857, 7 El. & Bl. 779.]

If the name of the broker effecting a policy of insurance be inserted in the policy as "agent," it is a sufficient compliance with the 28 Geo. 3, c. 56. Goods, the produce of Holland, purchased in that country during hostilities between Holland and Great Britain, by a British agent resident there, and shipped for British subjects, were insured by them in this country; held, that this was a legal insurance (a)².

This was an action on a policy of assurance underwritten by the Defendant on the 8th December 1797, for 200l., on goods shipped on board the "Elizabeth," Captain

(a)¹ Vid. *Halton v. The Earl of Thanet*, 2 Bl. 1134.

(a)² S. C. 8 T. R. 275, where this judgment was reversed in K. B. and see *Potts v. Bell*, 8 T. R. 552. *Baring v. Cluggett*, 3 B. & P. 200. *Hibbert v. Martin*, 1 Campb. 538. *Mellish v. Bell*, 14 East, 4. *Willison v. Patteson*, 7 Taunt. 439, 446.

Spewce, from Rotterdam to Hull, at a premium of two guineas and a half per cent. The first count of the declaration stated that the Plaintiffs caused to be made the policy of assurance, purporting thereby and containing therein that Barrett and Co. agents, the names of Barrett and Co. being the usual style and firm of dealing of the persons residing in Great Britain, who received the order for and effected the said policy of assurance, as well in their own names, as for and in the name and names of all and every other person or persons to whom the same did, might, or should appertain, in part or in all, did make assurance, &c.; and the said first count averred the interest to be in the Plaintiffs, and that the insurance was made on their account, and for their use and benefit; that the ship sailed on the voyage insured with the goods on board, and that in the course of that voyage she was captured by the French, and the goods and the voyage lost. There were also counts for money had and received, and money paid. The Defendant pleaded the general issue non assumpsit, on which issue was joined; and paid the premium into court on the count for money had and received.

This cause came on to be tried by a special jury at the last sitting in Trinity term at Guildhall, before Eyre Ch. J. when a verdict was found for the Plaintiffs for 194l. 15s. subject to the opinion of the Court on the following case:

The Plaintiffs, being British merchants resident in London, gave orders to Messrs. Barrett and Co. insurance-brokers (also resident [346] in London) to effect the policy in question, who as brokers effected the same in their own name and usual firm of Barrett and Co., describing themselves therein agents. The ship "Elizabeth" was a neutral vessel belonging to H. Bauerman and Son, of Greetsyl and Embden in Prussia, bound on the voyage insured from Rotterdam to Hull, on which she sailed, and was captured as stated in the declaration; and the Plaintiffs had goods on board her for the voyage insured of greater value than the amount insured. The said goods, consisting of sixty casks of madders, were purchased for the plaintiffs, and on their account, at Rotterdam, by Robert Twiss their agent resident there. When the goods were purchased on the Plaintiff's account, and also at the time of the shipping and capture thereof, and when the said insurance was made, open hostilities had commenced and then existed between Great Britain and the persons exercising the powers of government in the United States. During all that time it was and is the constant practice to enter goods at the Custom-house direct from Holland, and was never impeded, though the officer at the Custom-house knew whence they came, as he always inquired whether they were aliens or neutrals, on account of the alien duty.

The questions for the opinion of the Court were, 1st, Whether the name of Barrett and Co. agents, inserted in the policy, were a sufficient compliance with the stat. 28 Geo. 3, c. 56? 2dly, Whether the said insurance on the said goods were legal?

Heywood Serjt. for the Plaintiffs. The first question in this case is, whether this policy, effected in the name of Barrett and Co. as agents, has sufficiently complied with 28 Geo. 3, c. 56? As this point, however, has been decided in the course of this term, not only in this court (*a*), but also in the court of King's Bench (*b*), I shall leave it without any further argument, and pass to the second question, viz. whether an insurance on goods purchased by [347] a British subject in an enemy's country, and shipped for this country on his own account in a neutral vessel, be legal? Suppose the property in dispute to have belonged to the Plaintiff before the commencement of the present war, will it be contended that in such case he would be precluded from

(*a*) *Wolff and Others v. Horncastle*, ante, 316.

(*b*) The following was the case alluded to:

De Vignier v. Swanson, B. R. Nov. 16th. Action on a policy of assurance effected in the name of Grandclos Mesle and Co., who were brokers to the Plaintiff, and also agents to her in several money transactions. The Plaintiff, as well as Grandclos and Co., resided in London. The latter were not called agents in the policy, but in the declaration were stated to be "the persons residing in Great Britain who received the order for and effected the said assurance." Interest in the Plaintiff was averred. A verdict was found for the Plaintiff, and a rule nisi for a nonsuit obtained, on an objection to the form of the policy as not sufficiently complying with the 28 Geo. 3, c. 56, because effected in the name of Grandclos and Co., without stating them to be agents. This point was to have been argued this day, but Lord Kenyon said he was surprised to find the rule had been drawn up, as there was nothing in the case. Accordingly the rule without argument, was discharged.

bringing it home? Whatever may be the objection to allow British subjects to export goods, on the ground of such exportation being of assistance to the enemy, there is no policy which forbids him to bring goods from thence, as that tends to distress the enemy. It is not laid down as a general proposition in Grotius, Puffendorf, or Vattel, that commerce is prohibited between powers at war. There may be ordinances of particular countries to this effect, such as that of Barcelona (*a*), of the year 1484, cited in *Bristow v. Towers*, 6 T. R. 45, and though Valin, tom. 2, p. 31, says, that every declaration of war contains a prohibition of commerce, yet it appears from the next paragraph, p. 32, in which he relies on the ordinances of France of the years 1543, art. 42, and 1584, art. 69, that his observation must be confined to the law of his own nation: and this is confirmed by a passage in Emerigon, *Traité des Assurances*, tom. 1, p. 128, from which it appears that the declarations of war issued by the Kings of France always contained an express prohibition of commerce with the enemy. Indeed if the declarations of war issued by this country had usually contained the same prohibition, it would not affect this case, since the present war with Holland commenced under a proclamation for general reprisals only. With respect to the law of England, Lord Mansfield, in *Gist v. Mason*, 1 T. R. 85, said, that he knew of two cases only in which a subject had been prohibited from trading with the enemy. The first of those cases (*viz.* 2 Roll. Abr. 173, *Prerogative (L)*, *Guerre*, where trading with Scotland then in a general state of enmity with this kingdom, was held illegal) goes much farther than this, for the party there not only bought of the enemy, but sold to him: and the second was a case of corn carried by a subject of this country to the enemy; now corn is clearly a contraband article in time of war; for, though the commencement of hostilities does not create a prohibition of all commerce with enemies, yet it does of such commerce as may be the means of affording them assistance. [Heath J. In the case in Roll. Abr. the keepers of the truce permitted two persons to go into Scotland, which was clearly illegal in [348] them, for by so doing they exceeded their authority, as information might thereby have been given to the enemy. The second case cited by Lord Mansfield happened in the time of famine (*a*)², and probably a proclamation had issued prohibiting the exportation of corn (*b*).] In *Henkle v. The Royal Exchange Assurance Company*, 1 Vez. 320, Lord Hardwicke observed that it might be going too far to say that all trading with enemies is unlawful. With respect to the cases of *Brandon v. Nesbitt*, 6 T. R. 23, and *Bristow v. Towers*, 6 T. R. 35, it is sufficient to say that the actions in those cases were brought in favour of alien enemies: and it is clear that the decisions proceeded only on the ground of a disability in the Plaintiffs at the time of the action brought, since Lord Kenyon in *Brandon v. Nesbitt*, when commenting on the case of *Ricord v. Bettingham*, 3 Burr. 1734, and 1 Bl. 563, S. C., where it was held that an action by an enemy might be maintained on a ransom bill, observed that the action there was not brought until peace was restored. It is certain that the Legislature of this country has not considered hostilities as amounting to a general prohibition of importing articles from the enemy's country, since it has been thought necessary in every war from the reign of Charles the Second to this time, to pass acts of parliament (*c*) for prohibiting or regulating the importation of particular articles during particular periods, which would not have been requisite if such trade had been already prohibited in toto and for ever.

Williams Serjt. for the Defendant. 1st, The cases of *De Vignier v. Swanson* is distinguishable from this, since the brokers who effected the policy there were the general agents of the Plaintiff, whereas here Barrett and Co. were only employed in this particular transaction; the same observation will apply to *Wolff v. Horncastle*, where that fact was much relied on by the Court. A mere broker is not within the words of the 28 Geo. 3, for he is neither the person interested, the consignor, the consignee, the person giving the order for insurance, nor the person receiving it from those who are interested. By the expression "as agents," used in this policy, the underwriter

(*a*)¹ See also Ord. of Stockholm, 2 Mag. 257, No. 1028.

(*a*)² This appears from Park's Insur. 238, which is founded on the manuscript note of *Gist v. Mason*, cited in the margin of the same book, p. 242, a.

(*b*) Which would bring the case within the principle of *Delmala v. Motteux*, Park's Insur. 234.

(*c*) See these acts collected in the argument of *Bristow v. Towers*, 6 T. R. 40, 1, 2, 3, 4.

has been deceived, since he may have been led to suppose that Barrett and Co. were the gene-[349]-ral agents of the Plaintiffs, which they do not appear to have been. 2dly, The supposition of this property having belonged to the Plaintiff before the commencement of the war, is excluded by the case. It is established by *Bristow v. Towers* that the insurance of enemies property is illegal; and though the judgment in that case appears to have been given with reference to *Brandon v. Nesbitt*, yet they were different; for as there was a plea of alien enemy in the one and not in the other, we must conclude that *Bristow v. Towers* was decided on the illegality of the trade. With respect to the policy of the question, this case is stronger than the two above-mentioned decisions; for if it be not lawful for an enemy to spend his money here to the advantage of this country, it certainly cannot be lawful for a British subject to enrich the enemy by purchasing his goods. By the case in 2 Roll. Abr. 173, Prerogative (L), Guerre, it distinctly appears that it is illegal for an Englishman to traffic in the enemy's country. The commencement of hostilities puts an end to all amity and commerce (a). If this neutral vessel had been captured by an English ship of war, though the vessel would have been restored to the owners, it is clear, both from the general practice of the Court of Admiralty, and from the express decision by the Lords Commissioners of Appeal, in the "*Louisa Margaretha*," Henslop, 3d April 1781, that the goods would have been condemned as lawful prize (b).

(a) Bynk. Quæs. Juris. Pub. lib. 1, c. 3, p. 197, fol. ed. 1767.

(b) *John Kirkpatrick Escott of London, Claimant and Appellant against Henry Smedley Captor and Respondent.* (See Printed Proceedings in the Court of Appeal, from which the following statement is abridged.)

Kirkpatrick Escott, and Reed, of London, for many years previous to the commencement of hostilities between Great Britain and Spain, in 1779, traded to Malaga, and had an established house there: at which place Escott, one of the partners, resided, till within ten months previous to the war. On his leaving Malaga considerable quantities of wine and other merchandize belonging to the house, and deposited in vaults and warehouses set apart for the same, were left in the hands of one Henry Grivegne, a Fleming by birth, and brought up in the house, who was suffered to remain at Malaga as agent for the partners, for the purpose of preserving the wines for them during hostilities, with directions to remit them to London if a favourable opportunity should offer, and to act under the firm of Grivegne and Co. Part of the cargo claimed consisted of wines taken from the above-mentioned stores, and the residue (with the exception of two chests of hams, which were a present from Grivegne) of goods, the produce of Spain, purchased by Grivegne, for the partners, and by their order. These goods were shipped on the 7th April 1780, by Grivegne, on board the "*Louisa Margaretha*," a Dutch ship, furnished with a pass or sea-brief according to treaty, for the sole purpose of being remitted to the partnership; but to prevent its being known in Spain that they were the property of Englishmen, it was expressed in the bills of lading that they were shipped on neutral account and risk, and to be delivered at Ostend, for which port the ship was chartered and cleared out. Grivegne was to receive 14 per cent. on the goods remitted, but no person whatever, except the three part-[350]-ners in London, was interested in them. The ship set sail on the 11th of April from Malaga, but being obliged to put back, Grivegne, before she could sail again, received a letter from the partnership, ordering him to send the ship direct to London, under the expectation of her being protected by the Levant bill (20 Geo. 3, c. 45), then pending in parliament. She accordingly sailed direct for London on the 21st April; and on the 15th May was captured by a British privateer near the English coast. On the 1st June 1780 the Court of Admiralty, by consent of the parties, restored the ship, reserving the adjudication of the cargo; but on the 8th July following condemned it as lawful prize. From this determination there was an appeal to the Lords Commissioners.

Reasons for the Appellant.

1st, For that it is sufficiently proved that the goods claimed were at the shipping and capture thereof the sole property of Messrs. Kirkpatrick and Co. British subjects, who had no other means of conveying them with safety from Spain.

2d. For that the order of Council suspending the Dutch treaty bears date the 17th April 1780, and the ship last sailed from Malaga the 21st of the same month, so that

[350] Heywood in reply. The cases of *Brandon v. Nesbitt* and *Brislow v. Towers* must both be considered as having proceeded [351] on the same principle, viz. that an action cannot be maintained in favour of an alien enemy : that having been expressly stated as the ground of the former decision, and the Court having professed in the

it was impossible for Messrs. Kirkpatrick and Co. to have countermanded the voyage, and that undoubtedly Mr. Grivegneé had reckoned on the peculiar privileges enjoyed by the States General of the United Provinces respecting their trade and navigation in time of war, and it is submitted that the Judge of the Admiralty Court has construed the suspension directed by the said order of Council as referring to the times and places of capture ; whereas, as is also submitted, that reference was intended to be had at the time of the ship's departure from the ports of loading ; for that otherwise the avowed object of delay in the suspension by the said order, to wit, from a regard to the interest of individuals, and a desire to prevent their suffering by any surprise, would not be answered, inasmuch as it is impossible (as was the case in the present voyage) to direct the alteration of the voyage, which had been already begun.

3d, For that the Levant trade bill (which passed previous to the arrival of this ship in England) authorized the importation of such goods direct from the Mediterranean in neutral ships ; and that this was the intention of the Legislature in passing this act is manifest, inasmuch as the act, which was not passed till the month of June 1780, had retrospect to the 1st of the preceding January, in order to comprehend many cargoes, the produce of Spain, within the Streights of Gibraltar, (which, in expectation that the act would have passed sooner than it did,) had been imported by British subjects in foreign vessels, (and in every respect under the same circumstances with this cargo,) and deposited by an order of the Lords of the Treasury in the King's warehouses, on bond that they should be either re-exported in a limited time, if the act should not pass, or pay the duties if it should ; and when the act had passed, they were admitted to an entry accordingly ; and since that period the produce of Malaga, and other ports of Spain within the Mediterranean, has continued to be imported directly from the places of their growth, in foreign vessels, in virtue, as is understood, of the said Levant trade bill.

Reasons for the Respondent.

1st, Because after actual hostilities between two states, and the issuing of letters of general reprisals, all trade and intercourse between the subjects of those states is illegal, even though no express prohibition of trade should be issued, because every subject is by virtue of his allegiance obliged to assist the King and distress the enemy to the utmost of his abilities, and not to aid or assist them either by trade or otherwise.

2d, Because if British merchants were permitted in time of war to import goods into this kingdom immediately from and the produce of the territories of the enemy, under a pretence that the articles imported were such as were their property and deposited in their warehouses prior to hostilities, it would operate to a very alarming degree ; their warehouses might be constantly supplied by their agents during the whole war, and a continual and extensive trade might be carried on, to the very great benefit and support of the enemy.

3d, Because in this case, besides the wines claimed by the appellant, as having been his property, and deposited in his warehouses in Spain prior to hostilities, there is a considerable quantity of other goods claimed by him as his property, and as having been bought in Spain by his orders since the commencement of hostilities ; which avowal of a trade so repugnant to his duty as a British subject will, it is hoped, not only warrant the sentence of condemnation of the property claimed, but subject the claimant to exemplary costs.

4th, Because the Levant act, on which Mr. Escott the appellant, seems in a great measure to rest his cause, is not applicable to the present case, such act being calculated only to permit an importation into Great Britain from neutral ports, and in neutral bottoms, of such goods as could not before have been imported in any other than British ships, but not to give any countenance or warrant to the subjects of Great Britain to carry on a trade directly or indirectly with the enemy, in a neutral ship from a neutral port, and much less from an enemy's port to the port of Great Britain.

On the 23d April 1781 the Lords Commissioners of Appeal (present Earl Bathurst, President of the Council ; Earls Sandwich, Marchmont, Hillsborough, Clarendon ;

latter case to be governed by the authority of the former. The case cited from the Cockpit may have been determined on two grounds very different from those on which this case rests. 1st, The goods at the time of the capture might have been considered as belonging to persons inhabiting in Spain: for though the Plaintiffs themselves were resident in London, they had a partner (a)¹ resident at Malaga, where the house of business was continued. Which brings the case within the command of the proclamation for reprisals, "to seize the goods of all persons inhabiting within the enemy's state." 2dly, As the bills of lading were made out to Ostend, which was not the real port of discharge, the documents were fraudulent. With respect to the policy of allowing the trade in question, since it is stated in the case to be usual for the Custom-house to permit goods to be imported under circumstances similar to the present, this sort of trade is at least allowed by the Government of the country, who must be presumed to be the best judges of the mere policy.

BULLER J. (after stating the case). On this case two questions have been raised; 1st, whether the policy is described to [352] have been made by Barrett and Co. as agents sufficiently complies with the 28 G. 3? I think this question ought now at least to be quite at rest, two decisions having been already made upon this subject within the term; one in this court, and one in the King's Bench; both of which are directly in point. It may be material to remember, that previous to the passing of the 25 and 28 G. 3, many objections were made by the merchants, that policies in their frames were so loose and incorrect, that an underwriter had no opportunity of knowing the nature of the thing insured, or who the persons were for whom he insured. Great inconvenience arose, as appears by the preamble of one of the statutes (a)², from the circumstance of many policies being made in blank, in consequence of which the underwriters were not led to the knowledge of any of the parties. I remember it was the conversation both in Westminster-hall and out of that place, that the underwriters wanted to know the name of somebody concerned, though it was not so material who that person should be. And why was this? It was because though they might not know the name of the principal, yet if they were in possession of the name of the person who brought forward the policy, they might have some confidence, that if that person was a merchant of character, or a respectable broker, he would not be engaged in a dishonest transaction; such as I remember to have been not unfrequent in the course of last war; viz. the insurance of ships and cargoes, which were only carried out for the purpose of being sunk. In this case the wish of the underwriters has been complied with, as well as what the Legislature thought fit to direct; for the name of the person immediately employed to effect the policy has been inserted. The case in the King's Bench goes farther than this, for there it was not even stated in the policy that the parties were agents, but only averred in the declaration that they were so; whereas here it is expressly said in the policy that Barrett and Co. effected the policy "as agents," by which is imported that they acted not on their own account, but on the part of somebody for whom they were concerned. The second question is, whether this policy on goods being English property, purchased since the [353] commencement of hostilities, and shipped at Rotterdam, be legal or not? Now, in the first place, I take it to be extremely

Viscount Stormont; Lords Grantham; Loughborough, Ch. J. of the Common Pleas; and Sirs Richard Worsley and John Goodricke) affirmed the degree of the Court of Admiralty.

See also the case of *The Saint Elizabeth*, Lauritz, 29th June 1749; *The Comte Wohrenzonff*, Willers, 18th July 1781; *The Fortuna*, Knock, 27th June 1795; and *The Freeden otherwise Vreede*, Backman, 4th July 1795, in the same Court. To which may be added what was said by Lord Mansfield in *Gist v. Mason*, 1 T. R. 85, viz. "By the maritime law, trading with an enemy is cause of confiscation in a subject; but this does not extend to a neutral vessel."

(a)¹ Quære tamen. See the case *suprà*.

(a)² 25 Geo. 3, c. 44. Whereas it hath been found by experience that the making or effecting insurances on ships or vessels, and on goods, merchandizes, and effects in blank, and without specifying therein the name or names of any person or persons for whose use and benefit, and on whose account such insurances are made and effected, hath been in many respects mischievous, and productive of great inconveniences, for remedy whereof, be it enacted, &c.

clear, that this is not an insurance on enemy's property, and that we have nothing to do with that consideration here. Let us see what the case does state. It states that the goods were purchased for the Plaintiff at Rotterdam by his agent. But whose goods they were before they were so purchased is not mentioned. They might have been the property of Danes or Swedes, and then no objection could be made: or they might have been the property of an Englishman; for it appears by the case, that the Plaintiff's agent in Holland was an Englishman; and if an Englishman could buy goods in Holland, why could not an Englishman also sell goods there; and if these goods were bought of an Englishman, it is perfectly immaterial whether they were purchased in England or in Holland. I cannot distinguish this from the case put by Brother Heywood. Suppose an Englishman, at the commencement of hostilities, to have goods in an enemy's country; may he not bring them away? In such cases a time is generally limited for the subjects of the state against which hostilities are commenced, to leave the country; and it will be said, that during that time, they may not carry away their goods? But I will go one step further. I will suppose that the party has stolen these goods; and that being in possession of them at the time of the policy made, he wants to bring them home. The underwriter will have no right to go into the state of the property previous to the time when he insured. Suppose certain requisites to have been necessary, by the law of Holland, to make a good sale in Holland, shall the underwriter say that the goods were not sold according to the law of Holland? Or if they were seized by a pirate, and sold by him to the Plaintiff, shall the underwriter set up that as a defence? These cases are too monstrous to bear consideration. What is the nature of the contract of insurance? It proceeds on this ground, that a party being possessed of goods which he wishes to bring home, desires to divide the risk with other persons. Whether the goods were improperly sold to him or not, provided he has paid the value, he is interested to the amount of them: and shall he not insure them? The underwriter cannot be permitted to go beyond the time when the goods were shipped. It has however been contended, that the subjects of this realm shall not bring home their own property from an enemy's country. Nothing but positive authority would warrant the [354] Court in laying that down as law. If the subjects of this country have goods in an enemy's country, it is most clearly for the interest of this country that they should be able to bring them home. Independent of cases, we all know how frequently this subject has been canvassed. If we look into the Parliamentary Debate in 1746 and 1747, we shall see that Sir Dudley Ryder, Lord Mansfield, and the other great men of that time, argued the question entirely on its expediency, and held that it was good policy to permit insurances on enemy's property. In later times I well remember to have seen many policies tried professedly on enemy's property, without ever hearing the objection raised. Lord Mansfield did all in his power to prevent so dishonourable a defence being made. When the case of *Gist v. Mason* came on, I more than once conversed with Lord Mansfield on the subject, being desirous to obtain his opinion on the legality of such insurances. On the legality, however, I never could get him to reason. He often said, that in former times it was considered for the interest of the country to insure enemy's property, and on the persuasion of its being for the interest of the country, he always discountenanced any objection on that head. But he never went beyond the ground of expedience. At present I think such insurances are not expedient; the state of the countries at war is such as to make them otherwise. But the underwriters have taken care that such a case as this shall never rise again; for from the moment that any one underwriter succeeded on this kind of defence, there was an end of insurance on enemy's property. It is not however necessary to go into the ground of expedience: the illegality of such underwriting is now pretty well settled (a). The case cited from the Cockpit does not strike me as governing this. We have so loose an account of it, and are so much left to guess at the grounds on which the judgment was founded, that it can have no effect here. Indeed a very sufficient answer has been given to it, by observing that the documents appear to have been fraudulent. But let us see whether there are not other grounds on which it might have proceeded. In time of war subjects of Great Britain have an agent settled and permanently resident at their house of business in Spain, are dealing in articles of the produce of Spain, and are carrying on

(a) Vide Park. Insur. 239, 243.

trade in order to make a profit of those goods, which is a very different case from this. Here no profit goes to the enemy. There a question might [355] have arisen, whether some of the partners, being resident in this country, should save the goods purchased by the house abroad; on which question considerable doubts might be entertained, nor am I now prepared to give an opinion upon it. Being therefore so little informed of the grounds of the decision at the Cockpit, and consequently not at all governed by it, I think it clear that this Plaintiff is entitled.

HEATH J. I am of the same opinion. With respect to the first point, as two decisions have already been made on the subject in this term, one in this court, and one in the King's Bench, it will not be necessary to say any thing. The second point turns on this question, whether the goods of a British subject purchased in any enemy's country, after the commencement of hostilities, may not be sent hither? It is clearly competent to a British subject to reside in Holland in time of peace, or to have a factor in that country; there has always been an English factory at Rotterdam, and this appears by some old acts of parliament to have been considered so meritorious, that the Legislature thought fit to legitimate the children of English subjects born there. That being so, if hostilities commence, must not the persons resident there bring their fortunes home? It is said that, in this case, the goods were purchased since the commencement of hostilities. But we must remember that a man cannot always remit his goods and effects to another country in specie. He must convert them into such goods as will be merchandizable in the place to which he wishes to remit them. It is not said that these parties carried on trade, but only that they bought these particular goods. Without therefore infringing on the general question, whether a British subject may carry on trade in an enemy's country in time of war (*a*)¹, (which I should not wish to decide without the Court being full,) but steering clear of that general question, (which need not here be raised, as on the facts stated we shall rather intend for that against the insured,) I think the Plaintiff ought to recover. The case cited from the Cockpit, gives me no satisfaction. The situation of the insurer will not be varied, whether the goods be purchased before or after hostilities.

ROOKE J. The objections which have been made by the Defendants do them no credit; and they ought not to have made them. First, it is clear from the words of the act, and from the [356] decisions, both here and in the King's Bench, that the policy is well warranted in point of form; secondly, the Defendant was aware at the time he made the insurance what sort of contract he was entering into, and his defence is unconscientious, but having set up that defence we must give judgment on the point of law. I own that in reading this case I cannot decide it clear of the general question, whether it be legal to traffic during time of war with an enemy's country? The facts are so generally stated in the case, that they import to my understanding a general trading. The goods were purchased at Rotterdam; when they were purchased, when they were shipped, and when they were captured, open hostilities existed. Under these circumstances, if the Plaintiffs meant only to bring home their own property, it might have been so expressed. But being stated in this way, I think it of necessity brings on the general question; on which I am more ready to say that I have great doubts, as it will not affect the judgment in this case, my Brothers having already declared their opinion in favour of the Plaintiffs. Had it been necessary to give an opinion on that question, I should have wished for a further argument.

Judgment for the Plaintiff (*a*)².

(*a*)¹ As to which vide *Park. Insur.* 237, 8, 9.

(*a*)² The Court was pressed by the Defendant to allow this case to be turned into a special verdict, in order that it might be carried into error, and it was stated that a special verdict being asked for at the trial, *Eyre Ch. J.* said that a case might be made, and afterwards turned into a special verdict if the Court should think it necessary; and it was added in support of the application, that the other underwriters on the policy were ready to be bound by a decision in error on this case. But the Court being of opinion that the insured ought not any longer to be kept out of his money by this defence, refused the application.

FENTON v. RUGGLES. Nov. 26th, 1798.

If bail be put in without any description, one of whom proves to be clerk to an attorney, and the other a person in a low situation, Plaintiff may take an assignment of the bail-bond (*b*)¹.

Bail in this case were put in within time, by the name of Thomas Trimmer, Gent. and John Taylor, Gent. without any farther description. The Plaintiff did not except to the bail; but finding on inquiry, that the former was clerk to the Defendant's attorney, and the latter a porter, watchman, and shoeblack, at Clifford's-Inn, took an assignment of the bail-bond, and proceeded upon it. To stay the proceedings on the ground of irregularity, a rule nisi having been obtained on a former day,

[357] Le Blanc Serjt. now shewed cause, and contended that as an attorney's clerk could not become bail (*a*)¹, the bail here put in might be considered as a nullity, and an assignment of the bail-bond might be taken: he cited *Ritchie v. Gilbert*, Imp. Prac. C. B. 214, ed. 4, and *Price v. Oldfield*, H. 37 Geo. 3, C. B.

Shepherd contra admitted that an attorney's clerk cannot become bail, but insisted on the authority of *Thomson v. Roubell*, Doug. 466, note [1], that the only mode by which the Plaintiff could take advantage of that circumstance was by excepting to the bail: and that with respect to the second bail, to allow an assignment of the bail bond on the ground of the facts disclosed in the affidavit, would be to try his sufficiency without bringing him up to justify.

But the Court said, that as the Defendant had practised a trick upon the Plaintiff, he should not avail himself of it, and

Discharged the rule with costs (*a*)².

DE GAILLON v. VICTOIRE HAREL L'AIGLE (*a*)³. Nov. 27th, 1798.

If the husband reside abroad, and the wife trade and obtain credit in this country as a feme sole, she is liable for her own debts; but not unless she represents herself as a feme sole (*b*)².

Indebitatus assumpsit. The declaration contained the common money counts.

Plea: That the Defendant, before and at the time of the making the said several promises and undertakings in the said declaration mentioned, was and from thence hitherto hath been, and still is the wife of, and married to, one John Martin Harel L'Aigle, and which said J. M. H. L'Aigle is now living, to wit, at Westminster, &c.

Replication: That before and at the time of making the said several promises and undertakings in the said declaration mentioned, and from thence hitherto, the said John Martin Harel L'Aigle lived and resided in parts beyond the seas out of this kingdom, to wit, at Hamburg; and that during all that time the said Victoire Harel L'Aigle lived in this kingdom, separate and apart from the said John Martin Harel L'Aigle, and followed and carried on the trade and business of a merchant as a single woman, and a sole trader, to wit, at Westminster, &c.; and that the Plaintiff did not give any credit to the said John Martin Harel L'Aigle, but traded and dealt with the said Victoire Harel as a feme sole, and on her sole credit; and that the said Victoire Harel made the said several promises and undertakings in the said declaration mentioned as such feme sole as aforesaid. And this, &c. wherefore, &c.

[358] To this there was a general demurrer and joinder.

Runnington Serjt. in support of the demurrer. The question here is, whether this Defendant being a married woman, and her husband resident abroad, is liable to be sued? On the pleadings it does not appear that her case comes within the

(*b*)¹ Vide *Rex v. Sheriff of Surrey*, 2 East, 181. *Wallace v. Arrowsmith*, 2 B. & P. 49. *Allingham v. Flower*, Id. 246. *Redit v. Broomhead*, Id. 564.

(*a*)¹ Vid. *Hawkins v. Maguall*, Doug. 467, and notes: *Boulogne v. Fautrin*, Cowp. 828. *Laing v. Cundall*, 1 H. Bl. 76.

(*a*)² Vid. *Richardson v. Morriss*, 2 Bl. 1179.

(*a*)³ Vide ante, p. 8.

(*b*)² S. C. post, 368. And see *Boggett v. Frier*, 11 East, 301. *Marsh v. Hutchinson*, 2 B. & P. 227. *Farrer v. Granard*, 1 N. R. 81. *Hookham v. Chambers*, 3 B. & B. 92.

exception to the general rule of law established by the modern cases of *Corbett v. Poelnitz*, 1 T. R. 5, and of *Ringstead v. Lady Lanesborough*, and *Barwell v. Brooks* cited *ibid.* (reported Cooke B. L. 26 and 29, ed. 4th). It is not stated here, that any permanent separation from bed and board was agreed upon between the parties, or any separate maintenance allowed; on which grounds the modern decisions have proceeded. Accordingly in *Gilchrist v. Brown*, 4 T. R. 766, a replication not stating a separate maintenance (b)¹ was held bad; and in *Clayton v. Adams, executor*, 6 T. R. 604. Lord Kenyon thought that a feme covert would not be liable where the separation from her husband was only temporary. If the Court go so far as to determine that the mere circumstance of the husband being out of the kingdom (c) makes the wife liable, a feme covert may be subjected to an execution, by her husband quitting the kingdom, at a moment's warning. Nor will the trading averred in these pleadings make any difference; for no action lies against a feme covert trader, except by the custom of London, in which case the husband must be joined; whereas here the Defendant is sued as a feme sole (d).

Marshall Serjt. *contra*, was stopped by the Court.

BULLER J. There is another set of cases of a very different nature from those which have been relied on by the Defendant; but which are much more applicable to this case. The first of these is *The Lady Belknap's case* (e): now let us see if any sound distinction between that case and this can be maintained. The husband there was banished, but it is not stated whether he was banished for one year, or for five years, or for life (f): it [359] was held sufficient that he was in banishment at the time when Lady Belknap's contract was made; and I can see but one principle on which the case could have been decided; viz. that the rights known to exist in law between husband and wife were not interfered with, by allowing the wife to be taken in execution: as the husband was banished (though it be not stated whether for life or not) the matrimonial rights during his banishment were at least suspended. In later times the cases have gone further. In *Sparrow v. Carruthers* (a), it was shewn in answer to evidence of coverture that the husband was transported for seven years only, and after that time was expired he had a right to return, and demand the comfort of his wife, even if she were in gaol; yet the husband being abroad and not capable of enjoying the matrimonial rights, it was held that the disability of the wife was suspended. In those cases the husband was sent out of the country for his crimes, whereas here the husband has voluntarily abandoned his wife, and, for any thing that appears, never was in England, and perhaps never may come here. The wife has traded as a feme sole, has obtained credit as such, and ought to be liable for her debts.

HEATH J. I am of the same opinion. The cases of banishment and transportation of the husband are directly in point. Besides, it is for the benefit of the feme covert that she should be liable to an action in such a case as this, otherwise she could obtain no credit, and would have no means of gaining her livelihood. The husband perhaps never was in England, and never may be, so that this case is not at all like those which proceeded on the ground of a separate maintenance.

ROOKE J. of the same opinion.

Judgment for the Plaintiff (b)².

(b)¹ Vid. *Wittersheim v. Lady Carlisle*, 1 H. Bl. 631. *Stedman v. Gooch*, Esp. Cas. N. P. 7. *Ellah v. Leigh*, 5 T. R. 679. *Thompson v. Hervey*, 4 Burr. 2178.

(c) Vid. *Moor*, 851.

(d) Vid. *Lean v. Shutz*, 2 Bl. 1195, where, in an action against a feme covert with a separate maintenance, it was held that the husband should have been joined for conformity.

(e) 2 Hen. 4, 7 a. Vide also the case of *Lady Maltravers*, 10 Ed. 3, 53. *Sybell Belknap's case*, 1 Hen. 4, 1 a. *Margery Weyland's case*, 19 Ed. 1. Ryley. Plac. Parl. 66. *Deerly v. Duchess of Mazarine*, Salk. 116 and 646. *Ld. Raym.* 147, S. C. Comb. 402, S. C. and *Countess of Portland v. Prodgers*, 2 Vern. 104.

(f) It appears by the Year Book 1 Hen. 4, 1 a. that Belknap was banished to Gascony, there to remain till he obtained the King's favour: which Sir Edward Coke considers as a banishment for ever. *Co. Litt.* 133 a. and adds, that if the husband by act of parliament have judgment to be banished but for a time, which some call relegation, that is no civil death. Vid. *tam.* Hargrave's note, 209.

(a) Cited in *Lean v. Shutz*, 2 Bl. 1197, and in *Corbett v. Poelnitz*, 1 T. R. 7.

(b)² Vid. *etiam* Espin. Cas. N. P. 554. *Watford v. Duchess de Pienne*, whom Lord

LEADER v. DANVERS. Nov. 27th, 1798.

The Court refused to grant an attachment against the sheriff, because he had returned to a writ of venditioni exponas, that part of the goods levied remained in his hands for want of purchasers (a)¹.

Cockell Serjt. moved for an attachment against the sheriff of Leicestershire, for having made an insufficient return to a writ of venditioni exponas.

[360] The Plaintiff having sued out a fi. fa. the sheriff returned that he had levied to the value of the sum indorsed, but that the goods remained in his hands for want of purchasers; upon which a venditioni exponas having issued, the sheriff returned, that he had sold a moiety of the goods levied, and that the remainder continued in his hands for want of purchasers (a)².

Cockell urged, that as no other writ could be sent to the sheriff while this venditioni exponas was in force, the goods under this return might remain in his hands for ever.

But the Court was of opinion, that the motion could not be supported, and that if the Plaintiff was dissatisfied with the return, he might set up a purchaser of the goods himself.

Cockell took nothing by his motion.

ADAM AND WIFE, Executrix, v. KERR. Nov. 27th, 1798.

In debt on bond, if one of the attesting witnesses be dead and the other beyond the process of the Court, it is sufficient to prove the hand-writing of the witness that is dead. Qu. Whether evidence of a custom in Jamaica to execute bonds by substituting a mark with a pen for a seal, be admissible in support of a declaration on a bond sealed, &c. (a)³?

Debt on bond. The declaration was in the usual form, averring the bond to have been made and sealed by the Defendant, with a profert accordingly. Plea, non est factum.

The instrument in question was made in Jamaica, and attested by two witnesses, but being produced at the trial before Rooke J. at the Westminster sittings in term, appeared to have no seal, though a mark of a particular kind had been made with a pen, in the place where bonds are usually sealed. Evidence was admitted to shew a custom in Jamaica to execute bonds in this manner. One of the attesting witnesses having been proved to be dead, and the other to be resident in Jamaica, the hand-writing of the former only was established, and no evidence was given of the hand-writing of the obligor. Verdict for the Plaintiff, subject to the opinion of the Court.

Heywood Serjt. moved for a rule to shew cause why the verdict should not be set aside and a nonsuit be entered; and insisted, 1st, that the hand-writing either of the witness living in Jamaica, or of the obligor, should have been proved; 2dly, that the evidence of the custom in Jamaica should not have been admitted.

BULLER J. On the last ground there is no objection to the rule to shew cause being granted, but I am clear there is nothing in the first point. Where a witness is dead, the course is to prove his hand-writing. In this case one of the attesting witnesses was [361] dead, and the other was beyond the reach of the process of the

Kenyon ruled to be liable for debts contracted by her during her husband's absence from this country, though at his departure he proposed returning in a short time, but had in fact been absent some years.

(a)¹ Vide *Keightley v. Birch*, 3 Campb. 521.

(a)² Vid. *Clerk v. Withers*, 6 Mod. 293. 2 Ld. Raym. 1075, S. C., where Holt C. J. says, "If a sheriff seize goods to the value, and return it, he is bound to find buyers." Also, *Cameron et al. v. Reynolds*, Cowp. 406, where Ld. Mansfield says, that upon a writ of venditioni exponas the sheriff "must return the money into court."

(a)³ Vide *Milward v. Temple*, 1 Campb. 375. *Cunliffe v. Sefton*, 2 East, 183. *Currie v. Child*, 3 Campb. 283. *Prince v. Blackburn*, 2 East, 250.

Court; the best evidence, therefore, which could be obtained was given (a)¹. The hand-writing of the obligor need not be proved: that of the attesting witness, when proved, is evidence of everything on the face of the paper; which imports to be sealed by the party.

The Court accordingly granted a rule to shew cause on the last ground, but recommended the Defendant to accede to the terms of the Plaintiffs taking judgment without costs.

The case being called on this day, Heywood for the Defendant assented to the proposal made by the Court, and on those terms the

Rule was discharged.

PIERSON v. GOODWIN. Nov. 28th, 1789.

If a Defendant be supersedeable for want of judgment being entered up in time, but not actually discharged, he cannot be detained on an action on the judgment.

The Defendant was arrested on the 8th of September 1797 by process out of the Court of King's Bench; on the 5th of February 1798 he was charged with a declaration; on the 8th of the same month he was removed by habeas corpus to the Fleet; judgment (which went by default) was not entered up till the 26th July, in the Trinity vacation following, and the Defendant was therefore supersedeable, according to the practice of both Courts: on this ground a summons for the 31st October was taken out before Lord Kenyon, for the Plaintiff to shew cause why the Defendant should not be discharged out of the custody of the Warden of the Fleet; this order, at the particular request of the Plaintiff's attorney, stood over till the 5th November; but between the 31st October and the 5th November the Defendant was charged with a declaration at the suit of the Plaintiff in an action on the judgment. The Plaintiff's attorney not attending to shew cause on the 5th November, an order was made for a supersedeas to issue.

Le Blanc Serjt. this day shewed cause against a rule nisi for discharging the Defendant, in the action on the judgment, out of the custody of the Warden of the Fleet, on his entering a common appearance, and contended that the present application was not warranted by the rule made in Hil. 8 Geo. 2 (a)², as that only extends to [362] cases where the prisoner is actually discharged or ordered to be discharged before he is detained in an action on the judgment.

Shepherd Serjt. in support of the rule.

HEATH and ROOKE Js. (absente Buller J.) were of opinion that the actual discharge of a prisoner relates back to the time when he has a right to be discharged, viz. to the time when he is supersedeable, and that the practice of the Court was with the Defendant, and accordingly made the

Rule absolute (a)³.

MICHAELMAS TERM, 39 GEO. III. 1798.

Whereas the Right Honourable the Lord High Chancellor hath been pleased, by an order bearing date the 12th day of July last, to direct that from and after such

(a)¹ Vid. *Coghlan v. Williamson*, Doug. 93. *Holmes v. Pontin*, Peake N. P. 100. *Cooper v. Marsden*, Espin. Cas. N. P. 2. *Barnes v. Trompousky*, 7 T. R. 265, and *Wallis v. Delancy*, *ibid.* n. (c).

(a)² Ordered, that in all cases where a prisoner in the Fleet or other gaol or prison, is discharged or ordered to be discharged by supersedeas for want of prosecution, and such prisoner be afterwards arrested or detained in custody, by action of debt brought upon judgment obtained in the cause wherein such prisoner was so discharged, or ordered to be discharged, that a common appearance shall be accepted for the Defendant in such action of debt upon judgment. Cooke's Rules and Orders, C. B. Imp. Prac. C. B. 173, ed. 4.

(a)³ Vid. *Foy v. Percy*, T. 8 Geo. 3, C. B. cit. per Buller J. 1 T. R. 592, *contra* in *B. R. Hutchins v. Kenrick*, 2 Burr. 1048. *Rose v. Christfield*, 1 T. R. 591, and *The London Assurance Company v. Perkins*, cit. *ibid.*

day no writ of Dedimus Potestatem, to be executed in England, shall issue under the Great Seal, directed to any persons except the Judges, Serjeants at Law, Barristers of five years standing, or Solicitors or Attorneys of some of the Courts in Westminster-Hall, the Judges of the Court of Session and Exchequer, Advocates and Clerks to the Signet of five years standing, in Scotland: It is ordered, that from and after the last day of this Term, no Common Recovery or Fine shall be suffered to pass, unless the taking of the Warrants of Attorney for suffering any Common Recovery or Caption of any Fine be before one of the Justices or Barons of His Majesty's Courts of Record in Westminster-Hall, or one of the Serjeants at Law, unless an affidavit be made and filed, stating that the Commissioners taking the same are, to the best of the Defendant's information and belief, either Barristers of five years standing, or Solicitors or Attornies of some of the Courts in Westminster-Hall, the Judges of the Court of Session and Exchequer, or Advocates and Clerks to the Signet of five years standing, in Scotland.

F. BULLER.
J. HEATH.
G. ROOKE.

Lord Chief Justice Eyre was absent during the whole of this Term, from indisposition.

The end of Michaelmas Term.

[363] CASES ARGUED AND DETERMINED IN THE COURT OF COMMON PLEAS, IN HILARY TERM, IN THE THIRTY-NINTH YEAR OF THE REIGN OF GEORGE III.

JONES v. CHUNE, ONE, &C. Jan. 25th, 1799.

If notice of a writ of inquiry to be executed at a particular hour and place, be continued, the notice of continuance need not express any hour or place.

This was a motion to set aside the writ of inquiry executed in this case for irregularity.

Judgment having been signed for want of a plea, notice was given that a writ of inquiry would be executed at the Secondaries' office in Lothbury, between the hours of eleven and one on a particular day. This notice was afterwards continued to a subsequent day, but in the notice of continuance no mention was made of the hour or place at which the writ of inquiry would be executed. The Defendant did not attend; and a verdict was found for 11. 17s.

Shepherd Serjt. in shewing cause contended, that the notice of continuance was regular, as it necessarily referred to the time and place mentioned in the original notice, and added, that it was notorious that writs of inquiry always were executed between the hours of eleven and one, unless the convenience of both parties particularly required that it should be otherwise. He also relied on the circumstance of this being a small debt due to a tradesman, and that the Defendant having been summoned to the Court of [364] Requests pleaded his privilege as an attorney, and forced the party to this more expensive proceeding.

Williams Serjt. *contra* contended, that notices of this kind were construed strictly, and that a notice of a writ of inquiry to be executed between eleven and two had been held bad (a). He urged also that as writs of inquiry are occasionally executed between four and six this notice of continuance was not sufficiently certain.

Sed per EYRE Ch. J. (after a reference to the officers, who said that the point had never been ruled, but that all the printed forms of continuances as well as of original notices express both the hour and place)—A more ungracious application never came before the Court. The justice of this verdict is not impeached, and the only question to be considered arises on the simple ground of a supposed irregularity in not men-

(a) *Robinson v. Philips*, Prac. Reg. 445, Barnes, 296, S. C. Vide etiam *Foster v. Smales*, Barnes, 295. *Hannaford v. Holman*, *ibid.* *Last v. Denny*, Barnes, 302, Prac. Reg. 446, S. C. *Le Mark v. Newman*, Com. 551. Barnes, 299, S. C. Prac. Reg. 447, S. C. *Squire v. Almond*, Barnes, 297. *Arnold v. Squire*, Sayer, 181. *Isom v. Fowen*, 2 Strā. 1142.

tioning the hour and place in the notice of continuance. Ungracious as it is, if this supposed irregularity is established on authority or on principle the Defendant must succeed. I am not satisfied however that it is supported by either. Though the printed forms do express the hour and place in the notice of continuance as well as in the original notice, yet the question is how far they are necessary, and what would be the effect of omitting them? Does the omission enable the Plaintiff to chuse his own time and place? If so, the objection would be well founded. I think that if an original notice be given specifying the hour and place as well as the day, and that notice be afterwards continued with an alteration of the day only, the latter will refer to the former and incorporate the hour and place: and that it would be an irregularity in the Plaintiff to execute his writ of inquiry at any other hour or place than those mentioned in the original notice.

ROOKE J. I am of the same opinion. Had this application been made on the ground of the writ of inquiry having been executed at a different time and place from those mentioned in the original notice I should have thought it well founded.

Rule discharged with costs.

[365] STEVENTON, ONE &C. v. WATSON AND OTHERS. Jan. 26th, 1799.

[Overruled, *Sheriff v. Gresley*, 1835, 5 N. & M. 493.]

This Court will not stay proceedings in an action on an attorney's bill, brought subsequent to the order of the Judge of another court for its taxation, but previous to that taxation having taken place.

The Plaintiff, who was an attorney, having delivered a bill of costs to the Defendants, the latter obtained Lord Kenyon's order for referring it to be taxed: before any taxation had taken place the Plaintiff commenced an action upon the bill in this court. Le Blanc Serjt. now moved for a rule nisi to stay proceedings in this action, and that the Plaintiff should pay the costs incurred subsequent to Lord Kenyon's order.

Sed per Curiam. If the order for taxation had been made in this Court an attachment might have been granted; but where an order is made by one of the Judges of the Court of King's Bench, and pending that order the party sues in another court, it is for the Court of King's Bench to enforce the order. We cannot prevent a party from pursuing a remedy to which he is entitled by law unless in so doing he incurs a contempt of this Court.

Le Blanc took nothing by his motion.

JENKINS v. LAW. Jan. 29th, 1799.

An affidavit to hold to bail stating the Defendant to be indebted "for damages awarded and for costs and expences taxed and allowed," is sufficiently certain; for it will be inferred that the award and taxation are such as will support the action (a).

Shepherd Serjt. obtained a rule to shew cause why the Defendant should not be discharged out of custody on entering a common appearance, on the ground of a defect in the affidavit to hold to bail, which stated, that the Defendant was indebted to the Plaintiff in a certain sum "for damages awarded, and for costs and expences taxed and allowed," contending, that it did not appear that the award or taxation were made by competent authority.

Cockell Serjt. this day in shewing cause, urged that if the original affidavit should be deemed defective, still the Court would allow the Defendant to file a supplemental affidavit.

EYRE Ch. J. I am not satisfied that the original affidavit does not sufficiently allege a cause of action. If a Plaintiff swear that a Defendant is indebted to him, "for goods sold and delivered" it is enough, and he need not set out so much of the

(a) Vide *Brook v. Trist*, 10 East, 358. *Armstrong v. Stratton*, 7 Taunt. 405.

transaction as will shew that it amounted to a legal sale, for he takes upon himself to say, that such a sale and delivery took place as constitute a cause of action. In the present case I think the word "awarded" is to be construed in its legal sense, and that the Plaintiff takes upon [366] himself to say, that an award and taxation have been made upon which a right of action may accrue. If indeed the Court were not satisfied with the original affidavit, this would be precisely the case in which a supplemental affidavit should be allowed, because it would not in any degree vary the original affidavit, but only explain an ambiguity.

Per Curiam. Rule discharged.

DOBSON v. SIR WM. HERNE KNIGHT AND ANOTHER Sheriff of Middlesex.
Jan. 29th, 1799.

The omission of "and thereupon the said I. S. complains" in the beginning of a declaration of trespass on the case is no cause of special demurrer.

Action on the case by the landlord of certain premises against the sheriff for removing the goods of his tenant under a fi. fa. without having previously paid to the Plaintiff three quarters of a year's rent then in arrear, according to the provisions of 8 Ann. c. 14, s. 1. The declaration began thus: "Sir W. H. Knight and R. W. Esq. were attached to answer unto John Dobson in a plea of trespass on the case for that whereas the said J. D. heretofore to wit on &c. at &c. did demise and let to one J. P. Gashiot a certain messuage" &c. stating entry and possession by him "and the said J. D. further saith that afterwards and during the continuance of the said demise" &c. proceeding to the end in the usual form.

To this there was a special demurrer, assigning for cause "that it does not appear in or by the said declaration that the said John complains by attorney (a) or otherwise against the said Sir W. H. and R. W. of or for the premises therein mentioned: and also for that the said declaration is merely by way of recital, and does not contain any positive allegation that the said Sir W. H. and R. W. committed the said several supposed grievances therein mentioned: and also for that the said declaration is in other respects uncertain, insufficient, and informal."

Joinder in demurrer.

Shepherd Serjt. in support of the demurrer. The whole of this record is a mere recital of a writ having been sued out without any averment that the Plaintiff complains of or alleges any thing against the Defendant. The declaration should have been in this [367] form. "The Defendant was attached to answer the Plaintiff in a plea of trespass on the case, and thereupon the Plaintiff complains, &c." I do not mean to contend that it is necessary to state that the Plaintiff complains by attorney, though that is one of the objections stated in the special demurrer. Before the rule of Court 1654, s. 16, the writ was recited at length in all declarations as is now done in declarations in trespass only; and thereupon the Plaintiff made his allegations. By that rule the Plaintiff is allowed in all cases except trespass to state the writ shortly: but when he has so done he must make his complaint and allegations in the same manner as was necessary before the rule referred to. When pleadings were ore tenus the writ being returned and the parties having appeared, the Counter read the writ to the Court, and then mentioned the time, place, and circumstances contained in it, &c. and the particular damage accrued. Gilb. C. P. 47, Ed. 2. The present case stands as if the writ had been read but no count had followed.

Marshall Serjt. *contrà* was stopped by the Court.

EYRE Ch. J. The Defendant's objection seems to be that there is no declaration: but I do not perceive that cause among the special causes of demurrer; the complaint is that the declaration fails in certain particulars, but the existence of a declaration is admitted. The first objection, viz. that the complaint is not made by attorney has been abandoned. The second objection is, that the declaration is merely by way of recital, and does not contain any allegation of the Defendant having committed the offences there mentioned. As to this I am of opinion that the allegation is positive enough. The Defendant's objections are not sufficient to entitle him to judgment;

(a) The omission of the attorney's christian name was held to be error in *Hewson's case*, 1 Roll. 336.

but as the declaration is drawn in a slovenly manner, and ought not to stand on the records of the Court, I think that the Plaintiff should have leave to amend without costs.

ROOKE J. Of the same opinion.

Leave given to amend without costs.

[368] DE GAILLON v. VICTOIRE HAREL L'AIGLE. Feb. 5th, 1799.

[See S. C. 1 Bos. & P. 8, 357. Referred to, *Paice v. Walker*, 1870, L. R. 5 Ex. 178.]

At the execution of a writ of inquiry after judgment on demurrer it is not competent to the Defendant to controvert any thing but the amount of the sum in demand.

Judgment having been given against the Defendant in this case on demurrer (*a*), the Plaintiff at the execution of a writ of inquiry proved that the Defendant had acknowledged the debt to a certain amount; the Defendant on the other hand adduced evidence to shew that she had only acted as agent for her husband. The under-sheriff directed the jury, that if they should be of opinion that the Defendant really acted in the transaction as agent for her husband, they ought to find a verdict for the Plaintiff with only 1s. damages. This they accordingly did.

Marshall Serjt. having obtained a rule to shew cause why the execution of this writ of inquiry should not be set aside on the ground of improper evidence having been admitted on the part of the Defendant,

Shepherd Serjt. shewed cause and contended that although the Defendant by demurring had admitted something to be due, yet that it was competent to her to shew that the particular debt proved by the Plaintiff was contracted by her as agent only and was not the debt admitted by the demurrer.

But the Court were clearly of opinion that this evidence ought not to have been admitted; that the only question to be decided by the jury was the amount of the debt; and that the question whether the debt were contracted by the Defendant as agent for her husband, or in her separate capacity, must be taken to be determined by the record.

EYRE Ch. J. added: I am not aware that I have ever concurred in any decision in which it has been held that if a person describing himself as agent for another residing abroad, enter into a contract here, he is not personally liable on the contract.

Per Curiam. Rule absolute (*b*).

[369] PELL v. BROWN. Feb. 8th, 1799.

Where judgment has gone by default on a promissory note, no irregularity previous to the judgment can be shewn as cause against referring the note to the prothonotary.

A rule nisi having been obtained by Sellon Serjt. for referring a promissory note, on which judgment had gone by default, to the prothonotary to compute principal, interest and costs, Heywood Serjt. shewed for cause against it that the process was not served till two days after it was returnable.

But the Court were of opinion that while the judgment remained in force no cause could be shewn against this rule founded on any irregularity previous to the judgment; and that if the judgment had been irregularly obtained the Defendant might move to set it aside.

Rule absolute.

(*a*) Vid. ante, 357.

(*b*) Vid. *Bevis v. Lindsell*, 2 Str. 1149. *Thellusson v. Fletcher*, Doug. 315, Ed. 3. *Green v. Hearne*, 3 T. R. 301, and *Shepherd v. Charter*, 4 T. R. 275.

DOE EX DIM. JOHN BAILEY v. ROE. Feb. 9th, 1799.

Service of a declaration in ejectment on one of two tenants in possession, is good service on both.

Kerby Serjt. moved for judgment against the casual ejector, saying that as the affidavit of service of declaration was not in the usual form he would state the substance of it. The deponent went to the house of Thomas Bailey and Wm. Kirk the tenants in possession, and seeing two women in the house tendered and explained to them a declaration which they refused to accept and which he fastened on the premises; in returning he met Wm. Kirk, to whom he tendered and explained another copy which he likewise refused to accept, and which the deponent fastened on another part of the premises.

EYRE Ch. J. I do not know that we have ever construed the rule of Court so strictly as to hold that service on one of two tenants in possession may not be considered as a good service. In this case it is expressly sworn that a declaration was tendered to Kirk who refused to receive it.

Rule granted.

MENHAM, Assignee &c. of a Bankrupt, v. EDMONSON. Feb. 9th, 1799.

It is no objection to a commission of bankruptcy that it was sued out with intent to defeat a previous execution, if no collusion appear on the part of the bankrupt. If a creditor accompany the sheriff's officer in levying an execution which is afterwards avoided by a commission of bankruptcy, trover may be maintained against him by the assignees though he has never received either the goods or their value from the sheriff.

Trover for goods taken in execution at the suit of the Defendant. The cause was tried before Rooke J. at the Guildhall sittings in this term, when it appeared that the act of bankruptcy [370] was committed in December 1796; that in June following a commission was sued out, under which four or five creditors proved their debts: and that the debt of the petitioning creditor arose on two notes drawn by the bankrupt in his favour for a good consideration: that on the 30th March in the same years the goods in question were taken in execution at the suit of the Defendant who accompanied the sheriff's officer to see the writ executed.

At the trial it was objected by the counsel for the Defendant, that the action of trover was improperly brought; as it would only lie against the sheriff in whose hands the money levied by the execution remained. But this was over-ruled. It was then urged that the commission was fraudulently taken out for the purpose of avoiding the execution. The learned Judge left the question of fraud to the jury, having first observed that he thought the evidence preponderated in favour of the Plaintiff; that the act of bankruptcy took place three months before the execution was thought of; but that the commission was taken out in consequence of the execution, and that under all the circumstances the jury might perhaps be warranted in finding the bankruptcy fraudulent. Verdict for the Defendant.

Clayton Serjt. having on a former day obtained a rule to shew cause why this verdict should not be set aside and a new trial be had, on the ground of its being contrary to evidence, and in a great measure to the direction of the Judge,

Cockell Serjt. was now to have shewn cause.

Sed per EYRE C. J. I do not see sufficient ground for saying that the bankruptcy was fraudulent. There appears to be nothing beyond mere suspicion. It is indeed highly probable that the commission of bankruptcy was sued out in order to defeat the bill of sale made under the execution. This has I doubt not been frequently done, nor is there any injustice in it; one creditor endeavours to gain an advantage over the other creditors by taking his whole debt in execution; they on the other hand when they see all the effects likely to be swept away endeavour to set aside that execution by a commission, in order to obtain an equal distribution (a). It is also true

(a) See the opinion of Ld. Eldon C. decreeing differently, observing that it may be done with the privity of the bankrupt. 7 Vez. Jun. 303.

that this may be done by the contrivance of the bankrupt, and the whole may be a collusion, in which case the Court will interfere. But where the parties before the Court are both creditors standing in an equal degree of right and equally entitled to favour, unless there be [371] some circumstance of collusion on which we can place our finger, the bankruptcy must take effect. The question is not whether this commission has been taken out to avoid the execution, but whether it has been so taken out with the collusion of the bankrupt himself?

Cockell then desired to take the opinion of the Court on the point which had been mooted at the trial, viz. Whether trover could be maintained against the Defendant, or whether it should not have been brought against the sheriff, in the hands of whose broker the money remained? He cited *Rush v. Baker*, Bull. N. P. 41.

EYRE Ch. J. I had some doubts at first as to this point, and whether the execution having been regularly made under the authority of the law, and the goods regularly sold, the action should not have been brought for the money. There is a fact however in the case which decides the point, namely, that the Defendant was in company with the sheriff's officer at the time of the execution. By the case cited it appears, that trover may be maintained against the party himself if he give a bond to the sheriff, because giving a bond is equal to intermeddling; actual intermeddling therefore must be equal to giving a bond (a).

Per Curiam. Rule absolute.

WHALLEY v. TOMPSON AND ANOTHER. Feb. 9th, 1799.

[Referred to, *Baring v. Abingdon*, [1892] 2 Ch. 389.]

One being seised in fee of the adjoining closes A. and B. over the former of which a way had immemorially been used to the latter, devises to B. with the "appurtenances"; held that the devisee cannot under the word "appurtenances" claim a right of way over A. to B., as no new right of way is thereby created, and the old one was extinguished by the unity of seisin in the devisor.

Trespass for breaking and entering the Plaintiff's close.

Pleas 1st, Not guilty. 2d, That long before the said times when &c. and long before the said Plaintiff had any thing in the said close in which &c. (to wit) on the 20th day of March in the year of our Lord 1753 one Thomas Adderley Esq. was at one and the same time seised as well of two closes situated in the parish of Weddington aforesaid formerly called the Wood Close and Ox Close and lately divided into four pieces and now known by the name of Little Leyfield and Ox Meadow as of and in the said close in which &c. in his demesne as of fee and that the said Thomas Adderley and all those whose estate he then had in the said close [372] formerly called the Wood Close and Ox Close and now called Little Leyfield and Ox Meadow from time whereof the memory of man is not to the contrary had used and enjoyed and was used and accustomed to have use and enjoy and the said Thomas Adderley had used and enjoyed by his farmers and tenants a certain way from the King's highway in the parish of Weddington aforesaid leading from Nuneaton in the county aforesaid to Atherston in the said county unto into through over and along the said close in which &c. to the said closes formerly called the Wood Close and Ox Close and now called Little Leyfield and Ox Meadow and from thence back again by the same way to the said common highway for himself and themselves and his and their tenants and his and their servants to pass and repass on foot and with their cattle carts and other carriages at all times as occasion required as an easement and appurtenance belonging to the said closes formerly called the Wood Close and Ox Close and now called Little Leyfield and Ox Meadow. And the said Thomas Adderley being so seised as well of the said close in which &c. as of the said closes formerly called the Wood Close and Ox Close and now called Little Leyfield and Ox Meadow and so having using and enjoying the said way as an easement and appurtenance belonging to the said closes

(a) In the report of *Rush v. Baker*, in 2 Stra. 996, it is said "that the action was well brought against the Defendant, who received the money without joining the officer" though no mention is there made of any bond being given to indemnify the sheriff.

formerly called the Wood Close and Ox Close and now called Little Leyfield and Ox Meadow afterwards (to wit) on the same day and year last aforesaid at Weddington aforesaid in the county aforesaid did duly make and publish a certain codicil to his last will and testament the said codicil being in writing and duly executed to pass real estates and did thereby (amongst other things) give and devise the said closes formerly called the Wood Close and Ox Close and now called Little Leyfield and Ox Meadow with their and every of their appurtenances to the use of his sister Elizabeth Liptrott for and during the term of her natural life remainder to Amicia Bracebridge the then second and youngest daughter of Philip Bracebridge Clerk and the heirs of her body, remainder to the right heirs of the said Philip. And the said Thomas Adderley afterwards and before the said times when &c. (to wit) on the 15th day of February in the year of our Lord 1757 at Weddington aforesaid died, not having revoked or altered his said codicil and so seised as aforesaid as well of and in the said closes formerly called the Wood Close and Ox Close and now called Little Leyfield and Ox Meadow with the rights members and appurtenances thereunto belonging as of and in the said close in [373] which &c. upon whose death the said Elizabeth Liptrott by virtue of the said devise afterwards and before the same times when &c. (to wit) on the same day and year last aforesaid entered into the said closes formerly called the Wood Close and Ox Close and now called Little Leyfield and Ox Meadow together with all the rights members and appurtenances thereunto belonging so devised to her as aforesaid and was thereof seised for and during the term of her natural life and had used and enjoyed by her farmers and tenants the said way as an easement and appurtenance belonging to the said closes formerly called the Wood Close and Ox Close and now called Little Leyfield and Ox Meadow (to wit) at Weddington aforesaid in the county aforesaid and the said Elizabeth Liptrott being so thereof possessed and so using and enjoying the said way afterwards (to wit) on the second day of March in the year of our Lord 1765 at Weddington aforesaid died, whereupon the said Amicia Bracebridge afterwards and before the said times when &c. (to wit) on the same day and year last aforesaid entered into the said closes formerly called the Wood Close and Ox Close and now called Little Leyfield and Ox Meadow together with all the rights members and appurtenances thereunto belonging so devised to her as aforesaid and became seised thereof to her and the heirs of her body and had used and enjoyed by her farmers and tenants the said way as an easement and appurtenance belonging to the said closes formerly called the Wood Close and Ox Close and now called Little Leyfield and Ox Meadow (to wit) at Weddington aforesaid in the county aforesaid. And the said Amicia being so seised as aforesaid and so using and enjoying the said way afterwards (to wit) on the 19th day of September in the year of our Lord 1769 at Weddington aforesaid in the county aforesaid intermarried with one George Hemming Esquire whereby the said George and Amicia in right of the said Amicia became and were and still are seised of and in the said closes formerly called the Wood Close and Ox Close and now called Little Leyfield and Ox Meadow with all the rights members and appurtenances thereunto belonging to the said George and Amicia and the heirs of the body of the said Amicia, and had used and enjoyed by their farmers and tenants the said way as an easement and appurtenance belonging to the same. And being so thereof seised and so using and enjoying the said way as last aforesaid the said George afterwards and before the said times when &c. (to wit) on the first day of January in the year of our Lord [374] 1796 demised the said closes formerly called the Wood Close and Ox Close and now called Little Leyfield and Ox Meadow with all the rights members and appurtenances thereunto belonging to one Thomas Tompson the elder, who thereupon entered into and became and still is possessed of the said closes formerly called the Wood Close and Ox Close and now called Little Leyfield and Ox Meadow together with all rights members and appurtenances thereunto belonging and held used and enjoyed the same way as aforesaid and being so possessed thereof the said Defendants as servants of the said Thomas Tompson the elder and by his command at the said several times when &c. passed and repassed on foot and with horses mares geldings carts and other carriages from the said King's common highway in the said parish of Weddington unto into through over and along the said close in which &c. to the said closes formerly called the Wood Close and Ox Close and now called Little Leyfield and Ox Meadow and from thence back again by the same way to the said common highway as occasion required using the said way as an easement and

appurtenance to the said closes formerly called the Wood Close and Ox Close and now called Little Leyfield and Ox Meadow as it was lawful for them to do for the cause aforesaid. And this &c. wherefore &c.

General demurrer and joinder.

Le Blanc Sjt. was this day to have argued in support of the demurrer on these grounds, viz. that T. Adderley could not prescribe for a right of way over his own soil; that he could not have the way as an easement or appurtenance belonging to one close while he was seised in fee of both, since whatever right of way might have existed while the closes were separate property was extinguished by the unity of seisin (*a*); that being extinguished therefore it did not exist as a right of way, easement, appurtenance or [375] any species of property corporeal or incorporeal, which could pass by the will of T. Adderley under the word "appurtenances" supposing that word to be sufficient to carry it; that not being stated as a way of necessity it could not be raised by operation of law: and not being given by express words the devisee could not take it as a new grant.

Williams Serjt. *contra* (being called upon by the Court, who inclined against the plea in bar, to state the grounds on which he meant to defend it). The Court will not on a general demurrer, take notice that this right of way in T. Adderley is informally pleaded viz. by way of prescription. The averment in substance amounts to this; that T. Adderley for a long time previous to the devise used a way over the locus in quo, to the close devised, as an easement and appurtenance to the latter. By the devise therefore of "Leyfield and Ox Meadow with their and every of their appurtenances" the way in question may well pass; the word "appurtenances" being clearly sufficient to carry a right of way. Plowd. 170. Suppose a man being possessed of two closes with a causeway leading over one into the other, alienate the latter; after which the alienee use and enjoy the causeway for forty years; would he not have obtained a good right of way? Such a user would be sufficient evidence to support an action on the cause by the alienee, for any interruption of that right. Now in this case the devisor died in 1757; the devisee for life entered and enjoyed the way till his death, upon which the remainder-man entered and has enjoyed it from that time to this. Then is it consistent to say, that the Defendant might maintain an action for the interruption of this way, and yet that he cannot use it without being subject to an action?

EYRE Ch. J. There can be no doubt that the word "appurtenances" may convey an existing right of way. But from the moment that the possession of two closes is united in one person, all subordinate rights and easements are extinguished. The only point therefore that could possibly be made in this case is, that the ancient right which existed while the possession was distinct was merely suspended, and may revive again. If it be stated, that a man and his ancestors have been in possession of two adjoining closes, and a prescription be then set up for a way over one to the other, that prescription will be *felo de se*.—If indeed the fields were let to different tenants, and from time immemorial a causeway had [376] been built over one field to the other, by which the tenants had passed and repassed, this in user and in fact would be a road, but there would be no right to a road in point of law, for no right could exist in the owner independent of the fee-simple. If an alienation of one of the closes

(*a*) See this position supported by several cases collected in Vin. Abr. Extinguishment, (A. & C.). But it appears that there is a distinction between rights which are of necessity and those which are merely by way of easement; the former are not destroyed by unity of seisin; as a way to church or market, 1 Rol. Abr. Extinguishment, 936, l. 1, *Sury v. Pigot*, Poph. 172, per Doddridge J. 3 Bulst. 340, S. C. Noy 84, S. C. or a gutter carried through an adjoining tenement, 11 H. 7, 25, or a water-course running over the adjoining lands, *Sury v. Pigot*, Poph. 166. Latch, 153, S. C. 3 Bulst. 340, S. C. though that is also said to be because it hath it's being not by prescription but *ex jure naturæ*, per Whitlock J. S. C. So things not issuing out of lands as parts of the profits, but due in another respect, though taken within the lands, are not extinguished by unity of possession, Dav. 5, 6, as warren, 35 H. 6, 55, 56. Dyer, 327, franchises, waife, stray, wreck, leet, &c. Nor things which are part of the profits of the land and payable by such person only who has the land, if they commence upon any personal respect, and not in respect of the land, and so that the person only is charged, and not the land, as annuities, tithes, proxies &c. Dav. 5, 6.

was to take place, and the alienee were afterwards allowed to use the causeway, a right might possibly grow out of such user to him; but that is not the case on this record, and unless the claim of these Defendants can be put in some legal form it will not avail them. Circumstances thrown into the record, which might possibly be sufficient to support an action on the case, will not necessarily be an answer to an action of trespass. I admitted, during the argument, that the word "appurtenances" would carry any easement or legal right. Upon that it was observed, that if the road in question had been described in the devise it would have passed: and that observation was followed up by a question, Whether the word "appurtenances" would not carry any easement or right that would pass by a particular description? To which I answer, that it's operation must be confined to an old existing right, and that if the right of way had passed in this instance it must have passed as a new easement (a). Had the devise been "with the way now used" it would certainly have been a devise of the close A. with an easement newly created. The word "appurtenances" in this will had nothing to operate upon.

Per Curiam. Judgment for the Plaintiff.

EX PARTE GRACE. Feb. 9th, 1799.

[Distinguished, *In re Biss*, [1903] 2 Ch. 40.]

If a person jointly interested with an infant in a lease, obtain a renewal to himself only, and the lease prove beneficial, he shall be held to have acted as trustee, and the infant may claim his share of the benefit; but if it do not prove beneficial he must take it upon himself.

One Harrison being possessed of a beneficial lease under the trustees of a charity, died leaving his widow administratrix of his effects. By his death Mrs. Harrison became entitled to the lease jointly with E. T. Harrison, her son by the deceased, and then an infant. Soon afterwards Mrs. Harrison married W. Grace, who as her husband having taken possession of the above-mentioned lease and title deeds, on the approaching expiration of the lease (and [377] during the infancy of E. T. Harrison) treated with the trustees for a renewal of it to himself only, and in his own name; this he accordingly obtained. W. Grace having afterwards become a bankrupt, his assignees took possession of the lease and were proceeding to sell it for the benefit of the estate, when E. T. Harrison having attained the age of twenty-one, claimed his proportion of the money arising from the sale of the lease. This matter having been referred to arbitration, an award was made in favour of E. T. Harrison.

Shepherd Serjt. on a former day obtained a rule to shew cause why this award should not be set aside, and now contended, that no trust resulted to E. T. Harrison by operation of law, but that the lease which W. Grace had obtained must be considered as his sole property, since there was no covenant for renewal in the original lease. He urged that W. Grace by stipulation with the trustees had been obliged to lay out money on the estate without being able to ascertain whether E. T. Harrison would assent to it, and that the principle of this award would enable an infant in such a case to claim a benefit if the lease proved to be beneficial, and if otherwise to refuse his concurrence and throw the whole burden on the trustee.

Sed per EYRE Ch. J. These arguments might have weight if it were now to be decided for the first time whether a person renewing a lease in which he is partly interested, and in which another person (that person being an infant) is also partly interested, shall or shall not be considered a trustee. The point has been decided at least forty times. Grace took the lease at his own peril; if it had not turned out beneficial he must have sustained the loss, but as it is a beneficial lease it must be for the benefit of the trust. This is the peculiar privilege of the unprotected situation of an infant. In the present case it has clearly proved a beneficial lease, or this application would not have been made to the Court. As to any sums which may have

(a) A way to a mill having been extinguished by unity of possession in J. S., he died; whereupon partition was made between his daughters; the mill and way were assigned to one and the land to the other: held that the way was revived: tamen videtur that it is a new way. Bro. Abr. Extinguishment, pl. 15.

been paid for the renewal of the lease, or laid out in consequence of it, E. T. Harrison must contribute his due proportion before he can claim any advantage, and as the fund is in the hands of Grace he may do himself justice. The point is perfectly familiar; the trust arises by implication of law, and is not within the statute of Frauds. If Grace thinks himself aggrieved he may apply to a court of equity, which is more competent to discuss this question; but to me it appears that the award is both equitable and just, and not to be controverted.

[378] Shepherd then added, that the assignees only wished to take the opinion of the Court, and would be perfectly satisfied.

Per Curiam. Rule discharged.

Le Blanc Serjt. in support of the award.

KITCHEN v. BLANCHARD. Feb. 11th, 1799.

A Defendant cannot demand a bill of particulars till after appearance.

Marshall Serjt. this day supported a rule for setting aside an interlocutory judgment, by shewing the following supposed irregularity, viz. The Defendant before appearance demanded a bill of particulars under a Judge's order; previous to the expiration of which order the Plaintiff signed judgment for want of a plea. He contended, that a Defendant need not appear till he has actually obtained the particular; since the particular when obtained may afford a reason for not proceeding in the action, if the demand appear to be just.

The Court being of opinion that the Defendant has no right to demand a bill of particulars till he has appeared,

Discharged the rule.

PAGE v. SIR JOHN EAMER KNIGHT, AND ANOTHER. Feb. 11th, 1799.

The action on the case against the sheriff for taking insufficient pledges in replevin ought to be brought by the person making cognizance where there is no avowant on the record (a).

This was an action on the case by the Plaintiff, who had made cognizance as bailiff of one Alexander Blair, Esq. in an action of replevin, against the Defendants as sheriff of Middlesex, for having taken insufficient pledges.

Plea. General issue.

This cause was tried before Buller J. at the Westminster sittings after last Trinity Term, when it was objected that the action would not lie in the name of the person making cognizance, but ought to have been brought in the name of the landlord. The learned Judge however observing, that the objection was on the record, and might be the subject of a motion in arrest of judgment: the cause proceeded, and a verdict was found for the Plaintiff. Damages £120.

Accordingly a rule nisi for arresting the judgment having been obtained in last term,

[379] Shepherd Serjt. now shewed cause. The only question in this case is, whether the person making cognizance be competent to maintain this action? Now as it is in the election of the Plaintiff in replevin to declare against the bailiff only, or to join the landlord with him, if the bailiff be not competent to maintain this action, the Plaintiff in replevin will always have it in his power to exempt the sheriff from being responsible for taking insufficient pledges. At common law the sheriff was bound to take pledges for prosecuting the replevin: by the stat. of Westm. 2, c. 2, he is directed not only to take pledges for the prosecution but for the return of the distress, if it shall be awarded. On the construction of that statute it has been held, that an action will lie against the sheriff if he take insufficient pledges; and if an action will lie on that statute, in whose favour can it lie but in his who is entitled to a return of the distress? Now the Plaintiff in replevin having in this case declared

(a) Vide *Turnor v. Turner*, 2 B. & B. 107.

against the bailiff, he alone is entitled to the return. By the case of *Blackett v. Crissop*, 1 Id. Raym. 278, it appears, that when the sheriff takes a bond for the return of the distress he does it by virtue of stat. Westm. 2. Now the 11 Geo. 2, c. 19, s. 23, directs, that such bond may be assigned to the avowant or the person making cognizance, meaning thereby to give the party entitled to the return of the distress, an action on the bond against the sureties in his own name, instead of his action in the name of the sheriff. If then these sureties had been sufficient there is no doubt but that the person making cognizance would have had a right of action on the bond against the sureties. Now on the construction of stat. Westm. 2, the sheriff stands in the place of the insufficient sureties, and is responsible for their default. On principle therefore the person making cognizance is not only entitled to bring this action, but is the only person who can maintain it. The sheriff is responsible for the insufficiency of the pledges; the pledges bind themselves for the return of the distress; and the person to whom they are to answer, is he who alone can demand the return, viz. the party making cognizance, who alone is entitled to sue the writ de retorno habendo. Moreover the sureties for the prosecution are answerable not only for the return of the cattle but also for the costs of the action of replevin; and the only person entitled to those costs is the Defendant in replevin. [The Court observed, that at common law the pledges were only bound to answer for the amercement pro falso clamore: but that as the [380] security is now taken by bond, the Court will not relieve against the penalty without obliging the surety to pay costs.] The judgment in replevin is singularly constituted: it is a double judgment, that the Defendant have a return, and that he recover the arrears of rent, though the proceeding be under the stat. 17 Car. 2, c. 7: and the reason for retaining the old form in addition to judgment for the recovery of the money, is stated in *Cooper v. Sherbrooke*, 2 Wils. 117, and *Baker v. Lade*, Carth. 254.

Cockell Serjt. in support of the rule. The objection to the Plaintiff's recovery is, that he has no interest in the suit. Now it is essential in an action on the case that the party complaining should prove himself to be really damnified. The landlord alone is entitled to the distress, and the bailiff is merely his instrument for the recovery of it. If a return be made, it is to the landlord's advantage; he therefore alone is substantially interested in obtaining it. No argument in the Plaintiff's favour can be drawn from that part of the 11 Geo. 2, which directs that the bond may be assigned to the party making cognizance; since it by no means follows from the express provisions of that statute that he would be entitled to any action independent of the act. The case stands on the principles of the common law and the construction of the stat. Westminster, there being no authorities upon the subject. The action is brought against the sheriff, because the landlord is injured; then upon what principle can the bailiff be allowed to maintain it? If he recover damages he will not be entitled to retain them, but must pay them over to his principal.

EYRE Ch. J. I am very glad to find that the case is not incumbered with any authorities which might be supposed to stand in the way of plain justice and good sense. Independent of authorities, it appears to me one of the clearest cases that ever came before the Court. It is admitted that the Plaintiff in replevin may declare against the bailiff, without putting any person on the record to stand in the situation of avowant. Now by the course of the proceeding in replevin it appears clearly, that if the action be brought against the bailiff alone, and he maintain his cognizance, he will be entitled to judgment and to have the writ de retorno habendo. The law gives him a right to the possession of the goods, and if the sheriff return that the goods are eloiigned, is not the bailiff damnified in being deprived of that possession to which the law has given him a right, or shall the judgment which he has [381] obtained be altogether defeated, because there is a trust and confidence existing between him and another person? It being once established, that the action of replevin will lie against the bailiff alone, and that he may have the writ de retorno habendo, all the rest follows as a necessary consequence. It is immaterial to the sheriff who brings the action, since he can be answerable but to one person, and that must be the person on record. I am perfectly satisfied on principles of reason and good sense, independent of the last statute, that the person making cognizance is the only one entitled to bring this action, and that if the landlord himself had brought it, we should have been obliged, however unwillingly, to have given judgment against him.

ROOKE J. I am clearly of the same opinion. The bailiff was the party on record

in the action of replevin, the only person entitled to a return of the distress, and therefore the proper person to bring this action.

Rule discharged (a).

[382] HOPKINS v. SHROLE. Feb. 12th, 1799.

The Court will not stay proceedings in an action of replevin, unless upon payment of the rent in arrear, together with all costs, though the arrears were tendered before replevin with costs up to that time.

The Plaintiff who was tenant to the Defendant, not having paid his rent when it became due, was distrained upon; soon after the rent was tendered together with the costs, but being refused by the Defendant, the Plaintiff replevied and entered into the usual bonds to prosecute his suit, which he accordingly did.

(a) When this motion first came on, the following case was referred to by Mr. Just. Buller, from the paper-book in his possession.

Archer and Others, Assignees, &c. v. Dudley, and Others, E. 22 Geo. 3, B. R.—Debt by the Plaintiffs as assignees of H. C. W. Esq. late sheriff of Shropshire, secundum formam statuti, they being infants, and appearing by Sarah Baroness Archer their prochein ami, and complaining for that whereas J. D. complained to the said H. C. W. against the Plaintiffs, for taking and unjustly detaining certain goods and chattels of the said J. D. and prayed that they might be replevied and delivered to him; thereupon the said H. C. W. took from the said J. D. and the two other Defendants as responsible sureties, a bond in double the value of the goods so distrained (that value being ascertained by the oath of a credible witness) the condition of which was, that if the said J. D. should appear at the next county court to prosecute his action with effect against the Plaintiffs, and also make a return of the goods and chattels, if a return should be adjudged, and also keep indemnified the said H. C. W. and his deputy and bailiffs, touching the replevin, then the obligation to be void, or else, &c. Profert, &c.—And thereupon H. C. W. replevied the goods, &c. and J. D. at the next county court came in his own proper person and levied his plaint against the plaintiffs, and removed the record by re. fa. lo. into K. B. and complained, &c. (here followed the declaration in replevin against the Plaintiffs and T. Hunt their bailiff, imparlance prayed by them and obtained, avowry by the present Plaintiffs and cognizance by T. Hunt for rent in arrear, future day to plead prayed by J. D., his non-appearance and consequent judgment pro retorno habendo to the present Plaintiffs); and Plaintiffs averring that J. D. made no return, by which the bond became forfeited to the said H. C. W., set out the assignment by him of the bond under the statute to themselves. By means whereof, &c. and by force of the statute, &c. actio accrevit, &c.

Plea. And the said J. D., J. C., and H. W. in their own proper persons come and pray judgment of the aforesaid bill because they say that the said T. Hunt in the said bill mentioned against whom the said J. D. levied his aforesaid plaint as well as against the said Plaintiffs in manner aforesaid and who as their bailiff well acknowledged the taking of the aforesaid goods and chattels in the said condition of the said writing obligatory and bill mentioned in manner and form as in the said bill is alleged and to whom as a person making such cognizance as aforesaid the aforesaid writing obligatory was or ought [382] to have been assigned as well as to the said Plaintiffs according to the form of the aforesaid statute, at the time of the exhibiting of the bill aforesaid of the said Plaintiffs was and still is living and in full life to wit at &c. And this, &c. Wherefore inasmuch as the said Thomas is not named in the said bill they the said J. D., J. C., and H. W. pray judgment of the said bill and that the same may be quashed &c.

To this there was a general demurrer and joinder therein.

The Court were of opinion that the avowants being the parties interested, and the person making cognizance a mere man of straw, the replevin-bond might well be assigned under 11 Geo. 2, c. 19, to the avowants only, without the cognizer, and accordingly gave

Judgment of respondeas ouster (1).

(1) Vide *Phillips v. Price*, 3 M. & S. 183. *Short v. Hubbard*, 2 Bing. 349, 354.

Williams Serjt. on a former day moved to stay proceedings in the action of replevin, on payment by the Plaintiff of the rent in arrear, together with costs up to the time of the tender made. He cited *Vernon v. Wynne*, 1 H. Bl. 24, and observed, that as the Plaintiff was obliged by the replevin bond to proceed, he ought not to be called upon to pay the costs of the action.

Sed per Curiam. There is no ground on which we can allow this application (a)¹. If a tenant neglect to pay his rent when due he must suffer for it. In *Vernon v. Wynne* the motion was made on payment of the costs of the action.

Williams on hearing this moved to stay proceedings on payment of the rent in arrear and costs up to the time of the application; and accordingly a rule nisi was granted. Against this Heywood Serjt. now shewed cause, and objected that the motion was only made to defeat the Defendant in replevin of his double costs, and that the Plaintiff ought therefore to pay the costs out of pocket. He suggested that another object might be to prevent the avowant going to trial at the next assizes, since perhaps the Plaintiff would never draw up his rule.

[383] The Court however thinking the application reasonable made the rule absolute on the following terms.

On payment within a fortnight of the rent due, and costs up to the present time, including the costs of the application, all proceedings to stay, and that if the money be not paid within a fortnight, the avowant to be at liberty to proceed, and the Plaintiff to plead in bar instanter and take short notice of trial.

ROGERS v. JENKINS. Feb. 12th, 1799.

If process be served in the name of one Plaintiff, and declaration be delivered in the name of two, it is bad.

A Clausum fregit having issued against the Defendant at the suit of T. Rogers and J. Barber, a summons was made out in the sheriff's office at the suit of T. Rogers only, and served on the Defendant; to which he entered an appearance: on discovery of the mistake another summons was made out at the suit of both Plaintiffs, and served on the Defendant, but not till four days after the writ was returnable; to this no appearance was entered: a declaration was afterwards delivered in the name of both Plaintiffs, and judgment was signed for want of a plea. Le Blanc Serjt. having on a former day obtained a rule nisi for setting aside this judgment for irregularity.

Runnington Serjt. now shewed cause, and contended, 1st, That any irregularity in the service of the process was waved by appearance (a)². 2dly, That the variance was immaterial, it having been determined in *Hally v. Tipping*, C. B. 3 Wils. 61, that if a Plaintiff arrest a Defendant in his own right, he may declare against him as executor if he will waive his bail, and in *Lloyd v. Williams*, C. B. 3 Wils. 141, 2 Black. 722, S. C. that a Plaintiff who has sued out a *capias* in his own name, may declare *qui tam* (b).

(a)¹ Tender upon the land before a distress maketh the distress tortious; tender after the distress and before the impounding, maketh the detainer and not the taking wrongful; tender after the impounding maketh neither the one nor the other wrongful, for then it comes too late, because that then the case is put to the trial of the law, to be there determined. 8 Co. 147 a. *Six Carpenters' case*. 5 Co. 76 a. *Pilkington's case*, 2 Inst. 107.

(a)² Vid. *Fox v. Money*, ante, 250, and *Davis v. Owen*, ante, 344. But a defect in proceedings cannot be waved. So the writ may be general and the count as executor or assignee of the sheriff, *Hainey v. Sparing*, 10 Geo. 3, C. B. Impey's Prac. C. B. ed. 4, p. 233. *Goodwin q. t. v. Parry*, 4 Term Rep. 577, and *Hussey v. Wilson*, 5 Term Rep. 254.

(b) Vid. etiam *The Weavers' Company q. t. v. Forrest*, 2 Str. 1232. But where the process is to answer the Plaintiff in a special character, he cannot declare generally. Thus, if the process be *qui tam*, *Canning v. Davis*, 4 Burr. 2417, or in the names of assignees, *Meggs and Another, Assignees of Cochran v. Ford*, E. 25 Geo. 3. Tidd. Pr. 225, in notis, the Plaintiffs cannot declare in their own characters. It is said however in the case of *Lloyd q. t. v. Williams*, as reported 2 Bl. 722, that Yates J. in the case of *Canning v. Davis*, made this distinction, that though a Plaintiff style himself executor

[384] Sed per EYRE Ch. J. The defendant has appeared to a suit commenced against him by T. Rogers, and now he is declared against by T. Rogers and J. Barber. The question is, whether the declaration be warranted by any process? It is a very different case where a Plaintiff sues out a writ as executor, to which the Defendant appears; for in such case the Defendant is before the Court, at the suit of the person named in the writ, whether that person declare in his own right or in *auter droit*. The Defendant in this case has never been called upon to answer J. Barber, who cannot therefore require him to put in a plea.

Per Curiam. Rule absolute.

GOODTITLE EX DEM. READ v. BADTITLE. Feb. 12th, 1799.

The mere acknowledgment of the wife of the tenant in possession that she has received a declaration in ejectment will not bind the husband (c).

Le Blanc Serjt. moved for judgment against the casual ejector on an affidavit of service stating that the deponent went to the house in question, in order to serve the declaration, and was there informed by the niece of the wife of the tenant in possession, that the tenant and his wife had been from home above three weeks, and that she did not know where they were gone, or when they would return; that the deponent thereupon served a copy of the declaration on the niece, and nailed another copy to the door of the house: and that the tenant's wife afterwards acknowledged to the deponent, that the declaration had come to her hands, and that she had sent the same to her husband.

EYRE Ch. J. If a declaration be served on the wife of the tenant in possession, and she neglect to deliver it to her husband, he must answer for her default (a). But it would be going further than we have ever yet gone to admit the mere acknowledgment of the wife to bind the husband.

Le Blanc took nothing by his motion (b).

[385] GOODTITLE EX DEM. ROBERTS AND WIFE v. BADTITLE. Feb. 12th, 1799.

Service of a declaration in ejectment on a person appointed by the Court of Chancery to manage an estate for an infant, is not sufficient.

To support a similar motion to that made in the last case Le Blanc Serjt. produced an affidavit of service, by which it appeared, that the declaration was served on one John Rumbold Leeds, who informed the deponent, that there was no tenant in possession of the premises (which consisted of a large wood) but that he was appointed by the Court of Chancery to manage the same for the benefit of a minor, to whom it belonged, and that he cut and sold the underwood.

or give himself any other superfluous description in the process it will not hurt, for the demand is still the same, but that in the case before him the very nature of the demand was altered, the process importing a demand to the King and the Plaintiff, and the declaration a demand to the Plaintiff only. It was agreed by all the Court in 9 H. 5, 5, that a man may bring a writ of trespass as executor for taking goods, and declare in his own right. And Broke says that it was the better opinion of the Court in that case, that a man might have a writ in debt as administrator and count for his own debt. Bro. Administrator, 21. Nugaton and Surplusage, 11 & 18, Dette, 78. The title of executor or administrator was considered in 9 H. 5, 5, as a superfluous addition by those who thought that the writ was good, for they compared it to the addition of Carpenter, &c. If a writ be sued out as executor, and Plaintiff declare in his own name, the Court will discharge Defendant. *Douglas v. Irlam*, 8 T. R. 416, or vice versa if the writ be in Plaintiff's own name and the declaration as executor. *Turing v. Jones*, Dict. P. C. 5 T. R. 402.

(c) Vide *Doe d. Baddlam v. Roe*, 2 B. & P. 55. *Jenny d. Preston v. Cutts*, 1 N. R. 308.

(a) *Goodright & Waddington v. Throutout*, 2 Bl. 800.

(b) But service on the wife on the premises is sufficient. *Smith ex dem. Lord Stourton and others v. Hurst*, H. Bl. 644.

The Court were of opinion that this service was insufficient: and that it amounted to no more than a service on a gentleman's bailiff.

Le Blanc took nothing by his motion (a)¹.

Mr. Justice Buller and Mr. Justice Heath were absent during the whole of this term from indisposition.

In this term John Vaughan of Lincoln's-Inn, Esq. was called to the Honourable Degree of Serjeant at Law, and gave rings with this motto, "Paribus se legibus ambæ."

End of Hilary Term.

[387] CASES ARGUED AND DETERMINED IN THE COURTS OF COMMON PLEAS AND EXCHEQUER CHAMBER, IN EASTER TERM, IN THE THIRTY-NINTH YEAR OF THE REIGN OF GEORGE III.

PEETERS v. THROGMORTON. April 10th, 1799.

The Defendant may rule the Plaintiff to enter the issue, and move for judgment as in case of a nonsuit in the same term.

Issue having been joined in Trinity term last, but no notice of trial given, the Defendant in Hilary term ruled the Plaintiff to enter the issue, and then obtained a rule nisi for judgment, as in case of a nonsuit.

Runnington Serjt. shewed cause in Hilary term, and contended, that it was not competent to the Defendant to move for judgment as in case of a nonsuit in the same term, in which he had ruled the Plaintiff to enter the issue, since it would be obliging the Plaintiff to take two steps in one term. One of the Secondaries also stated the practice to be for the Defendant in such cases to wait till the next term.

Marshall Serjt. contra insisted, that as soon as the issue is actually entered, the Defendant has a right to move for judgment as in case of a nonsuit.

[388] EYRE Ch. J. This is not obliging the Plaintiff to take two steps. The question is, whether the Defendant be not entitled to avail himself of the Plaintiff's having omitted to take one step, viz. to give notice of trial, within the number of terms prescribed, as soon as he has brought himself into a situation to make the application? The motion proceeds on the ground of a neglect in the Plaintiff which has already taken place; and though the Defendant cannot move till the issue is in court, yet the delay of the Plaintiff is not purged by the Defendant's omitting to give a rule to enter the issue at an earlier period. Unless the practice be most clearly settled I never can yield to the objection.

ROOKE J. however entertaining some doubts upon the practice, the case stood over till this term; when the Court over-ruled the objection. And Rooke J. added, that he entirely agreed in the reasoning of the Lord Chief Justice, though as the practice had been supposed to be the other way, he had wished the point to be considered.

Rule absolute.

SCHIEBEL v. FAIRBAIN AND ANOTHER. April 11th, 1799.

[Discussed, *Clissold v. Cratchley*, [1910] 1 K. B. 379.]

An action on the case will not lie against a party suing out a writ, if he neglect to countermand it after payment of the debt: at least unless malice be averred. Reasonable time is a question of law (a)².

This was an action on the case. The declaration stated, that the Plaintiff being indebted to the Defendants in the sum of 223l. 9s. 2d. the Defendants sued out of this court a writ of capias ad respondendum to hold the Plaintiff to bail; that the Plaintiff afterwards paid to the Defendant the debt, and that thereupon "it became

(a)¹ But a notice to quit given by a receiver appointed under an order of Chancery, though it make no mention of the landlord, is sufficient to support an action for double rent under 4 Geo. 2, c. 28. *Wilkinson v. Colley*, 5 Burr. 2694.

(a)² Vide *Gibson v. Chalters*, 2 B. & P. 129. *Page v. Wiple*, 3 East, 314.

the duty of the said Defendants to have forthwith countermanded the arrest of the said Plaintiff upon or by virtue of the said writ, yet the said Defendants, well knowing the premises but not regarding their duty in this behalf, did not nor would forthwith or at any time afterwards countermand the arrest of the said Plaintiff upon or by virtue of the said writ, but wrongfully neglected so to do." By means whereof the Plaintiff was arrested and kept in prison for several hours, and was put to great charges in procuring his liberty, &c.

Plea. General issue.

The cause was tried before Heath J. at the Guildhall Sittings after last Michaelmas term, when the suing out the *capias*, the making the affidavit to hold to bail, and the directing the warrant to the sheriff's officers being established, it was proved that on the 8th October the [389] Plaintiff went to the house of the Defendant Fairbain and paid the debt in question: that on the next morning at 20 minutes past 10 he was arrested at his own house, and carried to that of the officer. Nothing was said, at the time when the money was paid, concerning the writ. The Defendant Fairbain lived in Grafton-Street, Soho, and there received the money, and in order to countermand the arrest he had only to send from thence to Titchfield-Street, Oxford-Street. A countermand was in fact given by letter, though it did not arrive at the sheriff's office until some time in the morning of the 9th of October, when all the officers were gone out with their warrants. A question arose at the trial, whether the countermand had been given in reasonable time. The learned Judge ruled this to be a question of law; and that if it were incumbent on the Defendants to countermand the arrest, as supposed by the pleadings, they ought to have done it in the course of the day in which they received the debt. The jury found a verdict for the Plaintiff. Damages 5*l*.

Sellon Serjt. in the course of last term obtained a rule to shew cause why a new trial should not be had, on the ground of a misdirection; but when the case was called on

EYRE Ch. J. said, there could be no doubt of the direction of the learned Judge being perfectly correct, the question of reasonable time being for his decision and not for that of the jury. He suggested however, that as the declaration averred, that the Defendants had wrongfully neglected to countermand the writ, a motion might perhaps be supported in arrest of judgment: in which case the question would arise, whether the Defendants had such a duty necessarily imposed upon them to countermand the writ instantly on the satisfaction of the debt as made them guilty of wrongful neglect, in case of the Plaintiff suffering any damage by their omission: or whether they had by law a reasonable time to perform that duty which did not appear to have been exceeded?

ROOKE J. was of the same opinion as to the direction of the learned Judge, thinking reasonable time a question of law, not of fact: for this he cited 13 Co. 3. Bract. lib. 2, fol. 51 (a), and Cro. Car. 14.

[390] Accordingly the rule for a new trial having been discharged, and a rule nisi for arresting the judgment granted,

Shepherd Serjt. now shewed cause. Upon this motion in arrest of judgment, the consideration of reasonable time is out of the question: and whatever tends to shew that the Defendant had no opportunity of countermanding the writ, is evidence to rebut the Plaintiff's allegation of wrongful neglect. Here the question is general, whether a party to whom a debt has been paid, and who does not prevent the execution of a writ, be liable to an action: if the declaration had stated, that the Defendant without sufficient reason caused the sheriff to execute the writ, it would clearly have been good: in which case, evidence that he neglected to countermand the writ, might have amounted to causing the sheriff to execute it; since there can be little difference between causing the sheriff to arrest without reason, and omitting to prevent the arrest when the reason which did exist has ceased. In actions for malicious arrests, the gist of the action is the arrest: neither making the affidavit of debt, suing out the

(a) The passage in Bracton is, rather incorrectly, cited in the margin of Coke thus; "Quàm longum debet esse tempus non definitur in jure, sed pendet ex justiciariorum discretione;" as if it applied to time in general, whereas it only relates to the length of possession necessary to confer a title, and runs thus; "Quàm longa (scilicet possessio) esse debeat non definitur à jure, sed ex justiciariorum discretione."

writ, or putting it into the hands of the sheriff will support the action, unless an arrest follow; and whether such arrest be occasioned by the actual malfeasance of the Defendant, or by his nonfeasance in omitting to do the necessary acts to prevent it, makes no difference in principle. Hobart in his report of *Waterer v. Freeman*, 267, says, "Likewise I hold that I may have an action upon the case against him that sues me against his release or after the money duly paid." Every man is bound to stop the continuation of any act set on foot by himself as soon as it becomes injurious to another.

Sellon Serjt. in support of the rule. This is an action of the first impression, and if not bad upon the general principle, cannot be supported in the way in which it is shaped. 1st, The action is founded on a supposed duty which the Plaintiff ought to have performed; that duty however must arise from a legal obligation; a mere moral obligation will not suffice. The writ having been sued out by the Defendants for a debt actually due, they were not bound to accept the satisfaction tendered; having accepted it and thereby granted an indulgence which the law could not have compelled, it cannot be contended that such indulgence shall impose a new duty upon them. The dictum in Hobart applies only to the case of a new writ sued out subsequent to satisfaction accepted. Besides it was the business of the Plaintiff to have taken [391] care that the writ was countermanded, and no person can maintain an action against another for damage sustained in consequence of his own neglect. *Virtue v. Birde*, 2 Lev. 196. 1 Vent. 310, S. C. 3 Keb. 766, S. C. *Bayly v. Merrel*, Cro. Jac. 386. 1 Roll. Rep. 275, S. C. and in *Paisley v. Freeman*, 3 Term Rep. 51, the same principle is recognized. 2dly, This action cannot be maintained in the way in which it is stated on this record. It can only be supported on the ground of malice, which must be averred in the declaration. *Goslin v. Wilcock*, C. B. 2 Wils. 302. There should also have been an averment that the writ was not countermanded in reasonable time; for supposing the writ to be sent into the country and the debt to be paid in town, it may be impossible for a Plaintiff to countermand it before execution.

EYRE Ch. J. It is agreed that this is an action of the first impression, and it strikes me at present that it cannot be supported. It is not founded on any injury wilfully committed by the Defendants, but on a mere non-feasance. The writ having been regularly sued out, a tender was made, which it is clear these Defendants might have refused to receive. However they think proper to accept it. Upon this, was it not the business of the Plaintiff to inquire whether any writ had been sued out, and offering to pay whatever costs were incurred thereby, to desire a countermand which he might take to the sheriff? The Plaintiff ought not to have trusted to a countermand of the writ by the Defendants, but to have obtained it for himself by his own diligence: it appears that the Plaintiff has been the occasion of all the inconvenience which he has suffered; for, having made it necessary in the first place, by his neglect to pay a just debt, that the writ should be sued out, he did not prevent its consequences by taking the countermand into his own hands. If the cause had proceeded, the offer to satisfy the debt could not have been pleaded as a tender. Without the ingredient of malice this action cannot be supported, and I think, in a case new as this is, and where mal-feasance and non-feasance are attempted to be confounded, the Court ought to incline against it. Had the defendants refused or wilfully neglected to countermand the writ, it might have afforded evidence on an averment of malice by which such an action might have been sustained; but without such averment the Court should be extremely cautious of subjecting a party to damages for mere non-feasance. I am more inclined to remain upon that ground which has been already [392] trodden, than to open a new field for litigation, of which it is not easy to see the extent.

BULLER J. Under some of the circumstances stated by my Lord, I think an action might be maintained, though of a different complexion from the present. If any conversation had taken place between the parties at the time when the debt was satisfied, or any thing had passed from which an undertaking to countermand might have been inferred, and the costs of the writ had been paid, that might have afforded ground for an assumpsit, and payment of the costs would have been a sufficient consideration. But this is an action for mere non-feasance; now in order to support such an action, some duty must be shewn to have attached on the Defendants. Here however the Plaintiff himself seems to have been guilty of great negligence, not having taken a discharge or receipt for his debt, which of itself would have been a sufficient answer to any arrest. The position contended for, is, that where a party in such a

case as this receives his debt, the law imposes an obligation on him to countermand the writ. But that countermand may be attended with some expence, and where is the authority to shew that a man who only receives his due is under any obligation to incur expence? The case was well put of a writ sent into the country, and an arrest after a payment in town; for the Court can make no distinction between that which is to be done at the distance of 100 yards, and that which is to be done at the distance of 100 miles. The question is, whether the receipt of the debt imposed any obligation to incur expence?

HEATH J. I am of the same opinion. This action is founded on mere non-feasance, and no case or precedent has been cited to shew that such an action was ever maintained. All the cases of arrests and holding to bail without cause are founded on malice. Had any thing passed in conversation with respect to a countermand of the writ, that might have been evidence of malice. At all events the party was not bound in this case to stop the action until the costs were tendered.

ROOKE J. I am of the same opinion. An action of this kind cannot be supported, unless malice be alleged and proved.

Rule absolute.

[393] PARKIN v. RADCLIFFE. April 12th, 1799.

Evidence that the homage have been accustomed to assess a certain sum of money as a heriot upon alienation, and that such assessment has always been made with reference to the best chattel of the tenant, will not support an avowry for a heriot in kind upon alienation.

These parties having gone to trial upon the issues joined according to the intention intimated by them when the case was before the Court on a former occasion (a)¹, the cause came on before Thompson Baron at the Spring Assizes for York, when a verdict was found for the Plaintiff.

Cockell Serjt. now moved for a new trial on two grounds, 1st, A misdirection of the Judge; 2dly, His having rejected evidence which ought to have been admitted. He stated the circumstances at the trial to have been as follow: The Defendant having given parol evidence to shew that heriots had always been taken on alienation, and that several seizures had been made, produced certain entries from the year 1667 to the year 1794; these for the most part were entries of sums assessed by the jury of the manor for heriots or fines of heriots (both terms being used in the Rolls) on alienation; one however dated the 31st May 1667 was in the following form: "Thomas Haigh one old cow for a fine of a harriott for William Jackman of Halifax upon alienation 1l." It was not disputed that heriots were due on descent: in order therefore to make these entries support a right to a heriot on alienation, and to explain the term "fine of heriot" therein used, the Defendant offered to prove, that by the custom of the manor, appraisers had always been appointed upon the death of every tenant to appraise his effects; that the jury had then inquired which was the best chattel of the deceased, and declared it to be a heriot due to the lord; after which they had proceeded to set a price upon it, in doing which they had always followed the valuation of the appraisers: and he produced the rolls of the manor relating to descent, in which was the following entry, dated 15th April 1661, among others of a similar nature: "John Marsden's death presented, and that a cow was the best of his goods at his death, and of the value 11l. que prædict' vacca deliberari debet Dño maner' pro heriot suo." This last evidence was rejected by the learned Judge, who treated all the entries as evidence of mere money payments, and said that the only question to be tried by the jury was, whether a heriot in kind were due? For that the [394] lord having claimed a specific thing, if not entitled to that must fail in his avowry (a)².

EYRE Ch. J. Had I been in the place of the learned Judge, I am not quite certain

(a)¹ Vid. ante, 282.

(a)² On a justification by the lord of the manor, under a custom, that the lord should have the best beast on the tenant's death the custom proved was, that the lord should have the best beast or good &c. and the whole Court of C. B. held the variance fatal. *Adderley v. Hart*, T. 4 Geo. 1.

that I should have rejected the evidence; but had I received it I should have found myself obliged to turn the application of it against the Defendant. The entries in question tend to shew, that no heriot in kind is due even in the case of descent, but a pecuniary payment only. Whether the jury in estimating the sum to be paid refer to the value of the best chattel, or whether they assess a sum in gross, it is equally clear that the lord receives nothing in specie. The right of the tenant to have a sum assessed in lieu of the chattel is inseparable^(b) from the right of the lord: the right of the latter therefore is not an absolute right to the chattel, but to something to be commuted for it by the jury.

Cockell took nothing by his motion.

BRANDON v. BRANDON. April 12th, 1799.

An attachment for not paying a sum of money pursuant to an award cannot issue before a personal demand has been made; even though the time and place for payment of the money awarded be specified in the award^(a).

Williams Serjt. in the course of last term shewed cause against a rule obtained by Marshall Serjt. for an attachment for not paying a sum of money pursuant to an award, and contended, that though it was awarded that the party should pay the money at a particular time and place, viz. between the hours of 10 and 12 on a certain day, at the Baptisthead Coffee-house, yet that a personal demand and tender of a release, which were necessary, not having been made, the attachment could not issue.

EYRE Ch. J. The reason for naming a particular time and place is, to supersede the necessity of a personal demand, and I know of no authority that in such a case any demand need be made.

ROOKE J. This objection would afford no answer to an action on the award, but I think it was held in the time of Mr. Justice Gould, that a personal demand must be shewn in applications to the summary jurisdiction of the Court.

[395] It having been also suggested at the bar that such a practice had prevailed, the case was ordered to stand over till the bench should be full.

On this day the case was again mentioned, when the Court declared themselves of opinion, that a personal demand was necessary to warrant the issuing of the attachment, but

EYRE Ch. J. said, that though he submitted to the practice, he continued to think that on principle a personal demand was unnecessary.

Rule discharged without costs^(a).

SIR HARRY GORING BART. v. WELLES, Clerk. April 12th, 1799.

If several persons who have purchased annuities of A. agree to give up these annuities on receiving a certain sum of money and a bond payable at a future day, they retaining their annuity securities till the bond becomes payable, the Court cannot under the 17 Geo. 3, c. 26, order any of the securities so retained to be delivered up, although they may be void. At least not unless the creditors attempt to set them up again as annuity securities on nonpayment of the stipulated sum or the bond's proving bad. Semb. That after payment of the money and delivery of the bond to the creditors, their debt is satisfied whether the bond prove good or bad.

The Defendant having granted several annuities which he was unable to pay, on the 3d of September 1798 entered into an agreement to give up to the Plaintiff and

^(b) Vid. *Gray's case*, 5 Co. 78 b. in which it was held, that where a party prescribes absolutely, and the evidence is of a prescription under a condition or limitation, if such condition or limitation be parcel of the prescription, it is a variance: secus if not parcel.

^(a) Vide *Dodington v. Hudson*, 1 Bing. 410.

^(a) Vid. 12 Mod. 257, *Anon.* C. B. where it is said by the Court, that there must be a positive affidavit of personal notice of award and demand of the money all at one time, because it brings the party into contempt. Vid. etiam *King v. Tooley*, 12 Mod. 312, K. B.

several other annuity creditors 800*l.* in cash, and a bond for 1020*l.* with interest from the 14th December 1798, payable to the Defendant on the 14th June 1799, to be divided amongst them on the 1st July in the same year. The bond was to be placed in a banker's hands as the property of the annuity creditors, they being at liberty to hold the securities for their respective annuities till the time of payment, and signing an undertaking to make void and deliver up the securities at such time of payment. Among these securities was a warrant of attorney to confess judgment given by the Defendant to the Plaintiff, for the purpose of securing an annuity of 100*l.*

A rule having been obtained in the last term, calling on the Plaintiff to shew cause why this warrant of attorney should not be delivered up to be cancelled; 1st, Because at the time when the Defendant executed it he was not aware that it was a security for an annuity; 2dly, Because the consideration for the annuity had never been paid;

Shepherd Serjt. now shewed cause, and urged that as the annuity had been put an end to by the agreement between the Defendant and his creditors, the warrant of attorney now stood as a security [396] for the money actually advanced, and consequently could not be affected by the provisions of the annuity act. He added, that a case under the same circumstances had been before the King's Bench on that day, in which the rule was discharged.

Le Blanc Serjt. in support of the rule contended, that in case a dividend should not be made among the creditors on the 1st of July according to the agreement, the warrant of attorney would remain in full force as a security for the annuity, and execution might be taken out upon it: and that being defective within the provisions of the annuity act, the Court ought not to suffer it to continue in the Plaintiff's hands.

EYRE Ch. J. It is one thing, whether the Court ought to set aside these securities, considered as securities for a subsisting annuity, and another, whether it ought to entertain this application, after the annuity has been abandoned and a new agreement entered into for the repayment to the grantee of the principal sum. In the former case the objections now made might have prevailed: but in my apprehension, this motion has been made in breach of good faith, and in contravention of that new agreement between the parties, to insure the performance of which the annuity securities were to remain in the hands of the grantees. It is true that it may be urged as an argument, that the grantee, in case the stipulated payments shall not be duly made on the 1st of July, will attempt to resort to the securities as annuity securities: but should he do so it will then be time to apply to the Court to interfere as in the case of a subsisting annuity. Here the annuity having been abandoned, the motion now before the Court is made for a purpose quite collateral to 17 Geo. 3, c. 26. The construction put upon that act has never been carried to the length of saying that the grantee shall not get back his money.

BULLER J. I think it perfectly clear that the warrant of attorney was objectionable at the time when the annuity was granted: but the question is, whether any thing has since been done to waive the objections? Unquestionably the grantee may waive them if he thinks fit. Here a new agreement has been entered into, by which the annuity was turned into a money debt. This amounted to a waiver of the objections. The argument in support of the rule proceeds on the supposition of a case which never occurred, nor do I think that it ever could occur. It having been settled that the warrant of attorney should remain as a security for the new agreement, it must so remain; nor can it ever be resorted to again to [397] enforce the annuity. From the moment that the 800*l.* was paid over and the bond delivered into the banker's hands, there was an end of the whole debt, and the creditors were to run the risk of the bond being good or bad. It is true that there can be no use in leaving the warrant of attorney in the hands of the party, but the Court cannot order it to be delivered up.

The Court were inclined to discharge the rule with costs, but finding that the Court of King's Bench had not done so in the case alluded to,

Discharged the rule without costs.

POULTER v. KILLINGBECK. April 12th, 1799.

A. agreed with B. to let him land rent-free on condition that A. should have a moiety of the crops; while the crop was on the ground it was appraised for both parties; A. declared in *indebitatus assumpsit* for a moiety of the value of the crop sold to

B. without stating the special agreement; and held that he might well do so, as the special agreement was executed by the appraisement and the action arose out of something collateral to it. *Semb.* That such an agreement need not be in writing under the statute of frauds (a)¹.

Indebitatus assumpsit. The first count of the declaration was "for 20l. for the moieties of divers crops of wheat and cole-seed, by the Plaintiff before that time sold to the Defendant, and by the Defendant in consequence of such sale before then had reaped and taken to and for his own use and benefit." The 2d count was on a quantum meruit, "for that the Plaintiff had permitted and suffered the Defendant to depasture, eat up, and consume with his cattle the moiety of a certain other crop of cole-seed." There was also a count for money had and received. *Plea.* General issue.

The cause was tried before Ashhurst, J. at the last Cambridge Spring Assizes, when it appeared that the Plaintiff being possessed of certain pieces of fenn-land which he was desirous of having put into a state of cultivation, made a verbal agreement to let them to the Defendant without rent, who was to plough, dress and sow them for two successive crops, and in lieu of rent to allow the Plaintiff a moiety of the crops. While the crops of the second year were on the ground, an appraisement of them was taken for both parties, and the value ascertained. The Defendant having afterwards refused to pay a moiety of the value, this action was brought. It was contended at the trial, that a special agreement for a moiety of the crops having been proved, this action of *indebitatus assumpsit*, for a moiety of the value, could not be supported: and also that the agreement itself was within the statute of frauds: first, because it related to land; and secondly, because it was not to be executed within a year; and that it ought therefore to have been in writing. A verdict [398] was found for the Plaintiff, subject to the opinion of the Court on the first objection.

Accordingly, Sellon Serjt. now moved for a rule to shew cause why this verdict should not be set aside and a nonsuit be entered.

EYRE Ch. J. The circumstance of the appraisement seems to put an end to this point. It is true that as the case originally stood the Plaintiff had a claim to a moiety of the produce of the land under a special agreement; but that special agreement was executed by the appraisement. It had been agreed that the moiety of the crops was the property of the Plaintiff; but he being willing that the Defendant should keep them, a surveyor was appointed to settle the price between them. The circumstance of the appraisement affords clear proof that the plaintiff sold what the Defendant had agreed was his: and the price being ascertained, brings this to the case of an action for goods sold and delivered (a)². It is unnecessary to state a special agreement, which has been executed, where the action arises out of something collateral to it.

BULLER J. If no appraisement had taken place, the objection to the action in this form must have prevailed. But that circumstance is decisive. With respect to the point made at the trial, on the statute of frauds, this agreement does not relate to any interest in the land, which remains altogether unaltered by the arrangement concerning the crops.

Sellon took nothing by his motion.

ROBERTS AND OTHERS, Assignees of Horsman a Bankrupt, v. EDEN.
April 17th, 1799.

A note payable on demand with interest drawn by A. in favour of B. as a security for a debt, was by him indorsed to C. for the same purpose; after the indorsement it passed backwards and forwards between B. and C. several times, and previous to its being ultimately deposited with C. he received an intimation from B. not to negotiate it as he should want it when he settled accounts with A.; held that C.

(a)¹ Vide *Crosby v. Wadsworth*, 6 East, 602. *Mayfield v. Wadsley*, 3 B. & C. 357. *Duncan v. Thwaites*, 3 B. & C. 556, 575.

(a)² An agreement executed often amounts to a bargain and sale. *Com. Dig.* tit. Agreement (A, 2), Dict.

could not, after a settlement of accounts between A. and B. without a re-delivery of the note, recover on it against A.

Action by the assignees of the indorsee of a promissory note against the drawer: the note was for 400l. dated the 20th of April, 1792, and made payable to one Hunt on demand, with lawful interest, and had been indorsed by him to the bankrupt, Horsman.

It appeared at the trial before Rooke J. at the Guildall Sittings in this term, that the note in question was given by the Defend-[399]-ant Eden to Hunt (who was a banker,) for money borrowed; that Hunt indorsed it over to Horsman as a security for money advanced in the course of trade; that in 1793 Hunt and Eden settled accounts and the balance was paid, but the note in question was not asked for or delivered up; that the note had passed backwards and forwards several times between Hunt and Horsman, during all which time the former was indebted to the latter in more than 400l.; and that Hunt upon one occasion (the date of which did not appear, but which was before the last time the note was deposited) told Horsman that it must not be negotiated, as he should want it when he settled accounts with Eden. For the Defendant it was contended, that as the note had been taken out of Horsman's possession, and again placed in his hands so long after it bore date, and with an intimation not to negotiate it, it was taken under such circumstances of suspicion as ought to have induced him to make some inquiry concerning it; and it was compared to a bill of exchange negotiated after it has become due, in which case the holder must stand upon the title of the person from whom he receives it. On the part of the Plaintiff it was insisted, that there was no analogy between a bill payable on a day certain and this note, which being made payable on demand, with lawful interest, was intended as a permanent security; that the intimation given by Hunt to Horsman not to negotiate the note, as he might want it when he settled accounts with Eden, so far from being a circumstance to raise suspicion, amounted to saying that an open account existed between Hunt and Eden, and that the note had not been paid; that Eden ought, under these circumstances, to suffer for his own neglect in not getting the note back when he settled accounts with Hunt. The jury found a verdict for the Defendant.

Le Blanc Serjt. now moved for a rule nisi for a new trial, on the part of the Plaintiff, and contended, on the grounds above stated, that the verdict was contrary to law and evidence.

EYRE Ch. J. It is clear that this note was not regularly negotiated from Hunt to Horsman, so as to give the latter an absolute property in it, but only so as to give him a security to the amount of the balance due from the former. Suppose this to have been the case of a bond: it would have been in the nature of a pledge, and good for nothing after the debt had been satisfied. The question then is, whether there be any difference between a bond and a note circumstanced like the present, which has been placed [400] in the hands of a creditor as a mere security for his debt, except that the latter may be put in suit in the name of the holder, but the former must be sued in the name of the principal? When the note was put into the hands of Horsman, he was told that he must not consider it as his own, for that Hunt might want it when he settled accounts with the Defendant. I agree with my Brother Le Blanc, that this circumstance did not import that the note had been paid at that time, but it is decisive to shew that it was not negotiated to Horsman, but only deposited with him as a pledge; the consequence of which is, that it must remain in his hands subject to the same equity as if it were in the hands of the original payee. However, as I understand that the verdict did not pass to the entire satisfaction of the learned Judge who tried the cause, there can be no objection to our granting a rule to shew cause.

BULLER J. There are many situations in which one man is bound to stand in the place of another; and this seems to me to be one of the clearest cases that ever came before the Court. Here is direct evidence that Hunt told Horsman that he must not negotiate the note, as he should want it when he settled accounts with the Defendant. Did not that amount to saying, "The Defendant has a charge and lien on the note: you must not consider it as cash, but must stand in my situation." It is impossible to understand the words in any other way.

ROOKE J. Though the verdict was not altogether agreeable to my directions to

the Jury, I cannot say that I was dissatisfied with it. The case was not considered, at the trial, in the light in which it has been viewed by my Lord and my Brother Buller; but I entirely concur in their opinion.

Le Blanc finding the opinion of the Court against him, declined taking a rule to shew cause.

HOLCROFT v. HEEL. April 22d, 1799.

[Commented on, *Campbell v. Wilson*, 1803, 3 East, 298.]

If the grantee of a market under letters patent from the crown, suffer another to erect a market in his neighbourhood and use it for the space of twenty-three years without interruption, he is by such user barred of his action on the case for disturbance of his market. The crown is not. *Quære*. Whether if no specific toll be granted in the letters patent, the grantee be entitled to any toll, and whether in such case he can support any action for an injury to his market (*a*)?

Action on the case; For that whereas the Plaintiff, on the 1st day of March 1798 and before, was and from thence hitherto hath been and still is lawfully possessed of a certain close, [401] called Market Close in Northcott, otherwise Southall, in the county of Middlesex, and of a market holden, and to be holden there, in or upon every Wednesday, for the buying and selling of horses and all other kinds of cattle, together with toll, stallage and other commodities, to such like market appertaining; whereby great gains, profit and advantages, during all the time aforesaid, until the committing of the grievance hereafter next mentioned, accrued to and were received by the said Plaintiff, to wit, at, &c., yet the Defendant well knowing the premises, but contriving and fraudulently intending craftily and subtilly to deceive and defraud the said Plaintiff, and to deprive the said Plaintiff of the profits emoluments and advantages which he might and ought to have had and enjoyed from his said market, whilst the said Plaintiff was so possessed of his said market, to wit, on Wednesday the 7th day of March 1798, and on divers other Wednesdays between that day and the day of suing out the original writ of the said Plaintiff, being days on which the said market of the said Plaintiff ought to be held and was held, at &c. wrongfully and injuriously and without any legal warrant or authority whatsoever, at Hayes, in the said county of Middlesex, near to Northcott, otherwise Southall aforesaid, and within three miles of the said place where the said market of the said Plaintiff was so held and ought to be held as aforesaid, levied and erected and caused to be levied and erected a certain other market for the buying and selling of cattle, and then and there wrongfully and injuriously, and without any legal warrant or authority whatsoever, held and kept the said last-mentioned market, whereby divers great quantities of cattle were then and there brought to, and bought and sold at, the said market so levied, erected, held and kept as last aforesaid; which otherwise on those days to the aforesaid market of the said Plaintiff would have been brought to be there sold, and divers butchers and other persons were induced to resort to the said market so levied erected held and kept at Hayes, as last aforesaid, and there to buy cattle who would otherwise have resorted to the said market of the said Plaintiff at Northcott, otherwise Southall aforesaid, and there bought cattle, to the great damage of the said Plaintiff, and to the great nuisance and detriment of the said market of the said Plaintiff, by reason whereof the said Plaintiff was greatly annoyed and disturbed in the exercise and enjoyment of his said market, and lost, and was deprived of divers great sums of money, amounting in the whole to a large sum of money, to wit, the sum of 100l. which [402] otherwise would have accrued to him, and he would have had and received from the toll, stallage and other commodities to his market appertaining and belonging; to wit, at, &c.

There were nine other counts stating the market at Southall, and the injury thereto in different ways.

Plea. Not Guilty.

At the trial before Eyre Ch. J. at the Westminster sittings, after last Hilary term,

(a) And see *Lowden v. Hierons*, Holt Ni. Pri. 647. *Campbell v. Wilson*, 3 East, 294. *Bailiffs of Tewkesbury v. Diston*, 6 East, 438, 456. *Dawson v. D. of Norfolk*, 1 Price, 246. *Levell v. Wilson*, 3 Bing. 115.

it was proved, that the Plaintiff was lessee of this market at Southall, the title to which was founded on letters patent of the 10 W. 3, which, after reciting an inquisition by writ of *ad quod damnum*, proceeded thus: *Dedimus et concessimus ac per presentes pro nobis hæredibus et successoribus nostris, damus et concedimus præfato F. M. et hæredibus suis, liberam et licitam potestatem licentiam et auctoritatem quod ipse et hæredes sui habeant teneant &c. unum mercatum in vel super quemlibet diem Mercurii in perpetuum, ac etiam duas ferias sive mundinas annuatim, &c. unà cum curiâ pedis pulverizati ac omnibus libertatibus liberis consuetudinibus potestatibus custumagiis theoloniis stallagiis piccagiis et aliis commoditatibus ad hujusmodi mercatum ferias sive mundinas et curiam pedis pulverizati pertinentibus seu spectantibus*; that the Defendant was lessee of certain pennis erected in the year 1775 at Hayes, within two miles of Southall, in consequence of a quarrel between the salesmen and the proprietor of Southall market; and that cattle had been sold in those pennis on every Wednesday since that time. Two objections were taken to the Plaintiff's recovery; 1st, That as no specific toll was mentioned in the letters patent, the Plaintiff was entitled to no toll, and therefore had sustained no injury; 2dly, that after an undisturbed possession of this market at Hayes, by the Defendant for twenty-three years, the present action could not be maintained. The Lord Chief Justice nonsuited the Plaintiff, giving him leave to move to set that nonsuit aside, and if the Court should think he ought to have recovered, then a verdict to be entered for him with 1s. damages.

Accordingly, Le Blanc Serjt. early in this term moved for a rule nisi for that purpose, and urged, 1st, that it was not necessary in a grant of toll to specify the particular sums to be paid, *Palm. 86 (a)*¹; that by the words of the letters patent such toll [403] having been granted as was usually taken at markets of this kind, the Plaintiff was entitled to take reasonable toll, and that if he exacted unreasonable toll he did it at the peril of forfeiting his market *(a)*². 2dly, Supposing the Plaintiff not entitled to toll, yet that as he had an undoubted right to the market at Southall, the levying another market within two miles interfered with that right, and was an injury for which an action might be maintained, as in the case of a commoner who may maintain an action for injury to his common, though he have no cattle to put in *(b)*. 3dly, That the only ground on which the Defendant's possession of the market for more than twenty years could defeat the Plaintiff's right of action, was the presumption which it afforded of a grant; but that all such presumption had been rebutted in this case by the proof which was given at the trial of the commencement of the Defendant's market.

The Court inclined against the Plaintiff's application, but granted a rule to shew cause.

On this day the case was to have been argued by Le Blanc and Shepherd Serjts. for the Plaintiff; and Cockell, Runnington, and Sellon, Serjts. for the Defendant.

But EYRE Ch. J. intimating a decided opinion, that the undisturbed possession of the market by the Defendant for twenty-three years was a clear bar to the Plaintiff's right of action, the counsel for the Plaintiff declined arguing the case.

Per Curiam. Rule discharged *(c)*.

*(a)*¹ This was the opinion of three Justices (see also the Register, p. 103); but Montague C.J. held the contrary, and in *Palm. 79* said that it was agreed by Popham in *Heedie's case* (see *Heddy v. Wheelhouse*, Cro. Eliz. 558 and 591) that the King ought to determine the quantum of toll. Moore, 474, S. C. In *Osbuston v. James and others*, 2 Lutw. 1377, where the same words were used in the grant as in the present case, the same objection was taken, but judgment was given on another point. A grant of such toll to be taken at two bridges, as is used to be taken, *ibi et alibi infra regnum Angliæ* was held uncertain & void in *Lightfoot v. Lenet*, Cro. Jac. 421.

*(a)*² Contra Com. Dig. tit. Market (1); only the Toll is forfeited.

(b) Vid. *Wells v. Watling*, 2 Bl. 1233.

(c) In *Campbell v. Wilson*, 3 East, 298 Le Blanc J. said that the ground on which this case went off, was that on a new trial the Judge would direct the jury to presume a grant after 20 years undisturbed possession.

[404] BUSH v. STEINMAN. IDEM ET UX. v. EUNDEM. April 22d, 1799.

[Overruled, *Reedie v. London and North Western Railway*, 1849, 4 Ex. 256.

Referred to, *Barker v. Herbert*, [1911] 2 K. B. 639.]

A. having a house by the road side, contracted with B. to repair it for a stipulated sum; B. contracted with C. to do the work; and C. with D. to furnish the materials. The servant of D. brought a quantity of lime to the house and placed it in the road, by which the Plaintiff's carriage was overturned. Held that A. was answerable for the damage sustained (a).

These were two actions on the case against the Defendant for causing a quantity of lime to be placed on the high road, by means of which the Plaintiff and his wife were overturned and much hurt, and the chaise in which they then were was considerably damaged. Pleas. Not guilty.

The two actions came on together to be tried before Eyre Ch. J. at the Guildhall Sittings after last Hilary term, when the following circumstances appeared in evidence. The Defendant having purchased a house by the road side, (but which he had never occupied,) contracted with a surveyor to put it in repair for a stipulated sum; a carpenter having a contract under the surveyor to do the whole business, employed a bricklayer under him, and he again contracted for a quantity of lime with a lime-burner, by whose servant the lime in question was laid in the road. The Lord Chief Justice was of opinion that the Defendant was not answerable for the injury sustained by the Plaintiff under the above circumstances; but in order to save expence, a verdict was taken for the Plaintiff for 12l. 12s. with liberty to the Defendant to move to have a nonsuit entered.

Accordingly a rule nisi for that purpose having been obtained on a former day,

Cockell and Shepherd Serjts. now shewed cause. The question is not whether this action might not have been brought against some other person, but whether it cannot be maintained against the present defendant. It is sufficiently established that masters are civilly answerable for the neglect of their servants, though absent at the time of the injury committed. *Hern v. Nicholls*, 1 Salk. 289. *Jones v. Hart*, 2 Salk. 441. So it is with carriers and owners of ships. The house in this case was undergoing repair for the Defendant, and the act which caused the injury complained of, was an act done for his benefit, and in consequence of his having authorised others to work for him. Though the person by whose neglect the accident happened was the immediate servant of another, yet for the benefit of the public he must be considered as the servant of [405] this Defendant. The maxim in law is respondent superior; and accordingly Lord Kenyon in a case strongly analogous to the present, said, "In all these cases I have ever understood that the action must either be brought against the hand committing the injury or against the owner for whom the act was done." *Stone and another v. Cartwright*, 6 Term Rep. 411. If this Defendant be not liable, the Plaintiff may be obliged to sue all the parties who have subcontracts in this case, before he can obtain any redress for the injury he has sustained.

Le Blanc and Marshall Serjts. contrà. The Plaintiff contends, first, that a person is liable for the consequences of every act done for his benefit, at least if the act take place on his own premises: secondly, that he is answerable for any injuries committed by those whom he employs, if the injuries happen in the course of carrying into execution the commission with which they are charged. First, it is clear that the cause of action did not in this case arise on the Defendant's premises, the complaint being, that a quantity of lime which should have been placed there, was actually laid in the highroad: that being the case, there is no authority to shew that the Defendant is liable, merely because the act from which the injury arose was done for his benefit. If that general proposition were true, it might be contended, that the Defendant must have answered for any accident which might have happened during the preparation of the lime in the lime-burner's yard. Secondly, The liability of the principal to

(a) And see *Turner v. Hawkins*, post, 475. *Weyland v. Elkins*, Holt, Ni. Pri. 227. *Matthews v. W. L. W. Company*, 3 Campb. 403. *Nicholson v. Mouncey*, 15 East, 384. *Flower v. Adam*, 2 Taunt. 314. *Leslie v. Pounds*, 4 Taunt. 649. *Harris v. Baker*, 4 M. & S. 27. *Attorney Gen. v. Case*, 3 Price, 302, 308. *Hall v. Smith*, 2 Bing. 156.

answer for his agents, is founded in the superintendence and control which he is supposed to have over them. 1 Black. Com. 431. In the civil law that liability was confined to the person standing in the relation of pater-familias to the person doing the injury. Inst. lib. 4, tit. 5, § 1. Dig. lib. 9, tit. 3. And though in our law it has been extended to cases where the agent is not a mere domestic, yet the principle continues the same. Now clearly it was not in the power of this Defendant to control the agent by whom the injury to this Plaintiff was effected. He was not employed by the Defendant but by the lime-burner: nor was it in the Defendant's power to prevent him, or any one of the intermediate subcontracting parties, from executing the respective parts of that business which each had undertaken to perform. The Defendant's interference would have amounted to a breach of his own contract with the surveyor, by which the latter was empowered to employ such persons as he might [406] think proper. So little connection was there between the Defendant and the various persons employed in the work that he could have maintained no action against any one of them for having ill performed his part, but must have resorted to the surveyor with whom his contract was made. With respect to *Stone v. Cartwright*, the owner of the mine was there said to be answerable for the negligence of the persons employed by the steward, but it is to be observed, that he was also answerable to them for their wages. In *Lane v. Sir Robert Cotton*, 12 Mod. 488, 9. Holt Ch. J. said, that "the reason why a principal shall answer for his deputy is, because as he, as principal, has power to put him in, so he has power to put him out without shewing any cause." So in *Michael v. Alestree*, 2 Lev. 172, it was held that an action might be maintained against a master for damage done by his servant to the Plaintiff, in exercising his horses in an improper place, though he was absent, because it should be intended that the master sent the servant to exercise the horses there. But if a servant who is ordered to do a lawful act exceed his authority, and thereby commit an injury, the master is not liable. *Kingston v. Booth*, Skin. 228. *Middleton v. Fowler* 1 Salk. 282.

EYRE Ch. J. At the trial I entertained great doubts with respect to the Defendant's liability in this action. He appeared to be so far removed from the immediate author of the nuisance, and so far removed even from the person connected with the immediate author in the relation of master, that to allow him to be charged for the injury sustained by the Plaintiff seemed to render a circuitry of action necessary. Upon the Plaintiff's recovery, the Defendant would be entitled to an action against the surveyor, the surveyor and each of the subcontracting parties in succession to actions against the persons with whom they immediately contracted, and last of all the lime-burner would be entitled to the common action against his own servant. I hesitated therefore in carrying the responsibility beyond the immediate master of the person who committed the injury, and I retained my doubts upon the subject, till I had heard the argument on the part of the Plaintiff, and had an opportunity of conferring with my Brothers. They, including Mr. Justice Buller, are satisfied that the action will lie, and upon reflection, I am disposed to concur with them: though I am ready to confess that I find great difficulty in stating with accuracy the grounds on which it is to be supported. The relation between master and [407] servant as commonly exemplified in actions brought against the master is not sufficient: and the general proposition that a person shall be answerable for any injury which arises in carrying into execution that which he has employed another to do, seems to be too large and loose. The principle of *Stone v. Cartwright*, with the decision of which I am well satisfied, is certainly applicable to this case: but that of *Littledale v. Lord Lonsdale* (a) comes much nearer. Lord Lonsdale's colliery was worked in such a manner by his agents and servants (or possibly by his contractors, for that would have made no difference) that an injury was done to the Plaintiff's house, and his Lordship was held responsible. Why? Because the injury was done in the course of his working the colliery: whether he worked it by agents, by servants, or by contractors, still it was his work: and though another person might have contracted with him for the management of the whole concern without his interference, yet the work being carried on for his benefit, and on his property, all the persons employed must have been considered as his agents and servants notwithstanding any such arrangement; and he must have been responsible to all the world, on the principle of sic

(a) 2 H. Bl. 267, 299. The facts of that case are to be collected from the pleadings.

utere tuo ut alienum non lœdas. Lord Lonsdale having empowered the contractor to appoint such persons under him as he should think fit, the persons appointed would in contemplation of law have been the agents and servants of Lord Lonsdale. Nor can I think that it would have made any difference, if the injury complained of had arisen from his Lordship's coals having been placed by the workmen, on the premises of Mr. Littledale, since it would have been impossible to distinguish such an act from the general course of business in which they were engaged, the whole of which business was carried on either by the express direction of Lord Lonsdale, or under a presumed authority from him. The principle of this case therefore, seems to afford a ground which may be satisfactory for the present action, though I do not say that it is exactly in point. According to the doctrine cited from Blackstone's Commentaries if one of a family "layeth or casteth" any thing out of the house which constitutes a nuisance the owner is chargeable. Suppose then that the owner of a house, with a view to rebuild or repair, employ his own servants to erect a hord in the street (which being for the benefit of the public they may lawfully do) and they carry it out so far as to encroach [408] unreasonably on the highway, it is clear that the owner would be guilty of a nuisance: and I apprehend there can be but little doubt that he would be equally guilty if he had contracted with a person to do it for a certain sum of money, instead of employing his own servants for the purpose; for in contemplation of law the erection of the hord would equally be his act. If that be established we come one step nearer to this case. Here the Defendant by a contractor, and by agents under him, was repairing his house: the repairs were done at his expence, and the repairing was his act. If then the injury complained of by the Plaintiff was committed in the course of making those repairs, I am unable to distinguish the case from that of erecting the hord, or from *Littledale v. Lord Lonsdale*, unless indeed a distinction could be maintained (which however I do not think possible) on the ground of the lime not having been delivered on the Defendant's premises, but only at a place close to them, with a view to being carried on to the premises and consumed there. My Brother Buller recollects a case which he would have stated more particularly, had he been able to attend. It was this: a master having employed his servant to do some act, the servant out of idleness employed another to do it, and that person in carrying into execution the orders which had been given to the servant committed an injury to the Plaintiff, for which the master was held liable. The responsibility was thrown on the principal from whom the authority originally moved. This determination is certainly highly convenient, and beneficial to the public. Where a civil injury of the kind now complained of has been sustained the remedy ought to be obvious, and the person injured should have only to discover the owner of the house which was the occasion of the mischief; not be compelled to enter into the concerns between that owner and other persons, the inconvenience of which would be more heavily felt than any which can arise from a circuity of action. Upon the whole case therefore, though I still feel difficulty in stating the precise principle on which the action is founded, I am satisfied with the opinion of my Brothers.

HEATH J. I found my opinion on this single point, viz. That all the subcontracting parties were in the employ of the Defendant. It has been strongly argued that the Defendant is not liable, because his liability can be founded in nothing but the mere relation of master and servant; but no authority has been cited to support that proposition. Whatever may be the doctrine [409] of the civil law, it is perfectly clear that our law carries such liability much further. Thus a factor is not a servant: but being employed and trusted by the merchant, the latter according to the case in *Salkeld* is responsible for his acts. There are besides this other cases. As where a person hires a coach upon a job, and a job-coachman is sent with it, the person who hires the coach is liable for any mischief done by the coachman while in his employ, though he is not his servant. We all remember an action for defamation brought against Tattersall who was the proprietor of a newspaper, with sixteen others: the libel was inserted by the persons whom the proprietors had employed by contract to collect news, and compose the paper, yet the Defendant was held liable. Now this is a strong case to shew that it makes no difference whether the persons employed by the Defendant, were employed on a quantum meruit, or were to be paid a stipulated sum. In *Rosewell v. Prior*, Salk. 460, an action for the continuance of a nuisance was held to lie against the Defendant though he had underlet the building which was the

subject of it, and though the Plaintiff had recovered against him in a former action for the erection of the nuisance; for the Court said "he affirmed the continuance by his demise, and received rent as a consideration for it." That case is analogous to the present; the ground of the decision having been, that the Defendant was benefited by the nuisance complained of. It is not possible to conceive a case in which more mischief might arise than in the present, if the various subcontracts should be held sufficient to defeat the Plaintiff of his action. Probably he would not be able to trace them all, since none of the parties could give him any information, and consequently he might be turned round every time he came to trial.

ROOKE J. I am of the same opinion. He who has work going on for his benefit, and on his own premises, must be civilly answerable for the acts of those whom he employs. According to the principle of the case in 2 Lev. it shall be intended by the Court, that he has a control over all those persons who work on his premises, and he shall not be allowed to discharge himself from that indentment of law by any act or contract of his own. He ought to reserve such control, and if he deprive himself of it, the law will not permit him to take advantage of that circumstance in order to screen himself from an action. The case which has been supposed of the lime having been deposited at a distance [410] from the Defendant's house, and the accident having happened there does not apply: for here a person acting under the general employment of the Defendant brought a quantity of lime to the premises, and deposited it without any objection being made by any person there, whereas it was the duty of the Defendant to have provided a person to superintend those employed in his work. The person from whom the whole authority is originally derived, is the person who ought to be answerable, and great inconvenience would follow if it were otherwise. There is such a variety of subcontracts in this case, as rarely occurs, but this serves only to illustrate more strongly the mischief which would ensue should we depart from the doctrine in *Stone v. Cartwright*. In that case, and in *Littledale v. Lord Lonsdale*, the safest rule was adopted. The Plaintiff may bring his action either against the person from whom the authority flows, and for whose benefit the work is carried on, or against the person by whom the injury was actually committed. If the employer suffer by the acts of those with whom he has contracted he must seek his remedy against them.

Rule discharged.

GWILLIM v. THOMAS HOLBROOK. April 27th, 1799.

The condition of a replevin bond is not satisfied by a prosecution of the suit in the county court, but the plaint if removed by re. fa. lo. into a superior court must be prosecuted there with effect, and a return made if adjudged there.

Debt on a replevin bond by the assignee of the sheriff of Middlesex. The declaration stated the Plaintiff's having distrained as bailiff of the mayor and commonalty and citizens of the city of London governors of the house of the poor commonly called Saint Bartholomew's Hospital near West-Smithfield London of the foundation of King Henry the Eighth, and proceeding in the usual way, set out the bond and condition which was that R. Holbrook should "appear at the next county court for the county of Middlesex to be holden at &c. and then and there prosecute his action with effect against the Plaintiff for taking and unjustly detaining his cattle &c. and make return thereof if return thereof should be adjudged by law;" it then averred, that a plaint was duly levied at the next county court by R. Holbrook, and removed into this court by recordari facias loquelam; that R. Holbrook made default and judgment was given for a return; that the bond was thereby forfeited and was in consequence duly assigned &c.

Plea. Actionem non, because he says, that the said R. Holbrook did appear at the county court for the said county of Mid-[411]-dlexex holden next after the making of the said writing obligatory as in the said declaration is mentioned, and did then and there prosecute his action with effect against the Plaintiff for taking and unjustly detaining his said cattle goods and chattels, and continued to prosecute the same with effect until the record of the said plaint in the said declaration mentioned was duly had and removed into the said Court of our said lord the King of the bench aforesaid by virtue of the said writ of our said lord the King of recordari facias

loquellam in the said declaration also mentioned to wit at &c. And this &c. Wherefore &c.

General demurrer, and joinder.

Le Blanc Serjt. in support of the demurrer, contended that by the condition of the bond R. Holbrook was not merely bound to prosecute his suit with effect in the county court, but to follow it into the court above, and, to make a return, wherever such return should be legally adjudged : he cited *Anon. Fortes. 209, Nichols v. Newman, Fortes. 361, and Vaughan v. Norris, Cas. temp. Hardw. 137.*

Shepherd Serjt. who was to have argued on the other side, admitted that the present case could not be distinguished from those cited ;

And the Court were of the same opinion.

Judgment for the Plaintiff (a)¹.

TIPPET AND OTHERS v. MAY AND TWO OTHERS. April 30th, 1799.

Assumpsit against three : two pleaded a debt of record by way of set off : the Plaintiff replied nul tiel record, and gave a day to the two Defendants, but entered no suggestion respecting the third ; held on demurrer that the action being discontinued, judgment must be given against the Plaintiff, even though the Defendants' plea were bad (a)².

Declaration in assumpsit against three. Two of the Defendants pleaded a debt of record by way of set off, without taking any notice of the third. The Plaintiffs replied nul tiel record, and gave a day to produce the record to the two Defendants who pleaded, but entered no suggestion on the roll respecting the third.

To this there was a general demurrer, and joinder.

Marshall Serjt. in support of the demurrer. The ground of this demurrer is, that as two of the three Defendants have pleaded, and the Plaintiffs have given them a day to produce the record, without suggesting any thing with respect to the third, the action is discontinued as to him, and that a discontinuance as to one [412] Defendant is a discontinuance as to all. It is a settled rule of law that a suit must be continued from its commencement to its conclusion without any chasm ; and that any chasm is a discontinuance. In Gilb. Hist. C. P. 150, 158, it is said that if a Defendant pleads to part and says nothing to the other part, and the Plaintiff replies to such plea without taking judgment for the part not answered to, it is a discontinuance, because he does not follow his entire demand in the court. So if he demur generally, for he ought to have prayed judgment upon nul dielit for that part. 1 Roll. Abr. fo. 487, 488. And this rule applies not only to the subject-matter of the cause, but also to the parties. 1 Rol. Abr. fo. 488. Com. Dig. Pleader (W. 3). Thus in Bro. Abr. Discontinuance de Process, pl. 22. Replevin against three, avowry by one, and so to issue, and the two others said they came in aid of the avowant, yet if the two have not a day given and continuance on the roll from day to day, all is discontinued : and pl. 8. Replevin against three of a taking in S. one appeared and avowed for himself in B. and traversed the taking in S. and made avowry to have a return which passed for the Plaintiff, and he prayed judgment, and it was determined that as no proceeding was against the other two, all was discontinued, for the proceeding shall be made to continue against those who make default, otherwise it is a discontinuance. *Green v. Charnock and another*, Cro. Eliz. 762, is to the same effect. The rule holds also where a Plaintiff makes default. *Paston v. Lusher*, Yelv. 155. If it be contended on the other side that a plea of set-off by two Defendants in an action against three is bad, still the Plaintiffs will not be entitled to judgment on this record for by the discontinuance the cause is out of court.

Shepherd Serjt. contra. Though the question immediately in issue on this demurrer be, whether the replication which the Plaintiffs have put in be sufficient in law to answer the Defendant's plea, still if we can shew that the plea itself is bad, they cannot have judgment. Indeed if we were to amend our replication the Defen-

(a)¹ Vid. etiam *Chapman et al' v. Butcher*, Carth. 248. *Lane v. Foulk*, Comb. 228.

(a)² Vide *Everard v. Paterson*, 6 Taunt. 626. *Winstone v. Linn*, 1 B. & C. 460.

dants would be under the same difficulty. No authority has been adduced to shew that discontinuance is the subject of demurrer (a)¹.

[413] EYRE Ch. J. There is no rule in pleading more certain than that if a party can trace back the vices in the pleadings to the first fault he has a right to take advantage of it on demurrer. But he cannot ask the judgment of the Court unless he appear on the record to be capable of demanding judgment (a)². Now in this case the Plaintiffs, having replied to a plea by two of the Defendants without taking notice of the third against whom they declared, have made a discontinuance; the cause therefore being discontinued, judgment must be given against the Plaintiffs, for they are not in a situation to take advantage of the badness of the Defendants' plea.

ROOKE J. The Plaintiffs not being in court, cannot call upon the Court to give them judgment.

Per Curiam. Leave given to amend on payment of costs (b).

GRIFFITHS v. EYLES. April 30th, 1799.

To debt for an escape Defendant pleaded a negligent escape and voluntary return since which the prisoner had been safely kept. Plaintiff in his replication admitted the negligent escape and voluntary return, but alleged that the prisoner had not been safely kept since that time, having again escaped, which was a different escape from that mentioned in the plea, and the same for which the action was brought. Defendant in his rejoinder traversed the allegation that the prisoner had not been safely kept, and then pleaded to the latter part of the replication as to a new assignment, a negligent escape, voluntary return, and safe keeping since, in the same manner as in the plea. This latter part of the rejoinder the Court refused to strike out on motion, but held it bad on special demurrer.—A plea that, if the prisoner escaped several times (without specifying them), he returned as often, is bad (a)³.

This was an action of debt for an escape out of execution, against the Defendant as warden of the Fleet. Pleas. 1st, [414] Nil debet. 2d, That the escape was

(a)¹ See *Weeks v. Peach*, 1 Salk. 179, and *Market v. Johnson*, 1 Salk. 180, in the former of which cases Lord Ch. J. Holt said "if a plea begin only as an answer to part, and is in truth but an answer to part, it is a discontinuance and the Plaintiff must not demur but take his judgment for that as by nil dicit; for if he demurs or pleads over the whole action is discontinued." However, the doctrine in *Cross v. Bilson*, 1 Salk. 3, res. 2, seems scarcely reconcileable with those cases: there the Defendant having discontinued by concluding his demurrer to the Plaintiff's replication with a prayer quod narratio prædicta cassetur, it was held that the Plaintiff had his election to take judgment, or to join in demurrer, and that having done the latter, the Court might give him judgment upon the whole record.

(a)² So "When Plaintiff makes replication, sur-rejoinder, &c. and thereby it appeareth that upon the whole matter, and record, the Plaintiff hath no cause of action, he shall never have judgment, although that the bar or rejoinder be insufficient in matter; for the Court ought to judge upon the whole record." *Doctor Bonham's case*, 8 Co. 120 b. See also in confirmation of this, *Ridgway's case*, 3 Co. 52 b. and *Turner's case*, 8 Co. 133 b.

(b) Had the demurrer been of the same term with the record, it seems the Plaintiff would have been entitled de jure to enter a suggestion after demurrer joined. Thus in *Woodward v. Robinson*, 1 Str. 302, where the Defendant having pleaded a bad plea to the 1st count, and in his 2d plea pleaded to part only of the other counts, the Plaintiff in his replication merely tendered issue, and the Defendant demurred; the Court held that though there was a discontinuance, yet the pleading being of the same term, the Plaintiff might still take judgment by nihil dicit for so much as was uncovered by the plea. Accordingly the case was adjourned, and the Plaintiff having set the matter right, had judgment on the demurrer. To the same effect is *Vincent v. Boston*, 1 Ld. Raym. 716. But it is to be observed, that in those cases the Plaintiffs were not allowed to have judgment until the discontinuances were done away, although the Defendants had committed the first fault upon the record. Vid. etiam *Middleton v. Cheseman*, Yelv. 65.

(a)³ Vide *Chambers v. Jones*, 11 East, 406.

without the knowledge privity consent or permission of the Defendant, and against his will, and that before he knew of the escape, and before the filing of the bill the prisoner voluntarily and of his own accord returned back into the custody of the Defendant, and continually from thenceforth hitherto hath been and still is there kept and detained in execution at the suit of the said Plaintiff. This was accompanied by an affidavit on the part of the Defendant according to the provisions of 8 & 9 Will. 3, c. 27, s. 6, that the escape was without his privity. The Plaintiff in his replication, 1st, joined issue on nil debet; 2dly, admitting that the escape was without the privity of the Defendant and that the return to prison was voluntary, went on to allege that the prisoner had not from thenceforth been kept and detained in the custody of the Defendant, but that after he had so returned into custody and after the Defendant had notice of the former escape, and before the exhibiting the bill, the Defendant permitted and suffered the prisoner to escape and go at large in manner as the Plaintiff had complained against him, "which said last mentioned escape is another and different escape than the escape mentioned in the plea of the Defendant so by him lastly above pleaded in bar as aforesaid, and was and is the very same identical escape for which the said Plaintiff brought this action and exhibited his aforesaid bill, and this," &c.

The Defendant in his rejoinder having traversed the allegation that the prisoner had not been safely kept since his voluntary return, with a verification in the usual way, proceeded: "And as to the said supposed escape so by the said Plaintiff newly assigned actionem non, because if any such escape so newly assigned was made by the said prisoner the same was so made by the said prisoner privately and without the knowledge privity consent or permission of the Defendant and against his will, and that afterwards and before the Defendant knew of such escape and before the filing the bill of him the said Plaintiff against the said Defendant in this behalf, to wit, on &c. at &c., the said prisoner voluntarily and of his own accord returned back again into the custody of the said Defendant, and continually from thenceforth hitherto hath been and still is kept and detained in the custody of the said Defendant in execution at the suit of the said Plaintiff for the debt and damages aforesaid in form aforesaid recovered by the said Plaintiff; which said escape in this plea mentioned, if any such was made, is the same escape [415] whereof the said Plaintiff hath above in his said new assignment in this behalf alleged against him the said Defendant. And this &c. wherefore he prays judgment if the said Plaintiff ought to have or maintain his aforesaid action in respect of the premises so newly assigned against him," &c.

Le Blanc Serjt. in the last term moved to strike out the latter part of the rejoinder, contending that the Defendant had pleaded two rejoinders, which he could not do even with the leave of the Court, much less without it: and that it was like the case of a Defendant pleading two pleas without the leave of the Court, where the Plaintiff may apply to the Court to strike out one of them (a).

Shepherd Serjt. opposed the application in the first instance, and urged that as the replication was in the nature of a new assignment, the Defendant was obliged to put in this sort of rejoinder in order to meet the allegation of a voluntary escape in the latter part of the replication.

EYRE Ch. J. There is a difference between this case, and that of two pleas pleaded without leave of the Court: the two pleas are distinct from each other: this is but one rejoinder containing double matter; it may be a subject for demurrer, but not for the exercise of the summary jurisdiction of the Court.

In consequence of this intimation from the Court a special demurrer was afterwards put in, assigning for causes, "that the said rejoinder is double and multifarious in this, that it contains two separate and distinct answers, and offers two separate and distinct issues upon the aforesaid replication of the Plaintiff to the said plea of the Defendant, so by him lastly above pleaded in bar, whereas only one issue could or ought to have been offered or taken upon the said replication or upon the matter therein contained, and that the said rejoinder is also double and informal in this, that it offers to put in issue two distinct and different escapes, whereas the Plaintiff

(a) It has been said that in such case the double plea is a nullity, and the Plaintiff may sign judgment, per Buller J. *Bedford v. Gutfield*, H. 26 G. 3, K. B. Tidd's Pr. 388.—1 Sellon's Pr. 296.

bath originally declared upon and in his subsequent replication bath supported his said declaration by only one escape, and that according to the rules of good pleading the said rejoinder should and ought to have been confined to and [416] have concluded with a traverse, which is thereby taken on the said escape so set forth in the said replication of the said Plaintiff, yet the said Defendant hath very unnecessarily and inartificially extended the said rejoinder to further and other and different matter by way of supposed second answer to the said replication, whereas only one answer could or ought to have been made to and only one issue offered or taken upon the said replication or in or by the said rejoinder; and that the matter so secondly alleged in the said rejoinder is no answer to the said replication, nor direct or positive denial of the escape therein mentioned, but only an argumentative denial of such escape, whereas the said escape should have been expressly and directly traversed and denied by the said rejoinder; and that the said rejoinder is calculated to occasion the trial of two separate issues upon one and the same fact, and also to introduce a vexatious and unnecessary length of pleading in this cause; and that the said rejoinder is repugnant and informal in this, that although in one part thereof it considers the said replication and answers the same as being a replication, yet in another part thereof it considers the said replication as being a new assignment, and professes to answer the same accordingly, and that the said rejoinder is in various other respects repugnant, multifarious, insufficient and informal."

Joinder in demurrer.

Le Blanc in support of the demurrer now contended, that if this rejoinder should be allowed the pleadings might go on in infinitum, for if the Plaintiff were to sur-rejoinder in the same manner as he had replied, the Defendant might rebut in the same manner as he had rejoined, and so a new issue would be created at every stage of the pleadings; and that it was a clear rule in pleading that issues could not be multiplied after the plea.

Shepherd Serjt. contra, again insisted that as the Defendant could not give in evidence a negligent escape and voluntary return in answer to the allegation of a voluntary escape in the latter part of the replication without putting it on the record, the Defendant might be deprived of a fair defence, unless the rejoinder were allowed; and urged that the form of the rejoinder was the consequence of the unusual and ingenious way of pleading adopted in the Plaintiff's replication.

EYRE Ch. J. If the observation be well founded, that the common forms of replication in these cases stop at the allegation, that [417] the warden has not kept the prisoner in custody since the first voluntary return, the consequence is, that this replication is not merely ingenious but informal, and my doubt has been, whether the first fault was not committed by the Plaintiff. But in truth it seems to me that the latter part of the replication is nothing more than an amplification of the denial that the Defendant had kept the prisoner in safe custody; it amounts to this, that he had not kept him in safe custody, for he had permitted him to escape afterwards. It does not appear to me that this rejoinder will enable the Defendant to give in evidence any second voluntary return. The Defendant by his plea excuses an escape, upon the ground of the prisoner having voluntarily returned and remained in his custody ever since. Now put the case that the prisoner had made two or three escapes, and had returned as many times, the Defendant was bound to state them all in his plea, in order to establish the averment that the prisoner had been kept safe in custody ever since. If this be not the case, the pleadings may go on for ever. The Defendant therefore has made the real fault, as there is nothing in the replication in the nature of a new assignment. Perhaps had the Plaintiff merely traversed the allegation in the Defendant's plea, it would have been sufficient and the shortest way, though I do not think him wrong for putting in a more explicit contradiction.

The Court however gave the Defendant leave to amend on payment of costs, intimating at the same time that it must be done in such a way as not to preclude the question being brought to issue as soon as possible.

Accordingly the Defendant amended his second plea by inserting an allegation "that if the said prisoner did at any time or times after the said commitment &c. go at large from and out of the said prison of the Fleet and from and out of the custody of him the said Defendant, he the said prisoner so escaped and went at large privately and without the knowledge &c. of him the Defendant and against his will; and that if any such escape or escapes was or were so made the said prisoner after such escape

or escapes and before the Defendant knew of such escape or escapes and before the filing of the bill voluntarily and of his own accord returned back again into the custody of the Defendant and continually from thenceforth until and at the time of the commencement of the suit was and hath been and still is kept and detained," &c.

[418] Upon this *Le Blanc* again applied to the Court and contended, that this plea by no means complied with their injunction, and was so framed as to afford no probability of any issue.

EYRE Ch. J. The defendant knows and is bound to know the state of his prison, and whether there has been an involuntary escape and a subsequent return and safe keeping of the prisoner since that time, or whether there has been no escape at all. If there has been one escape and one return, or if there have been ten escapes and ten returns, and the Defendant thinks fit to plead them, and to insist, that independent of such escapes the prisoner has been kept in safe custody, he is at liberty to do so. But he cannot plead hypothetically that if there has been any escape there has also been a return. He must either stand upon an averment that there has been no escape or that there have been one, two, or ten escapes, after which the prisoner returned, and that having kept him in custody since that time he is entitled to give that answer to the Plaintiff's charge. The Defendant must take upon himself to state the escapes specifically, that the Plaintiff may have an opportunity of combating his assertion. With respect to the Plaintiff's replication it never abandoned the escape laid in the declaration. To that escape the Defendant pleaded what was an answer as far as it went; in reply to which the Plaintiff admitted the fact of the Defendant's plea, but added, that he did not complain of the escape previous to the return, but that the Defendant had not kept the prisoner in custody since that return.

The Court again gave the Defendant leave to amend, by striking out the latter part of the rejoinder which had been demurred to, and leaving the traverse of the allegation, that after the return of the prisoner, and after notice of the former escape, the Defendant voluntarily permitted the prisoner to escape (*a*).

[419] PEEL AND OTHERS v. TATLOCK. April 30th, 1799.

[Referred to, *Phillips v. Foxall*, 1872, L. R. 7 Q. B. 675.]

If A. become bound to B. for the honesty of C. who embezzles money, B. may maintain an action on the guaranty, though three years have elapsed without any notice having been given of the embezzlement of C. by B. to A.; at least if A. was acquainted with the circumstance from any other quarter, and B. does not appear to have concealed it from him industriously. A. will not be discharged from his guaranty though B. appear to have given credit to C. for the amount of the sum embezzled (*b*).

This action was brought to recover 100*l.* the amount of the Defendant's subscription to a guaranty of 600*l.* for the true and faithful discharge of the trust which the Plaintiffs might repose in one Absalom Goodrich, acting as cashier or superintending clerk in their banking-house.

The cause was tried at the Guildhall sittings after last Michaelmas term, before Heath J. and a Special Jury, when the following facts appeared in evidence. The guaranty was signed on the 5th October 1790: Goodrich continued in the Plaintiffs' service till March 1793, at which time he absconded having embezzled money of the Plaintiffs to the amount of 1292*l.* 8*s.* 6*d.* In April following a correspondence commenced between Goodrich and the Plaintiffs, in which the former, after stating that he had embezzled four bills, went on thus; "I should conceive it may not be

(*a*) The Defendant having amended accordingly, issue was joined on the traverse, and the cause came on to be tried before Eyre Ch. J. at the Guildhall sittings after this term. At the trial the Plaintiff proved a notice of an escape to the Defendant, and an escape subsequent to that notice, but did not prove any escape previous to the notice. Upon this the Lord Chief Justice nonsuited him, holding, that the first escape must still remain the gist of the action, and would be purged or not, as it should turn out that the prisoner had or had not been safely kept since his voluntary return after that escape.

(*b*) Vide *Orley v. Young*, 2 H. Blac. 613. *Mason v. Pritchard*, 2 Campb. Ni. Pri. 436. 12 East, 227.

unreasonable to propose that the gentlemen should make a consideration of about 300l. for the extra exertions I have used for the interest of the house, and the extra expences I have been at by having no regular home in town: perhaps there may be due to me on my own account about 100l. though of this I am not quite certain. If these proposals could be admitted, I should then stand a debtor to the house about 890l. My property at home may have cost me about 150l. which I freely offer." He then suggested a plan (a)¹ for balancing the books of the house, by which the Plaintiffs might keep his misconduct secret from the other clerks, and having intimated an intention of retiring into the country and establishing a school, concluded thus, "Whatever I can obtain by labour and industry above the common necessities for existence shall be faithfully appropriated to repay the debt once a month or once a quarter into the hands of some person for your use." In answer to the above the Plaintiffs wrote a letter dated the 22d June 1793, containing the following expressions; "We have no objection to your adopting your proposed plan of tuition, and you may rest free of apprehension from being disturbed in a laudable pursuit for support of yourself and [420] family, taking it for granted that your representations to us will be found strictly true. Indeed by such endeavours it is possible that you in future may be in a situation to make some recompence for past misfortunes, and respecting which in every conversation which we have been obliged to enter into we have uniformly expressed ourselves with great tenderness towards you. If we had no other motives for that, self-policy would dictate such conduct." The plan suggested by Goodrich for concealing his misconduct from the clerks was adopted by the Plaintiffs. In the Summer of 1795 James Tatlock offered Goodrich, who was then out of employ, to procure him a place provided the Plaintiffs would give him a character: upon which Goodrich made an application to the Plaintiffs for that purpose, and on the 15th September 1795 wrote them a letter in which were the following expressions: "I have just waited on Mr. Tatlock, and mentioned in general what you remarked on my request, his reply was, he would call on you himself this day: it would have pleased me better had not that been the case; but as I could not with any propriety forbid him, I must take the consequences. However as I believe Mr. Tatlock knows no more of my concerns in your house than what I have told him myself respecting Riley, Barber &c.'s (a)² losses, you will have it in your power to speak in general terms respecting your being considerable losers by my imprudence, and this done with tenderness on your part may induce him to be my friend. In regard to the bond, should he mention it, and you think proper, perhaps making him the offer of his name may be in my favour." No evidence was given of actual notice by the Plaintiffs to the Defendant or to any of the other subscribers to the guaranty of Goodrich's misconduct, and the loss they sustained thereby, till July 1796, when actions were commenced against the Defendant, and against his brother James Tatlock and one S. Potter who were also subscribers; these were all consolidated. The learned Judge left it to the jury to say whether the Plaintiffs had waived the guaranty and exonerated the Defendant by making the whole of Goodrich's embezzlement a debt from him? The jury found a verdict for the Plaintiff.

Le Blanc and Shepherd Serjts. on a former day shewed cause against a rule nisi for a new trial, and contended, that the guaranty was not waived by any thing which passed between Goodrich and [421] the Plaintiffs, or by the length of time which had elapsed before notice was given to the Defendant; that with respect to the concealment it might have been dangerous for the house to have made public the misconduct of their clerk and their loss in consequence; that by the terms of the guaranty the Defendant was absolutely bound to answer for the deficiencies in Goodrich's accounts, and that the effect of the length of time which had elapsed was a question for the jury who had decided that it was not a waiver. They urged that the Defendant had not been injured by the delay, as Goodrich continued insolvent from the time that he committed the fraud to that of his death, which was just before the trial.

Cockell and Heywood Serjts. contra insisted that the Plaintiffs had accepted Goodrich for their debtor, by giving him credit to the amount of the deficiency,

(a)¹ This was to be done by entering the deficiency as a loan to him in the private ledger of the partners, and carrying it into the books to which the clerks had access, under the head of private loan, marked with a particular letter.

(a)² These were transactions which did not come within the scope of the present case.

and entering it in their books as a loan; that the danger the Plaintiffs might have incurred by making public the embezzlement in question, could not deprive the Defendant of his right to notice, as in the case of a bill of exchange, where notice of the drawer's default must be given on the earliest opportunity lest his situation should be altered, and that the same rule held in cases of bankruptcy, and ought to be observed in all other mercantile transactions: and that the time within which notice should have been given was a question of law.

EYRE Ch. J. This case seems to involve many points of law deserving serious consideration. The 1st question is, whether a person who enters into a guaranty for the faithful discharge of duty by another be liable to answer for embezzlement of money by him at any indefinite period, or whether notice of such embezzlement ought not to be given within reasonable time? A 2nd question will be, whether the intentional concealment of such embezzlement will not discharge the guarantee from his liability? And a 3rd, whether that degree of credit has not been given to the party originally guilty, which may be sufficient to change the character of the transaction, and by assent of the Plaintiff to convert Goodrich's delinquency into a debt. And if so, whether the guarantee be answerable on the foundation of the original embezzlement? These are questions of real importance to the mercantile world, and I wish to have them deliberately considered, not being prepared to give an opinion.

BULLER J. Some things have been advanced in argument to which I do not agree. It has been said that the rights of parties have been altered. If any new debt had been incurred, or if the [422] demand had been enlarged, that might have been a fraud on the guarantee. But that is not the case here. The Defendant was liable to make satisfaction for the embezzlement of Goodrich to the amount of his subscription, and if the Plaintiffs endeavoured to obtain any thing from Goodrich before they called on the Defendant, that was only in aid of the Defendant and tended to relieve him. Unless something had taken place between the Plaintiffs and the guarantee, I do not see how the responsibility of the latter could be given up, since no favour shewn by the former to Goodrich, nor any thing done between them which did not create an injury to the Defendant, could discharge the guaranty.

HEATH J. This case differs from that of a bill of exchange inasmuch as the Defendant was not merely bound to pay the money in case Goodrich should not pay it, but was bound absolutely to pay for his deficiency.

Cur. adv. vult.

EYRE Ch. J. On this day (absentibus Buller & Heath Js.) referred to the letter of the 11th of September, and said; I am much inclined to think that a reasonable inference may be drawn from this letter, which will go a great way towards laying out of the case the question how far those to whom a guaranty has been given may, by concealing the failure of the party for whom the guarantee is answerable, and giving him credit for the amount of the failure, be considered as having taken upon themselves the whole loss. I daresay the jury were satisfied that the Defendant was not kept in ignorance of the transaction. He did not put his case upon that ground; but the ground he has taken is, that the Plaintiffs had done enough to discharge the guarantee; upon this I at first hesitated, but am now disposed to agree with my Brothers that it is not sufficiently made out: this case therefore may stand without breaking in upon the rules of law.

ROOKE J. The points formerly stated by my Lord were all left to the jury, and I have no reason to think that they decided wrong.

Rule discharged.

May 6th. Cockell now stated to the Court that the letter alluded to by the Lord Chief Justice on a former day, did not relate to the present Defendant but to his brother, and certainly could not affect S. Potter, the other guarantee. He urged that even if a communication between the Defendant and his brother could be presumed yet that such presumption could not be extended to S. Potter; [423] and trusted therefore, that if the Court should still think this rule ought to be discharged, they would open the consolidation rule, in order to enable S. Potter to defend the action.

EYRE Ch. J. The principal difficulty I felt in the case arose on the ground of a supposed industrious concealment by the Plaintiff not only from the servants of the house, but from all the world, which on general principles of law might have had an effect on the liability of the guarantee. But looking through the case again, I think there is room to collect that there was no want of communication with the Defendant.

The names of Tatlock and Goodrich are names not unknown at Guildhall, or in Westminster-hall: whether the letter related to the Defendant or his brother, there is a plain allusion to the guaranty in it. Considering either the probable issue of another trial, or the value of the interest, this is not a case in which the Court ought to open the consolidation rule. To prevent mistakes, I add that it is not to be taken to be the opinion of the Court, whatever my opinion might have been, that the case as it was stated originally by the report was attended with much difficulty.

EX PARTE HUBBARD. May 6th, 1799.

A prisoner who is taken in execution for more than 300l. and afterwards reduces his debt below that sum is not entitled to be discharged under the Lords' act in the next term after he has so reduced his debt unless it be also the next term after he was taken in execution.

This was a petition by a prisoner in execution to be brought up to be discharged under the 32 Geo. 2, c. 28, s. 13, and was founded on the following circumstances. The prisoner having been originally confined for several debts the amount of which was too large to entitle him to the benefit of the act, had during his confinement satisfied some of his creditors, and thus reduced the amount of his debts below 300l. He now therefore applied to the court in this term, as the term next after that in which he had thus reduced his debt to the sum specified in the 33 Geo. 3, c. 5, by which act the benefit of 32 Geo. 2, c. 28, is extended to persons in execution for sums not exceeding 300l.

Clayton Serjt. moved this on a former day and now urged in support of the application that though the act directs persons desirous of being discharged under it to apply "before the end of the first term which shall be next after such prisoner shall be charged in execution," yet it appears from the preceding parts of the clause that the legislature had in contemplation a [424] case where the debt after that period was elapsed, had been reduced to the stipulated sum. He cited in support of this the words, "if any person shall be charged in execution for any sum of money not exceeding in the whole the sum of 100l. or on which execution there shall at any time remain due a sum not amounting to above the said sum of 100l.," &c.

EYRE Ch. J. The material words of the act are "before the end of the first term which shall be next after such prisoner shall be charged in execution of his creditor;" now this is not within the first term after this prisoner has been charged in execution, though it is the next term after that in which his debt has been reduced below the sum limited. Indeed the Court will not be very anxious to establish a precedent which will enable prisoners to deal with their creditors, and thus manage to prefer some of them by paying their debts, and come in under the Lords' act against all the rest. I had almost convinced myself that the application was reasonable, and that we should be justified in ordering the prisoner to be brought up; but upon examining the act, it appears that the case is not within the words, and considering the inconvenience that may result from extending it's provisions in the way required, it seems more advisable to adhere to a strict construction.

ROOKE J. I am of the same opinion.

Clayton took nothing by his motion.

HILL v. REEVES. May 6th, 1799.

The Court will not order a common appearance to be entered on the ground of the Plaintiff having proved his debt and been chosen assignee under a commission of bankruptcy issued against the Defendant (a).

The Plaintiff having proved his debt under a commission of bankruptcy issued against the Defendant, and having been chosen one of the assignees, arrested the Defendant and held him to bail.

(a) Vide *M'Master v. Kell*, ante, 302. *Oliver v. Ames*, 8 T. R. 364. *Percy v. Powell*, 3 B. & P. 6.

Le Blanc Serjt. now shewed cause against a rule nisi obtained on a former day for cancelling the bail-bond and entering a common appearance, and contended that this application could not be attended to, since a party has a right to sue his creditor even after he has received a dividend under the commission.

Shepherd Serjt. in support of the rule observed that this was not a motion to stay proceedings in the action, but merely to cancel [425] the bail-bond, on the ground of the hardship which the Defendant sustained in being held to bail by the Plaintiff, who as assignee had possessed himself of all his property. He urged that the Plaintiff had elected his remedy, having completely adopted the commission by becoming assignee and acting under it (a)¹.

The Court refused to interfere, saying that the Defendant must apply to the Court of Chancery.

Rule discharged (b).

WATT AND ANOTHER v. DANIEL. May 6th, 1799.

The Court will not change the venue in an action on a deed to the county where it was executed on the ground of the defendant's witnesses residing there, if from the pleadings it does not appear necessary to produce many witnesses from that county, unless a question be raised of which a fair trial cannot be expected there.

By indenture of the 21st of November 1780, executed in the county of Cornwall, an agreement was entered into between the Plaintiffs (the patentees of the new-invented steam-engine) and the Defendant's father (who was concerned in certain Cornish mines) that the latter should erect five steam-engines in Cornwall at his own expence, and pay the Plaintiffs a certain sum of money monthly during the time he should work them. These monthly sums were regularly paid up to the year 1793. The present action of covenant was brought to recover the arrears from that time, amounting to between eight and nine thousand pounds.

A rule nisi having been obtained on a former day for changing the venue from London to Cornwall, on an affidavit that the Defendant must incur great expence in bringing up witnesses from Cornwall, if the cause were tried in London, and that several persons employed in superintending the mines would be compelled to leave them, at a great inconvenience to the Defendant;

Palmer Serjt. now shewed cause, and relied on an affidavit stating that the Plaintiffs had reason to believe that a fair and impartial trial could not be had in the county of Cornwall, for that great prejudice had arisen there respecting the cause in consequence of calumnies which had been circulated concerning the Plaintiffs, and that a subscription had been entered into to defray the expences of resisting the Plaintiff's demand. He ob-[426] served that from the nature of the case the question to be tried must excite a strong interest in the public mind in Cornwall, where so many persons were under the same circumstances as the Defendant; and referred to the cases cited in the note to *Foster v. Taylor*, 1 Term Rep. 781. He then adverted to the Defendant's pleas (a)², which were 1st, Non est factum. 2d, Riens per discent. 3d, That Defendant had ceased from a certain time to use the engines, and that he had paid 11,041l. for the time during which he had used them. 4th, nearly the same as the 3d. 5th, riens in arrere; and said, that with respect to the first plea, one of the two witnesses to the deed was the Defendant in the action: that the only fact to be proved under the third and fourth pleas, was the time during which the engines were worked,

(a)¹ Vid. *Aylett v. Harford and Richards bail of Lowe*, 2 Bl. 1317, where an execution was set aside on the ground of the Plaintiff having adopted the commission by acquiescing under it for a year and acting as assignee.

(b) Vid. *ex parte Ward*, 1 Atk. 153, where it was said that barely being assignee without proving a debt under the commission did not amount to an election: *Ex parte Donvilliers*, 1 Atk. 221, where the same was held with respect to a party who had chosen himself assignee. And *ex parte Capot*, 1 Atk. 210, where the plaintiff being an assignee was permitted to proceed at law, on refunding what he had received as dividends under the commission.

(a)² This he did from a notice of an application to plead those several matters and which came on afterwards.

which might be done by any of the workmen who attended them; and that the affirmative of all the other pleas lay on the Plaintiffs. He added that a similar application had been refused in the case of *Boulton v. Bull*.

Le Blanc Serjt. in support of the rule, relied on the affidavit which stated the Defendant's witnesses to reside in Cornwall, and contended that the plea shewed that all the evidence must come from that county. He insisted that nothing was to be apprehended from the prejudices of the county, as the question on the patent was now out of the case being admitted by the deed; and that as proof must be given of the times during which the engines were worked, and when they ceased working, it would be necessary to bring up a number of witnesses who had been employed about them.

EYRE Ch. J. There is no doubt that in a proper case the Court will order the venue to be changed notwithstanding the Plaintiff's right to lay it in any county. The question then is, whether this be a proper case? The first plea is non est factum. Now where other pleas are pleaded, which shew that the deed has been acted under, I cannot think it right for the Court to give any indulgence on the ground of that plea. With respect to riens per discent, that does not require many witnesses, nor that they should reside in the county of Cornwall. If the third and fourth pleas are to be understood as going singly to the point how long the engines have been in use, and whether any use had been made of them since the time alleged, two witnesses will be sufficient to prove that, [427] without calling all the county of Cornwall. The nature of the case therefore excludes the necessity of incurring great expence or inconvenience by drawing away from the mines persons whose presence may be material. But behind this narrow view of the subject I can see a case which may make it necessary for many witnesses from the county of Cornwall to attend. I can hardly suppose that from the year 1793 the mines have been worked without any engines. Probably it will turn out that the Defendants mean to contend that the engines in question have not been used because others different in principle have been substituted for them. This would bring on the question with respect to the infringement of the patent, and all the points formerly raised; upon which many persons residing in Cornwall would be necessary witnesses. But when that very question was before the Court we were of opinion that the county was too much interested for such a question to be tried there. The only ground therefore on which the Court can allow this application in point of convenience is the very ground which has been decided upon as that on which the cause ought not to be tried in Cornwall. The narrow sense of the pleadings does not call for the interference of the Court, and the other sense renders it improper for the Court to accede to the application.

ROOKE J. of the same opinion.

Rule discharged.

Palmer then shewed cause against the rule for pleading the above several matters, But the Court refused to interfere, and accordingly That rule was made absolute.

LISTER ONE & C. v. MUNDELL. May 6th, 1799.

If a fi. fa. issued against a bankrupt before certificate obtained, be not executed till after, the Court will order the goods to be restored; even though he has not pleaded the certificates according to 5 G. 2, c. 30, s. 7. For the Court will always give that relief in a summary way which might be obtained by auditâ querelâ. But if any thing be alleged to invalidate the effect of the certificate, the Court will direct a trial on a plea of bankruptcy. If the testimony of witnesses on which a verdict has proceeded be founded on and derive it's credit from particular circumstances, and those circumstances be afterwards clearly falsified by affidavit, the Court will grant a new trial (a).

This was an application to have a writ of fieri facias set aside, and the goods and money levied under it restored to the Defendant, on the ground of his having become a bankrupt subsequent to the time when the cause of action accrued, and hav-[428]-ing obtained his certificate between the day on which the writ of fieri facias issued and the day on which it was executed.

(a) Vide *Warwick v. Bruce*, 4 M. & S. 140.

The debt accrued to the Plaintiff for business done as an attorney in March 1793: In November following the Defendant became a bankrupt and a commission issued against him: The Plaintiff having declared in assumpsit, and the Defendant having pleaded the general issue, the cause was tried at the summer assizes for York 1798, and a verdict found for the Plaintiff, on the 13th November in the same year final judgment was signed, and the fieri facias sued out: on the 14th the Defendant's certificate was allowed: and on the 23d of the same month the sheriff levied under the fieri facias in Yorkshire.

Le Blanc Serjt. in the last term opposed the application, as neither warranted by the 5 Geo. 2, c. 30, s. 7, which enables bankrupts to plead their certificate, and discharges them from all debts due before the bankruptcy, the Defendant in this case not having pleaded his certificate but only the general issue; nor by s. 13, which only authorises the Court to discharge the person of the bankrupt imprisoned after the certificate obtained (a)¹.

EYRE Ch. J. By refusing this application we shall drive the Defendant to his *auditâ querelâ*, and I take it to be the modern practice to interpose in a summary way in all cases where the party would be entitled to relief on an *auditâ querelâ* (b).

Le Blanc then stated that the Defendant had lost more than 5l. on one day by horse-racing, and was therefore deprived of the benefit of the act by s. 12, and also that he had frequently promised payment of the debt since the certificate obtained.

EYRE Ch. J. Certainly if we entertain a summary jurisdiction in order to relieve a party from the necessity of having recourse to an *auditâ querelâ*, we must look into the circumstances of the case, and see whether there be any thing to prevent the *auditâ querelâ* from taking effect. However, as the facts now produced are collateral to the original motion, the party ought to have an opportunity of answering them by affidavit.

[429] Le Blanc then suggested that the Court might direct a trial in the first instance, in order to ascertain the truth of the facts under a plea of bankruptcy.

The Court accordingly ordered the rule to stand over: the Plaintiff to deliver a declaration; the Defendant to plead his certificate: and the parties to go to trial at the ensuing assizes.

At the trial the principal point in dispute was, whether a certain sum of money had been lost at the Scarborough races in August 1793, or in August 1792, the latter not being within twelve months previous to the bankruptcy. To prove that it was lost in 1793, the Plaintiff produced three witnesses, all of whom swore to the fact of the money having been lost in 1793, and two of them founded their testimony on particular circumstances within their recollection; viz. Thomas Dinnis, that till 1793 he had lived at Hunmanby in Yorkshire, and on his leaving that place had come immediately to Scarborough; and Fr. William Dove, that a child of his died about a month before the race in question took place. Verdict for the Plaintiff.

Cockell Serjt. early in this term moved for a rule nisi for a new trial, on two affidavits contradicting the particular circumstances on which the two witnesses above-mentioned founded their testimony: viz. first, the affidavit of two persons who had been overseers of the poor of Hunmanby in the year 1791, and swore that Thomas Dinnis was master of the poor-house there, and was paid off and discharged by the deponents on the 22d of November in that year, and that within a few days afterwards he went and resided at Scarborough: Secondly, the affidavit of two other persons, who, together with the vicar of the parish where William Dove resided, had examined the registry of burials, and found that a child of his had been buried there on the 17th of August 1792, and that no other child of his had been buried there since that time. The certificate of the vicar to that effect was also produced.

The Court observed, that though it was unusual to grant a new trial on evidence contradicting the testimony on which the verdict had proceeded, discovered subsequent to the trial (a)², yet as the [430] very facts on which these witnesses had founded

(a)¹ *Ashdowne v. Fisher*, Barnes, 206, ed. 3. *Cellan v. Meyrick*, 1 T. R. 361.

(b) Vid 3 Bl. Comm. 406. *Anon.* 1 Salk. 93. *Wicket v. Cremer*, 1 Lord Raym. 439. 1 Salk. 264, S. C. Cont. *Calcraft v. Swann*, Barnes, 204, ed. 3.

(a)² So an objection to the competency of witnesses discovered subsequent to the trial is not a sufficient ground for a new trial. *Turner v. Pearte*, 1 T. R. 717.

themselves were falsified by the affidavits produced, they thought it afforded a sufficient ground for a new trial, and accordingly granted a rule nisi:

Against this *Le Blanc* was now to have shewn cause, but on a question from the Court he admitted that he could not contradict the affidavits which had been produced: and therefore the Court made

The rule absolute.

IN THE EXCHEQUER CHAMBER.

MARRYAT v. WILSON IN ERROR. May 6th, 1799.

Under the late treaty between this country and the United States of America confirmed by 37 Geo. 3, c. 97, it is not necessary that the trade conceded to the Americans by the 13th Article should be direct from America to the British settlements in the East Indies: it may be carried on circuitously through any country in Europe, including Great Britain. A natural-born subject of this country admitted a citizen of the United States of America either before or after the declaration of American independence, may be considered as a subject of the United States so as to entitle him to trade to the East Indies under the above treaty (a).

A writ of error having been brought in this Court on the judgment given in the Court of King's Bench between these parties, (vid. 8 T. R. 31) the case was argued early in this term by Rous for the Plaintiff in Error and Gibbs for the Defendant; the general line of argument however being the same as that in the King's Bench, and much commented on in the judgment of the Court, it was thought unnecessary to do more than subjoin in the form of notes to the following judgment whatever appeared at all new or material.

The Court took time to consider of their opinion, which was this day delivered by EYRE Ch. J. The substance of this record having been very recently stated to the Court, and the record at large being to be found in the Term Reports, I shall content myself with referring to it, stating so much of it only as may be necessary to introduce the questions which have arisen upon it. This is an action upon policies of insurance set forth in the first, third, and fifth counts of [431] the declaration. That in the first count being a valued policy on one moiety of the ship "Argonaut," Collet master, at and from Bourdeaux to Madeira, and the East Indies, and back to America, with liberty to touch stay and trade at all ports and places whatsoever or wheresoever on the outward or homeward bound voyage; and this policy is stated and found to have been effected by the Plaintiff for the use of John Collet. The policy in the third count being a valued policy on goods neutral property on board the same ship on a voyage at and from Bourdeaux to the East Indies with liberty to touch call and trade at all ports and places or islands whatsoever and wheresoever as well at the Cape as on this or the other side of the Cape of Good Hope, until her arrival at her port of discharge in Bengal; and this policy is also stated and found to have been effected for the use of the said John Collet. The policy in the fifth count being on goods warranted American property laden on board the same ship for a voyage at and from Madeira to her last port of discharge in India, with liberty to touch stay and trade at all ports places and islands whatsoever and wheresoever as well at, as on this and on the other side of the Cape of Good Hope; and this policy is stated and found to have been effected for the use of the said John Collet and one Anthony Butler.

The Defendant underwrote all these policies, and a loss has been sustained both of ship and cargo which is admitted to be within the terms of the policy; but it has been insisted upon the part of the Defendant that the voyages described in these policies are illegal voyages, and as such cannot be made the subject of contracts of this nature, and therefore that the Defendant is not bound by these contracts to make good his proportion of the loss.

The facts of the case upon which this charge of illegality is founded, as may be

(a) And see *McConnell v. Hector*, 3 B. & P. 113, 14. *Pearce v. Cowie*, Holt Ni. Pri. 69.

collected from the special verdict in this cause, are these: John Collet and Anthony Butler on whose account these policies were respectively effected, appear to have been natural-born subjects of His Majesty but to have been resident and domiciled within the United States of America, the latter before the declaration of the independence of the United States the former at a period subsequent to the ratification of such independence. On the 12th of June 1795 they became the owners [432] of this vessel in moieties; on the 25th of July 1795 Collet sailed in her as master, having a cargo of corn and flour on board from Philadelphia for France, with a view of proceeding from thence with the ship after the disposal of her cargo there to Madeira and the East Indies and from thence back to the United States. On the 1st of May 1796 Collet arrived with this ship at Brest, and there sold his flour: he afterwards proceeded to Bourdeaux where he sold the remainder of his cargo, and he there shipped on his own account the goods mentioned in the second of these policies. While the ship remained at Bourdeaux, Collet came to London, and having procured a credit with the Plaintiff in this cause, he the Plaintiff purchased here upon his own credit by commission goods and merchandize of British growth and of British manufacture on account of Collet and Butler, and these are the goods which are the subject of the third of these policies.

The Plaintiff by the direction of Collet and during his stay in London shipped these goods in the port of London on the joint account and risk of Collet and Butler on board three American ships, in which they were carried from London to Madeira for the purpose of being there re-shipped and put on board the "Argonaut," and of being carried in that ship together with the goods shipped on board her at Bourdeaux from Madeira to the British territories in the East Indies, and of being imported into those territories and traded trafficked and adventured in there: and it appears that at the time of this loss Collet and Butler remained debtors to the Plaintiff for the amount of these goods. On the 1st May 1796 the "Argonaut" sailed from Bourdeaux with the goods there taken on board her for Madeira in order there to meet receive and take on board the goods shipped from London: she arrived at Madeira and took those goods on board there and afterwards sailed from Madeira in the prosecution of her voyage to the East Indies, in the course of which voyage she was seized by the commander of a squadron of the King's ships on suspicion of being an illicit trader, and this has been considered throughout the cause on all sides as a total loss of the ship and cargo.

It seems to have been admitted on all sides in this cause that this voyage and the trade and traffic intended to have been carried on by the "Argonaut" with the British territories in the East Indies is to be considered as illegal and the ship an illicit trader, [433] unless the voyage and the intended trading were legalized by the treaty of commerce which was entered into between Great Britain and the United States of America on the 19th of November 1794, which was afterwards ratified by the United States on the 14th of August 1795, and by His Majesty on the 28th of October in that year and retrospectively confirmed by parliament in the 37 Geo. 3.

By the 11th article of that treaty it is agreed that there shall be a reciprocal and entirely perfect liberty of navigation and commerce between their respective people in the manner, under the limitations and on the conditions specified in the treaty.

By the 13th article His Majesty consents that the vessels belonging to the citizens of the United States of America shall be admitted and hospitably received in all the sea-ports and harbours of the British territories in the East Indies, and that the citizens of the said United States may freely carry on a trade between the said territories and the said United States in all articles of which the importation or exportation respectively to or from the said territories shall not be entirely prohibited: Provided only that it shall not be lawful for them in any time of war between the British government and any other power or state whatever to export from the said territories without the special permission of the British government there any military stores, or naval stores, or rice. The citizens of the United States are to pay no higher tonnage duty than British vessels pay in the ports of the United States, and they are to pay the same import and export duties as are paid by British vessels. It is expressly agreed that the vessels of the United States shall not carry any of the articles exported by them from the said British territories to any port or place except to some port or place in America where the same shall be unladen, and such regulations shall be adopted by both parties as shall be found necessary to enforce the due and faithful observance of this stipulation. This article is not to extend to allow the vessels of

the United States to carry on any part of the coasting trade of the British territories: and for explanation it is added that vessels going with their original cargoes or part thereof from one port of discharge to another are not to be considered as carrying on the coasting trade. This article contains some other provisions by which Americans are to govern themselves in their intercourse with the British territories, [434] but nothing arises upon that part of the article material to the present subject.

On the part of Mr. Marryat the Defendant in the action, it has been insisted by Mr. Rous who entered very fairly into the real merits of the case, that according to the true construction of this treaty, viewing it in all its parts and attending both to the letter and the spirit of it, the trade to be carried on between the British territories in the East Indies and the United States, is a direct and immediate trade from the United States to the British territories as well as from the British territories to the United States, which unquestionably must be direct and immediate, it being expressly agreed that the vessels of the United States shall not carry any of the articles exported by them from the British territories in the East Indies to any port or place except to some port or place in America where the same shall be unladen; and consequently that the voyages insured from Bourdeaux and from Madeira not being protected by the policy were *ex concessis* illegal.

Mr. Rous's verbal criticism (*a*) upon the word "between" was ingenious, and well supported: but in truth there is hardly a word in the English language less precise in its meaning or more indefinite in its application than the word "between." According to the context it is used to express the strictest local sense of to and from, or the most remote relation which any one thing can have or bear to another. For instance, when we say that the inlet from the Western Ocean to the Mediterranean is between the coast of Spain and the coast of the empire of Morocco, it marks geographical lines precisely drawn. But if we were to say that the intercourse between the coast of Spain and that of the empire of Morocco was interrupted by the religious opinions and the habits of living prevailing in the two countries, the word "between" would have no other effect than to point out the countries or nations whose intercourse is spoken of as interrupted by the causes enumerated, and would mean no more than what is meant by the same word in the 11th article of this treaty where the expression is "between their respective people." When we leave [435] this narrow ground of argument, and proceed to consider the whole context of this article, the generality of the expressions, the most obvious interpretation of those expressions, and all the probable and possible consequences which may follow from our exposition of this article, the subject expands itself to an alarming magnitude, and the argument would take a very wide compass indeed, if it were now to be entered into for the first time: but after the very elaborate discussion which this cause has undergone in the Court of King's Bench, where a solemn judgment was pronounced at the close of a fourth argument, and considering that that judgment has now been submitted to our review upon arguments which, though very ably put, have not materially varied the state of the questions which have been made and decided upon by that Court, we do not feel ourselves called upon to enter very much at large into the subject, and I shall content myself with stating as shortly as I can the grounds upon which the unanimous opinion of this Court that the judgment of the Court of King's Bench is not erroneous and ought to be affirmed may be supported.

The language of the 13th article is that the citizens of the United States may freely carry on a trade between the said territories and the said United States in articles not entirely prohibited. They are therefore not restricted to trade in articles of the growth produce and manufacture of the United States: it is enough that the articles they trade in are not articles prohibited from being imported to the British territories in India, or exported from thence by any body. If then they propose to trade with the British territories in India in foreign commodities as they may do, they must use means to furnish themselves with those commodities. In the nature

(*a*) To prove that the word *between* meant to and from, Mr. Rous referred to the *ETHEA PITEPOENTA* of John Horne Tooke, part 1st, p. 404, ed. 2, where it is said to be a dual preposition derived from the Anglo Saxon imperative *be* and the Anglo-Saxon for *Twain*, and also to Johnson's Dictionary, where it is interpreted "from one to another."

of things it must be done in a course of trade. The obvious course of trade is that they should carry their native commodities to other countries where they can be exchanged with the most advantage for articles proper for the East India market, and that they should then proceed to India in order to carry on a trade there in those articles. I find nothing in the treaty which will warrant me in saying that it was the intention of the contracting parties that the trade conceded by the treaty should not be so carried on. Mr. Rous found himself obliged to acknowledge that the citizens of the United States might within the terms of this treaty first import into America the articles in which they propose to [436] trade with the British territories in India, and then export them from America in a direct voyage to the East Indies, and he could not deny that they might have imported these articles into America even from London. Indeed it would have been a most extraordinary state of things if they might have gone to every other market for the goods they wanted, but that the British market was excluded. And to the apparent disadvantage under which the citizens of the United States would carry on trade with the British territories in India so conducted, Mr. Rous argued, that so to understand the treaty would be only to give the fair and due preference to the great national commerce of the East India Company. Whether this trade should have been conceded under any qualifications or restrictions is one thing, it having been conceded now, to attempt to cramp it by a narrow, rigorous, forced construction of the words of the treaty, is another and a very different consideration. We cannot suppose that an indirect advantage was intended to be reserv'd to the East India Company by so framing the treaty that the American trade might by construction be put under disadvantage; because this would be a chicanery unworthy of the British government and contrary to the character of its negotiations, which have been at all times distinguished for their good faith to a degree of candour which has been supposed sometimes to have exposed it to the hazard of being made the dupe of more refined politicians. The nature of the trade granted in my opinion fixes the construction of the grant. If it were necessary to go farther strong arguments may be drawn from the context of this article and the contrast, which the comparing it with the preceding article, will produce. From the context it appears that the trade was to be free, subject only to certain specific regulations. The citizens of the United States are put upon the same footing as to duties with British subjects. No question is proposed, no means of ascertaining the fact are provided, where they come from, though it is anxiously stipulated where they are to go to. The words "original cargo" are to be found in the article and it was supposed they might be used as a ground to infer that the trade was to be direct from the United States. But "original cargo" is plainly set in opposition to the cargo to be taken in India. The provision respecting it is that though the coasting trade is not permitted to the citizens of the United States, they may carry the cargo, which they originally [437] brought with them, into the ports of the British territories from one port of delivery to another for the purpose of a market. The word original serves the purpose for which it is used perfectly well, and it marks a total indifference to the question where the cargo was picked up. I have already had occasion to take notice that as to the cargo to be imported no other restriction or qualification was in the view of the contracting parties than that it should consist of articles not expressly prohibited. But when this article is contrasted with the preceding article, the true construction of it will be seen in a still clearer point of view. The 12th article is in substance, that it shall be lawful for the citizens of the United States to carry to any of His Majesty's islands and ports in the West Indies from the United States in their own vessels, not being above seventy tons, any goods or merchandize being of the growth manufacture or produce of the said states, which British vessels might carry to the islands from the said states, and that the citizens of the United States may purchase load and carry away in their said vessels to the United States from the islands all such articles being of the growth manufacture or produce of the islands as British vessels could carry from thence to the said states, provided that the American vessels carry and land their cargoes in the United States only, it being agreed that the United States are to prohibit and restrain the carrying any molasses sugar coffee cocoa or cotton in American vessels either from His Majesty's islands or from the United States to any part of the world except the United States, and there is a proviso that British vessels may import from the islands into the United States, and may export from the United States to the islands, all articles of the growth produce or manufacture of the islands or of the

United States respectively, which by the laws of the said states might be then imported or exported.

The trade to be carried on between the citizens of the United States and the British West India islands, by virtue of this article, is required to be in goods of the growth produce or manufacture of the islands and United States respectively. This trade in the nature of it must be immediate and direct. It could not be in the contemplation of the contracting parties that it might be circuitous, except indeed within the limits of the United States and within the range of the British West India islands, and so far as I take it, it is circuitous. The contracting parties could not look [438] to so remote a possible case as that a citizen of the United States might load the native commodities of the United States in a foreign port, and therefore we are not driven to collect the meaning of this article from the precision of the language it uses. Its language is however most precise. The terminus à quo and the terminus ad quem are designed with as much certainty as would be required in an indictment for not repairing a particular part of the King's highway. And to exclude all possibility of misapprehension, mark how entirely this trade was to be immediate and direct, a provision is added that the United States are to prohibit the carrying goods of the produce of the West India islands in American vessels to any port of the world except the United States. Thus contrasted, those articles afford an illustration of the internal evidence of the import and true intent and meaning of each considered separately, and the conclusion from the whole appears to us to be irresistible that the trade to be carried on under the 12th article between the United States and the British West India islands is a direct trade, and that the trade to be carried on between the United States and the British territories in the East Indies under the 13th article may be as circuitous as the enterprising spirit of commerce can make it. There may be reason to apprehend that such an intercourse with the British territories in the East Indies may prove very injurious to the interests of the East India Company, and to Great Britain in respect of the great national commerce which is carried on by that Company. In particular there may be reason to apprehend that this treaty will open a door to many of our own people whom the policy of our laws has shut out from a direct trade to the East Indies. In truth it can hardly be expected that the spirit of commerce, too often found eluding laws made to keep it within bounds, that the *lucri bonus odor* should not embark British capital in this trade. This ought to have been foreseen, and therefore I conclude it was foreseen, and that it was found that the balance of advantage and disadvantage preponderated in favour of the treaty. If not; those who advised it will have to answer for it: the responsibility is not with us. We are not even the expounders of treaties. This treaty is brought under our consideration incidentally as an ingredient in a cause in judgment before us: we only say how it is to be understood between the parties to this record. This we are bound to do; and we have but one rule by which we are to govern [439] ourselves. We are to construe this treaty as we would construe any other instrument public or private. We are to collect from the nature of the subject, from the words and from the context, the true intent and meaning of the contracting parties, whether they are A. and B., or happen to be two independent states. The Judges who administer the municipal laws of one of those states would commit themselves upon very disadvantageous ground, ground which they can have no opportunity of examining, if they were to suffer collateral considerations to mix in their judgment on a case circumstanced as the present case is. It has been urged that in this instance (at least as to the goods in the third policy) this was a commerce direct from this country, and that this treaty does not open a trade between Great Britain and the British territories in the East Indies to the prejudice of the monopoly vested in the East India Company. This objection is plausible but not founded. The circumstance that this part of the cargo of the "Argonaut" was procured here, and the share which the Plaintiff Wilson had in procuring it, might have deserved consideration as evidence of a collusion by means of which Wilson was carrying on for himself an illicit trade to the East Indies which might have subjected this ship and cargo, or this part of the cargo to seizure and confiscation. But this use has not been made of the facts found by the special verdict: and no other use, consistent with our opinion of the legal effect of the treaty, could be made of them. For a citizen of the United States being allowed to trade to the British territories in India generally with an exception of a few articles only, as he may take in his cargo in the ports of his own country, so he may take it in the

ports of this country as well as any other; and he may employ an agent, and that agent may be a British subject. It is a lawful agency. It seems to me impossible to maintain in argument that the subject of a nation in amity who may trade to the British territories in India should be excluded from one market for his outward investment when all other markets are open to him, and when it is distinctly admitted that the markets of all the world, including ours, circuitously must be open to him.

There remains one other topic of which I am called upon to take some notice. It is said that Collett, who is solely interested in the two first of these policies, and has a joint interest with Butler in the last, being a natural born subject of this country, [440] cannot shake off that character, and become an American so as to entitle himself to the protection of this treaty. He is a British subject trading to the East Indies: his trade is therefore illicit: the voyages insured are illegal: and the policies are void. Or perhaps the objection ought to be put another way thus. The vessels in which only the trade can lawfully be carried on between the United States and the British territories in India according to the provisions of the Statute 37 Geo. 3, c. 97, must be owned by subjects of the United States, and whereof the master and three fourths of the mariners at least are subjects of the United States: whereas this vessel the "Argonaut" was in part the property of a natural-born subject of this country, and this part-owner was also the master; consequently she was not owned by a subject of the United States, nor navigated by a master a subject of the United States, within the true intent and meaning of the navigation laws, and particularly the Statute 37 Geo. 3, c. 97. The conclusion will be the same. The voyages insured were therefore illegal and the policies void. This is the only point in the case which has appeared to me to have any difficulty in it. I must confess that when I found it stated as a fact in this special verdict that Collett and Butler were natural-born subjects of his Majesty, I felt myself embarrassed, and I could not readily disengage myself. And when I found that in the year 1797 there had been a reference (a) from

(a) By 37 Geo. 3, c. 97, s. 1, goods of the growth of America are allowed to be imported into Great Britain from the United States of America in British ships owned navigated and registered according to law, or American ships "whereof the master and three-fourths of the mariners at least are subjects of the said United States." On this a question arose, whether one Smith who had become a citizen of the United States since the declaration of independence, and came here as master of an American vessel, was within the meaning of the act. The case was submitted to the opinion of the King's Advocate and the Attorney and Solicitor General; which was as follows:

To the Lords of His Majesty's Most Honourable Privy Council,

May it please your Lordships,

In obedience to your Lordships' order of the 16th instant, referring to us the petition of John Montgomery, the representation of Simon Cock, and papers accompanying the same, to your Lordship's order annexed, and requiring us to consider thereof, and report, whether Alexander Smith therein named is to be considered according to the true construction of His Majesty's order in council of the 31st May 1797, for regulating the trade between Great Britain and the territories belonging to the United States of America, as a subject of the United States of America, and whether he is entitled to be master of a ship belonging to the said United States trading to this country, and to confer on the said ship the benefit of the said order in council: We have considered the said papers so referred to us, and we are of opinion, that Alexander Smith, being a natural-born subject of His Majesty, and not having been admitted a citizen of the United States of America until the 6th of May 1796, cannot be considered, with respect to this country, as a subject of the United States, so as to entitle him to be master of a ship belonging to the United States trading to this country, and to confer on the said ship the benefit of the said order in council. We apprehend that this point was submitted to the opinion of Sir Philip Yorke [1], in 1732, in the case of a Scotchman, who had been made a burgher of Stockholm, and was the master of a Swedish ship navigated with Swedish mariners;

[1] Vide Reeve's Law of Shipping, 252.

the Privy Council [441] to the then Advocate General, and the two law officers of the Crown, and that they had concurred in opinion that the master of an American vessel a subject of the United States domiciled there, but in fact a natural-born subject of Great Britain was not to be considered as a subject of the United States within the meaning of our navigation laws, founding themselves upon an opinion of Lord Hardwicke when he was Attorney General, and that the Council had adopted and acted upon that opinion, I felt my difficulty increase upon me: for, though this was not a judicial decision, (as in the argument at the bar of the Court of King's Bench it was supposed to be,) it was certainly of the highest authority next to a judicial decision: it was a public act of the executive government, founded on the advice of eminent and learned men, whose situations called upon them to make themselves well acquainted with our naviga-[442]-tion laws, and must have made them very familiar with all the questions which had arisen upon those laws: and it was therefore entitled to very great respect from me. It may be observed that this order might have been followed by a judicial decision. It purports to recommend, that under the actual circumstances the vessel should be admitted to an entry though she was not navigated according to law. Notwithstanding the order and the entry in consequence of it, the vessel might have been seised and prosecuted in the Exchequer, and so the question might have been brought to a judicial decision. It was done in the case of *Scott qui tam v. Schwartz*, Com. 677, cited in the argument. By the way I do not understand upon what ground the case of *Butler* was distinguished from *Collett's case*, unless Butler has been expressly discharged from his allegiance by act of parliament, in consequence of our acknowledgment of the independence of the United States. They were both natural-born subjects,

and that he thought this would not entitle the Scotchman to be considered as a Swede in Great Britain, his native country.

All which we humbly submit to your Lordship's consideration.

WILLIAM SCOTT,
JOHN SCOTT,
JOHN MITFORD.

June 19, 1797,

In consequence of the above opinion the following letter was written for the information of the Lords Commissioners of the Treasury, and acted upon by them:

Council-Office, Whitehall,
23d June 1797.

Sir,—The Lords of His Majesty's most honorable Privy Council having had under consideration a report of His Majesty's Advocate, Attorney and Solicitor General, on the petition of John Montgomery, and a representation of Simon Cock his agent, and papers accompanying the same, requesting the entry at the port of Liverpool of the American ship "America," Alexander Smith master, from New York; notwithstanding it has been objected to, on the grounds of the master of the said ship not possessing all the qualifications of an American subject; I am commanded by their Lordships to transmit a copy of the said report to you for the information of the Lords Commissioners of His Majesty's Treasury, and I am to signify that the Lords of the Council agree in opinion with His Majesty's Advocate, Attorney and Solicitor General, that a British subject cannot so divest himself of the character of a British subject, by being naturalized or becoming a citizen of any foreign estate, as to entitle him to be considered, in this country, as a subject of such foreign state, under the laws of navigation. And their Lordships are further of opinion, that for many reasons it would be very contrary to the interest of this country, to admit of such a claim, yet, as this is the first case with respect to the United States of America in which a claim of this nature has been brought forward, their Lordships do not think it would be proper to take advantage of the forfeiture of the said ship, &c. and are even of opinion, that under all the circumstances of the present case, the said ship "America" should, according to the request of the memorialist, be permitted to enter the cargo at the port of Liverpool; I am however directed by their Lordships to desire that a copy of the said report may be transmitted to the Commissioners of His Majesty's Customs, and that they may be informed, that after such notice a like indulgence will not be granted.—I am, &c.

W. FAWKENER.

Geo. Rose Esq.

they were both adopted subjects of the United States, and it is to be said of both *Nemo patriam in qua natus est exuere, nec legeantie debitum ejuarre possit*. It was observed by Lord Hale, that a natural-born subject of this country may by foreign naturalization entangle himself in difficulties and a conflict of duties. So may the naturalized or denizen subject of the King of Great Britain. Yet it is clear, that we and all the civilized nations and states of Europe do adopt (each according to their own laws) the natural-born subjects of other countries. So, as I take it, Vattel (lib. 1, c. 19, s. 212, et seq.) puts it in the passages referred to. Our laws give certain privileges and withhold certain privileges from our adopted subjects, and we may naturally conclude, that there may be some qualification of the privilege in the laws of other countries. But our resident denizens are entitled, as I take it, to all sorts of commercial privileges which our natural-born subjects can claim. We should consider them as English in the language of the Navigation Act. The United States do undoubtedly consider their adopted subjects as subjects of the United States within their laws. And I take it that we should consider their adopted subjects, if they happen not to be natural-born subjects of the King of Great Britain, as subjects of the United States within our navigation laws. To this proposition I take the case of *Scott v. Schwartz* to be in point, if it wanted an authority. The case now begins to work itself clear. It comes to this question: What difference does the circumstance of the adopted sub-[443]-ject of the United States being a natural born subject of the King of Great Britain make? Is there any general principle in the law of nations (out of which this adoption of subjects seems to have grown) that in the parent state the adopted subject is incapable of enjoying the privileges which have been conceded by the parent state to the other subjects of that state which has adopted him? I know of no such disabling principle. Let us then come to our own municipal law. Lord Hale says foreign naturalization may involve the natural-born subject in a conflict of duties. This is eloquence but not precision. What are the duties of which there may be a conflict? Our laws pronounce, that if there should be war between his parent state and the state which has adopted him, he must not arm himself against the parent state. Perhaps they go further and say, that if he is here he may be prevented from returning to his domicile in the state which has adopted him: that if he is there, he must on receiving the King's commands under his privy seal return hither on pain of incurring a contempt and penalties consequent upon it. Whether the proclamation (8 Term Rep. 34) which has been introduced into this cause will have the same effect as a privy seal served upon the party, is a question not necessary to be here discussed. It cannot have a greater effect, nor an effect of a different nature, and may therefore be laid out of the case. Our municipal laws may attach upon him in some other cases, but I conclude in no instance which by analogy can govern the present case, because I have heard of no such argument from analogy. Upon what authority then is it said, that a natural-born subject of the King of Great Britain shall not trade to the East Indies, though he is an adopted subject of another country whose subjects in general are allowed to trade to the East Indies? Shall it be enough to say the rest of the King's subjects are not allowed to trade to the East Indies, and therefore you being the King's subject shall not? He will answer, I have a privilege which the rest of the King's subjects have not. I am the King's subject, but I am also the subject of the United States, and Great Britain has granted to the subjects of the United States that they may trade. He may add, I violated no law of my parent state, in procuring myself to be received a subject of the United States. She encourages the practice, for she herself adopts the subjects of other states. Why then are the fruits of my adoption to be withheld from me? If it be said to him, you a British subject ought not to trade to the loss and injury of the East India Company [444] who have a monopoly: he may say, the subjects of the United States may and ought to carry on this trade under the authority of the laws of this country; under the authority of the same laws which gave to the East India Company their monopoly. If the Company sustained a loss, it is *damnum sine injuria*. In short, it being once granted that natural-born subjects of the King of Great Britain may become subjects of the United States, there can be no breach of moral, political, or legal duties, no conflict of duties in claiming or exercising the privileges which belong to that character. The same train of reasoning, in my judgment, goes to prove that it is not yet sufficiently established to be now taken for clear law upon the ground of which we ought to declare these contracts void, that a natural-

born subject of the King naturalized, or otherwise adopted as a subject by a foreign state, is not to be considered within our navigation laws as a subject of that foreign state when acting in the character of the master of a vessel belonging to the subjects of that foreign state. Such a man is certainly to many purposes, "of that country or place" which are the words of the Navigation Act, and "a subject of the United States," which are the words of the Stat. 37 Geo. 3, c. 97. In point of title to this character of subject, he is sufficiently so within our navigation laws. I mean that he is sufficiently adopted, according to the case in *Comyns*, to be considered a subject of that country within our navigation laws, supposing his claim not to be repelled by his being a natural-born subject of Great Britain. I am not prepared to say, highly as I respect the authority of those who held that opinion, that this character of natural-born subject will control or suspend the legal operation of that of a subject of the United States. There is here no conflict of duties. Both characters may stand together; and if some political inconveniences, such as those suggested in the argument before us, (though these seem very remote,) should follow, yet if these inconveniences are not of consequence enough to prevent the practice of the adoption of subjects by Great Britain and every other state in Europe, we cannot satisfy ourselves that they ought to control the legal consequences of that adoption. We are of opinion that there is no error in this judgment, and that it ought to be affirmed.

Judgment affirmed.

Mr. Justice Buller was absent from the 20th and Mr. Justice Heath from the 24th of April to the end of the term, from indisposition.

The end of Easter Term.

[445] CASES ARGUED AND DETERMINED IN THE COURT OF COMMON PLEAS, IN TRINITY TERM, IN THE THIRTY-NINTH YEAR OF THE REIGN OF GEORGE III.

WILTON Executrix v. HAMILTON. May 6th, 1799.

A. sued as executrix of B. on a policy effected by B. in his life-time, in which he was jointly interested with C. and D. now living and was nonsuited, held that she was entitled to the privilege of an executrix to be exempt from costs (*a*).

This was an application to the Court to direct the prothonotary to tax costs against the Plaintiff who had been nonsuited. The ground on which it was attempted to differ this from the common case of an executrix were as follow. The plaintiff declared as executrix of her husband on a policy of assurance effected by him in his life-time, and in which he was jointly interested with two others. The 1st count stated, that the testator in his life-time, for the use of himself, S. L. and S. B., effected the policy for himself, and as agent, &c.; that the testator, S. L. and S. B., were interested &c.; that afterwards, in the life-time of the testator, the ship sailed on her voyage, and that afterwards and during the voyage she was lost. The 2d count only differed from the first in some circumstances which could not affect this motion. The 3d and 4th were money counts, stating that the Defendant was indebted to the Plaintiff as executrix, for money paid by the testator in his life-time to the use of the Defendant, and for money had and received by the Defendant in the life-time of the testator to his use.

Heywood Serjt. moved this on the last day of Easter term, but was at that time refused a rule nisi by the Court, who said they [446] would not stir the point unless upon further consideration of the case he should think the motion well founded.

Accordingly on this day he again applied for a rule to shew cause and contended, that this case did not fall within the general rule, that where an executor sues in right of his testator for a cause of action arising in the life-time of his testator, and the estate will be benefited by a recovery, he shall not pay costs. 1st, Because it did not appear upon the pleadings that the cause of action accrued in the life-time of the testator, for though the policy was stated in the two first counts to have been made by him, yet it was not shewn that the loss happened before his death, and the money

(a) Vide *Cooke v. Lucas*, 2 East, 395. *Tattersall v. Groote*, 2 B. & P. 253, 256. *Comber v. Hardcastle*, 3 B. & P. 116.

counts were on promises made to the Plaintiff. 2dly, Because the Damages if recovered would not have been assets, but must have been carried to the partnership fund and liable to the partnership debts; and 3dly, because it was not necessary for the executrix to have brought this action, as either of the surviving parties interested might have supported it. He cited *Jenkins and Wife v. Plombe*, 6 Mod. 92, 181. *Mobley and Wife v. York*, 11 Mod. 135. *Marsh v. Yellowley*, 2 Str. 1106. *Nicolas v. Killigrew*, 1 Ld. Raym. 436. *Harris et Ux v. Hanna*, Cas. temp. Hardw. 204, and *Bollard v. Spencer*, 7 Term Rep. 358.

Le Blanc Serjt. shewed cause in the first instance, and insisted, that it might be inferred from the pleadings that the cause of action accrued during the life of the testator.

EYRE Ch. J. On the two first counts we may infer, that the loss happened in the life-time of the testator, and with regard to the money counts, the promise is an implication of law, since the testator is the person to whom the debt is substantially due. The Plaintiff was entitled to bring this action, and she could only bring it in right of her testator. The rule of law is clear. With regard to such causes as fall under the cognizance of the executrix herself, she sues at her peril; the privilege is given on account of the situation in which she stands as to those claims of the testator which were executed in his life-time. It is her duty to convert those claims into assets, which she must do with ignorance and uncertainty, and on that account she is protected from costs.

BULLER J. I am of the same opinion. It makes no difference that the surviving parties for whose interest this policy was made might have brought the action in their own names.

Heywood took nothing by his motion.

[447] SARAH LEGH v. FRANCES LEGH. May 30th, 1799.

If the obligor of a bond, after notice of its being assigned, take a release from the obligee, and plead it to an action brought by the assignee in the name of the obligee, the Court will set the plea aside; nor will they under these circumstances allow the obligor to plead payment of the bond (a).

On a former day Shepherd Serjt. shewed cause against a rule nisi obtained by Le Blanc Serjt. for setting aside a plea of release in an action on a bond, and ordering the release to be cancelled.

The case as disclosed by the affidavits in support of the rule appeared to be this: Frances Legh having given a bond to Sarah Legh to secure 75l. Sarah assigned it to John Legh as a security for the payment of a lesser sum, of which Frances had notice: John having brought an action on the bond against Frances in the name of Sarah, Sarah gave a release to Frances by whom she had been satisfied her debt, and this release was pleaded.

EYRE Ch. J. The conduct of this Defendant has been against good faith, and the only question is, whether the Plaintiff must not seek relief in a Court of Equity? The Defendant ought either to have paid the person to whom the bond was assigned, or have waited till an action was commenced against him, and then have applied to the Court. Most clearly it was in breach of good faith to pay the money to the assignor of the bond and take a release, and I rather think the Court ought not to allow the Defendant to avail himself of this plea, since a Court of Equity would order the Defendant to pay the Plaintiff the amount of his lien on the bond, and probably all the costs of the application.

BULLER J. There are many cases in which the Court has set aside a release given to prejudice the real Plaintiff. All these cases depend on circumstances. If the release be fraudulent, the Court will attend to the application.

The Court recommended the parties to go before the prothonotary, in order to ascertain what sum was really due to the Plaintiff on the bond.

Shepherd on this day stated that the Defendant objected to going before the prothonotary, upon which the Court said, that the rule must be made absolute. He then applied for leave to plead payment of the bond, and contended that as this was

(a) Vide *Jones v. Herbert*, 7 Taunt. 421. *Innell v. Newman*, 4 B. & A. 419.

not an application under the statute to plead several pleas, the Court had no discretion.

EYRE Ch. J. The Court has in many cases refused to allow a party to take his legal advantage, where it has appeared to be [448] against good faith. Thus we prevent a man from signing judgment who has a right by law to do so, if it would be in breach of his own agreement. In order to defeat the real Plaintiff, this Defendant has colluded with the nominal Plaintiff to obtain a release; and I think therefore the plea of release may be set aside consistently with the general rules of the Court (a)¹. And if so, the Defendant cannot be permitted to plead payment of the bond, as that would amount to the same thing.

BULLER J. The Court proceeds on the ground, that the Defendant has in effect agreed not to plead payment against the nominal obligee.

Upon this the Defendant consented to go before the prothonotary.

DONNELLY v. DUNN. May 30th, 1799.

If bail plead the bankruptcy of their principal in their own discharge, they must plead it circumstantially, or it will be bad on special demurrer. Quære if it can be pleaded at all (a)²?

Debt on a recognizance against the Defendant as bail of one Robert Maclagan. Plea: That the said Robert Maclagan after the entering into the recognizance in the declaration mentioned and before the return of any writ of *capias ad satisfaciendum* against the said Robert Maclagan upon the said judgment in the said declaration also mentioned to wit on &c. at &c. became and was a bankrupt within the true intent and meaning of the several statutes made and then and now in force concerning bankrupts. And that the said Robert Maclagan having so become and being such bankrupt as aforesaid afterwards and before the return of any writ of *capias ad satisfaciendum* against [449] him upon the said judgment to wit on &c. at &c. a certain commission of bankrupt was in due manner awarded and issued forth against him the said Robert Maclagan under the great seal of Great Britain directed to certain commissioners therein named under which said commission he the said Robert Maclagan was afterwards in due manner adjudged and declared a bankrupt to wit at &c.; that the said Robert Maclagan having been so adjudged and declared bankrupt as aforesaid and having in all things conformed himself as such bankrupt to the several statutes concerning bankrupts, he the said Robert Maclagan afterwards and before the return of any writ of *capias ad satisfaciendum* against him upon the said judgment in the said declaration mentioned to wit on &c. at &c. in due manner obtained from the major part of the commissioners acting under the said commission and from sufficient in number and value of the creditors who had proved their debts under the said commission his certificate of conformity to the several statutes made and then in force concerning bankrupts which said certificate was afterwards and before the return of any writ of *capias ad satisfaciendum* against the said Robert Maclagan upon the said judgment in the said declaration mentioned and also before the suing forth of the original writ of the said Plaintiff against the said Defendant to

(a)¹ See also *Payne v. Rogers*, Dougl. 407, where the tenant of a commonable tenement, having been made nominal Plaintiff by his landlord in an action on the case for an incroachment on the common, gave a release to the Defendant pending the suit, the Court on motion ordered the release to be delivered up to be cancelled, and permitted the action to proceed in the name of the tenant, expressing great indignation at the attempt made to prevent it. Indeed in *Salk. 260*, Holt Ch. J. says, that in ejectment where the Plaintiff is a mere nominal person and trustee for the lessor, if he release the action he may be committed for a contempt. Lawrence J. mentioning this opinion in the case of *Bauerman v. Rudenius*, 7 Term Rep. 670, adds "but he did not say that the release would not defeat the action." If it would necessarily defeat the action, an objection might have been taken to the pleading in *Craig and Wife v. D'Aeth*, 7 Term Rep. 670, n. b., where a release having been pleaded to an action on a bond by the assignee of the bond in the name of the obligee, the special circumstances under which the release was given, and that it was obtained by fraud, were replied.

(a)² Vide *Donnelly v. Dunn*, 2 B. & P. 45.

wit on &c. at &c. in due manner allowed and confirmed by the Lord High Chancellor of Great Britain according to the form of the Statute in such case made and provided. And that the said commission of bankrupt hereinbefore mentioned is still in full force and that the cause of the said action or suit in which such judgment was so recovered as aforesaid against the said Robert Maclagan accrued before such time as the said Robert Maclagan so became a bankrupt as aforesaid to wit at &c. And this &c. Wherefore &c. To this there was a special demurrer, assigning for causes "that the said plea does not state that the said Robert Maclagan was a trader within any of the Statutes made concerning bankrupts. And that the said plea does not state how or in what manner the said Robert Maclagan became a bankrupt. And that the said plea does not state that the said Robert Maclagan owed any debt or debts upon which the said commission in the said plea mentioned could legally have been awarded or issued. And that the said plea does not state that the said commission was awarded or issued upon the petition of any person or persons to whom the said Robert Maclagan was indebted. And that the said [450] plea is in other respects defective insufficient and informal." Joinder in demurrer.

Le Blanc Serjt. in support of the demurrer observed, 1st, That the bankruptcy and certificate of the principal were not usually pleaded in discharge of bail, but that the Court exercised a summary (a) jurisdiction where the principal had obtained his certificate before the bail were fixed. 2dly, That the 5 Geo. 2, c. 30, gives the general plea of bankruptcy to the bankrupt only, and that in all other cases bankruptcy must be pleaded in the same manner as was necessary before that Statute; he cited *Tulley v. Sparkes and others*, 2 Ld. Raym. 1546, 2 Str. 869, S. C.

Marshall Serjt. who was to have argued in support of the plea, finding the opinion of the Court against him, moved for leave to amend, which was accordingly granted.

BULLER J. expressed a doubt whether the Defendant should not have sought relief by an application to the summary jurisdiction of the Court, instead of pleading the bankruptcy and certificate of the principal (b).

(a) Vid. *Woolley v. Cobbe*, 1 Burr. 244, and *Cockerill v. Oweston*, 1 Burr. 436.

(b) In the course of this term the following case was also decided:

Beddome and another v. Holbrooke and another.—Scire facias on a recognizance of bail. To this the Defendants pleaded "that R. H. (their principal) in the said writs of scire facias and declaration thereon mentioned after the recovery of the said judgment and before the issuing of the said first scire facias and before any capias ad satisfaciendum sued forth upon the judgment aforesaid at the suit of them the said Plaintiffs against the said R. H. had been returned and filed to wit on &c. at &c. became a bankrupt within the true intent and meaning of the several Statutes made and now in force concerning bankrupts. And that the said R. H. having so become bankrupt as aforesaid afterwards and before any such writ of capias ad satisfaciendum was sued forth at the suit of the said Plaintiffs against the said R. H. on the judgment aforesaid to wit on &c. at &c. did duly obtain his certificate according to the form of the Statute in such case made and provided. And the same certificate was afterwards and before the return and filing of any such capias ad satisfaciendum and also before the issuing of such writ of scire facias as aforesaid to wit on &c. at &c. duly allowed and confirmed according to the form of the Statute in such case made and provided. And this &c. Wherefore &c." The Plaintiffs put in a replication, to which there was a special demurrer.

Shepherd Serjt. was proceeding to argue in support of the demurrer to the replication, but Runnington Serjt. on the other side referred the Court to the plea as radically bad.

Of this opinion were the Court. And

BULLER J. (absente Eyre, Ch. J.) said, the plea is bad on every account. The general plea is only given to the bankrupt himself. And I am by no means satisfied, that the bankruptcy of the principal can be pleaded by the bail. It may afford ground for the Court to give relief on motion, but I do not see how it can be made a legal defence.

Judgment for the Plaintiff (1).

(1) Vide *Clarke v. Hoppe*, 3 Taunt. 47.

[451] VAN BRAAM v. ISAACS. June 3d, 1799.

If a bond and warrant of attorney given to secure an annuity, are no otherwise noticed in the memorial, than by way of recital in the annuity deed which is set out, it is not a sufficient compliance with the 17 Geo. 3, c. 26. Nor can the Court refuse to interfere on the ground of 18 years having elapsed since the grant, and the grantee being dead (b).

This was an application calling on the Plaintiff's executor to shew cause why a warrant of attorney given to secure an annuity should not be delivered up to be cancelled, and the judgment entered thereon be set aside. It was moved on two objections to the memorial, viz. 1st, That neither the warrant of attorney or the annuity bond was sufficiently described: 2dly, That the names of the witnesses to those two instruments were not mentioned.

The memorial set out an indenture bearing date the 20th of August 1781 between the Plaintiff and Defendant, which indenture after reciting that the Defendant had executed a bond bearing even date with the said indenture in the penal sum of 1000l. conditioned for the payment of an annuity of 100l. to the Plaintiff, and also that for the better securing the said annuity the Defendant had executed a warrant of attorney of the same date, proceeded to the grant of the annuity. The witnesses to the indenture were regularly stated in the memorial, but no other notice was taken of the bond and warrant of attorney than what was introduced by the recital in the deed. The grantee was dead.

Marshall Serjt. in the course of the last term shewed cause. The object of the act, as appears by the preamble, was to prevent secrecy in annuity transactions; and it was with that view that all the deeds were ordered to be memorialized, and all the witnesses to be mentioned. The answer therefore to the first objection is, that the bond and warrant of attorney having been mentioned in the recital of the deed, the public is equally informed of all the securities, as if a substantive allegation had been made of the bond and warrant of attorney. Mentioning the consideration by way of recital has been held sufficient. *Sowerby v. Harris*, 4 Term Rep. 494, and *Hodges v. Money and another*, 4 Term Rep. 500 (a)¹. With respect to the second objection, it is only necessary that the names of all the witnesses should appear on the face of the memorial. The reason is obvious; that every person interested may be able to get at all the evidence relative to the transaction. But it appears from the bond and warrant of attorney now in court, that the witnesses to the indenture were also witnesses to [452] those instruments. Besides, admitting the objections to be valid, the Court will not give them effect after the death of the grantee, and in a case where the annuity has stood eighteen years unimpeached (a)².

Le Blanc Serjt. in support of the rule. The Court has never refused to interfere on account of the death of the grantee, except in cases where the application has been made on the ground of something which passed at the time of granting the annuity, and which the grantee only could contradict; as where part of the consideration-money has been retained or paid back: and with respect to the length of time which has elapsed since this annuity was granted, it is sufficient to say that the grantee has enjoyed for eighteen years, an annuity for which he gave only five years purchase, and which he never ought to have enjoyed at all. This clearly is only a memorial of one deed instead of a memorial of "every deed" as required by the act. A mere recital in the indenture of a bond and warrant of attorney cannot be a sufficient compliance with the act: since mention of those instruments may have been introduced with a view to take a sum of money under pretence of a charge for the deeds, and they may never have been executed. This case may be distinguished from those in which a recital of the consideration has been held sufficient; for if the whole con-

(b) Vide *Coare v. Giblett*, 3 East, 461. *Brown v. Rose*, 6 Taunt. 126.

(a)¹ Vid. etiam *Cousins v. Thompson*, 6 Term Rep. 335.

(a)² Vid. *Symmonds v. Mortimer*, 5 Term Rep. 140. *Withy v. Woolley*, 7 Term Rep. 540, and *Poole v. Cabines*, 8 T. R. 328, in which last case the annuity having been regularly paid during the life of the person who negotiated the annuity for the grantee, the Court refused to set the annuity aside on a representation of facts which that person only could have answered.

sideration recited be not actually paid, the annuity is void under the fourth section of the act. As to the second defect, it cannot be cured by matter dehors. The memorial runs "which said indenture is witnessed by A. and B." How then is the grantor or any other person interested given to understand that the other instruments referred to were witnessed by the same persons.

EYRE Ch. J. As at present advised I do not see how these objections can be got over. The cases which have been cited in support of this memorial only tend to establish that a statement by way of recital of the contents of a deed is sufficient; for the consideration is part of the contents of the deed. Perhaps there may be good ground to support those cases. And yet it is apparent that the consideration recited in the deed and the true consideration may be very different things. The object of the 17 Geo. 3, c. 26, having been to give every opportunity of scrutinizing annuity transactions, perhaps the better construction would [453] have been to have required a positive allegation of the consideration actually paid. However as the consideration is always to be found in the body of the deed, it may have been reasonable to hold that a memorial of the deed should be a memorial of the particular parts of the deed specified. But how can that determination affect other instruments which are quite dehors the deed, and on what construction are we to dispense with the memorial of any deeds, when the Statute requires a memorial of every deed? Can it be said that a memorial of one deed which recites other deeds to have existed is a memorial of every deed recited? If an act requires all the deeds of a mortgage to be inrolled, and the bond recites the indenture of mortgage, will it be contended that by the enrolment of such a bond the law is satisfied? With regard to the names of the witnesses the same difficulty occurs. If we could dispense with a distinct memorial of the bond and warrant of attorney, we might be satisfied without a description of the witnesses to those deeds; referring for the witnesses to the principal deed. However I should wish the Court to pause before it exercises a summary jurisdiction in the case of a grant made eighteen years ago; and in which the grantee is dead. This being an application to the general summary jurisdiction of the Court over all warrants of attorney, I see no reason why we should not expect the same rules to be followed in this, as in other applications to our summary jurisdiction; we require them to be made in the first instance, and before the rights of parties are fixed and determined. There is a clause in the 17 Geo. 3 by which the Court is directed to interfere, but that relates to cases of fraud, and there we are empowered to order the securities to be delivered up to be cancelled. In this case if we act, it will be on our general jurisdiction, and not under the 17 Geo. 3.

BULLER J. The question with respect to the discretion of the Court principally depends on the nature of the instrument. In this case if the Court do not interpose in the manner pointed out, I do not see how they can interpose at all. By the instrument which has been given the question is concluded. And I apprehend that in all cases where a party is precluded by a warrant of attorney from litigating a question which ought to be tried, the Court will interfere. The words of the act give us no discretion.

HEATH J. Had this been a recent transaction I should have had no doubt. The only question is, whether the Court has [454] any discretion. With respect to the length of time which has elapsed, I think that there is a great difference between an annuity which is paid quarterly, and a debt of which the party never thinks till he is called upon to pay.

ROOKE J. I think the Court have no discretion, but are bound to set aside the annuity.

Cur. adv. vult.

The case having stood over until this day, Le Blanc now mentioned it to the Court, and informed them, that in the course of last term and the present, two annuities granted by the same person had been set aside in the Court of King's Bench notwithstanding the same length of time had been suffered to elapse.

On hearing this, the Court made

The rule absolute.

ROBINSON v. SMYTH. June 3d, 1799.

The Court will not put off a trial on account of the absence of a material witness, if by his evidence the defence of slavery is intended to be established.

Shepherd Serjt. moved to put off the trial in this case on account of the absence of a material witness. He stated that the action was brought for wages supposed to be due to the Plaintiff as a seaman, upon a voyage from the West Indies to London, and that the defence to be established by the evidence of the absent witness, was that the Plaintiff was slave to the Defendant who had paid a valuable consideration for him.

Sed per Curiam. This is an odious defence, to which the Court will give no assistance. If the Defendant were to offer to put it on the record, we should not give him a day's time. It is as much a denial of justice as the plea of alien enemy, which is always discouraged by the Court.

Shepherd took nothing by his motion.

[455] SCUDAMORE AND OTHERS v. STRATTON AND OTHERS,
Executors of T. Rothley. June 3d, 1799.

If a lease for 99 years determinable on 3 lives be conveyed in trust for A. for life, and A. covenant to use his utmost endeavours, as often as any of the persons on whose lives the premises are held, shall die, to renew the same by purchasing of the lord of the fee a new life in the room of such as shall fail, it is no breach of the covenant, if, upon one of the lives failing he procure a renewal upon his own life. Performance pleaded otherwise than in the terms of the covenant, is bad, even on general demurrer.

Covenant. The declaration stated "that one Margaret Gardner was possessed of certain premises for the residue of a term of ninety-nine years determinable on the deaths of certain persons then living, and being so possessed, by indenture dated the 7th of September 1770 between the said M. Gardner of the first part T. Rothley of the second part and the Plaintiffs of the third part reciting that M. Gardner was possessed of a lease of parcel of the said premises determinable on the deaths of Anne Foy and J. Chandler and of a lease of certain other parts determinable on the deaths of Anne Gardner the said M. Gardner and Seymour Love that a marriage was agreed upon between the said M. Gardner and T. Rothley and that the said leases should be assigned to trustees upon trust, it was witnessed that the said M. Gardner with the consent of T. Rothley assigned the said leases to the Plaintiffs in trust among other things for the said T. Rothley for his life; that T. Rothley covenanted with the Plaintiffs that as often as any of the persons on whose lives the premises were then held or should be held from the time being should die, he would forthwith use his utmost endeavours to renew the same premises respectively with the lords of the fees thereof by purchasing of them new lives or a new life therein respectively and such further terms estates and interest therein as before mentioned determinable on some other new lives or a new life in the room of such lives or life as should so happen to die as aforesaid, and to procure new leases to be granted thereof by the said lords respectively to the said Plaintiffs upon the trusts in the indenture mentioned and that he would pay the fines or consideration money of the renewals and the expences of the leases and other charges; that the marriage took effect; that M. Rothley formerly M. Gardner died in 1772 and that T. Rothley survived her." First breach "that the said T. Rothley did not after the death of the said M. Rothley his wife she being one of the persons on whose lives the premises were held forthwith and as soon as he reasonably might and ought to have done or at any time afterwards use his utmost or any endeavours to renew the same premises respectively with the [456] lords of the fees thereof by purchasing of them a new life therein respectively or such further terms estates and interests as in the indenture mentioned determinable on some other new life in the room of the said M. Rothley his wife so deceased as aforesaid and procure new leases to be granted thereof by the said lords to the Plaintiffs upon the trusts in the indenture mentioned, although he might and could have renewed &c. and procure new leases &c. but neglected &c." On the 2d, 3d, and 4th breaches issues

were joined. Fifth breach "that during the life of T. Rothley, M. Rothley Anne Gardner J. Chandler and S. Love died, yet T. Rothley did not after the deaths of them or any of them they being persons on whose lives the premises were held use his utmost endeavours to renew the premises by purchasing new lives &c. in the room of the said M. Rothley Anne Gardner J. Chandler and S. Love according to the form and effect of his covenant although in his lifetime he might and could have so done, but on the contrary on the death of T. Rothley there remained and was one life and no more, for and during which was held any term estate or interest whatsoever in the said premises, contrary to the form and effect of the covenant &c.

Pleas. To the first breach, "That T. Rothley did forthwith and as soon after the death of M. Rothley his wife as he reasonably could or ought to have done to wit on &c. use his utmost endeavours to renew the said premises respectively with the lords of the fees thereof, and did actually renew the same by purchasing a new life, that is to say the life of himself the said T. Rothley therein in the room of the life of the said M. Rothley his wife, and although T. Rothley in his lifetime did not thereupon procure new leases to be granted to the plaintiffs, but procured them to be granted to himself, yet that the Defendants as his executors after his death offered to assign the leases to the Plaintiffs, but that the Plaintiffs refused to accept them or any assignment of them, and that the Defendants are still ready and willing to assign them &c. And this &c. Wherefore &c." To the 5th breach, "That T. Rothley did forthwith and as soon after the death of M. Rothley his wife as he reasonably could or ought to have done to wit on &c. use his utmost endeavours to renew the said premises respectively with the lords of the fees thereof and did actually renew the same by purchasing a new life that is to say the life of the said T. Rothley therein in the room of the life of the said M. Rothley his wife, and that the said [457] T. Rothley in his lifetime forthwith and as soon after the death of the said Anne Gardner &c. did use his utmost endeavours &c. and did renew by purchasing a new life that is to say the life of one W. Haynes in the room of the life of the said Anne Gardner. And that the said T. Rothley in his lifetime forthwith and as soon after the deaths of the said J. Chandler and S. Love &c. did use his utmost endeavours to renew the said premises held during the lives of the said J. Chandler and S. Love with the lords of the fees thereof, and did make application to the said lords to permit him to renew the said premises by purchasing of them new lives respectively, or such further terms estates and interest therein as in the said indenture mentioned determinable on some other new lives, in the room of the said J. Chandler and S. Love; but the said lords wholly refused to permit the said T. Rothley to renew the same by purchasing any new life or lives or any further term estate or interest in the premises, and from thence continually till the death of the said T. Rothley did refuse so to do. Wherefore on the death of the said T. Rothley there remained and was one life and no more for and during which was held any term estate or interest in any of the premises aforesaid. And this &c. Wherefore &c."

To these two pleas there were general demurrers, and joinders therein.

Shepherd Serjt. in support of the demurrer to the 1st plea contended, that according to the spirit of the covenant T. Rothley was bound to leave the estate at his death in as good a condition as he received it, viz. with three cestuy que vies living; that a covenant to renew as often as any of the persons on whose lives the premises were held should die, there being three such persons, amounted to a covenant to keep up three lives: and that T. Rothley by having put in his own life in the room of that of his wife, had left the estate at the time of his death in the same situation as if he had not renewed at all. He referred to *Cooke v. Booth*, Cowp. 819, to shew that the Court would extend covenants for renewal beyond the strict letter of the covenants if it appeared consistent with the intention of the parties. He added, that no offer by the Defendants as executors of T. Rothley to assign the leases made out to him, which ought to have been made out to the Plaintiffs, could be deemed a performance of T. Rothley's covenant.

[458] The Court, after inquiring if there was any authority to shew that under such a covenant as the present a party is restricted from putting in his own life, and no such case being produced, said; As it was in the power of the parties to provide against what has been done by inserting a covenant, that T. Rothley should leave the estate with as many lives as he received it, and they omitted to do so, there was fair ground for T. Rothley to put in his own life, that he might avoid the burden of again

renewing on the death of the person he should put in. It was natural for T. Rothley who had the beneficial interest to renew with his own life; and to construe the covenant in the way contended for by the Plaintiffs, would be introducing a restriction which the parties themselves did not conceive necessary. However as it is very clear that the Defendants' offer to assign the leases does not amount to a performance of T. Rothley's covenant, there must be judgment for the Plaintiff.

Le Blanc Serjt., who was for the Defendants, insisted, that they were entitled to judgment on the 2d plea, the only remaining objection to which was, that it did not aver performance in the terms of the covenant, which being a point of form could not be taken advantage of on a general demurrer.

But the Court were of opinion that the omission was matter of substance.

Judgment for the Plaintiff.

WYBURD v. TUCK. IDEM v. DYSON. IDEM v. SMITH. IDEM v. HOLBROOK.

June 3d, 1799.

If a composition for tithes is made by A. as proprietor and he lease them to B., whose interest is afterwards put an end to by A. before any alteration is made in the composition, A. cannot determine it without a six months' notice (a).—If A. execute a lease of tithes to B. on a day subsequent to their severance, but previous to their being carried away by the landholder, B. cannot maintain an action on 2 & 3 Ed. 6, c. 13, as the right to the tithe vested in A. immediately on severance.—Evidence that the parishioners have treated with the proprietor for a composition is not alone sufficient to establish his possession of the tithes in an action on the Statute.—Quære, Whether if one only of two joint-tenants execute an assignment of a lease of tithes, the person claiming under that lease can support an action for not setting them out?

Debt for not setting out tithes under the 2 & 3 Ed. 6, c. 13. Plea, General issue.

At the trial of these four actions before Eyre Ch. J., the evidence on which several objections to the Plaintiff's recovery were [459] founded, and which were reserved by the Lord Chief Justice for the opinion of the Court, was as follows:

The ancestors of the late Stephen Jermyn having been lessees under the Dean and Chapter of Saint Paul's of the tithes of the parish of Tottenham, about sixty years ago leased them to one Howard, who held them for thirty years. On the 28th of October 1747 Stephen Jermyn was found lunatic; after which one Lambly became lessee under him, and on the 30th April 1781 obtained a new lease for seven years from Edward Tyson the then committee of Stephen Jermyn, after the expiration of which he held over until the year 1798. In March 1796 Stephen Jermyn died, upon which Harriet Eyre and Margaret Udney the next of kin took out administration. In May 1796 the Dean and Chapter of Saint Paul's granted a new lease of the tithes to Harriet Eyre and Margaret Udney for twenty-one years on their surrender of the old one. From them Lambly received notice, dated the 30th September 1797, to quit at Lady-day 1798, with which he complied, and an assignment of their lease was executed to one Sperling on 7th December 1797. Sperling executed a lease of the tithes to the present Plaintiff, dated the 15th June 1798, to hold the same for seven years from the 25th March preceding.

During all the time that Howard and Lambly were tenants to the Jermyn family the same composition was paid to them by the occupiers of lands in the parish, and Lambly was expressly forbid by those under whom he held to make any alteration therein. Sperling having determined to raise the composition, gave a general notice to the parish in March 1798 that he was willing to treat with the landholders. In consequence of this a meeting was held by them, at which the terms proposed by Sperling were not acceded to.

In the case of *Smith*, that which was the subject of tithe was severed before, though not carried away until after the execution of the lease to him. The case of *Tuck* the first Defendant was also differed from the others by the circumstance of the Plaintiff's failing to prove the execution of the assignment to Sperling by Harriet Eyre jointly with Margaret Udney; and it appeared that Tuck was not present at the meeting of

(a) Vide *Morgan v. Church*, 3 Campb. 71. *Fell v. Wilson*, 12 East, 83. *Welch v. Uppill*, 1 B. & B. 84, 90.

the parishioners. Upon the whole therefore the objections as applying in the different cases, were ; 1st, That as the Plaintiff claimed under Sperling, to whom the assignment of the lease from the Dean and Chapter of Saint Paul's had been executed by Margaret Udney only, he had [460] not shewn a good title to support the action. 2dly, That a sufficient notice to determine the composition had not been given to the Defendants. 3dly, That the Plaintiff was not entitled to recover, as the tithe vested in Sperling immediately on severance.

A rule Nisi having been obtained for setting aside the several verdicts which had been found for the Plaintiff, and entering nonsuits in all the causes,

Shepherd Serjt. now shewed cause. In answer to the first objection, it may be contended that this action being founded on a tort, it is not necessary for the Plaintiff to make out his title, but that he may recover if he merely shew possession. It was so held in *Wheeler v. Heydon*, Cro. Jac. 328. In Marsh 1798, Sperling gave notice to the parishioners, that he was willing to enter into a composition for tithes, in consequence of which a meeting was held, and at that meeting the only question in dispute was the amount of the composition to be paid ; the right to the tithes was acknowledged to be in Sperling. Both in *Selwyn v. Baldy*, and *Hartridge v. Gibbs*, Sussex Assizes 1682, Bull. N. P. 188, edit. 2, it was holden sufficient by Pemberton Ch. J. for the Plaintiffs in actions on the Statute of Edw. 6, to prove their receipt of tithes from the other farmers in the parish in order to entitle them to recover against the Defendants. Proof of an agreement to pay a composition comes within the same principle. As to the second objection, it is to be observed that the case of *Hewitt and others v. Adams*, Dom. Proc. April 19th, 1782 (a), by which the necessity of a six months' notice to determine a composition of tithes was established, proceeded on the analogy between the occupiers of lands paying a composition, and tenants of lands holding from year to year. Now if A. let lands to B. for a term of years, and B. underlet to C. from year to year, A. will be entitled to enter upon the lands at the expiration of B.'s term without giving notice to C. So if A. let lands to B. at Michaelmas to hold from year to year, and B. underlet the same to C. at Lady-day to hold in the same manner, it will be sufficient if A. give notice to B. at Lady-day to quit at the Michaelmas following, without regarding the sub-contract between him and C. In the present case Lambly is to be considered as tenant to the Jermyn family from year to year, and the occupiers of the lands from whom he received the composition as his undertenants holding in the same manner. [461] The notice therefore which was given to Lambly by the representatives of Stephen Jermyn must be sufficient to entitle them, and those who claim under them, to take the tithes in kind of the occupier of the lands. If this be not so, and the composition taken by Lambly is to bind the Jermyns or those who claim under them, it may equally be contended that it shall bind the Dean and Chapter of Saint Paul's who were the original lessors. With regard to the third objection, the words of the Statute are, that no person shall "take or carry away any such or like tithes &c. under the pain of forfeiture of treble value of the tithes so taken or carried away." The right of action therefore does not accrue until the tithes have been carried away : and though the tithes in question may have vested in Sperling upon severance, yet the lease to Wyburd was executed previous to the time when they were carried away ; by that lease all the tithes in the parish of Tottenham to which Sperling was entitled, in which must be included the tithes in question, vested in Wyburd ; consequently the latter was entitled to those tithes at the time when the wrong was committed. If however it should be thought upon general grounds that a lease of tithes will not convey such tithes as are actually severed at the time of its execution, it will be sufficient in this case to advert to the habendum by which the lease is made to take effect from the 25th day of March preceding the date.

Le Blanc Serjt. contrâ. First, Admitting that it would be sufficient for the Plaintiff to have proved peaceable enjoyment of the tithes without establishing any other title, yet it was not in his power to support his claim by evidence of enjoyment, since Sperling had never received any tithes, or come to any composition. Secondly, A certain composition having existed in the parish of Tottenham without alteration, as far back as the evidence went, the Court will infer that it was made not by Lambly but by the Dean and Chapter of Saint Paul's, or by the Jermyn family from whom the Plaintiff derives his title. Now if a rector having made a composition lease tithes,

and the lessee make no alteration in the composition, when the tithes revert to the rector the occupiers of land will continue to hold under the composition originally made by the rector, and consequently will be entitled to notice before he can take the tithes in kind. The rules respecting notice to determine a composition are governed by the analogy to the notice to quit. Thus if the Jermyns, having let land to A. from Michaelmas to Michaelmas, had granted a lease [462] at Lady-day to B. for a term of years and A. had continued to pay rent to B. till the expiration of his term, A. would again be tenant from year to year to the Jermyns, and would be entitled to notice six months before Michaelmas. For though B. might have put an end to the tenancy during his term, yet not having done so, it continues as at first created: if it were not so, that which was originally taken as a tenancy from year to year beginning at Michaelmas, would be put an end to at Lady day. The case of *Hewitt and others v. Adams* is decisive of this point. Thirdly, The Statute of Edw. 6 being made for the protection of persons in possession of tithes, the Plaintiff cannot maintain this action against the Defendant Smith. Immediately on severance the right to the tithes vested in Sperling and Smith could only have justified carrying them away under a composition from him. If Sperling had been a spiritual rector instead of a lay impropiator, and had died after the severance of these tithes, they would have passed to his executors, and not to his successor; Sperling therefore was the person injured by the tithes being carried away. The habendum in the lease being from the 25th of March, has reference to nothing but the period from which the grantee is to hold, in order to ascertain the time when the lease is to expire, viz. in seven years from the 25th of March. If it were held to vest any title previous to the execution of the lease, it might be so framed that a lease for twenty-one years should give a right to tithes accrued fourteen years before.

EYRE Ch. J. On the first of the objections raised, and which applies to the case of *Tuck*, I have no difficulty, being of opinion that the verdict must be set aside and a nonsuit be entered on the ground of the Plaintiff's having failed to make out his title, and not having proved himself to be in possession of the tithes. It was admitted on his part, that he must at least shew himself to be in possession; and I am not prepared to agree that because possession unaccompanied with other circumstances will be a sufficient title, that therefore possession traced back by the Plaintiff himself to that which turned out to be no title, will equally avail. The case is altered where the Plaintiff proves his own bad title and thereby shews that to be a wrongful possession, which would otherwise have been good *prima facie* evidence to support his claim. However I only mean to state my difficulty on that point, not to give a precise opinion upon it, as the case cited from Croke seems to establish a contrary doctrine. But I am of opinion that this Plaintiff was not in possession, holding as I do that nothing will [463] place a man in possession but a good title, which will draw to it the possession, or the actual receipt of tithes, or that which is equivalent to receipt of tithes, viz. a composition. My Brother Shepherd argued, that the receipt of tithes, like the receipt of rent and profits, amounted to possession. Actual use and enjoyment does so I admit; but he was obliged to contend from thence that an agreement for a composition was equal to a receipt, and then to go one step further, and insist that a conversation tending towards an agreement though it ended in a disagreement was equal in effect to an agreement. By this chain of reasoning he endeavoured to prove that the Plaintiff was in possession. His title however must depend upon his having or not having a lease; here he had only a lease for a moiety and therefore was not in possession and cannot maintain this action.

With regard to the question of notice, which applies to all these causes, I have the more difficulty in speaking upon it, as I feel myself under the dominion of old prejudices. The judgment of the House of Lords which has been alluded to, was a reversal of a judgment given by the Court of Exchequer, and in which I concurred. I am to presume that the judgment of the House of Lords was right, but I am not master of the principles on which it proceeded. Tithes cannot in my opinion be well compared to land for any purpose, but particularly for the purpose of connecting a composition with the inheritance. It appears to me that the doctrine of binding the landlord by the interest of the tenant from year to year was founded on the distribution of land into a variety of interests, as that of the tenant and the reversioner, whereas it will not be found to apply to tithes so distinctly as to justify our adopting the same rules as are capable of being adopted with respect to land. In the case of

Hewitt and others v. Adams the Defendants insisted in the Exchequer that they were not at all bound to pay the tithes demanded, and we thought that where a Defendant claims to withhold tithe adversely, all idea of composition must be put out of the case. The analogy between land and tithe does not appear satisfactory to me. Land is either taken on a holding from Lady-day, or from Michaelmas, or from some other time, and then notice to quit must be given accordingly. But if a composition is to be determined on any just principles, the notice must be given from a period suitable to the nature of the tithes, and with a relation to the manure and cultivation of the [464] land. There must be such a rule as will enable the tenant to cultivate his land in the manner most beneficial to himself accordingly as he is to pay a composition or to pay in kind. I have great difficulty therefore in understanding on what ground a notice is necessary in the case of tithes, and I cannot at all comprehend how the owners of the land can be considered parties to a composition made with the occupiers of the land. Tithe in kind is the thing demised; the composition therefore begins with the interest of the tenant, is governed by that interest and must I should think end with it. It has been argued that there may be a connection between the title of inheritance to the tithes and the composition; if there can be, I submit; it may be a necessary consequence of that judgment, the principles of which I do not understand. As some of my Brothers concurred in that judgment, they will probably state on what ground it is, that a composition may be extended to the case of a new tenant, claiming on the determination of the interest of a former tenant.

On the last point there can be no doubt. The habendum of the Plaintiff's lease can only be considered as marking the duration of his interest, and its operation as a grant is merely prospective. That lease only vested in the Plaintiff a right to the tithe which should accrue from the time of the grant. Now the title to the tithe in question arose immediately on the severance of the tithable matter from the land. Is it not clear that if a rector dies after the severance of the tithe and before its separation, and a new rector comes in, that the right to the tithe is in the old rector? The law gives to the new rector in that case all that the grant gave to the new lessee in this. Sperling therefore being entitled to these tithes at the time of the severance and the person to complain if they were carried away, this Plaintiff has no ground of action against Smith in that view of the case.

BULLER J. My opinion will be principally founded on the two last points. On the first my mind still fluctuates. It has been contended that for want of evidence to establish the joint execution of the deed of assignment by the two persons who took out administration, the Plaintiff cannot recover against Tuck. But this is the case of a tort, and I am not quite satisfied that in such a case, if the Plaintiff declare as solely entitled and prove himself to be entitled to a moiety only, he may not recover for that moiety. It was so held in the case of *Nelthorpe and Farrington v. [465] Dorrington*, 2 Lev. 113. However, were I to rely on this point much, I should wish for further consideration, before I came to any conclusion (a).

The second point appears to me to have been fully settled by the decision in the House of Lords. That decision was, that the same notice must be given to determine a composition, as must be given to a tenant of land holding from year to year. The other point alluded to by my Lord Chief Justice was also raised in that case. The landholders contended in the first place, that they were not obliged to pay the tithe claimed; and 2dly, that if they were, the Plaintiff was not entitled to recover because there had been a previous composition, the notice to determine which was not sufficient. There was a doubt on the Woolsack at that time whether both or only one or which of these questions should be put to the Judges. At last the question put was whether the notice given was sufficient to determine the composition, and the Judges were unanimously of opinion that it was not, and said expressly that a notice to determine a composition for tithe ought to be given with analogy to the notice given in a holding of land. By that decision we are bound; nor do I think any of the difficulties it has been supposed likely to produce will ever occur. It has been argued that if the Plaintiff, as deriving title from the Jermyn family, is bound by this composition, the Dean and Chapter of St. Paul's will also be bound by it. That conclusion however is questionable and may or may not be true according to the circumstances. If the interest of the lessee under the Dean and Chapter with whom the composition was

(a) Vide *Scott v. Godwin*, ante, p. 67, and the cases cited therein.

made expire, the Dean and Chapter will not be bound. But if a lease be granted for a long term of years and the Dean and Chapter take an assignment of it, though as to many purposes that will operate as a surrender, yet with regard to the interest of third persons it will not. All depends on the single question whether there be a continuance of that interest under which the composition was first created? If that continues, the composition continues; if that be at an end, the composition is at an end also. It has been said that there may be a difference between a composition with the owner and a composition with the occupier of the land. If however the interest of the occupier cease, the composition made with him, unless under particular circumstances, will be at an end. But no question of [466] that kind arises here, for it does not appear but that the occupiers in all the stages of the case were the same. The difficulty would be if we were to suppose a composition to take place from Michaelmas with a tenant who is in on a Lady-day bargain. In that case the composition would be either during the interest of the tenant or from year to year generally. If the former, notice must be given for Lady-day; if the latter, a question might be raised whether the composition should not continue to the end of the year, though the interest of the tenant ceased on the expiration of his lease. That may be a nice question, but it does not arise in this case. There may be difficulties in point of convenience as to the time at which a composition shall commence, but those difficulties are for the consideration of the parties when they make their agreement. On the facts of the present case the composition must be taken to be continuing, inasmuch as the Plaintiff claims under those persons with whom it appears to have been made.

The last point has been fully and ably stated by my Lord Chief Justice, and I entirely concur with him.

HEATH J. The objection to the Plaintiff's recovery, that there was no notice to determine the composition, must prevail, because the title under which he claims is derived from Sperling, in whose time the composition existed and has not been dissolved by the parties. In the House of Lords the analogy between land and tithes was considered, and the opinion of the Judges was founded on the inconvenience which the occupiers of lands must sustain, if a composition could be put an end to without notice. It was considered that by notice they would be enabled to cultivate their lands in such a way as would best answer to them when called upon to pay tithes in kind, and that it would be very unjust to deprive them of this advantage. As to the question whether this Plaintiff can recover when one only of two joint-tenants has executed the lease, I wish to give no opinion, as my Brother Buller has cited a case in favour of the Plaintiff.

ROOKE J. It appears from the facts of this case that as far back as the evidence went, tithes had never been set out in the parish of Tottenham. It is to be wished therefore that these Defendants should not be liable to actions for not doing that which never appears to have been done within the parish: and in point of law I think they are not liable. As the lessees of the tythes under the Jermyn family were desired by them not to raise the [467] composition, it must be considered as having been made with that family. Now Mrs. Eyre and Mrs. Udney being the representatives of that family, may by implication be considered as having also desired that the composition should not be raised. And though they might have retracted the intimation originally given, yet not having done so, the composition must remain in force till notice be given to the landholders of an intention to put an end to it. The occupier may be induced by notice to alter the course of husbandry, and it would be hard to make him liable in a penal action where that notice has been withheld. On the principles of the decision in the House of Lords, and on the general justice of the case, I think a nonsuit should be entered.

With respect to the objection, that the assignment of the lease was executed by one only of two joint-tenants, it strikes me that it would be hard to allow the law as laid down in the case in Levinz to prevail: since it would be calling on the Defendant to plead in abatement, or be liable to two more actions.

On the third point I entirely concur with the rest of the Court: the right to the tithes accrued immediately on severance, and at the time when the lease was executed there was nothing but a possibility of action in case they should not be set forth, which possibility could not be assigned.

Rule absolute.

JELFS v. BALLARD. June 10th, 1799.

An action against a bankrupt, who has obtained his certificate under a second commission, on a cause of action accruing previous to his second bankruptcy may be maintained before a dividend has been made, or the period for making it allowed by 5 Geo. 2, c. 30, s. 37, is elapsed, if evidence be adduced to shew that it is not probable from the state of the effects in the hands of the assignees that the bankrupt will be able to pay 15s. in the pound (a)¹.

Indebitatus assumpsit. Plea. Bankruptcy and certificate. This cause came on before Buller J. at the Westminster Sittings in this term, when it appeared that the Defendant had formerly been a bankrupt and obtained his certificate; that a second commission issued against him on the 13th of April 1798, under which he also obtained his certificate; that the cause of action accrued previous to the second bankruptcy, but that under his last commission no dividend had as yet been declared. This last fact was proved by one of the assignees to the commission, who was called by the Plaintiff, and who stated that the debts proved [468] under the commission amounted to 1100l.; that effects of the bankrupt had been sold for 480l., and that there was also a freehold estate, but from the incumbrances upon it he did not think it was of any value, and was upon the whole of opinion that the bankrupt would not pay 15s. in the pound; but that no dividend had been made. The jury found a verdict for the Plaintiff.

Sellon Serjt. now moved for a rule Nisi for setting aside this verdict and entering a nonsuit; and contended, 1st, that the Defendants not having paid 15s. in the pound under his second commission, being the only ground on which the Plaintiff could support his action, it lay upon him to prove that fact and thereby deprive the Defendant of the benefit of his certificate, and cited *Gill v. Scrivens*, 7 Term Rep. 27, where it was held necessary to aver it in a Scire Facias. 2dly, That the evidence which was produced to shew that the Defendant had not paid 15s. in the pound was not sufficient, but on the contrary proved that this action was commenced prematurely, submitting that as there were still effects in the hands of the assignees, and the amount of the property undisposed of was uncertain, the action ought not to have been brought until a dividend had been made; that by 5 Geo. 2, c. 30, s. 37, the assignees are directed to make the second dividend in eighteen months, whereas in this case the period allowed by the act had not elapsed, and therefore till that time it could not be ascertained whether the bankrupt would pay 15s. in the pound or not. He admitted that if it had been proved that the bankrupt's estate was so insolvent as to allow of no dividend, the action might in that case have been supported.

BULLER J. (absente Eyre Ch. J.). The case referred to as decided in the King's Bench is good law; but that case does not shew on whom the proof of non-payment of the 15s. in the pound lies. The Plaintiff must state in his Scire Facias every thing that entitles him to recover; but it is a very different question what is to be proved by one party and what by the other. But supposing the onus probandi to lie on the Plaintiff, still the evidence which was given was at least presumptive evidence that the bankrupt will not pay 15s. in the pound, and not having been contradicted by the Defendant it must be held conclusive.

HEATH J. It is a common thing in actions on the game-laws for the Plaintiff in his declaration to negative all the qualifications, which would exempt the Defendant from the penalties of [469] those laws, but it lies on the Defendant to prove that he comes within any of them. The payment of 15s. in the pound is the condition of the bankrupt's discharge.

ROOKE J. Of the same opinion.

Sellon took nothing by his motion (a)².

(a)¹ Vide *Kennet v. Greenwallers*, Peake's Cas. 3. *Coverly v. Morley*, 16 East, 225. *Read v. Sowerby*, 3 M. & S. 78. *Edmonson v. Parker*, 3 B. & P. 185.

(a)² Vide *Rex v. Turner*, 3 B. & P. 187.

ELLIS AND WIFE, Executor and Executrix, v. GOVEY Executor. June 11th, 1799.

A replication taking issue on a plea of payment to debt on an annuity-bond must be signed by a Serjeant (a).

Debt on bond conditioned for the payment of an annuity to M. Shurmer deceased, during her life. Pleas: 1st, Payment of the annuity to M. Shurmer up to the time of her death; 2dly, Payment of all arrears of the annuity due in the life-time of M. Shurmer to the Plaintiffs since her death. The Plaintiffs, after protesting in their replication against the payments as alleged in the pleas, averred twenty years arrears, amounting to 80l., to be due and unpaid, and concluded to the country. This replication having been put in without the signature of a Serjeant, judgment of Nonpros was signed. To set aside this judgment for irregularity a rule Nisi was obtained on a former day, and Shepherd Serjt. in support of that rule now cited *Hubert v. Ld. Weymouth*, 2 Bl. 816, where it was held that a replication of Nul tiel record need not be signed by a Serjeant, notwithstanding the case of *Simpson v. Neale*, 2 Wils. 74, in which a contrary rule had been laid down.

Cockell Serjt. contra, was stopped by the Court, who (absente Eyre Ch. J.) said; This point must be governed by the practice of the Court; and indeed as far as reason is concerned it seems right that this replication should be signed. Much may depend on the manner of taking issue; it is material that it should be so taken as to decide the merits. Where the plea is signed by a Serjeant, the replication should be signed also; to this rule a similiter is an exception, for no judgment is required in merely joining issue.

However on payment of costs the Court made
The rule absolute.

In this term Mr. Justice Ashhurst having resigned his seat in the Court of King's Bench, was succeeded therein by Simon Le Blanc Esq. one of His Majesty's Serjeants at Law, who was knighted.

[470] On the last day of this term John Lens of Lincoln's-Inn and John Bayley of the Middle Temple, Esquires, were called to the honourable degree of Serjeant at Law, and gave rings with this motto,

"*Libertas sub rege pio.*"

The end of Trinity Term.

Shortly after the close of this term, at Ruscombe, his seat in Berkshire, died, Sir James Eyre Knight, Lord Chief Justice of this Court. *De cujus laude, neque hic locus est ut multa dicantur, neque plura tamen dici possunt quam populus Romanus memoriâ retinet.*

[471] CASES ARGUED AND DETERMINED IN THE COURTS OF COMMON PLEAS AND EXCHEQUER CHAMBER; AND IN THE HOUSE OF LORDS IN EASTER TERM, IN THE THIRTY-SIXTH YEAR OF THE REIGN OF GEORGE III.

The following cases now presented to the Public, as a conclusion to the First Volume of these Reports, were determined in the year which intervened between the completion of Mr. H. Blackstone's Reports, and the commencement of this work. The Reporters having been favored with the notes taken during that period by Mr. A. Moore with a view to publication, have bestowed their utmost attention in digesting and arranging them; conscious at the same time how much better the task might have been performed by the same hand by which it was begun.

(In the Exchequer-Chamber.)

TARLETON AND OTHERS v. STANFORTH AND OTHERS; IN ERROR. April 20th, 1796.

[See S. C. 5 T. R. 695 (with note).]

In a policy of insurance against loss by fire from half a year to half a year, the assured agree to pay the premium half yearly, "as long as the insurers should agree to

(a) Vide *Brooker v. Simpson*, 2 B. & P. 336. *Pitcher v. Martin*, 3 B. & P. 171.

accept the same," within 15 days after the expiration of the former half year; and it was also stipulated that no insurance should take place till the premium was actually paid; a loss happened within 15 days after the end of one half year, but before the premium for the next was paid; held that the insurers were not liable though the assured tendered the premium before the end of the 15 days, but after the loss.

Judgment in this case having been given for the Defendant in the Court of King's Bench, (See 5 Term Rep. 695) the Plaintiffs brought their writ of error in this court.

[472] The case was argued this day by Chambre for the Plaintiffs in error, and Wood for the Defendants, when the judgment of the King's Bench was affirmed.

(In the Exchequer Chamber.)

TURNER AND OTHERS v. HAWKINS AND OTHERS; In Error. April 20th, 1796.

A. declared in case against B. for sinking his boat, and after averring a non-feasance in B. as the cause, stated him to have acted with great force and violence in accomplishing the injury; A. recovered, and on error brought because the action should have been trespass not case, and because the two actions were mixed, the Court referred the concluding expressions to the non-feasance first stated, and held the declaration sufficient to support the judgment.

"Nottinghamshire to wit. Be it remembered that on Wednesday next &c. before our Lord the King at Westminster come the Plaintiffs by S. B. their attorney and bring into the court of our said Lord the King before the King himself now here their certain bill against the Defendants being in the custody &c. of a plea of trespass on the case and there are pledges &c. which said bill follows in these words; Nottinghamshire to wit, The Plaintiffs complain of the Defendants being in the custody &c. For that whereas the Plaintiffs before and at the time of the grievance hereinafter committed to wit on &c. were lawfully possessed of a certain boat or vessel then navigating and floating on the river Trent being a public navigable river and King's common highway and then and there drawn and hawled on the said river by certain cattle to wit 10 horses then and there affixed and fastened to the same and hawling the same on the said river and of divers goods &c. in the said boat &c. to wit at &c. and which said boat or vessel was then and there under the care and guidance of certain of their servants And whereas also the Defendants on the same day and year aforesaid were possessed of a certain other boat or vessel then floating and navigating on the said river drawn and hawled by certain cattle to wit 10 horses then and there affixed and fastened by certain ropes or hawling-lines to and hawling the same upon the said river to wit at &c. and which said last mentioned boat or vessel was then and there under the care and guidance of certain servants of the Defendants. And whereas before and at the time of the grievance hereinafter mentioned to wit on &c. at &c. the said boat or vessel of the Plaintiffs had overtaken and had occasion to pass by the said boat or vessel of the Defendants on which occasion the Defendants by their said servants so conducting and navigating their said boat or vessel ought then and there to have slackened the said ropes or lines with which the said cattle were so fastened to their said boat or vessel so as to permit the said [473] boat or vessel of the Plaintiffs to pass over the same whereof they then and there had notice. Yet the Defendants by their said servants not regarding their duty in this behalf but contriving and wrongfully intending to hurt injure and prejudice the Plaintiffs in this behalf did not nor would slacken the said ropes or lines or permit or suffer the said boat or vessel of the Plaintiffs to pass the said boat or vessel of them the Defendants but on the contrary thereof then and there to wit on &c. at &c. by their said servants in that behalf wrongfully unlawfully and injuriously drove on the said cattle hawling and drawing their said boat or vessel with great force and violence and thereby forced and drove the said boat or vessel of them the Defendants against the said boat or vessel of the Plaintiffs by reason whereof and by and through the straining and pressure of the said ropes or lines thereby and forcing the said boat or vessel against the said boat or vessel of the Plaintiffs the said boat or vessel with the

said goods &c. on board her as aforesaid was driven and forced across the stream there and sunk and the said boat or vessel was not only greatly damaged and spoiled thereby but the said goods &c. were spoiled &c. and the Plaintiffs lost the benefit of the voyage &c. and were obliged to spend a large sum of money &c. and also divers servants and horses of the Plaintiffs were for a long time out of employ and of no use to the Plaintiffs to wit at &c.

The 2d count stated, that the Defendants "ought to have permitted and suffered the said boat or vessel of the Plaintiffs to pass the said boat or vessel of the Defendants" but that they did not, omitting the circumstances of slackening the rope, but being in all other respects similar to the 1st count.

The 2d and 3d counts were for negligently and ignorantly conducting the vessel.

Plea, Not guilty. Verdict for the Plaintiffs and judgment in the King's Bench accordingly.

The Defendants assigned for errors in this court, "that by the record aforesaid it appears that the Plaintiffs have in the 1st count of their said declaration complained against the Defendants as if the whole of the said cause of action in that count mentioned had been a mere consequential injury, whereas so much of the cause of action in that count mentioned as arose from the driving on the said cattle in that count mentioned with great force and violence and thereby forcing and driving the said boat or vessel of them the Defendants against the said boat or vessel of the Plaintiffs [474] appears to have been a direct and immediate trespass and injury committed by the said defendants on the property of the said Plaintiffs." The same as to the 2d count. And "that the Plaintiffs have complained against the Defendants for the whole of the causes of action mentioned in the said declaration as in a plea of trespass on the case whereas for so much of the cause of action in the said declaration mentioned as arose from the said driving on the said cattle in the 1st count of the said declaration mentioned with great force and violence and thereby driving and forcing the said boat or vessel of the Defendants against the said boat or vessel of the Plaintiffs, they ought to have complained against the Defendants in a plea of trespass vi et armis." The same as the 2d count. And "that in the said declaration there are comprehended and included causes of action different and distinct in their natures to wit causes of action founded on immediate direct and forcible injuries and trespasses and causes of action founded on injuries that are merely consequential; which causes of action are incompatible with each other and ought not to be joined in the same declaration."

Joinder in error.

Wood for the Plaintiffs in error. The errors assigned apply to the 1st and 2d counts only, in which the breaches stated are clear acts of trespass. The distinction between the actions of trespass vi et armis and trespass on the case, is perfectly settled; "if the injury be committed by the immediate act complained of, the action must be trespass; if the injury be merely consequential upon that act, an action on the case is the proper remedy." Per Lord Kenyon in *Day v. Edwards*, 5 Term Rep. 649. The injury here complained of was the immediate act of the Defendants' servants; no negligence is stated in either of the two first counts. In *Day v. Edwards* an action on the case being brought against the Defendant for driving his cart against the Plaintiff's carriage, it was held bad on demurrer; and the only difference between that case and the present, consists in the injury having been there committed by the Defendant himself, whereas here it was committed by the Defendants' servants. But this difference in circumstance affords no distinction in principle; *Sarignac v. Roome*, 6 Term Rep. 125. The case of *Tripe and Dyer v. Potter*, before Yates J. at Exeter 1767, cited 6 Term Rep. 128, is strongly analogous to the present; there the Plaintiff having declared in case against the Defendant for wilfully rowing his boat against the Plaintiff's net, [475] whereby the Plaintiff's net was sunk and the Plaintiff prevented from drawing it, &c. was nonsuited. And the principles laid down by Lord Chief Justice De Grey in *Scott v. Shepherd*, 2 Bl. 899, clearly establish that if the act of the Defendant be immediately injurious to the Plaintiff, though the injury arise from accident, or the act which occasions it be lawful, yet trespass is the only remedy.

Wigley for the Defendants in error. Whatever might have been the event of this case on a demurrer, the Court will not now presume any thing after verdict which can defeat the Plaintiffs' judgment. *Slater v. Baker and another*, 2 Wils. 359. It appears that in some cases either trespass or case will lie. Thus in *Pitts v. Gaince and another*, 1 Salk. 10, where it was objected that case by the master did not lie

for entering and detaining a ship, but trespass only, Holt Ch. Just. held that either action might have been maintained. In *Scott v. Shepherd* it was said by Blackstone J. that every action of trespass with a per quod includes an action on the case; and that a man may bring trespass for the immediate injury and subjoin a per quod for the consequential damages, or case for the consequential damages and pass over the immediate injury; and for this he cited 11 Mod. 180. So in *Slade's case*, 4 Co. 94 b. a case is put where a man may have "a general writ of trespass or an action upon his case," and in Hob. 108, and Sty. 99, the same doctrine is laid down. It was thrown out in argument in *Savignac v. Roome*, that the master is not answerable for the wilful wrong of his servant, and for this was cited *Jones v. Hart*, 2 Salk. 441, and the marginal abstract there; if however the act whether wilful or not be done in the master's service, the master is answerable. 1 Ld. Raym. 265. 2 Term Rep. 154. It was indeed intimated in *Saunderson v. Baker and another*, 2 Black. 832. 3 Wils. 309, S. C. that there should be a recognition of the servant's act by the master in order to fix the latter; but that is now held unnecessary (a)¹. Had this appeared at the trial to have been an act altogether unauthorized by the Defendants, or a clear trespass, in either case the Plaintiffs would have been nonsuited, *Haward v. Bankes*, 2 Burr. 1113, and therefore the Court after verdict will suppose it to have been so proved as to support the judgment. Indeed in *Morley v. Gaisford*, 2 H. Bl. 443, the Court said it would be difficult to put a case where a master could be considered as a trespasser for the act of his servant, unless done by his command, [476] *Day v. Edwards* was on demurrer, and in *Savignac v. Roome* the injury was stated to have been done wilfully, which was much pressed in argument. The present cause of action was a mere non-feasance, for the injury is averred to have arisen from not slackening the rope, in consequence of which the Plaintiffs' boat was sunk.

EYRE Ch. J. Undoubtedly we ought to endeavour to preserve the distinction of actions, and therefore if it appear upon the pleadings that actions of a different nature have been mixed, that is a sufficient ground for arresting the judgment. That point however ought to be very clearly made out, where the objection is taken after verdict. Now if we read this declaration with that favour to which it is intitled after verdict, the judgment may well be supported without reference to all that learning which has been cited in its support. The cause of all the mischief which has happened in this case, was the Defendants' servants not slackening the rope as it was their duty to have done, and in consequence of which neglect the horses went on in a way injurious to the Plaintiffs. It is therefore extremely clear that the cause of action was a non-feasance, and it is fair to infer that it was not intended to charge the Defendants with wilfully driving their boat against that of the Plaintiffs. All the circumstances alleged are referable to the non-feasance, which makes it a compleat action on the case. The injury is not laid to have been done wilfully but wrongfully, which is applicable to case, and indeed to make it trespass, we must entirely overlook the non-feasance. This being so, we may pass over all the learning which has been collected, and decide the case on that ground on which the whole rests, viz. a fair understanding of the declaration, referring the different expressions to that first cause to which they are justly referable.

Per Curiam. Judgment affirmed (a)².

[477] CHAUNT v. SMART. April 25th, 1796.

No rule for an attachment to be absolute in the first instance except for non-payment of costs upon the prothonotary's allocatur (b).

Shepherd Serjt. moved for an attachment against the Defendant for neglecting to

(a)¹ See *Bush v. Steinman*, ante, 404.

(a)² The same in principle is the case of *Ogle and another v. Barnes and others*, 8 Term Rep. 188. There the declaration in case having alleged negligence and unskillfulness in the Defendants' management of a ship, by reason whereof she ran foul of the Plaintiffs' ship with great force and violence, and damaged her, the Court of K. B. on a motion in arrest of judgment, on the ground of the action having been case when it ought to have been trespass, refused to imply any act wilfully done by the Defendants, and held the action well conceived.

(b) Vide *King v. Price*, 1 Price, 341.

deliver up a promissory note in pursuance of an order of *Nisi Prius*, which had been made a rule of Court, and served upon him with a demand of the note. There was some difficulty at first as to the manner in which the rule ought to be drawn up, the officers seeming to be of opinion, on the authority of *Townsend v. Baker*, Barnes, 31, that the rule should be absolute in the first instance.

But The Court determined that a single authority was not sufficient to support that doctrine; that the party though willing might not be able to deliver up the note, as in case of fire; that where any excuse could be offered for disobedience to the rule, the party ought to be permitted to shew cause; that in future the practice of this Court should be conformable to that of the King's Bench (a)¹, and the rule should be to shew cause why the attachment should not issue in all cases except of non-payment of costs on the Prothonotary's allocatur.

EX PARTE BENJAMIN LAWRENCE. April 26th, 1796.

The Court of Chancery having refused to discharge a prisoner in custody for not putting in an answer unless on payment of the fees, he applied to C. B. to be discharged under the insolvent act 34 G. 3, c. 69, but was refused; his contempt not consisting in the non-payment of money.

Clayton Serjt. applied to the Court to discharge the petitioner out of the custody of the Warden of the Fleet, under the following circumstances. In 1784 the prisoner being then under confinement in Gloucester gaol for debt, was served with a subpoena issued out of Chancery at the suit of G. Mayo; in 1785 he was removed by Habeas Corpus to the Fleet, and his poverty disabling him from putting in any answer to Mayo's bill, a decree that the bill be taken pro confesso was obtained against him, on which he was regularly charged in custody for the contempt, and the fees amounting to near 50l. remained unpaid. On the 15th of September 1794 he was brought up at the Quarter Sessions for the City of London in order to take the benefit of the insolvent act 34 Geo. 3, c. 69, but was remanded, it appearing in the copy of the causes wherewith he stood charged in custody, that he was detained by virtue of an attachment issued out of Chancery. Application was then made to the Court of Chancery to discharge him, which was refused unless upon payment of the fees. Clayton [478] now urged, that though he was in custody for a contempt in point of form, yet that he was in reality detained for the non-payment of the fees incurred by that contempt.

The Court however were of opinion that no redress could be obtained by the prisoner, but from the Court of Chancery; for that though on payment of his fees, that Court had offered to discharge him, yet his contempt did not consist in the non-payment of money (the term used in the 34 Geo. 3, c. 69) and consequently that he was not intitled to be discharged under that act.

Clayton took nothing by his motion.

GRAVALL v. STIMPSON. April 26th, 1796.

A writ of error operates as a supersedeas from the time of the allowance, not from the time of service. Bail therefore must be put in within four days from the former period (a)².

Final judgment was signed in this case, and a writ of error allowed on the 27th February; on the 1st of March the Defendant's attorney served the Plaintiff's attorney with the allowance of the writ of error; on the 3d of the same month the writ of Fi. Fa. was sued out upon the judgment; and on the 4th bail in error was put in, execution under the Fi. Fa. having been previously levied in the morning of the same day. To quash this Fi. Fa. for irregularity and have the money levied under it restored to the Defendant with costs, Le Blanc Serjt. on a former day obtained a rule *Nisi*: the question being whether a writ of error operates as a supersedeas from the time of it's allowance, or from the time of serving the allowance on the party?

(a)¹ Tidd's Pract. K. B. 256.

(a)² Vide *Meagher v. Tandyck*, 2 B. & P. 370. *Payne v. Whaley*, 2 B. & P. 137.

Shepherd Serjt. shewed cause. A writ of error is a supersedeas of execution from the time of its operative allowance, provided bail be regularly put in. *Lane v. Bacchus*, 2 Term Rep. 44. Service of the allowance is only material to bring the party into contempt if he afterwards proceed to execution. Bail therefore must be put in within four days after the time of the operative allowance. In *Jacques v. Nixon*, 1 Term Rep. 279, the allowance of the writ of error was served on the 31st of May, final judgment was signed and execution sued on the 14th of June, and within four days after that time bail was put in. This was held to be a supersedeas; which could not have been the case, if the time of service which was long before the judgment, had been the date of the operative allowance, for bail would not then have been put in within four days. The inconvenience of the contrary practice is a sufficient argument against it: for if the plaintiff in error were not compellable to put in bail, till within four days after service of [479] the allowance, he might wait for any length of time till execution had been issued, and then harass the party by serving him with the allowance and putting in bail, by which the execution would be superseded.

Le Blanc in support of the rule. The case of *Jacques v. Nixon* is distinguishable from this; for there the writ of error was allowed, and the allowance served before final judgment, and bail was put in within four days after the judgment; but since bail could not possibly be put in until after judgment, and as the service and allowance were suspended till the judgment, and both began to take effect at that period at once, it cannot be collected from that case whether the operation of the writ of error as a supersedeas commenced from the allowance or the service.

EYRE Ch. J. This is a point extremely clear. The party has four days to put in bail after the allowance of the writ of error (a). It is indeed the practice to get the allowance of the writ of error previous to the judgment being signed; but that is an irregularity permitted for the convenience of the party, for the judgment in the action is the true foundation of the writ of error. The allowance therefore though previously obtained cannot be operative till judgment has been signed; and four days must then elapse before the party signing it can safely sue out execution. But if the writ of error be allowed after judgment has been signed, the party entitled cannot regularly sue out execution until four days after the allowance.

BULLER J. Two things are requisite to make a writ of error a supersedeas of execution: to wit the allowance, and putting in bail. If the writ of error be allowed before judgment, the time of putting in bail runs from the judgment, if after judgment from the time of the allowance.

Per Curiam. Rule discharged (b).

FREEMAN v. JACKSON. April 26th, 1796.

In an order to enlarge the time for pleading the first and last days are both reckoned inclusively.

An action having been commenced in Hilary Term last, the Defendant on the 18th of February obtained an order for a month's time to plead, and on the 17th of March another order for three weeks further time.

[480] On the 7th of April the Plaintiff signed judgment for want of a plea.

Runnington Serjt. now moved for a rule to shew cause why the judgment should not be set aside for irregularity, contending that it had been signed upon the day on which the time to plead expired; and that though it had been the practice of the Court to consider both the days as inclusive, in computing the time under a rule to plead, yet that under an order to enlarge the time of pleading one of the days should be exclusive.

But the officers of the Court concurring with Adair Serjt. who opposed the motion, that the days were in both instances computed inclusively, the Court held the judg-

(a) That is after delivery of the writ to the clerk of the errors. Reg. Mich. 28 Car. 2, and it is from this delivery, not from the sealing, that the writ operates as a supersedeas. *Merritt v. Stephens*, Barnes, 205, ed. 3, and *Sykes v. Dawson*, Barnes, 209.

(b) For the practice on this subject see Tidd's Pract. K. B. 868, 869, ed. 1, & 1100, 1101, ed. 2.

ment to have been regularly signed. It was however set aside on terms for the purpose of letting in the merits.

On the next day Runnington endeavoured to revive the question by a similar motion, and was about to cite the case of *Kay one &c. Whitehead*, 2 H. Bl. 35, to shew that the judgment was irregularly signed: but was stopped by Buller J. (absente Eyre Ch. J. and Heath J.) who said, that as the judgment had been already set aside, the Court could not attend to the motion, whether right or wrong.

GRIMES v. NAISH. April 27th, 1796.

If the damages given by a verdict be reduced by an award under an order of *Nisi Prius* which has been made a rule of Court, the party is entitled to have the *postea* delivered to him without any application to the Court (b).

Shepherd Serjt. moved, that the damages amounting to 100l. which had been found for the Plaintiff in this cause, should be reduced to 26l. pursuant to an award under an order of *Nisi Prius* which had been made a rule of Court, that the *postea* should be delivered to the Plaintiff, and that the judgment should be entered for the latter sum.

The Court were of opinion that the learned Serjeant should withdraw his motion, the Plaintiff under such circumstances being entitled to have the *postea* delivered to him without any application to the Court (a)¹.

MADOX v. EDEN. April 27th, 1796.

The Court will not discharge a Defendant on a common appearance on the ground of infancy.

Cockell Serjt. moved to discharge the Defendant out of custody on entering a common appearance. The affidavit stated that [481] the action was brought on a promissory note given by the Defendant, who was under age:

But the Court were of opinion, that as his infancy could not unless pleaded (a)² exonerate him from the debt, and as it was not certain as yet that they would plead it, it was no ground for the Court to discharge him out of custody.

Cockell took nothing by his motion.

TABRUM v. TENANT. April 28th, 1796.

One obligee in a joint bond having sued out a *Capias* against the obligor, and taken a recognizance of bail in his own name only, afterwards sued out an Original in the name of both obligors, and then applied to the Court to amend both the *Capias* and recognizance; the Court granted the former but refused the latter.

The Defendant having entered into a bond for the payment of a sum of money to this Plaintiff and one Lightfoot, which became forfeited, an action was commenced upon the bond, a *Capias ad respondendum* issued, and recognizance of bail taken at the suit of Tabrum alone. On discovery of the mistake an original was sued out in the joint names of Tabrum and Lightfoot, and an application was made to the

(b) Vide *Barrowdale v. Hitchener*, 3 B. & P. 244. *Bower v. Taylor*, 7 Taunt. 574. *Toussaint v. Hartop*, Id. 571.

(a)¹ Vide *Higgingson v. Neshitt*, ante, 97, where the Court gave leave to enter up the judgment without a rule to shew cause.

(a)² It should seem that this expression must not be confined to the Defendant's putting his infancy on record, but that it applies generally to his making it a defence; for in *Seaton v. Gilbert*, 2 Lev. 144 Lord Hale permitted infancy to be given in evidence on non assumpsit, and in *Darby v. Boucher*, 1 Salk. 279 Treby Ch. J. having doubts on the subject, referred it to the Judges, ten of whom then present held that it might be so given in evidence. The same doctrine is laid down by Lord Holt, *Ld. Raym.* 389, and is adopted in *Bull. N. P.* 52, where Gilb. Hist. C. B. 64, 65, ed. 2, is referred to.

Court to allow the *Capias ad respondendum* and recognizance of bail to be amended by the original by the insertion of Lightfoot's name as a Co-plaintiff.

Le Blanc and Marshall Serjts. now shewed cause against a rule Nisi obtained for that purpose, and contended, that this if allowed would not be a correction of the proceedings in conformity to the writ by which they were commenced, but an adaptation of them to a new original, the foundation of a new action; and that it was not a clerical error, nor within the Statute of Jeofails: they insisted that the bail who had only made themselves responsible for the Defendant in the separate suit of Tabrum, could not without their consent be bound to discharge the joint demand of Tabrum and Lightfoot; and that possibly the same bail who were willing to keep the Defendant out of prison, knowing that the Plaintiff had misconceived his action and could not finally recover, would object to engage themselves when, by the correction of that error, they were likely to be damnified.

Shepherd Serjt. in support of the rule, urged that stronger instances of amendments had occurred, as where a new bill had been [482] filed after judgment to amend a declaration; *Marshall v. Riggs*, 2 Str. 1162, or writs of execution had been amended by the previous proceedings; *Hunt v. Kendrick*, 2 Bl. 836. *Laroche v. Wasbrough*, 2 Term Rep. 737, and *Newnham v. Law*, 5 Term Rep. 577. He contended, that at least the Court would permit an amendment of the *Capias ad respondendum*, if not of the recognizance of bail, which would secure to the Plaintiffs the benefit of the Defendant's appearance; for that though the bail should be discharged, still the having put them in would amount to an appearance, as is the rule in cases where bail are discharged by the Plaintiff's declaring in a different county from that in which they are put in (a)¹.

Per Curiam. The recognizance cannot be amended, for the bail may not be charged but by their own consent. With respect to the *Capias* that may be amended by the consent of the Defendant, who will in that case be in as good a situation as he is at present; for if this amendment were refused, a declaration might be delivered at the suit of Tabrum, and immediately afterwards a declaration by the bye at the suit of Tabrum and Lightfoot.

Accordingly that part of the rule which related to the *Capias* was made absolute by consent (b)¹; and that which related to the recognizance was discharged.

SYMONDS ET UX v. COBOURNE. April 28th, 1796.

The Court cannot order an annuity bond to be delivered up to be cancelled for want of a memorial pursuant to 17 Geo. 3, c. 26, though it be void by the 1st section of that act (b)². Quære, Whether in such a case they would stay proceedings on the bond?

A rule was obtained upon a former day, to shew cause why an annuity bond made to Symonds, by the Defendant Cobourne and another person, should not be delivered up to be cancelled, for want of a memorial, in pursuance of the annuity act. An action had been commenced on the bond by the Plaintiffs against the Defendant.

Le Blanc now shewed cause, insisting that by the first clause of the act the bond was merely void, and that the cases where the Court interfered by ordering deeds, &c. to be delivered up to be cancelled, were founded on the 4th section of the act (a)².

EYRE Ch. J. The motion should have been to stay proceedings: perhaps that might not have been granted, but the Defendant put to plead the circumstances. However, as no stay of proceedings is prayed by this motion, the rule must be discharged.

Per Curiam. Rule discharged.

(a)¹ Vid. *Yates v. Plantin*, 3 Lev. 235.

(b)¹ Qu. Whether the Court would not have amended the *Capias* without the Defendant's consent? See *Davis v. Owen*, ante, 342.

(b)² Vide *Storton v. Tomlins*, 2 Bing. 475.

(a)² See the form in which the rule was made absolute in *Dulmer v. Barnard*, 7 Term Rep. 253; also *Ex parte Ansell*, ante, 66, in the note.

[483] CAPADOSE v. CODNOR. April 30th, 1796.

The indorsements on the certificate of registry required by 7 & 8 W. 3, c. 22, and 26 Geo. 3, c. 60, s. 16, need not be recited in the deed of assignment of a ship under s. 17 of the latter act (c).

Trover for the ship "Castor and Pollux." At the trial before Eyre Ch. J. it appeared that the ship having been built in the year 1790, was transferred by the builders to the present Defendant under the grand bill of sale, when a certificate of British registry was obtained by the Defendant for himself as owner and master, and several voyages in her were performed by him as such; that in 1791 the Defendant having had considerable dealings with G. Lempriere, a merchant in London, and being then indebted and likely to become more so to him, assigned the "Castor and Pollux" by way of security, and delivered possession of the grand bill of sale; that in the deed of assignment the certificate of the registry of the ship was truly and accurately recited in words at length, pursuant to the directions of 26 Geo. 3, c. 60, s. 17; that on the 3d of April 1792 G. Lempriere, in consequence of some transactions by which he became indebted to the Plaintiff, executed to him an indenture, which after reciting the assignment from the Defendant, and the debt due from him to G. Lempriere as well as that from G. Lempriere to the Plaintiff, assigned G. Lempriere's interest in the ship to the latter, subject to redemption on payment of the money due on the 2d of July following; that in this assignment as in the former, the certificate of the ship's registry was truly and accurately set forth; that at this time the Defendant was on a voyage with the ship and acting as master, and that previous to his return G. Lempriere having become bankrupt, he refused (a) to deliver up the ship to the Plaintiff. The objection stated at the trial to the Plaintiff's recovery, was, that neither in the assignment to Lempriere nor in that to the Plaintiff was there any recital of such indorsement of the change of property made on the certificate of registry, as was originally required by 7 & 8 W. 3, c. 22 (b) [484] and subsequently with some alterations by 26 Geo. 3, c. 60, s. 16. A verdict was found for the Plaintiff,

(c) Vide *Moss v. Mills*, 6 East, 144.

(a) This was in consequence of an indemnity given him by the house of De Fiott and Co., to whom G. Lempriere was also indebted. On the Defendant's refusal the ship was arrested by admiralty process, at the suit of the Plaintiff; and in consequence the Defendant filed a bill in Chancery against the Plaintiff, the assignees of G. Lempriere, and De Fiott and Co. as amicable Defendants; on the hearing the Master of the Rolls strongly inclined in favour of the present Plaintiff, but suggested the objection now made, and retained the bill for a year, in order that the question might be tried at law.

(b) The 21st sect. of 7 & 8 W. 3, c. 22, enacts that "in case there be any alteration of property in the same port, by the sale of one or more shares in any ship after registering thereof, such sale shall always be acknowledged by indorsement on the certificate of the register before two witnesses, in order to prove that the entire property in such ship remains to some of the subjects of England, if any dispute arises concerning the same." The 26 Geo. 3, c. 60, s. 16, referring to the above provision as insufficient, enacts, "that besides the indorsement required by the said recited act there shall also be indorsed on the certificate of such registry before two witnesses, the town, place or parish where all and every person or persons to whom the property in any ship or vessel or any part thereof shall be so transferred shall reside; or if such person or persons usually reside in any country not under His Majesty's dominion, but in some British factory, the name of such factory; or if in any foreign town or city, not being a member of some British factory, the name of such town or city, and the names of the house or copartnership in Great Britain or Ireland, for or with whom such person is agent or partner; and the person or persons to whom the property of such ship or vessel is transferred, or his or their agent shall also deliver a copy of such indorsement to the person authorised to make registry and grant certificates of registry, who is hereby required to cause an entry thereof to be indorsed on the oath or affidavit upon which the original certificate of registry of such ship or vessel was obtained, and make a memorandum of it in the Book of Registers, and give notice of it to the commissioners of the customs in England and Scotland."

with liberty to the Defendant to move to set it aside and have a verdict entered the other way.

Accordingly a rule Nisi for this purpose having been obtained, Adair and Le Blanc Serjts. shewed cause, and contended that the Legislature did not mean to make void assignments of this kind where a recital of the indorsement was omitted in the deed, since nothing to that effect appeared in the 26 Geo. 3, c. 60, s. 16, which regulates the form of the indorsement: that however the penalty of forfeiture enacted by 7 & 8 W. 3 may attach in cases where no indorsement is made, the sale itself is not avoided by 26 Geo. 3, probably in order that ships may be assigned by way of mortgage during the absence of the ship and master: that the subsequent statute 34 Geo. 3, c. 68, s. 15 (which could not affect this case, being passed after the transaction) makes all sales absolutely void which are not attended by an indorsement, and that this provision would be absurd had the same thing been necessary under the 26 Geo. 3: that the Court would not extend the words of a statute in order to make void a security for the omission of something not required by that statute to be inserted; and that the indorsement could not be deemed part of the certificate, since it had not been made so by the act.

Cockell and Shepherd Serjts. contra argued, that the security was void for not reciting the indorsements on the certificate of registry: that the object of the Legislature in altering and extending the provisions of 7 & 8 Will. 3, was to prevent the pos-[485]-sibility of any foreigner having a secret interest in the ship: that it was intended by the 17th section of 26 Geo. 3, c. 60(a) that the bill of sale should correspond with the registry, and that they should be checks upon each other, which would cease to be the case, if the indorsement were omitted in the recital of the certificate: that the words of the 17th section include indorsement as well as certificate, for that as by the preceding section, an entry of the former is to be indorsed upon the affidavit, upon which the latter was obtained, the old certificate of registry, becomes in fact a new certificate, and ought as such to be recited in the deed of assignment; that the 17th section which enacts the recital of the certificate of registry, being subsequent to the other provisions relating to transfer of property, may be construed thus; "all these things are necessary to be done, and shall be recited:" that it is proper that the purchaser should see by the bill of sale whether the ship be liable to confiscation, which does not appear unless the indorsements as well as the certificate be recited; and that one of the objects of the act was, to provide against fraud in future transfers. They referred to *Rolleston v. Hibbert*, 3 Term Rep. 406 (b).

EYRE Ch. J. This is an important point, depending upon the construction of particular acts of parliament, which are the bulwarks of the commerce of this country and the great tower of our naval strength. The construction of those acts must be made on a full consideration of their letter and spirit taken together. If it were shewn to be essential to a compliance with the spirit of the statutes referred to, that the indorsement should be recited as a part of the certificate, that would go far to establish the necessity of such a recital. Let us see then how far the nature and extent of these legislative provisions serve to explain the clause on which this question principally turns. The object of these laws was, to confine the advantage of trading to the plantations to British subjects and to British-built ships. In order to prevent evasions, it was necessary that the public should have the means of ascertaining without difficulty who were the owners, who were the masters of the ships, and what particular ships were employed in that trade. [486] But the transfer of ships from one owner to another was not otherwise interesting to government than to prevent their coming into the hands of foreigners. The 7 and 8 Will. 3, c. 22, s. 17, therefore directs that the name of every ship trading to the plantations, the port to which she

(a) Which enacts, "that when and so often as the property in any ship or vessel belonging to any of His Majesty's subjects shall be transferred to any other of His Majesty's subjects in whole or in part the certificate of the registry of such ship or vessel shall be truly and accurately recited in words at length in the bill or other instrument of sale thereof, and that otherwise such bill of sale shall be utterly null and void to all intents and purposes."

(b) Vid. etiam *Hibbert v. Rolleston*, 3 Bro. Chan. Cas. 571. *Rolleston v. Smith*, 4 Term Rep. 161. *Camden v. Anderson*, 5 Term Rep. 709, and *Westerdell v. Dale*, 7 Term Rep. 306.

belongs, the master's name, the kind of built, the burthen, the place where and the time when built, and the owner's name shall be registered upon oath, together with a declaration that no foreigner directly or indirectly hath any interest therein. By the 18th section a copy of the oath upon which the register is made is to be delivered to the master of the ship by way of certificate to prevent his being interrupted by confiscation; and by the 21st section of the same statute it is provided, that upon every alteration of property the sale shall be acknowledged by indorsement on the certificate, in order to prove, in case of dispute, that the entire property remains in British subjects. The 26 Geo. 3, c. 60, s. 16, goes beyond this, introducing a more circumstantial indorsement, and enacting that a copy of this indorsement shall be sent to the public officer authorised to grant certificates, who, after having made a memorandum of it himself, is to transmit it to the commissioners of the customs. By these means the real owner must be known both at the port and the Custom-house, which is a very important step towards preventing a secret conveyance to foreigners. It is indeed provided, that upon every transfer of the property of the ship, the certificate shall be recited in the bill of sale. But if it were also necessary under this provision to recite the indorsements made on such certificate, upon every successive transfer, it would be equally necessary to recite the indorsements made upon the several changes of masters, as directed by 26 Geo. 3, c. 60, s. 18. I am of opinion, however, that it is sufficient to send copies of the indorsements to the public offices, and that the certificate itself is enough to shew the owner. In this case there was no indorsement on the transfer to Lempriere, and it would be peculiarly hard upon the present Plaintiff to hold the assignment to him void because he did not require indorsements to be made in order to be recited. These parties chose to run the risk of confiscation: the certificate, such as it was at the time of the sale, was recited: and were it necessary to decide whether the want of indorsement upon the certificate made the assignment void, I should incline to think that it did not (*a*). Much has been said in favour of the policy of reciting [487] the indorsements, but I think it has not been shewn that it was made necessary by the provisions of 26 Geo. 3, c. 60.

BULLER J. It is not necessary to decide whether the want of indorsements avoids the assignment; for the question here is, Whether the bill of sale be insufficient because the indorsements are not recited therein? I think that the Legislature looked to the public interest only, as appears by all the provisions of the act, and that they did not regard the purchaser. If the certificate of registry must be entered at the Custom-house with the indorsements thereon, the ship's owner must be known, and as the purchaser must have the certificate of registry recited in the bill of sale, he will be directed thereby to resort to the Custom-house for any information which he may want. If therefore the public be sufficiently safe without any recital of the indorsements we ought not to hold this bill of sale void, the words of the act not having expressly required their insertion. It has been assumed that no transfer takes place till the indorsement: but that is not true, for the indorsement must always be subsequent to the transfer.

HEATH J. This question turns on the 17th section of the 26 Geo. 3, c. 60. How can the indorsement be considered part of the certificate of registry? The certificate belongs to an antecedent transaction, and is complete without the indorsement, which is not like a condition on bonds or bills of exchange, where it alters the quality of the bill or bond, but is only evidence of a subsequent sale, though introduced in that place. We cannot go beyond the words of the act to create a case of forfeiture.

ROOKE J. The 26th of Geo. 3 not having required any recital of the indorsements, we cannot extend its provisions to the prejudice of these parties.

Postea to the Plaintiff.

(*a*) By 34 Geo. 3, c. 68, s. 15, the form of the indorsement is altered, and all contracts for sale are now made absolutely void, unless such indorsement be duly made, and a copy thereof delivered to the person authorized to grant certificates.

THE MAYOR AND COMMONALTY AND CITIZENS OF THE CITY OF LONDON v. THE MAYOR AND BURGESSES OF THE BOROUGH OF LYNN REGIS, COMMONLY CALLED KING'S LYNN, IN THE COUNTY OF NORFOLK; IN ERROR. May 2d, 1796.

(In the House of Lords.)

[See S. C. 7 Bro. P. C. 120, and below, 1 H. Bl. 206; 4 T. R. 130. See *London Joint Stock Bank v. Mayor of London*, 1875-81, 1 C. P. D. 11; 5 C. P. D. 494; 6 App. Cas. 393.]

If toll be merely claimed of the individual members of a corporation exempt from toll, an action well lies on the writ *De essendo quietum de theolonio* in the name of the corporation.

This action was commenced in the Court of Common Pleas by the present Plaintiffs in error, on the writ *De essendo quietum de theolonio*.

[488] The declaration began by mentioning that the corporation of King's Lynn was summoned to answer why they required the citizens of London to yield toll within King's Lynn. It then alleged that the city of London was a body corporate by prescription, by divers names, and for fifty years last, by the name of the Mayor, and Commonalty, and Citizens of the City of London, and that the citizens of London, amongst other liberties and privileges, had time out of mind enjoyed, and still were accustomed and ought to enjoy, the liberty and privilege that they and all their goods should be quit, and free of and from all toll, passage, lastage, and other customs, throughout England, and the King's ports, except his prisage of wines; which liberties and privileges were alleged to be confirmed by divers acts of parliament. It then recited that the King, by writ under the Great Seal, commanded the corporation of King's Lynn to permit the citizens of London to be quit of such toll, and other customs, in King's Lynn, or to signify cause why not, but that the corporation of King's Lynn, not regarding the writ, had not signified to the King, as by the writ was commanded, and since the writ had disquieted the citizens of London, and required of five of them who were named, and of other citizens of London, toll, passage, and lastage, not being prisage of wine, of their goods within King's Lynn and its port, in contempt of the King, and to the damage of the corporation of London, of 100l.

The corporation of Lynn pleaded, first, that the citizens of London had not been accustomed, and ought not to enjoy such liberty and privilege of being free of toll and other customs, except the King's prisage; secondly, that the five citizens named were not citizens of London, as alleged.

Issue was joined on both pleas.

In Easter Term, 1789, the cause was tried at the Bar of the Court of Common Pleas, (see 1 H. Bl. 206), when a verdict was found for the corporation of London, on both issues, with one shilling damages, which damages were stated in the record to have been remitted by the corporation of London to the corporation of King's Lynn. The judgment was, that the citizens and all their goods should be quit of yielding such toll, &c.

On this judgment a writ of error was brought in the King's Bench, and in Hilary Term, 1791, the judgment of the Common Pleas was reversed. (See 4 T. R. 130.)

[489] In consequence of this, the present Plaintiffs brought a writ of error returnable in parliament, and assigned general errors: to which the Defendants having rejoined, the Plaintiffs hoped the judgment of the King's Bench would be reversed for the following among other Reasons:

I. Because the objection made below, by the Defendants in error, that the writ *De essend. quiet. de. theol.* is a writ merely prohibitory, on which no action can be maintained, has no foundation. This sufficiently appears from the precedents of attachments on this writ given in the Register (258 b. and the following pages), which run thus: *Si A. fecerit, &c.* "tunc pone, &c. B. & C. &c." being manifestly process to bring in the Defendants to answer to an action.

II. Because another objection, insisted on by the Defendants in error, that the action, supposing an action to lie, ought to be by the individual citizens aggrieved, and not by the corporation of London, appears to be equally groundless. In *Fitz. N. B.* (227, E.) it is laid down, that "all the corporation may bring the writ by the

name of their corporation, and may have an alias and attachment thereupon, if need be;" by which must be understood the process of attachment in the Register, neither that book nor Fitzherbert any where alluding to a criminal attachment on this writ.

III. Because the objection principally relied on by the Defendants in error was, that this action is not maintainable where no distress has been taken; which objection the Plaintiffs in error submit cannot be supported for the reasons, and upon the authorities following:

It is evident that *De. essend. quiet. de theol.* that *Monstraverunt* are no more than different names for the same writ, arising from a very slight variation in the form. The Register contains no such title as *Monstraverunt*: but several writs of *Monstraverunt* are inserted in the title *De essend. quiet. de theol.* Burgesses may have *Monstraverunt* (Register, 259 b.), and tenants in ancient demesne may have the writ *De theol.*; and all the tenants may sue as in *Monstraverunt* (Fitz. N. B. 228, B.); so that every authority as to the one is an authority as to the other. Lord Coke (1 Inst. 100 a.) says expressly, that a man may have *Monstraverunt* before distress; by which he must be understood to mean the action of *Monstraverunt*, having classed it with other writs, on all of which [490] the remedy is by action. The Register contains several precedents of writs *De essend. quiet. de theol.* and attachments on them, which do not state a distress; and other precedents of the same writ which do. Fitzherbert, (N. B. 226, I.) in the outset of the title, describes this writ to lie where the King's officer will demand toll. After giving the form of the writ, he goes on to state that the party may have an alias, pluries and attachment against those who grieve him. The natural meaning is, that those other writs are for a repetition of the same grievance complained of in the first; and Fitzherbert must be guilty of great inaccuracy if to found the attachment a new and different injury must have been committed in the mean time.

IV. Because this writ is analogous to other writs on which an action may be maintained, and judgment given on the right, without actual damage, (Co. Litt. 100); and such an establishment of the right seems peculiarly beneficial in a case like the present, of an exemption from toll claimed by a large body of persons, where the particular injuries may be very numerous, and in each instance so inconsiderable, that the individuals aggrieved not choosing to incur the expence of legal proceedings, may by continued acquiescence weaken or destroy the right of the corporation; or if those who claim the toll will not distrain for it, but bring actions of assumpsit, to which only the general issue can be pleaded, neither the corporation nor the persons aggrieved have any means, if none are afforded by this writ, of stating their exemption on the record, and obtaining a decision which shall either establish or destroy their claim for the future.

V. Because if the taking of a distress were necessary, this declaration does sufficiently allege it. By the precedent in the Register (258 b.) it appears that "*quietos esse permittere non curaverunt*" is a sufficient allegation in the attachment. The averment in this declaration is, that the defendants did disquiet and did require toll; and it is impossible to contend that the declaration is bad in this respect, without contending that the attachment also, which stands upon the authority of the Register, is equally bad.

VI. Admitting that the declaration ought in strictness of law, to have alleged a distress, the omission of it is mere form, and aided by the verdict. If a distress be necessary to support this action, the words "*quietos esse permittere non curaverunt*" in the attachment must be understood to mean disquieting by distress; and if the defendants had taken issue upon this same allegation in [491] the declaration, the Plaintiffs could not, supposing a distress necessary for the support of the action, have entitled themselves to a verdict without proving a distress. An actual distress cannot be more necessary to support this action than an actual impleading to support a *warrantia chartæ*; and yet it is laid down in Fitz. N. B. (134, K.) that in *warrantia chartæ*, if Defendant say that Plaintiff was not impleaded, he thereby confesseth the warranty, and plaintiff shall have judgment to recover it. By the same rule, if the present Plaintiffs had alleged a distress in their declaration, and the Defendants had denied it, they would have admitted the exemption, and the Plaintiffs must have had judgment for the acquittal. Here the exemption is found by the jury; and how can it be contended that the not stating a distress in the declaration, prevents the Plaintiffs

from recovering the acquittal, when, if the distress had been stated and denied by the Defendants, the Plaintiffs, notwithstanding that denial, would be entitled to recover their acquittal?

VII. Because, whether the exemption claimed by the city of London extended to all citizens, was a matter of fact to be determined by the jury on the trial of the issues; and the exemption being found as laid, the meaning of the term "citizens" cannot come in question here.

J. ADAIR.

V. GIBBS.

The Defendants in error hoped that the judgment of the Court of King's Bench, reversing the judgment of the Court of Common Pleas, would be affirmed, for the following, among other Reasons:

I. It is submitted, that the antiquated writ *De essendo quietum de theolonio*, to which the corporation of London has thought fit to resort, is not remedial, so as to bear the process and pleadings of a solemn action; but is simply a command from the crown, which being disobeyed ought not to be followed with any thing beyond an attachment for the contempt. Sir Henry Finch, in his profound discourse on law, (b. iv. c. 48) is a very pointed authority to this effect. The last chapter in that work treats of certain special writs wherein no process lieth. It begins in these words:—"Thus far of an action, and the several parts of it, and of writs both original and judicial that begin or prosecute the action. Besides which there are certain other originals, which are, as it were, special [492] anomalies and exceptions from the former, being not deductory to bring any matter into plea or solemn action, but only commandatory or prohibitory to do or leave something undone. And therefore no process at all lieth in these Writs, but only an attachment upon a contempt for not executing or obeying them."—After this introduction, Sir Henry Finch enumerates various writs of this special nature; and the last but two of these instances is the writ *De essendo quietum de theolonio*.

II. Should the writ *De essendo quietum de theolonio* be deemed so remedial as to bear an action, it is submitted to be a point deserving of consideration, whether on the face of the record there is not an error in the process against the corporation of King's Lynn; for the record states them to have been only summoned, whereas there are precedents according to which an attachment ought to have been part of the process.

III. It is apprehended to be an invincible objection against the corporation of London, that the sort of gravamen or injury stated by them in their declaration is not actionable. They do not allege any taking of a distress for toll by the corporation of King's Lynn. The injury alleged is simply a claim or requiring of toll from the citizens of London. In other words, the action is brought, not for an actual damage, not for an actual injury, but merely for damage and injury feared. It is then an action *quia timet*. But the corporation of King's Lynn are advised, that there are only certain special cases, in which an action *quia timet* is allowed by our law; and that this writ *De essendo quietum de theolonio* is not of the number. Lord Coke in his Commentary upon Littleton, (fol. 100 a.) thus enumerates the instances of actions *quia timet*. "Note, that there are six writs in law, that may be maintained, *quia timet*, before any molestation, distress, or impleading; as, 1. A man may have his writ of mesne, (whereof Littleton here speaks) before he be impleaded. 2. A Warrantia cartæ before he be impleaded. 3. A Monstraverunt before any distress or vexation. 4. An Audita querela before any execution sued. 5. A Curia claudenda before any default of inclosure. 6. A Ne injuste vexes before any distress or molestation.—And these be called Brevia anticipantia, writs of prevention." Hence it is plain that the writ *De essendo quietum de theolonio* did not occur to Lord Coke's extensive learning as one of the few anticipating [493] writs, on which an action is sustainable before actual damage received. It is observable also, that all of the few precedents hitherto explored and appealed to, for the corporation of London seem to fail of serving their purpose in this respect. The first of these is the case of the 18th of Edward the First against the bailiffs of Southampton in Mr. Ryley's *Placita Parliamentaria*, p. 13; and in that case the Abbot of Saint Edward's Place, who was the complainant, expressly states, a distress upon his tenants by the bailiffs, and lays damages on that account. In the next precedent, which is the case of the King and divers citizens of Lincoln against the bailiffs of Burton, in the 22d of the same reign, as given in Mr. Madlox's *Firma Burgi*, p. 138, the injury stated is, the having been aggrieved and disquieted by great distresses, to

the damage of the citizens of Lincoln, who were joined with the King as complainants. The third and remaining precedent is a case in the King's Bench, of the 2d of Edward the Second, in which certain tenants of the King's manor of Brimmesgrene and Norton were Plaintiffs; and on a search for this case, made in consequence of its being cited from Lord Coke's second Institute, (654, also in Dugd. Warwickshire, 1st ed. p. 657) the record has been found, by which it appears, that the Plaintiffs alleged the making of distresses for toll and a damage thereby of 20l. With these precedents originally cited for the corporation of London, but on this point at least operating against themselves, it may be proper to connect the chapter *De Libertatibus* in the second book of Bracton, (cap. 25, § 4 & 5, fol. 57 a.). In that part of Bracton, notice is taken of the remedy for those disquieted for toll in breach of their privilege of exemption granted to them by the crown. But in the only action there stated for such an injury, both the writ and the count suppose an actual damage received by the Plaintiffs; for the writ calls upon the Defendants to answer *Quare ceperunt theolonium*, and the count specifies a distress for the toll to the damage of the Plaintiffs in a certain sum.

IV. It is also conceived to be an objection to the declaration of the corporation of London in the present case, that for the injury they have alleged they are not the proper Plaintiffs. The exemption from toll under the royal grants to London is conferred in favour of the individual citizens of that place, and these are competent to defend their right of exemption without aid of the corporation. The corporation of London is not even within the benefit of the exemption: for it seems to have been admitted in [494] the great case between Waller and Hanger, in the reign of James the First, (3 Bulst. 14) on the London exemption from prisage, that if the chamber of London should traffic, it must pay prisage; because it is in their politick capacity as a corporation, and the exemption granted enures only for the citizens in their individual and natural capacities. If then an injury has been done in the present case, it is to the particular citizens, who are named as having been disquieted by the demand of toll. But these are not so much as Co-plaintiffs in the action. In point of principle it appears a strong proposition to assert, that the corporation of London, upon whom no demand of toll is stated to have been made, and upon whom if they had traded it is apprehended the demand would be justifiable, shall yet be Plaintiffs for the injury from a demand of toll, upon individual citizens, who, if the demand is actionable, are capable of suing for themselves. But that the corporation of London should be Plaintiffs is not merely quite unnecessary. The receiving of them as such seems to lead to two actions and two compensations for the same injury: for a recovery of damages by the corporation of London might not be a bar to an action brought by the particular citizens immediately affected by the demand of toll. Besides it is natural to ask, where are the precedents to be found of such an action by the corporation of any place for an injury to certain of its individual citizens. Here again, the three precedents, already referred to from Ryley's *Placita Parliamentaria*, Madox's *Firma Burgi*, and Lord Coke's Second Institute, will not serve the purpose; for in each of them the particular citizens, who were aggrieved by having their right of exemption contested, were Plaintiffs. Thus it seems, that the interference of the London corporation, as champions fighting the cause of its citizens against the corporation of King's Lynn, is at the same time unnecessary, irregular, and unprecedented.

V. Further it is submitted to be a point deserving of attention, whether the suit in the present case ought not to have been *qui tam*, that is, whether the corporation of London ought not to have sued as well for the King as for themselves. Latterly, indeed, the Courts appear to have been less strict, in requiring actions *qui tam*, for matters including a contempt of the King, than in ancient times. But it is to be considered, that in the present case the action is not merely laid to the contempt of the King; but actually proceeds upon a disobedience of the King's command, by writ under the great seal, expressly recited in the [495] declaration as one of the main grounds of it. It is not the case of a contempt merely virtual, but of one of the most direct and express kind. Perhaps, therefore, it may be found not to fall within the reach of those authorities, according to which a Plaintiff has an election to sue, either for the crown and himself, or for himself only.

VI. Lastly, it is with very serious anxiety submitted on the part of the corporation of King's Lynn, that the declaration of the corporation of London is essentially defective, in not stating how the five citizens, named as having been disquieted by the demand of toll, are entitled to that denomination. More particularly it is not

alleged, that they are both freemen and inhabitant-householders of London, or indeed inhabitants of any description. From the silence of the declaration in this respect, it may be inferred, that the citizens named are neither inhabitant-householders of London, nor inhabitants in any respect; are not full and complete citizens of London; but are persons belonging to and resident in other places, and merely connected with London by having purchased its freedom: in other words, are non-resident freemen. That this is the real fact of the case, will not it is presumed be disavowed on the part of the corporation of London: for, one great object of the present suit between London and King's Lynn is to have it settled, whether non-resident freemen of London are within the benefit of its charter exemptions from toll. It is not, indeed admitted by King's Lynn, that the London exemption applies in any respect against the King's Lynn port-duties; because as London founds upon charters, some of which are ancient enough to constitute a prescriptive exemption; so on the other hand King's Lynn claims a prescriptive right of toll; and thus if the latter can be made out, the question will be, which prescription ought to prevail, that is, which shall be presumed to be most ancient. But though this is certainly a point of controversy between the two corporations, yet, from the general verdict, this point is clearly not open to debate on the present record; and besides the more immediate cause of the present contention certainly was the claim of London to shelter its non-resident freemen from payment of the King's Lynn port-duties. If the wish of the corporation of King's Lynn had prevailed, there would have been a special verdict in the present case, which would have brought forward this latter question most completely and directly upon the record. But a general verdict having been given, the corporation of King's Lynn is [496] driven into raising the question about the non-resident freemen of London by argument and inference from the want of any allegation or mention of residence in the pleadings. However, it is conceived that the corporation of London will scarce decline meeting a question so notoriously a main object of their interference by institution of the present suit. It is hoped, also, that should they endeavour to avoid this latter question, there will be found sufficient defect in their declaration to justify forcing the point into discussion: for it is submitted, that where any persons claim to be exempt from the general law of the land, they ought to be very complete, distinct, and particular, in setting forth the facts by which they qualify themselves for such exemptions; and that merely styling the five persons, named as having been disturbed by the demand of toll, citizens, without specifying how they are so qualified, is too loose and general. On the information for a sum due for prisage to the King's farmer, in the case of *Waller and Hanger*, in the reign of James the First, it appears from a copy of the original record, that the Defendant, who claimed benefit of the London exemption from prisage as executrix of a deceased citizen, pleaded not only that her husband was a clothworker of London, and had for twenty years before his death been continually commorant and inhabiting within London, but that she the widow and executrix was a free woman of London, and commorant and inhabiting there.

An opening being thus made for the introduction of this great question, whether non-resident freemen of London are entitled to the benefit of the London exemption from tolls? it is deemed proper, on the part of the corporation of King's Lynn, to insist against such an extension of the privilege on these grounds:

(1.) It is submitted, that non-residents are neither within the words, nor within the intention of the charters of exemption.

In all the London charters the grant is in favour of the homines and civies of London. But how can one be said to be a man and citizen of a place, in which he is neither housekeeper, nor lodger, nor an inhabitant in any degree? The criterion of a citizen is reality, not merely a name. But a citizen without a house, without a family, without residence, is merely nominal; he wants the real qualifications. As, too, such a person comes not within the descriptions of a citizen, so he is clearly not within the intent of the exemption. The privilege, as Lord Hale (on ports and cus-[497]-toms, Part III. Chap. 3) properly remarks on prisage, is not intuitu personæ, but intuitu loci (a). It is local, not personal. It is intended as a favour to persons of one place, in preference to and by way of distinction from persons of other places. But to admit the inhabitants of all places equally, merely because they have purchased the

freedom of the place privileged, is to destroy the distinction evidently intended ; is to leave room for putting the inhabitants of all places upon the same footing ; is to convert a local privilege into a personal one.—Besides, other consequences of holding the privilege to be independent of residence are monstrous. It converts a privilege of exemption into a power of exempting. It transfers the prerogative of exempting from the crown to the corporation of London, and to every other corporation of the kingdom having grants of the same privilege. Nay, it more than transfers the prerogative of exempting : for it enables the subject to produce the effect of exemption, where the crown cannot exempt ; that is, as against grantees of ancient tolls, whose grants of the tolls from the crown are prior in date to the crown grant of exemption from them ; for the crown cannot exempt to the prejudice of existing grants of tolls. Further, it not only deducts from the crown the toll, which otherwise would be payable by London, and other places privileged in like manner, but enables London, and each of those places, to annihilate all ancient tolls for all persons throughout the kingdom ; and so, from time to time, to render this species of revenue and property wholly unproductive both to the crown and its grantees. Nay, what is even worse, it tends to change one toll for another ;—to detract the ancient toll from its real proprietor, who is generally subject to some burthen for the public benefit, such as the maintenance of a port,—and to substitute in its place a toll uncompensated by any such benefit, for the city of London and other privileged places invading this species of property, namely, a sum of money for the purchase of their freedom, both in fraud of the crown and its grantees of ancient tolls, and to the detriment of the citizens of the very place exempted. If being resident, and being a householder, as well as being a freeman, are considered as part of the qualification of a citizen, all this aggregate of mischief and injustice is avoided. But declare, that being a freeman without residence in any character and of any kind is sufficient to exempt, and the whole of such mischief will immediately attach.

[498] (2.) In the next place it is submitted, that all the authorities, hitherto gleaned, are pointedly against considering non-resident freemen as citizens within these charter exemptions ; most, if not all of them, excluding even resident freemen, not being also householders but only inmates or lodgers.

So was it declared against non-residents, by the King with the advice of the Lords in Parliament, in the eleventh of Henry the Fourth, on a consideration of the London charter exempting from prisage of wines.—(See Rotul. Parl. 11 Hen. 4 (a) vol. 3, p. 646.)—Thomas Chaucer, who as King's butler had the receipt of the prisage duty, complained to the Lords by petition of gross abuse of the London exemption from prisage. He represented, that this franchise was not granted to London and the Cinque Ports, "except to the end that those persons only who dwell, and by their service become continual dwellers in those places, and their children in the said places born, should have benefit of the said franchise." His petition next stated a gross abuse of and fraud upon this franchise by the city of London ; namely, that "in the city of London it is and has been used of long time, that every foreigner not free in the said city, who will come to the mayor, chamberlain, or the masters of any trade in the same city, and pay a small sum of money to the chamber, or to the masters of any trade of the same city, shall be received into the said freedom, as well as he who at all times is a continual dweller in the same city, notwithstanding that he is of another town or borough, to the disinherison of our said Lord the King, as well of the prisage which he ought to have of every such man not free, as of all other customs and duties to our said Lord the King also from them due." The conclusion of this petition runs thus : "May it please you to consider how the estate as well of our Lord the King as of his crown may be preserved without destruction or prejudice, and thereupon to ordain, that due remedy may be provided in that respect, that is to say, by praying our Lord the King and his very wise council to send for the mayor and aldermen of London, commanding them as well in their own persons as the masters of the different trades of the said city, to cease in future, so to grant their freedom to any foreigner, under peril of [499] forfeiture of the franchise of the same city, and also to repeal the freedoms to such foreigners already granted in any trade

(a) The paragraph at which this case begins is, in the printed copy, marked 73. No number is prefixed to the case, but it follows No. xxxii. and is the last in the Roll. 11 H. 4.—An abstract may be seen in Cotton's Records, p. 476.

within the same city, if they have come to the said freedom in manner aforesaid, in regard that otherwise in a short time, as well our said Lord the King who now is, as his heirs, who should be Kings in future, will be disinherited of all their prisage of wine throughout the whole kingdom of England, by the freedom of the same city of London." To the petition thus forcibly concluding, the answer is as follows: "The King will send for the mayor and aldermen of the said city; and further has declared by advice of the Lords in Parliament, that none hath or enjoys such freedom in this case, if he be not a citizen, resident and dwelling within the same city; and that all others dwelling in other cities and boroughs, or towns, &c. have and enjoy their own franchises to them granted, saving always to our Lord the King his Inheritance in this case."—Thus emphatically speaks this famous Parliamentary Record; not to the city of London only, but to all other cities and places in the kingdom having like privileges of exemption from prisage and other tolls and duties payable to the crown. All are equally told, that such privileges as well in the case of other tolls and duties as in the case of prisage, are local: that they belong to the real inhabitants and dwellers of the places on which the crown has bestowed the privilege of exemption: that selling or giving the freedom of London, or of any other place to persons residing elsewhere, to enable their enjoyment of the same privilege, is not only an unavailing abuse of their power of admitting freemen, but perhaps a fraud upon the crown and its grantees not altogether without dangerous consequences to those practising it: and that length of time in practising such fraud will not legalize it.

With this parliamentary declaration against non-residents, the language of the Courts of Westminster-Hall from the most ancient times, to which this point about exemption from tolls is traceable, appears to have uniformly accorded. To evince this, it is deemed proper to take a review of the adjudged cases.

1. The first of them is *Knoll's case* in the Exchequer, as long ago as the reign of Henry the Sixth. It is cited by Calthrop, Recorder of London, in his book on the Customs of London, pages 34 and 35, where he explains what persons shall be discharged under the London charter of the first of Edward the Third, which grants, that no prisage of wine shall be taken from the citizens of [500] London. In commenting upon the distinctions and degrees of citizens, his words run thus: "The first is, he that is a citizen of London for the bearing of offices in the city, and such special intents; because he is a freeman of the city, but not a citizen in residency and continuance in the city; for he inhabiteth and dwelleth out of the city. And such a citizen as this is not such a citizen as shall enjoy the benefit and privilege to be discharged of the payment of prisage, according to the resolution given in the Exchequer in the case of one *Knolls*, Trin. 4 Hen. VI. Rot. 14, where it was ruled, that one that was a citizen and freeman of London, but dwelt in Bristol, might not partake of the benefit of this charter, insomuch that he, by reason of his dwelling out of the city, was only a citizen to a special intent." This same case is cited in 1 Ro. Rep. 140, 142, 148 and 149, particularly by Lord Chief Justice Coke, who refers for it to the *Communia Placita Scaccarii* of 4 Hen. VI. Roll. 14 or 18: and by his manner of stating the case, it appears, that *Knolls* had a shop and servant in London, and yet was excluded, because he himself did not inhabit there. Lord Chief Justice Fleming and Judge Croke, in 3 Bulstr. 4 and 9, cite the same case.

2. The second case is *The Attorney General against Henry Sacheverell and Thomas Snede*, which was adjudged in the Exchequer in Easter, 44 Eliz. and began there Hil. 43 Eliz. It is cited in Calthrop's London, 35. Sir John Davis's Reports, fol. 10 b. 3 Bulstrode, 5. 1 Ro. Rep. 141, 142, 148, and by Lord Hale, in his Treatise on Ports and Customs (a). According to all these accounts of the case, the point decided was not merely that residence was necessary to intitle a freeman of London to exemption from prisage under the word gives in the London charter of the first of Edward the Third, but that he must be a householder also, inhabiting as an inmate being held insufficient, because inmates are not full scot and lot men. The most pointed account in print of the point in this case is by Sir John Davis, which being translated, is as follows: "The charter of London was allowed in the Exchequer of England, 44th of Elizabeth. But the question there was, if a citizen of London, who has not a family, nor pays scot and lot, but sojourns in the house of another, shall have the benefit of the said charter? In the argument of which case, Coke, then Attorney General, put

this difference of citizens, viz. that there is a citizen nomine, a citizen re, and a citizen re et nomine. [501] "But it was resolved, that only the citizen re et nomine, viz. he who is a freeman, and also inhabits and pays scot and lot there, shall be free of prisage by the said charter." But this case being important, the record itself has been searched for; and from a copy of the record, the case appears to have been to this effect:—Sir Edward Coke, Attorney General, informed for the Queen against Sacheverell and Snede, for taking and carrying away, and converting to their own use, five tons of Gascoyne wine, the property of the Queen; and the Defendants pleaded not guilty, upon which the case went to a jury, who found a special verdict. In this verdict the charter of the first of Edward the Third, exempting the citizens of London from prisage, is given verbatim. It next states, that the Defendants for two years past had been freemen of London, one being free of the Company of Haberdashers, and the other of the Company of Mercers; and that during the same time they were both abiding, lodging, and resident within the city of London, but without any family or household. It also finds, that they were taxable, and liable to scot and lot within London, but were never taxed or so burthened there. The verdict next states, that they had both taken the oath of a freeman of London, which is given at length, and one part of which is expressed to be contributory to all taxes scot and lot and other charges as a freeman ought. Then the verdict mentions, that the Defendants on such a day imported into the port of London from foreign parts 52 tons of Gascoyne wine, and before seizure or payment of the Queen's prisage, caused them to be landed and to be lodged in a cellar: and that 5 of the tons were seized by Lawrence Smith, a Queen's officer, for prisage, and afterwards taken from him by the Defendants. It was next found that for fifty years last past no citizen or freeman of London, inhabiting and residing in it as was done by the Defendants, used to pay any prisage of wine to the Queen. But whether on the whole matter the Defendants were guilty, the Jury leave to the Court, assessing 50l. for the five tons, and 10l. for costs against the Defendants, if the Court should find them guilty. After this special verdict there appear to have been several adjournments by the Court to advise upon the matter. But at length, in Trinity Term, in the 44th of Elizabeth, the Barons gave judgment against the Defendants. —From this abridgment of the Latin record it is plain, that, according to the solemn judgment of the Exchequer in this case, a freeman of London, to have benefit of the exemption from prisage, [502] must be not only resident, but also a housholder. It is also apparent that the Court so construed cives in the charter of Edward the Third, in spite of an uninterrupted usage of fifty years, found by the jury in favour of resident freemen being only inmates and lodgers. Further it is clear, that in the 44th of Elizabeth there was not so much as a pretension to have cives in the London charter of exemption from prisage, construed as including any freeman without residence: and that then the only point was, whether a freeman should not be a housholder as well as resident. Nor is this the whole; for the record of this case shews, that the oath of a freeman of London was before the Court; and that notwithstanding the engagement in that oath to contribute to taxes, and submit to scot and lot, but which indeed is qualified by the very significant addition of the words as a freeman ought, the Court would not dispense with the freeman's being a resident housholder. Therefore this record exhibits the decision of the Court in a stronger point of view against the extension of the privilege to resident freemen being only lodgers, than any account there is of the case in the printed books.

3. A third authority is the case of Sir Thomas Waller, a patentee or lessee of the crown for prisage of wine, against Francis Hanger, in the 9th of James the First. It is reported in Calthrop's London, p. 2, et seq. in 1 Ro. Rep. 138, in More, 832, and in 3 Bulst. 1. There is also existing a manuscript report of the case, in a volume, which is written in an ancient hand, and heretofore belonged to the Yelverton library. The case is also shortly stated by Lord Hale in his Treatise on Ports and Customs (a), and in Hardr. 302, and 1 Sid. 130. From a copy which has been obtained of the record, it appears, that the case is entered Easter 9 Jac. in Roll. 163, and that it began in the Michaelmas term preceding. It was frequently argued both at the bar and from the Bench; and on account of difference of opinion amongst the judges it seems to have at last gone off without any judgment. The general point of the case is foreign to

(a) Hargrave's Law Tracts, p. 121.

the present purpose: for it was, whether the wines of a citizen of London, who died, whilst part was at sea, and whilst other part was in the port of London, but before bulk broken, were exempt from prisage in the hands of the Defendant, his widow and executrix? However, all the reports of the case are full of a great variety of matter, shewing the necessity both of being resident and of being a householder, to qualify a freeman of London for exemption from prisage. Even the Defendant's own [503] pleading implied that inhabiting within London was essential to complete the title of citizenship for the purpose of their exemption; the defendant, as in a former part of these reasons has been stated, pointedly alleging the commorancy and inhabitancy of her husband, and after his death of herself, so as to shew, that both were resident in as well as free of London. The judges and counsel also appear to have been unanimous in considering actual residence as indispensable. Nor is it a little singular, that though we have the arguments of two Chief Justices and five other judges, and though on other points they differed most widely, yet there is not one of those arguments which doth not amplify upon the absolute necessity of being a resident householder of London as well as a freeman to constitute the character of citizen for the exemption from prisage. Even Calthrop, who as Recorder of London may be presumed to have been partial to its claims, in his account of this case, is full to the same purpose. It would be almost endless to give the variety of phrases which the Chief Justices Fleming and Coke, and all the other judges successively used to prove how indispensable they deemed it to the description of civis, that the person claiming the privilege of exemption should be a resiant, nay, a householder as well as a freeman of London. Instead of attempting so much, it may be sufficient to give Mr. Serjeant Moore's summing up of the arguments of the judges on this branch of the argument. His words, being translated from the law French, are these: "It was resolved by all, that he who is civis and liber homo to take the benefit of this privilege, ought to be free of the city, and also an inhabitant within the city, and also to be a pater-familias within the city. For one may be free of the city, and not civis; as if he removes and lives elsewhere. He may be a citizen by habitation, and yet not free. He may be a citizen and free, and not a housekeeper. And in all these cases he shall not have this privilege." Thus it is proved by this third authority, that in the reign of James the First, being an inhabitant householder was so absolutely necessary to qualify a freeman of London for exemption from prisage as a citizen, that not even their own law officer and counsel would set up a pretension to the contrary. It should also be attended to, that throughout the numerous arguments in this case, there is not any thing like confining this interpretation of civis to the single charter of London for prisage. On the contrary, there are various ancient authori-[504]-ties cited to shew, that the word civis bears the same sense, and is understood with the same restriction, in respect to other matters and privileges of London. A short extract from the manuscript report in law French of this case of *Waller and Hanger*, will serve as an instance; for in it Coventry, afterwards Lord Keeper, though one of the counsel for extending the exemption to Mrs. Hanger the widow, is represented as making the following admission to the other side. "He is not a citizen of London if he is not a resiant there and taxable to scot and lot, 38 Ass. pl. 18, 45 E. III. 26, 5 Hen. VII. 10, 19, for if he is not resiant, he cannot devise lands in mortmain," &c.(a). Another instance is the following passage from Bulstrode's Report of Judge Houghton's argument in *Waller and Hanger*. After citing one *Outes's case*, from 38 Ass. and 45 E. III. 26, on the London custom of devising in mortmain, Judge Houghton is made to proceed thus: "And there it is said by Fincheden, that citizens ought to have such franchises, scilicet, those to whom such franchises did extend, scilicet, those which were born and inheritors in the same city by way of heritage, or which are resiants, and taxable to scot and lot; and that he, which is not so, shall not be said to be a citizen." The same judge, after adding other words to explain

(a) Vide tamen Bro. Abr. tit. Mortmaine, pl. 35, where the case in 38 Ass. & 45 Ed. 3 is thus abridged and commented upon: "Vide que nul poit devise in mortmaine in London mes cestuy que est citizen, et nee et inhabite in London. Quere indi, et vide librum London de lour customes, car ceux livers hic ne scient le verity ut ciedo, car fuit auterment use in London post hac, ut dicitur, mes chescun ownor poit devise la al lay home, mes nul poit doner in mortmaine, car ceo est hors del custome, mes poit devise in mortmaine."

that a citizen of London means one who is commorant and resiant, and subject to scot and lot, and liable to supply the places and offices there eligible, says, "if he be not such a one, he shall not be said to be within the privilege of a citizen." Lord Coke also, then Chief Justice of the King's Bench, is stated by Bulstrode to have argued generally that a citizen without residence is not, in judgment of law, a citizen. The whole passage, from this part of Lord Coke's argument, is so full of pertinent matter, that it deserves to be here stated. According to Bulstrode these were his words: "Civis is taken five manner of ways in our books. First, civis re et non residentia; and such a one is not, in judgment of law, a citizen. And this appears to be so by 35 Hen. VI. fo. 12, præ-[505]-cipe I. B. in debt, civem Eboraci non residentem (a). 36 Hen. VI. fo. 28, civi et pannario Londini, and he did not dwell there: this is not good; for he may be pannarius de London, and yet dwell at York, 4 E. IV. fo. 10, where one is civis de London, and dwells in another place. And if this sufficeth not in legis estimatione, non sufficit in regis concessione. If he be a resident only in name, this is not good by the 24 E. III. fo. 7, 5 Hen. VII. fo. 10, and 19. If he be not a citizen and a freeman, he cannot by the custom devise his lands in mortmain. Also if he be but inquilinus, this will not serve his turn; but he ought to be a continuing citizen, and resident. He ought to have jus habitationis and jus societatis. If in the interim he happens to be disfranchised, he shall not then have the benefit of this discharge of prisage, but he ought to be a continual citizen. And if all these do concur in him, and he continues to be civis, then he is every way complete, and enabled to enjoy the benefit of this grant of discharge. Bracton, fol. 411 (lib. 5, Tract. 5, cap. 14) comprehends all these in one word, scilicet barones Londini." Here then Lord Coke not only makes the jus habitationis and the jus societatis both equally essential for the London discharge from prisage; but partly infers it from their being so for the privileges of citizenship there.

4. A fourth authority is another case of prisage; namely, the case of *Sir William Waller*, before the Barons of the Exchequer, in Michaelmas, 4 Cha. 1. It is given by Lord Hale, in his Treatise on ports and customs (c), but without the name of the Defendants. There is not any other report of it: and the search hitherto made for the original record has not proved successful. However, Lord Hale having reported the case, puts its existence beyond a doubt. According to Lord Hale the general question was, whether the exemption of the citizens of London, under the first of Edw. III. or otherwise, did extend to wines imported by them into Bristol, or other the out-ports? Having made this to be the great question, [506] he next states, that after several arguments the Barons, una voce, resolved three several points. The first resolution was, that by special words, such as *infra civitatem vel extra*, the King might have exempted the citizens of London from prisage at the out-ports. The second was, that for want of special words, and for other reasons, the exemption was confined to the port of London. The third was, that "bona civium must not be intended of every freeman of London;" but that the person must be, first, a freeman of London, secondly, an inhabitant of London, and thirdly, a householder within the city. In explanation of this last part of the qualification, Lord Hale adds, that an iumate is not exempt; "Because such a man contributes not to scot and lot, nor is beneficial to the city; and this privilege was granted intuitu civitatis, not personæ; and the grant being in diminution of the King's revenue, shall be construed as strictly as may be, and the word civis be taken in as restrained an exposition as may be." Thus, according to Lord Hale, the judges were again unanimous in construing civis on the London exemption from prisage as meaning, not the mere freeman, but a freeman being also an inhabitant householder. Thus, too, this construction was again adopted, upon a reason, as applicable to other duties, part of the ancient revenues of the crown, as to the prisage

(a) See the same case abridged, Bro. Abr. tit. Additions, pl. 13. The writ was in debt against A. B. civem Eborum. It was moved to arrest the judgment on the statute of Additions, (1 H. 5, c. 5) because it did not appear in the writ of what place the Defendant was, for he might be a citizen of York, and reside elsewhere. The Court were of opinion, that the objection could only be taken advantage of there by plea in abatement; though if the Defendant had been outlawed, the exception would have been good.

(c) Hargrave's Law Tracts, p. 128.

duty; namely, that the exemption granted to the citizens of London was founded upon locality. A further and auxiliary reason is indeed added to the resolution in this last case. But that reason also applies with no less force to other ancient crown duties than to prisage; for in both cases an ancient revenue of the crown is diminished.

5. The next authority applicable is a prisage case before the Court of Exchequer, on the Equity side, in Michaelmas, 14 Cha. II. whilst Lord Hale was Chief Baron. It was between Sir William Waller and Giles Travers, and is reported in Hardr. 301, but appears more fully from a copy which has been obtained of the decree. The general question in this case was the same as in *Sir William Waller's case* in the 4th of Cha. I. namely, whether the exemption of the citizens of London from prisage extends to the out-ports, or is confined to the port of London. When the proofs in this cause had been taken, and it came on for hearing, and the counsel had been heard, the Court ordered, that a case should be agreed on between the counsel on each side, and that upon this case there [507] should be an argument. Accordingly a case was agreed upon, and it is mentioned in the decree, that Sir Peter Ball argued for the Plaintiff, and Mr. Serjeant Hardress for the Defendant. Of the argument of the counsel for the Plaintiff Waller there is no report. But Mr. Serjeant Hardress gives his argument for extending the exemption to the out-ports very much at length, and in it great learning is exhibited. However, the determination of the Court was again for the patentee of the crown, and for confining the exemption to the port of London; and the Barons appear to have been unanimous; and Lord Hale, then Chief Baron, in order to put the question quite at rest in future, seems to have taken great pains in framing the decree; for it not only states the case agreed on at length, but particularly enumerates the grounds upon which the Court gave judgment. The general point decided in this case is foreign to the present consideration. But several things are to be collected, which, it is apprehended, bear upon the point of residence. First, it appears by Hardress's Report, that the Defendant pleaded himself to be not merely a freeman, but a citizen also. Secondly, it appears from the case stated in the decree, that the Defendant made out his title of citizenship by proving, that, at the time of the importation of the wines for which prisage was claimed, he was not only a freeman of London, but also was an inhabitant dwelling in the city of London, and did pay scot and lot there. Thirdly, according to Hardress's Report, Mr. Baron Atkins, in his argument, repeated the doctrine of the former cases as to the necessity of being an inhabitant householder of London, as well as a freeman. His words are these: "He that enjoys this privilege must be *civis et liber homo*, free of the city and an inhabitant within the city, and a *pater familias* too. If he want any of those qualifications, he is not entitled to this privilege, as was resolved in *Hanger's case*." Fourthly, it appears from Hardress's argument, that there was strong evidence for the Defendant, of non-payment of prisage by the citizens of London at the out ports: for he says, "we have it in proof, as far as a negative can be proved, that prisage has not been paid for citizens' goods, though imported elsewhere than at the port of London." This becomes material for shewing that such negative evidence, without something more, will not suffice to rule the construction of a charter of exemption, if the sense of the words is clear against the exemption [508] claimed. Should any reference be made on the part of London, to their having given such negative evidence on the trial in the present case, it will be material to recollect, that both in this last mentioned case of *Waller and Travers*, and in the case of *Suede and Sacheverell* before stated from the Record, the exemption was in vain propped up by negative evidence in its favour; in the former, as Hardres describes it, by proving non-payment, as far as a negative is capable of being proved; and in the latter, by an absolute proof, as the Record speaks, that there had been no payment for fifty years last past.—Fifthly, there is a passage in the decree of this case of *Waller and Travers*, which shews, that both for the sake of London itself, and for the sake of the rest of the kingdom, the Court thought it their duty not to encourage the least extension of the London exemption from prisage. For one of the reasons in the decree is "that to construe their exemption to extend unto the wine of the citizens of London, imported by way of merchandize to the out-ports, would not only abate the trade of the city, but would be a great prejudice to the trade of wines in general throughout the kingdom; for that they should be thereby enabled to undersell other men, and engross the whole trade in the out-ports, which cannot be presumed to be intended." Now the principle of the first

branch of this reasoning, with a little change of words, may be brought to bear in some degree against the general exemption of non-resident freemen of London from tolls and duties; for to bring non-residents within such privilege, is to enable the corporation of London and its companies, to deprive its real and complete citizens of the exclusive benefit intended, by admitting the inhabitants of other ports and places into a participation. Thus in one point of view, even London itself is interested against extending their charter exemptions to non-residents; for the value of the exemption must diminish in proportion as the number of participants in it is increased. Even the latter branch of the reasoning of the decree is not only inapplicable; because, if non-resident freemen of London, are to be exempt, then London, by a partial gift of its freedom to particular persons of particular places, may discourage trade and commerce in all others, and so cause a general prejudice.

To those five cases of prisage, with the accumulation of authority and reasoning comprised in them, it is thought proper to add [509] some extracts from the writings of Lord Hale relative to the same subject.

In an original manuscript of Lord Hale, intituled, "Preparatory Notes touching the Rights of the Crown," where he writes upon exemption from prisage, he thus expresses himself: "This privilege belongs in general to the city of London, by a charter of 1 E. III.; to those in the Cinque Ports in respect of their service with fifty-seven ships, and to the ancient members thereof; and by Carta Mercatoria to the Hanse merchants, upon their undertaking to answer two shillings per tun upon all wines by them imported. But here observe, 1. That no person can take the benefit of this privilege granted to London and the Cinque Ports, unless he be free, and also contributory to scot and lot, the grant to London being, *quod de vinis civium nulla prisa, &c.* And therefore Michaelmas 9 Jac. inter *Waller and Hanger*, where a citizen, owner of wines, died before the bulk broken, it was a great question, whether the executor should have the privilege or no." This passage not only is expressed, so as to amount to an opinion from Lord Hale himself, that the exemption from prisage is properly construed to exclude freemen of London not being actually contributory to scot and lot; but extends the same opinion to those of the Cinque Ports. The grant of 1 E. III. to the Cinque Ports is to the barons of those ports and their heirs, which is interpreted to include all freemen of the Cinque Ports. But this extract from Lord Hale expressly puts them on the same footing with the citizens of London; not admitting the citizens of freemen of either place, unless they are contributory to scot and lot there as well as freemen.

In chapter 13 of the same manuscript, which is on the King's power of ordering commerce and trade, Lord Hale writes thus: "Those that had an exemption from prisage were,—1. The citizens of London paying scot and lot.—2. Merchant strangers, who by Carta Mercatoria were exempt from prisage paying butlerage.—3. The barons of the Cinque Ports. Inter Communia Pasch. 7 E. III. it came in question, whether a merchant alien, being made a freeman of Sandwich, was liable to butlerage or no. It seems by the latter opinion he was; because it was a sum due by contract of the merchants aliens in compensation of the remission of other duties, or at least that [510] the mayor and burgesses of the port were fineable for admitting him to that liberty. But it is not adjudged."—Here Lord Hale again states the exemption of London from prisage, as a privilege confined to the real and compleat citizens of London, to freemen contributory to scot and lot there.—Something further also is brought to light by this last extract from Lord Hale's manuscript. It is, that there may be such a thing as an abuse of the power of making freemen: that there may be a fraud upon the crown and the proprietors of ancient tolls under royal grants, by making freemen merely to avoid such payment: and that not only freemen so made are excludable from the beneficial privileges aimed at, but perhaps the makers of them are in some way or other accountable for abusing their franchise: and still further, that though London and other places having like privileges may give or barter away their freedom, so far as themselves and their own interests are concerned; yet they may not have the right of so acting at the expence of the rights and property of others. In this last remark, as to the inefficacy and irregularity of attempting to extend the privileges and exemptions of the citizens of London to the inhabitants of other places, there is little more than repetition of the doctrine, which Lord Hale himself, once more declaring his opinion against such an abuse of franchise, has actually and pointedly expressed. The passage meant is in page 127 of the printed volume

containing Lord Hale's Treatise on Ports and Customs (a)¹; for these are his words explaining the extent of the prisage exemption of the Cinque Ports. "It doth extend only to such as are truly members of the Cinque Ports, and pay scot and lot there. And therefore anciently those of the Cinque Ports were fined, if they did colourably admit any person to be a freeman of their ports that was in truth no inhabitant there, merely to gain the privilege, viz. si advocare voluerint aliquem de libertate suâ esse qui non est."

Upon the whole of this last and grand question in the present contest between London and King's Lynn, it is submitted for the latter,—that the London privilege of exemption from tolls and duties is local:—that none but the real and full citizen, namely, the freeman of London, being also an inhabitant-householder, or at least an inhabitant, is legally participant of such exemption:—that though by being a freeman of London a man may become a citizen for certain intents, and may as such be subject to corpora-[511]-tion offices and certain other duties and payments; yet that no one can be a compleat citizen, a citizen for all intents a compleat scot and lot man, a scot and lot man for parochial and other purposes as well as for corporation offices and duties, without being an inhabitant-householder as well as a freeman:—that if the grant of exemption should be otherwise construed, instead of being merely a grant of exemption to the citizens of London, it would be also a grant enabling the corporation and companies of London to exempt the inhabitants of every place in the kingdom:—that if inhabitancy was not one part of the qualification of a citizen on these exemption charters, all the ancient tolls in the kingdom would be from time to time saleable and disposeable by London and every other place having like grants of exemption, to the disinheritance of the crown and all deriving title to such property under royal grants:—that the cases and authorities in respect to exemption from prisage of wine are direct authorities, against including within other exemptions any but freemen being also inhabitant householders; the London exemption from prisage being granted for the same description of persons as the London exemption from other tolls and duties, and the reasons for excluding the mere freemen being the same in both cases: that to hold, that civis in the prisage charters described the full citizen of London, the freemen being also an inhabitant-householder, but that the same word in the charter for the other exemption described the half citizen of London, the non-resident freemen, would be a monstrous construction without the colour either of language or of principle to sustain the distinction:—that the parliamentary record of the 11th of Henry the Fourth excludes non-resident freemen of London, as well from the general exemption as from the prisage one, expressly representing the mischief of any other construction as the same on both exemptions:—that in all the cases since, there is not so much as a hint at a distinction between the prisage exemption and the general exemption in this respect, there being on the contrary a generality of language embracing both as within the same principle of construction:—that, in so plain a case, any evidence of non-payment by the freemen of London without regard to inhabitancy ought now to be deemed as unavailing in the instance of other tolls and duties, as it formerly was adjudged to be in the instance of Prisage:—and further, that to permit London, through its freedom, to extend its privileges of exemption to the inhabitants of other places, would not only be substituting a toll to the invaders of property for toll to the real pro-[512]-prietors; but would even be sacrificing the privileges of London itself, that is, the privileges of its real and individual citizens, to the lucre of its corporation and trading companies.

To conclude, it is hoped on the part of King's Lynn, that the present attempt by London, to make its freedom subservient to the purpose of evading all the ancient tolls of the kingdom, will be condemned as an abuse of franchise equally unavailing and unbecoming; and that the corporation of London will be effectually reminded in the language of Lord Coke whilst Chief Justice of the King's Bench, that—a citizen without residence is not a citizen in judgment of law.

T. ERSKINE.

S. LE BLANC.

FRAS^r. HARGRAVE (a)².

(a)¹ Hargrave's Law Tracts.

(a)² These reasons for the Defendants in error are to be found in the Appendix to Hargrave's Juridical Arguments, vol. 2; and were drawn up by the learned author of that work. The manuscript volume of Reports cited ante 502, is in the possession,

This case was argued at the bar of the House by Adair Serjt. and Gibbs for the Plaintiffs in Error; and Le Blanc Serjt. and Erskine for the Defendants; and the opinion of the Judges was thus delivered by,

EYRE Ch. J.—This is a proceeding founded on the writ *De essendo quietum de theolonio*, a proceeding so far removed from common use, that it has been doubted whether or not it ever prevailed. It is not therefore to be wondered at, if in this attempt to revive it many difficulties should occur; that they should not be of easy solution; that they should divide the opinions even of learned men. We are called upon to offer our opinion under all these circumstances. It is our duty to obey. We shall offer it with the deference due to the opinions of those from whom we may differ. The long and frequent, and able discussion which the subject has undergone, must have assisted to throw light upon it—We have this advantage, that we have heard all that can be offered. We have endeavoured to profit by it, and have ourselves examined the subject as fully as the time with which we have been indulged would permit.

The judgment of the Court of Common Pleas has been objected to on four grounds:

First, the writ *De essendo quietum de theolonio* has been supposed to be a mandatory and prerogative writ only, the proceedings upon which must end with bringing the party into contempt.

[513] Secondly, it is said, that if judicial proceedings can be founded upon it, the citizens of London, in their corporate capacity, are not the proper parties to sustain those proceedings. One of the reasons is, that if toll be taken or even demanded, it must be from the individual citizen, and that the injury, if any, must be to him, and not to the corporate body; and that the party injured is the only party competent to sustain an action for the injury. And this leads to the

Third objection, that no particular damage to any one is stated in the count; that it states only, that the corporation have been disquieted by the Defendants on the occasion of the Defendants' demanding toll, and that the Defendants had required certain individual citizens to pay toll: that neither the general allegation of disquieting, nor the particular instance alleged, the requiring the parties to pay toll, amount to damage or to injury, which can be the subject of an action. And it is particularly insisted on, that nothing short of an actual distress for the tolls can be the foundation of a proceeding of this nature.

A fourth objection is stated, on the ground that freemen of the city, not resident, not householders, not paying scot and lot, cannot be entitled to be quit of toll.

We have no difficulty in pronouncing against the first objection, on the authority of the Register, which is conclusive. The attempt to explain the attachment mentioned in the Register, and to shew, that it is merely an attachment for the contempt of the King's writ, fails altogether. It is sued out by the party complaining. It has not effect until the party has given security to the sheriff that he will prosecute his complaint. The words are, "*Si A. B. fecerit te securum de clamore prosequendo*"—It does not take the body—"tunc ponas per vadium et salvos plegios" being an authority only to distrain the party by his goods and chattels to compel his appearance, as Sir Henry Finch (see Book iv. chap. 2, 4) treating of actions which concern the realty, has very clearly shewn. It follows the pluries; which Fitzherbert, speaking of the writ *De essendo quietum de theolonio* (N. B. 227, A.) says, is returnable in the King's Bench or Common Pleas at the will of him who would have it; and this attachment is also returnable in the court of common law, where, upon the appearance of the Defendant, the Plaintiff proceeds to count against him.

In a word, this attachment is that which is the common process on those writs of right which are the commencement of real actions, [514] not being pleas of land. The *Monstraverunt* is one of those real actions. In the Register it is called "*Loquela, quæ est coram vobis per breve nostrum de recto.*" And this form of attachment is the process on that writ.

We find nothing in our books which in any degree countenances this objection, except a passage in the second and subsequent editions of Sir H. Finch's *Discourse on Law*, in four books: the passage I allude to is in the chapter added to the work, which

and the property of Mr. Hargrave; and the manuscript of Lord Hale, intitled "*Preparatory Notes touching the Rights of the Crown,*" cited ante, 509, is also at present in the possession of the same gentleman.

most certainly is not to be found in that place in the original edition in French, published in 1613, with a dedication by the author himself to King James; and it has escaped my search, if it is to be found any where in that work. Probably it might have been found after the death of Sir H. Finch, among the collections of that work: and it may have happened, that the officious zeal of an editor has added to the work that which the better judgment of the learned author led him to reject.

If Sir H. Finch's memory is to be charged with a publication, which I take to be spurious, I ask, where did a text writer in the beginning of the 17th century find this doctrine laid down? from what sources did he collect it? and on what authority does he assume as clear law, a proposition flatly contradicted by the Register, which has always been considered as the highest authority to which we can appeal in questions of this nature, and by Fitzherbert's *Natura Brevium*, a book of little less authority? This chapter in Finch is as incorrect and unfounded in other particulars as in this of the writ *De essendo quietum de theolonio*: for instance, it includes among these unproductive writs the writ *De corrodio habendo*; which Fitzherbert states expressly (*N. B. 231, A.*) to be a writ, in which there shall be an alias, pluries, and attachment, if need be. On this first point we have never entertained any doubt.

The second objection is, that the corporation of London are not proper parties to sustain a suit grounded on the writ *De essendo quietum de theolonio*.

One of the reasons urged in support of this objection, viz. that the corporation can have sustained no damage, I shall have occasion to consider, when I come to the examination of the third objection: at present I have to observe, that the right insisted upon is a right by prescription; that it is the body corporate who prescribe; that there seems to be nothing incongruous, and on the contrary there is an appearance of propriety, in making them demandants or plaintiffs in a writ of right, in whom the right is vested, even admitting the right to be of such a nature, as to be [515] only or principally enjoyed, and fruits of it taken, by the individuals, who compose the body corporate: added to which Fitzherbert says expressly, that if any are disturbed, the corporation may sue. The passage is in fol. 227, E. And if any city or borough ought to be quit of toll for the merchandizes which they buy in another town or place, if any of them be compelled to pay toll, all the corporation may bring the writ by the name of their corporation, and may have an Alias and attachment thereupon, if need be, with these words at the end of the writ: "*Et districtionem si quam eis eâ occasione feceri, &c.*"

A passage from the Register, under title *Monstraverunt*, was thought to countenance this objection. It is the rule (for the author of the Register is a text writer, as well as a compiler of writs,) that when the attachment was to be sued, the names of the tenants were to be inserted. But this is explained by the obvious necessity of the case. In the suggestion of the writ *Homines* only are named: they are not a corporation, therefore the individuals must sue. In the present case there is a corporation, and therefore the individuals need not sue.

If indeed it be true, that there must have been an actual distress, or other positive damage to the party suing, to give ground for the suit (which the third objection goes to), this will not only fortify the second objection, but it will render it unnecessary to discuss it more particularly, or to decide upon it; for whether the corporation can or cannot be said to have sustained damage by being disquieted by a demand of toll made on some individuals, if damage be the ground-work of the action, the damages having been remitted in this case, the ground-work of this action is gone.

But is it a principle founded in the law of England, or in general policy (if by that is meant the policy upon which our judicature stood in old times) that there can be no action maintained without damage, in the sense in which we understand damage in personal actions? I consider it as a subordinate question whether that particular damage which arises from actual distress, is essential to the support of this particular action by writ of *De essendo quietum de theolonio*.

We must not enter upon the examination of this question with the prejudices which the established course of proceeding in the common personal actions may have created. We must look back into the history of our judicial policy at an early period. We shall [516] have to consider the nature and the end of the actions founded in right as contradistinguished from possession. We shall have to consider the forms of the ancient proceedings simply, and with reference to their object and effect; and by means of that reference to distinguish between that which is form only and that which is

substance : because however sacred our old forms may once have been, Your Lordships are now bound by positive law to decide in this stage of this cause, upon the very right of the case, to be collected from the whole of this record (if that right can be collected) stripped of all the forms with which it is clothed.

The first observation which the ancient history of our law suggests, as applicable on this occasion is, that at the common law, in actions founded on the right, no damages were recoverable. Damages were first given by Stat. 20 Hen. 3, in Dower and Quarentiue ; other statutes have, since that time, given damages in other cases ; but many remain at this day in which no damages are recoverable.

If damages were not originally recoverable ; if the right, and the right only was to be recovered by the judgment of the Court ; the inference seems unavoidable, that damages actually sustained could not be of the essence of the action, and that the right alone was essential.

The question here very naturally occurs, "What business has a man in a court of justice, who has sustained no damage, let his right be what it may ?" And a second question also occurs, "Shall any man be at liberty to drag another into a court of justice, who has done him no injury ?"

To the first question it may be answered, that (without controverting the truth of the proposition, considered as a general proposition and understood in a popular sense, "that no man shall prefer a complaint to a court of justice who has sustained no damage,") a man may sustain damage not pecuniary, nor to be recompenced by money.

An extreme jealousy prevailed formerly, respecting all matters of rights : many acts entirely unproductive of actual damage, pecuniary in its nature or capable of being recompenced by money, were deemed infringements of right, damage to the right sufficient to warrant the owner in asserting the right against the party infringing it, in an action.

Our ancestors thought that the breath of calumny tainted men's rights ; and indeed this is to a certain extent the language of our [517] times. The recovery of the right by the judgment of the Court was deemed a proper satisfaction for the damage sustained.

To the second of these questions I answer, that great care was taken that no man should come into a court of justice without having the right in him : but the protection against vexation from unfounded claims was, in the spirit of the times, by the amercement *pro falso clamore*. In a higher state of civilization, and when men's rights are better understood, and better protected, we make satisfaction to the party dragged into court and called upon to resist an unjust demand, by giving him costs.

It seems to have been the policy of former times to open the freest access to courts of justice, and to offer to all men who had right, the sanction of the judgments of the courts, for the establishment, security, and preservation of it.

If the party against whom a writ issued did not mean to contest the right, he disclaimed ; and if he did not come at the very first day he was liable to an amercement, though he disclaimed. Upon the disclaimer he was not simply dismissed, but the demandant had judgment to recover the right. At this day in *Quare impedit* the bishop disclaims, that is, claims nothing but as ordinary. The judgment as to the right passes against him upon his disclaimer, and there is no inquiry whether or not he did actually interrupt the patron.

Upon examination of the different writs of right, it will be found, that almost universally, if the right was of a nature to admit of a direct interruption by the act of the party, the writ is formed upon such a supposed interruption. A distress taken in contravention of the right is one of the instances ; but it is to be observed, that these writs are formularies framed for the purpose of bringing the right into discussion, like those of the prætor ; and though in *præscriptis verbis*, from which the suitor could not depart without hazard of losing his writ, there is the most direct authority, that in many cases it was not necessary that the act of interruption supposed by the writ should have actually taken place.

Such was the form in every one of the six *Brevia antieipantia*, as Sir Edward Coke quaintly calls them. This appears by the precedents in Rastall, under each of those heads, and by the text of Fitzherbert. The matter so stated must have been mere supposal, and a mere formulary, sued to introduce the matter of right in those cases. If the writs of *Monstraverunt*, *Mesne*, and *Ne injustè vexes* might be used before the

distress taken, the *Warrantia chartæ* [518] before the having been impleaded, the *Audita querela* before execution taken out, and the *Curia claudenda* before any damage actually sustained for want of inclosing; of necessity the matter of form alledged could not be true. And the observation admits not of the answer given to it, that though the mandatory writ might issue, the remedial writ could not; for in some of the cases there is no such previous mandatory writ, the *Audita querela* for instance, and the *Curia claudenda*.

In the course of these proceedings it has been said, (though I think it was not much pressed in the argument at Your Lordships' bar,) that this writ *De essendo quietum de theolonio* was included in Sir Edward Coke's enumeration under the head *Monstraverunt*. I conceive that the foundation of the argument lies deeper; that in a writ the suggestion of interruption or damage is mere form; and that, whether the writ *De essendo quietum de theolonio* is a writ of *Monstraverunt* or is not, ought to weigh nothing in the argument.

But if it should be thought necessary to examine this argument, thus far at least is clear—This writ is intimately connected with the writ of *Monstraverunt*; it is confessedly of the same nature, if not the writ of *Monstraverunt*. Probably it was formed upon the writ of *Monstraverunt* under the Statute of Westm. 2, which directs, that where a writ is found in one case, and none in another requiring like remedy, the clerks in the Chancery may agree on a writ, or adjourn the Plaintiff to the next parliament, when the writ would be formed under the authority of the King and his council.

I will hazard a conjecture as to the progress of this writ *De essendo quietum de theolonio* to the maturity in which it is found in the Register. Tolls are, generally speaking, derived from the crown; many of them were part of the revenues of the crown, collected by the bailiffs and officers of the crown. When the crown had granted to any description of persons to be quit of toll, or they could by law claim to be so quit, as was the case of tenants in ancient demesne; if the officers of the crown distrained them for toll, it was an obvious remedy to apply for the mandatory writ from the crown to its own officers, and this would most frequently be effectual. But when tolls were granted out, and became the private right of other subjects, the writ would not be obeyed; the grantees could not in justice be concluded by it; there must be an appeal to the law. Then, as it seems to me, was the course [519] of proceeding upon the writ *De essendo quietum de theolonio* devised upon the plan of a writ of *Monstraverunt*, as in consimili casu. It is highly probable that the King's name might have been originally joined with the Plaintiff's in the suit, as was formerly the case in prohibition: but what a mere form that was, may be collected from the proceeding in prohibition going on very well at this day without it.

If I could go farther than conjecture as to this, I should say, that this writ was a writ of *Monstraverunt* to the purpose for which Sir Edward Coke has mentioned that writ. Whether it ought to be so considered or not, and admitting, for the sake of the argument, that the form of this writ requires that it should be stated that the party had been distrained upon; still it may be maintained, that this is but form, and that the truth of the fact is not necessary to the support of the ground of the action, or to warrant the judgment.

A case in the Year-Books 40 Ed. 3, fo. 45 b. will maintain and illustrate this proposition. "Candish Serjt. demands judgment in *Monstraverunt* of the writ, because they have not declared how they were grieved, whether by distress, or otherwise, nor on what day.—Belknap Serjt. We have said, we brought a prohibition to you, after which you distrained us for other services and distrained the tenants.—Kirton J. You should have said how many beasts, for you are to recover damages; you should therefore declare how you are damaged.—Thorpe Ch. J. By their suit they are to discharge the tenancy, as in a *Ne injustè vexes* at common law; and for demanding without more they shall have their action; and if they are not damaged it will excuse you from damages. A man shall have a writ of *Mesne*, though he be not distrained, and shall recover the acquittal *pro loco et tempore*; but he shall be discharged of the damages; and so shall the land here be discharged, and you excused from damages."

I need not observe to Your Lordships, that if doubts have at any time been entertained, whether Sir Edward Coke's doctrine in Co. Litt. fo. 100 was founded, here is a judicial authority which goes a great way to support it. Indeed it was not likely

that he should have broadly stated such an enumeration of the *Brevia anticipantia* without sufficient ground.

There was another case cited at the bar from the Year-Books, which went still further to support Sir Edward Coke. I may add, [520] that Fitzherbert and Sir H. Finch both adopt this doctrine, as to some of these writs: and if the reason for allowing the writ of *Warrantia chartæ* to be sued out, before the party is impleaded, will support the doctrine as to that one case, I need not observe to Your Lordships how that will break in upon the whole train of reasoning for the Defendant in error. Why is a man, who has subjected himself to a warranty, to be dragged into a court of justice unnecessarily, before he has been called upon to perform his engagement; before the Plaintiff has sustained any loss? Is it just that he should be harassed by a suit which was not rendered necessary, for the mere accommodation of the Plaintiff, and to better his security? The ground which is peculiar to this writ will not bear it out. The foundation must be made broader or the edifice will fall.

If distress, supposing it to have been alleged in the count, would in a case of this nature be deemed matter of form only, Your Lordships will hardly think it necessary to enter into a critical examination of the force of the words "require to yield toll," and the difference between requisition and distress in this case, in which the parties have appeared, and waving all question as to the formal part of the case, have joined issue upon the right, and there have been a verdict and judgment upon it.

But let this examination be entered into. Distress, considered as the subject of a mere personal action for damages, is indeed a very different thing from claim and demand; but, considered only as it affects the mere right, it differs only in degree. Both impeach the right. And why should not a man who makes a claim against my right, be put either to support that claim, if he can, or to renounce it by disclaimer? Let it be remembered, that claim was considered by the common law of this country as a very solemn assertion of right, and was therefore as often as it interfered with the right of another, considered as a very serious attack upon that right. As a proof of the first branch of this proposition, I would remind lawyers, that claim prevented a descent from tolling an entry; and they will also recollect the effect of non-claim in fines, and many other less solemn cases. For the latter branch they will find a writ of right grounded altogether upon the adversary's having made a claim. I allude to the writ of *Quo jure*.

I will give Your Lordships the trouble of listening to Fitzherbert's account of the writ of (*a*)¹ *Quo jure*, because I think it very apposite [521] to another part of the argument. "The writ of *Quo jure*—Where a man hath land in fee, and another claimeth common on that land, he who owneth that land shall have this writ against that commoner who claimeth the common, and the writ is such. *Rex vic. &c. Si A. fecerit te securum, &c. tunc summoneas, &c. B. quod sit, &c. ostensurus quo jure exigit communiam pasturæ in terrâ ipsius A. sicut idem A. nullam habet communiam in terrâ ipsius B. nec idem B. servitium facit quare communiam in terrâ ipsius A. habere debet, ut dicit; et habeas inde, &c.*"—"And this writ is a writ of right in its nature; for when the Plaintiff hath declared in this writ, the tenant shall make defence and set out his title to the common, and allege seisin thereof, and the esplees, et quod tale sit jus suum, offert, &c. as the demandant shall do in a writ of right: and then the Plaintiff in the *Quo jure* shall make defence and deny the seisin alleged by the Defendant, and join the mise upon the mere right, or by battail."

Your Lordships perceive, that the only matter of complaint suggested in the writ was, that the party claimed a right of common. But Fitzherbert's account of what was to be done upon this writ goes to the very foundation of this third objection. It plainly evinces, that the suggestion of the writ was mere form on which nothing turned. The tenant was to set out his title; the plaintiff was to deny a seisin and join the mise upon the mere right. To claim liberties and franchises without right was usurpation upon the crown. The writ of *Quo warranto* proceeds upon claim. Claim was always one of the legal modes in which rights were asserted in courts of justice. Franchises were formerly claimed in the *Iter*, they are now claimed in the *Exchequer*. The writ *De libertatibus allocandis* issued upon claim made to the justices. *Fitz. 229 B.* Your Lordships will recollect, that the most solemn assertion of right, which the history of this country can furnish, was by claim (*a*)².

(*a*)¹ F. N. B. 128, F. G. I.

(*a*)² His Lordship probably alluded to the words in the declaration of right recited

The precedents of writs in the Register are frequently "quare distrinxit:" but there are several forms of writs in the Register under the title *Monstraverunt*, and other titles, where the suggestion is "quod exigit." In *Monstraverunt* the party is com-[522]-manded quod non exigit; he is required to shew quare exigit. There are also under title *De essendo quietum de theolonio* some writs in which there is no suggestion of a distress. I ought not to omit mentioning, that there are to be found in Rastal precedents of issues joined upon the fact of interruption suggested in these writs, I believe, the fact of the taking a distress. But, in those instances, there being no denial of the right, the party had judgment to recover the right. Probably it will be found that those issues were offered in cases whereby statute damages might be recovered as well as the right, and that they were offered to protect the party from the damages. However understood, they make a clear distinction between the right and the accidental pecuniary damages sustained in respect of it.

And therefore, neither upon the reason or policy of the law, the nature of the remedy, authority in law, or upon precedent, can it be maintained, that the action does not lie, or that the count is bad, because no actual distress has been taken or even stated to have been taken.

The fourth objection remains to be considered.

The ground-work of this objection is, that the prescription to be quit of toll does not extend to mere freemen, non-residents, not householders, and not paying scot and lot (a). If this were so, how is the objection upon this record to be shaped? Is it an objection in law to the prescription as laid? or is it the objection that the individual citizens of whom toll has been demanded, are not brought within the prescription as laid? There is no opening for the objection in either way upon this record.

The strongest way of putting it (if the act of parliament for confirming the customs, &c. of the city does not stand in the way) is, as an objection to the prescription as laid, because the verdict would be no protection against an objection so stated; and the particular ground of objection would be, that a prescription for all citizens without restriction or qualification is unreasonable and void. But if Sir Edward Coke's opinion, as stated by Bulstrode, is well founded, that a citizen without residence is not in judgment of law *civis*, then the *cives* in the prescription must mean citizens resident; and the averment that the several persons of whom toll [523] was demanded were *cives*, is tantamount to an averment that they were citizens resident, which removes all objection.

If *civis* is in judgment of law a mere general term, we have not heard upon what grounds of law it is to be argued without the assistance of facts which are not upon this record, that the prescription cannot extend to citizens in the largest sense of the word which the law will adopt. It must be first accurately defined what is a citizen; and then it would be to be considered, whether all persons of that description were in judgment of law capable of taking the benefit of the prescription; and that must be resolved in the negative, before the objection to the prescription as laid, could arise; all which may perhaps be matter for very serious discussion hereafter. At present I shall content myself with observing, that the authorities in the case of *prisage* seem to have no necessary application to the right to be quit of tolls, except as far as they go to maintain Sir Edward Coke's position, that a citizen without residence is not in judgment of law a citizen; which, for the reason I have given, will not assist the objection to the prescription as laid.

As to the practice of selling the freedom, and consequently selling the franchise, and defrauding the crown and its grantees of their rights, it is an answer to say, that upon this record, out of which we must not travel, it does not appear, nor can we take notice, that the freedom can be sold, or that it has been sold to the persons described as citizens upon this record. The facts therefore, out of which the objection in law is to arise, are not before Your Lordships.

In this and in other respects, it seems to be a mixed consideration of fact and of

in 1 Will. & Mary, Sess. 2, c. 2, viz. "and they do claim, demand, and insist upon all and singular the premises as their undoubted rights and liberties."

(a) In a subsequent case of *The Corporation of London v. The Corporation of Liverpool*, which was tried at bar in the Court of Exchequer in Easter Term 1799, the jury, under the direction of the Court, found that a freeman of London is not exempt from toll, unless he be resident, inhabitant, and in scot and lot.

law, and for inquiry by the jury what sort of citizens were to have the benefit of this prescription; as it certainly would be, whether the individuals had the qualification which the prescription required. Issues having been joined upon both points, and the jury having decided upon them, and the facts upon which they have decided not being before Your Lordships, we cannot advise Your Lordships to enter further into this fourth objection.

This attempt to revive a course of proceeding, which, if not obsolete, has certainly for a long time gone into disuse, has been the subject of some animadversion. This however may be said for it; that it has conducted the parties by a very short road indeed, if we compare this record with our modern pleadings, to issues upon what the parties understood at the time to be the very [524] right in dispute with them, free from all the embarrassments which forms and words are too apt to create. And I must say, that if these writs of right could be prosecuted without the delays in process, essoigns, &c. with which they are burthened, it would be much for the benefit of the suitors that more of them should be introduced into practice.

Upon the whole of the case I conclude, and am now to offer to Your Lordships the unanimous opinion of the Judges, that the matter in this record was sufficient to entitle the original Plaintiff in the action to recover.

After hearing the opinion of the Judges, the House, on the motion of the Lord Chancellor, resolved, that the judgment of the Court of King's Bench should be reversed, and the judgment of the Court of Common Pleas affirmed.

CLIFTON v. GERRARD. May 9th, 1796.

Under a covenant by a lessee of a coal-mine to pay a moiety of all such sums of money as the coals there raised shall sell for at the pit's mouth, the lessee was held liable to pay a moiety of the money which the coals, tho' sold elsewhere, would have produced at the pit's mouth.

This was a demurrer to a declaration in covenant, and the question was, Whether under a demise of a coal-mine at a certain yearly rent "and also one-half part or share of all such sums of money as all or any part of the cannel to be gotten by virtue of the said indenture shall sell for at the pit's mouth over and above 4d. the basket" the Plaintiff (a) was entitled to claim one-half of such sums of money as had been produced by the sale of the cannel at other places than at the pit-mouth, it being averred that the cannel, if sold at the pit-mouth, would have produced above 4d. per basket; (See the record at length upon Error, 7 Term Rep. 676).

The opinion of the Court was this day delivered by

EYRE Ch. J. We all agree that it may be collected from the whole of the deed taken together, upon which this action is brought, that it was intended that a proportion of the profit upon all coals, not being refuse coals, which should be raised from the collieries demised, should go to the lessor, the owner of these collieries. The question between us has been, whether the parties have used the proper and effective means to carry this intention into execution? The stipulation is, that the lessor shall receive a certain proportion of the price which the coals raised shall sell for at the pit's mouth. Probably all the coals raised were, at the time when [525] this lease was made, sold by those who raised them at the pit's mouth, and as long as they continued to be so sold, the provision for securing to the lessor his proportion of the profits would be sufficient. In point of fact, large quantities of the coals raised have for some years last past not been sold at the pit's mouth, but have been sold at other places by those who raised them. My Brothers are of opinion, that the change of circumstances should not be allowed to defeat the intent of the deed, and that to effectuate that intent the words "shall be sold at the pit's mouth" may be construed to mean "shall be worth to be sold at the pit's mouth," and I agree with them in thinking, that if the words were capable of that construction, there might be an averment what the coals were worth to be sold at the pit's mouth, and that the proportion of the profit to be rendered to the lessor might in that manner be ascertained, and that this would support the present action. The point upon which I differ from my

(a) There were originally two Plaintiffs, but the death of one was suggested on record before judgment.

Brothers is this: I am apprehensive that the words "shall sell for at the pit's mouth" will not bear out the construction which is put upon them. I am quite satisfied that the parties did not mean to use them in such a sense, but on the contrary, they used them in their plain and obvious sense, in which the terms of the covenant are adapted to that mode of selling the coals raised which prevailed when the lease was made. I believe the substantial justice of the case will be reached by the opinion which my Brothers have formed upon this deed, and I can only add, that I am sorry I cannot satisfy myself to subscribe to it.

Per Curiam. Judgment for the Plaintiff (a)¹.

CURRY v. WALTER. 1796.

[S. C. 1 Esp. 457. Questioned, *R. v. Creevey*, 1813, 1 M. & S. 279. Approved, *Lewis v. Levy*, 1858, El. Bl. & El. 557. Applied, *Usull v. Hales*, 1878, 3 C. P. D. 328; *Kimber v. Press Association*, [1893] 1 Q. B. 71.]

An action cannot be maintained for publishing a true account of the proceedings of a court of justice, however injurious such publication may be to the character of an individual (a)². Quære, Whether the matter of justification ought not to be pleaded?

This was an action for printing and publishing in the newspaper called *The Times*, under the title of "Law Reports," a libel on the Plaintiff. It imported to be an account of an application to the Court of King's Bench for an information against the Plaintiff and a Mr. Bingham, both justices of the peace for Hampshire, for refusing to licence an inn at Gosport.

The ground of the application, as moved by Mr. Erskine, was that the magistrates had conspired with the landlord of the inn-[526]-keeper to find a pretence for refusing him a licence, thereby to compel him to surrender a very beneficial lease to his landlord. The supposed libel, which was set out verbatim in the declaration, stated the circumstances of this charge very distinctly, and concluded by shewing that the rule was not granted, because there was no affidavit on the part of the prosecutor of the magistrates having had due notice of the motion. The Defendant pleaded the general issue, and at the trial, after the Plaintiff had proved the publication of the paper in question by him, produced as witness a person whom he employed to collect legal intelligence for the use of his paper, in order to prove that the report was a true and faithful account of what passed in the Court of King's Bench upon the motion. It was objected on the other side, that this defence ought to have been put upon the record, and could not be given in evidence under the general issue. This objection however was overruled by Eyre Ch. Just., who in summing up, told the Jury, that though the matter contained in the paper might be very injurious to the character of the magistrates, yet he was of opinion, that being a true account of what took place in a court of justice which is open to all the world, the publication of it was not unlawful. The Jury found a verdict for the Defendant.

A rule Nisi for setting aside this verdict having been obtained on a former day, upon two grounds, 1st, That the matter given in evidence did not amount to a defence in law: and 2dly, That supposing it to be a good defence it ought to have been pleaded in bar to the action, and not received in evidence under the general issue;

Le Blanc Serjt. now shewed cause. There are two points to be considered: First, whether the Defendant was at liberty to give in evidence under the general issue, that the account of the case published was a true account? Secondly, whether at all events it is not a libel to publish what did actually pass in court, if injurious to the character of the Plaintiff? It may be admitted, that a Defendant cannot justify an assertion on the ground of its being true, without specially pleading such justification. But in this case the libel was not justified as true, but evidence was merely called to shew that the account published in *The Times* was a true account of what passed in the

(a)¹ This judgment was reversed upon error in the King's Bench. See 7 T. R. 676.

(a)² And see *McDougrell v. Cludge*, 1 Campb. 267. *Rex v. Fisher*, 2 Campb. 563. *Stiles v. Nokes*, 7 East, 493, 503. *Rex v. Creevey*, 1 M. & S. 273, 276. *Rex v. Carlile*, 3 B. & A. 161, 168. *McGregor v. Thwaites*, 3 B. & C. 24, 29.

King's Bench. Many cases may be cited to shew that the Defendant is entitled to prove the occasion of speaking particular words. As in the case of giving the character of a servant: which was so ruled by Lord Mansfield at Nisi [527] Prius (a)¹. Or if a man repeat an injurious assertion expressing his concern of its having been made by another, and without any intention of doing an injury himself (b)¹. In Cro. Jac. 90, a case is cited of a clergyman, who in his sermon quoted a passage from Fox's Book of Martyrs, scandalizing a person then present; on action brought against him, and the general issue pleaded, he gave the matter in evidence, and it was held that "it being delivered but as a story and not with any malice or intention to slander any, he was not guilty of the words maliciously." So it is not actionable for one to tell another confidentially not to trust a tradesman: for it is only by way of counsel. *Vanspike v. Cleyson*, Cro. Eliz. 541. The same doctrine was laid down by Pratt, Ch. J. in the case of *Herver v. Dawson*, Sittings after Term, 5 Geo. 3, C. B. Bull. N. P. p. 8, edit. 2. If the account published by the Defendant be a libel, no man can report a case decided in a court of justice reflecting upon the character of another. Supposing the facts contained in the affidavits on which the motion in the King's Bench was founded to be false, the deponents are liable to be indicted. A counsel is justified in stating what appears in his instructions, but he must not go out of his (c)¹ way to vilify. In this transaction nothing of that kind appeared. The Defendant therefore might lawfully report what the counsel might lawfully say.

Adair and Marshall Serjts. contra. 1st, The matters given in evidence did not amount to a defence in law. 2dly, If they did, they ought to have been pleaded. It may be admitted, that the parties, counsel and witnesses in a cause are exempt from an action of slander, provided the allegations be made in a court of competent jurisdiction, and be pertinent to the cause, *Waterer v. Freeman*, Hob. 266; *Weston v. Dobniet*, Cro. Jac. 432; and *Astley v. Younge*, 2 Burr. 807. It has been held, that scandalum magnatum would not lie for bringing an unfounded charge of forgery against a peer, because the charge was exhibited in a court of justice. *Lord Beauchamp v. Sir R. Croft*, Dy. 285 a. For the same reason an action will not lie for a false charge before a justice of the peace. *Rum v. Lamley*, Hutt. 113, and per Cur. Cro. Jac. 432, or for a false charge in a plea. Ibid. So no action lies against a witness for a false charge. *Harding v. Bodman*, Hutt. 11. Brownl. 2, S. C. and *Buckley v. Wood*, Cro. Eliz. 230. So a counsel is not liable for false and injurious words, though not precisely pertinent to the issue, if they were in mitigation of damages, and [528] he spoke them by instruction of his client. *Brooke v. Montague*, 1 Roll. Ab. 87. The reason of the privilege in the above cases is that the suit is legal, though the foundation of it is false; and Lord Coke says, 4 Rep. 14 b. "If actions should be permitted in such cases, those who have just cause of complaint would not dare to complain for fear of infinite vexation." Besides "there can be no scandal if the allegation be material, and if it is not, the Court before whom the indignity is committed by immaterial scandal, may order satisfaction and expunge it out of the record, if it be upon the record." Per Lord Mansfield, 2 Burr. 810. This privilege however being ex necessitate has always been construed strictly and confined to the above cases. If a man exhibit a false charge in a court which has no jurisdiction, as felony in the Star-Chamber, *Buckley v. Wood*, 4 Co. 14 b. Cro. Eliz. 230, S. C. and Hob. 267, or an appeal of murder in the Common Pleas, 4 Co. 15, it is actionable. It appears also that a false charge, though made in a court of competent jurisdiction, if talked of elsewhere at large is libellous, 4 Co. 14 b. (a)², and *Justice Crook's case*, March. 76 (b)², and this has been expressly held of a petition to the King containing slanderous matter. *Hare v. Miller*, 3 Leon. 138, and of a petition to the House of Commons. *Lake v. King*, 1 Saund. 132 (c)². 1 Lev. 240, S. C. 1 Sid. 241, S. C. and of the

(a)¹ *Edmondson v. Stevenson & Uc*. Sitt. Westm. after E. 6 Geo. 3, K. B. Bull. N. P. p. 8, ed. 2. The doctrine of the above case was expressly recognized in *Weatherston v. Hawkins*, 1 Term Rep. 110.

(b)¹ 1 Lev. 82.

(c)¹ *Brook v. Montagus*, Cro. Jac. 90.

(a)² Sed quære, if that case warrants this deduction?

(b)² Vid. etiam *Rex v. Salisbury*, 1 Lord Raym. 341.

(c)² In the notes on this case by Mr. Serjt. Williams in his late learned edition of Saunders, both the points insisted on by Adair and Marshall Serjts. are very fully discussed.

publication of proceedings in prohibition. *Waterfield v. The Bishop of Chichester* (d), 2 Mod. 118. Lord Mansfield often mentioned that Lord Hardwicke granted an attachment against an attorney who published his brief after the trial of a cause, deeming it a libel. There was also an action in this court against the present Defendant, for publishing an account of a trial in the King's Bench before Lord Kenyon, in which some severe animadversions made by his Lordship upon the Plaintiff were set forth; and Lord Loughborough, before whom it was tried, held it a libel, and a verdict was found for the Plaintiff. The late case of *The King v. Lord Abingdon*, Esp. N. P. Cas. 226, is an authority on this point. There it was held that a publication by the Defendant of a speech which he had made in the House of Lords containing slanderous matter, was a libel. The only distinction that can be taken between the cases, is, that the present Defendant is not as the Defendant in that case was personally interested in, or party [529] to the original scandal, and therefore no malice can be inferred whereon to found a criminal prosecution. But this will not deprive him of his civil remedy; for in a declaration for slander falsò dixit without malitiosè has been held sufficient. *Mercer v. Sparkes*, Ow. 51. Noy, 35, S. C. and Moor, 459, *Anon.* Copying a scandalous matter is according to Lord Holt sufficient to constitute a libel, for it perpetuates the memory of the scandal; though if the copy be made by a clerk in writing an indictment, or a student a note, it is not so, because not done ad infamiam. *Rex v. Beare*, 1 L. L. Raym. 417. 2 Salk. 471. 12 Mod. 220. It is now perfectly settled that every one is answerable for the slander which he reports of another. Per (a) Lee Ch. J. G. Hall 1751. Bull. N. P. 10, Ed. 2.

With respect to the second point, it will be necessary to consider the allegation in the declaration. The libel purports to be an account of what passed in the Court of King's Bench, and it was not stated that the Plaintiff and Mr. Bingham did what was there ascribed to them, but that certain things were there ascribed to them. The truth of this account therefore, not the truth of the facts stated, should have been specially pleaded in justification. The general issue is either a denial of the publication, or that if published by the Defendant, the words are not actionable. The rule is, that where the Defendant admits the publication, and that the words are slanderous, but means to justify under the occasion of their publication, he should plead that justification specially, in order that the Plaintiff may have notice of the nature of the defence. *Underwood v. Parks*, 2 Str. 1200. This was done in *Brook v. Montague*, cited on the other side, where the Defendant pleaded that he spoke the words imputed to him as counsel, and in *Astley v. Younge*, that the scandalous matter was contained in an affidavit made by the Defendant in the King's Bench in his own defence. The present differs materially from the cases relied on, viz. of a mistress giving in evidence her being called on for a character of a servant, and of a friend having spoken of a tradesman's credit by way of advice; in those cases the parties uttering the imputed scandal had a duty to fulfil, which this Defendant had not.

The Court were of opinion that this action could not be maintained, but some doubts being entertained upon the bench whether the matter of justification ought not to have been pleaded, the case stood over; and no judgment was ever given (b).

[530] In this term Samuel Shepherd of the Inner Temple, Esq. was called to the honourable degree of Serjeant at Law, and gave rings with this motto, "Legibus Emendes."

End of Easter Term.

(d) Sed vide what is said of this case by Lawrence J. 8 Term Rep. 297, who shews that the charge against Waterfield was for publishing a false account of the proceedings.

(a) Vid. etiam *Davis v. Lewis*, 7 Term Rep. 17.

(b) See the reference to this case made by Lawrence J. in his judgment on the case of *The King v. Wright*, 8 Term Rep. 298.

[531] CASES ARGUED AND DETERMINED IN THE COURT OF COMMON PLEAS, IN TRINITY TERM, IN THE THIRTY-SIXTH YEAR OF THE REIGN OF GEORGE III.

DOE ON THE SEVERAL DEMISES OF POTTER AND OTHERS *v.* ARCHER AND ANOTHER. June 1st, 1796.

Tenant for life leases premises for 21 years, and before the expiration of that term dies; the trustees of the remainder man, then an infant, continue to receive the rent reserved, and he, on coming of age, sells the premises by auction; in the conditions of sale the premises are declared to be subject to the lease, and in the conveyance to the purchaser the lease is referred to as in the possession of the lessee; and in the covenant against incumbrances, that lease is excepted; the purchaser mortgages, and in the mortgage deeds the like notice is taken of the lease, and the mortgagees for some time receive the rent reserved; held that the lease expired with the interest of the tenant for life, and that the notice since taken of it did not operate as a new lease.

This ejectment, for certain premises in the parish of Tottenham in the county of Middlesex, came on to be tried before Eyre Ch. J. at the sittings after Hilary Term 1796, when a verdict was found for the Plaintiff, subject to the opinion of the Court, upon the following case:—

Francis Bowyer being seized of the tenements and premises in the declaration mentioned, in his demesne as of fee, by his will, dated the 21st of January 1779, duly executed and attested as the law requires for passing real estates, devised the said tenements and premises unto his nephew Thomas Bower for his life; remainder to Thomas Elde, Stephen Martin Leake, and William Whitaker, in trust to preserve contingent remainders; remainder to Thomas Bowyer Bower (the son of Thomas Bower,) for his life, remainder to the heirs male of the body of Thomas Bowyer Bower, remainder to the younger children of the said Thomas Bower, and remainder to the right heirs of Thomas Bower for [532] ever. The said testator afterwards died without revoking or altering his said will, so seized of the said tenements and premises with the appurtenances; by virtue whereof the said Thomas Bower entered and became seized of the said tenements for his life. And being so seized by indenture of lease, made on the 25th of September 1784, between the said Thomas Bower of the one part, and Thomas Archer, since deceased, of the other part, and bearing date the same 25th September 1784, the said Thomas Bower demised unto the said Thomas Archer, his executors, administrators, and assigns, the said tenements and premises, to hold the same unto the said Thomas Archer, his executors, administrators, and assigns, from the feast of St. Michael the Archangel next ensuing the date thereof, for the term of twenty-one years then next following, at the yearly rent of 90*l.*, payable half yearly, as therein mentioned; by virtue whereof the said Thomas Archer entered and was possessed thereof. In the month of January in the year 1790, Thomas Bower, the landlord, died, leaving Thomas Bowyer Bower, his son, then an infant; and the said trustees named in the said will received the half year's rent from the said Thomas Archer, which became due at Lady-day 1790, according to the terms of the said lease, and continued to receive the same rent, as reserved by the lease, half yearly, until Michaelmas 1792, at which time the said Thomas Bowyer Bower (having attained his age of 21 years in the month of April in the same year, and having previously, and after he came of age, suffered a recovery thereof, and declared it to the use of himself in fee,) sold the said premises to Samuel Potter by public auction. In the conditions of sale by which the premises were sold to the said Samuel Potter, it was declared that the sale was subject to the said lease to the said Thomas Archer, and the conveyance to the purchaser was by indentures of lease and release, dated and made respectively on the 20th and 21st November 1792. The release of three parts, between Thomas Bowyer Bower of the first part, Thomas Smith Esq. of the second part, and Samuel Potter, linen-draper, of the third part; after reciting that the said Thomas Bowyer Bower, on the 6th July last, did cause the messuage or tenement and farm aftermentioned, with the appurtenances, to be put up to sale by public auction at Garraway's subject to the lease therein after mentioned, and to a fee farm or quit rent of 2*l.* 10*s.* payable thereout to the said Thomas Smith, as lord of the manor of

Tottenham ; that at such sale the said Samuel Potter bid for, and being the highest [533] bidder, was declared the purchaser thereof (subject as aforesaid), at the price of 3,220*l.* exclusive of the timber, which was to be taken at a fair valuation ; and that the timber had since been valued at 146*l.* 5*s.* 2*d.* and that Mr. Potter had also agreed with Mr. Smith for the purchase of the fee-farm rent for 75*l.* ; witnessed, that in consideration of the purchase monies paid in manner therein mentioned, the said Thomas Bowyer Bower and Thomas Smith did convey the said messuage or tenement and farm, and the said quit-rent by the description therein mentioned ; all which said premises were then in the tenure or occupation of Thomas Archer or his assigns, at and under the yearly rent of 90*l.* ; and were under lease to him for a term of 21 years, which would expire at Michaelmas day 1805, together with the appurtenances, to hold the same unto and to the use of the said Samuel Potter, his heirs and assigns, for ever, discharged of the said quit-rent of 2*l.* 10*s.* Mr. Bowyer Bower, by the said indenture, also entered into the usual covenants of a seller ; and in the covenant for peaceable enjoyment, the rents and profits were to be received by the purchaser from the 29th September then last ; and in the covenant against incumbrances, the said lease to the said Thomas Archer, for the term of 21 years, which would expire at Michaelmas 1805, was excepted. By indentures of lease and release, dated and made on the 22d and 23d November 1792, the above premises were mortgaged by the said Samuel Potter to Benjamin Fuller, Matthew Hancock, and Richard Shaw, Esqrs., for securing 2000*l.* and interest ; and in the description of the parcels, and the covenant against incumbrances there was the like notice taken of the lease to the said Thomas Archer as in the conveyance to the said Samuel Potter. The abovementioned mortgagees have been in receipt of the rents ever since their mortgage, and have received the same of Thomas Archer the lessee half-yearly at Lady-day and Michaelmas down to Michaelmas 1793. The Defendants are the personal representatives of the said Thomas Archer deceased, and as such are in the possession of the premises. On the 24th day of March 1795, a notice subscribed by the lessors of the Plaintiff, Richard Shaw, Samuel Potter, Benjamin Fuller, and Matthew Hancock, was served on the Defendants, by which notice they were required to deliver up the possession of the said premises on the 29th day of September then next. Under these circumstances, the question reserved for the consideration of the Court was, Whether the Plaintiff was entitled to recover possession of the said premises ? And if the Court should be of opinion, that he [534] was, then the verdict to stand, and judgment to be entered thereon for him ; but if the Court should be of opinion that the Plaintiff was not entitled to recover, then a nonsuit to be entered.

Heywood Serjt. for the Plaintiffs. It has been repeatedly decided, that where tenant for life leases for a term, the lease expires with his life. *Doe v. Butcher*, Doug. 51. *Roe v. Ward*, 1 H. Bl. 97. If the Defendants mean to rely on the recitals in the indentures, the case in Bendloe's Reports (*a*), pl. 13, may be referred to, where it was held, that a lease which had been forfeited to the crown, could not be set up by a reference to such lease, in another lease from the crown, to a third person, to commence from the expiration of the term of years for which the forfeited lease was granted.

Williams Serjt. for the Defendants. I admit the doctrine laid down in the cases cited from Douglas and 1 H. Blackstone, but I contend, that it is not necessary to the creation of a lease, that the lessee should be a party to the instrument by which it is created. If one grant a lease to A. by deed poll, A. will not be a party to the deed. The release of November 1792 amounts to a new grant ; for after reciting the sale of the premises, and the reservation of the fee-farm rent, it witnesses that in consideration of the purchase money, the vendor conveyed subject to the lease of the Defendant. The lease therefore is not merely mentioned in the recital, but in the operative part of the deed : and the party by the express terms of it took a new lease, to run from the date of the deed to Michaelmas 1805. The vendor and vendee both meant the lease to have existence, and the latter taking, subject to the lease, paid for the premises accordingly. If this was the intent, the words amount to a new grant. Besides, Potter has concluded himself from entering upon Archer by his acceptance of the deed, and if he cannot enter he can maintain no ejectment. Now if Potter can main-

(a) The case is to be found in that part of Bendloe's Reports which follows some cases reported by Justice Dallison, and also in N. Bendloe, pl. 150, p. 38.

tain no ejectment, neither can the mortgagees, for the mortgage deed also notices the lease. In *Goodright v. Strathan*, Doug. 54, note [17] and Cowp. 201, S. C. a lease void in its commencement, was held to be set up as a new lease by subsequent circumstances.

The Court were of opinion, that the Plaintiff was entitled to recover, and Buller J. observed, that although a person might take a future interest as remainder-man, under a clause contained in an [535] indenture to which he was no party, yet that it did not follow that a present interest could be so taken (a).

Per Curiam. Judgment for the Plaintiff.

BLYTH v. HARRISON. June 4th, 1796.

A prisoner in custody on mesne process, is supersedable, unless a copy of the declaration be delivered before the end of the Term after the process is returnable.

The Defendant in this action was arrested by the Sheriff of Lincolnshire on a writ returnable in Hilary Term 1796, and detained in custody; on the 20th of April in Easter Term, a declaration was entered in the Prothonotary's Office, and a rule to plead given, but no copy of the declaration was delivered either to the prisoner or his gaoler till the 10th of May, which was the day after Easter Term expired. The Defendant conceiving that the Plaintiff was bound not only to enter the declaration, but to deliver a copy of it within the Term, and that without such delivery, he could not be said to have declared, took out a summons for a supersedeas before Buller J., who directed him to make his application to the Court. Accordingly a rule Nisi having been obtained for his discharge:

Le Blanc Serjt. now shewed cause, and contended that though by the rule of this Court, E. 5 W. & M. Reg. 3, a prisoner be entitled to his supersedeas unless the declaration be entered in the office before the end of the Term next after that in which the process is returnable, yet that the copy of the declaration is not required by that or any other rule to be delivered to the prisoner within the Term; that the 6th section of the rule allows the Plaintiff ten days after Easter, and twenty days after every other Term, to file his affidavit of the delivery of the copy, either of which periods is more than sufficient for the purpose of filing the affidavit, and was therefore certainly allowed that the Plaintiff [536] might have time to deliver the copy of the declaration after the expiration of the Term; that if this application should be granted, a Plaintiff might be obliged to declare some time before the second Term is expired (till the last hour of which he is entitled to delay his declaration), for wherever the prisoner should be in the custody of a sheriff of a distant county, it would be necessary that the declaration should be filed some days before, in order that the copy might be sent into the country and delivered in due time. He trusted therefore, that the Court would not abridge the Plaintiff of any portion of his privilege.

Runnington Serjt. in support of the rule, relied upon the established practice of the Court, and upon the statute 4 & 5 W. & M. c. 21, s. 2, which he contended was compulsory on the Plaintiff as to the delivery of the copy of the declaration within the second Term, that being the time appointed not only for declaring, but also for delivering the copy, according to the true construction of the statute: that if it were otherwise, great inconvenience would ensue, no other time being limited for the delivery of the copy, at least till the ten days allowed for filing the affidavit had

(a) In Co. Litt. 231 a. is the following passage to the same effect. "And albeit, he in the remainder be no party to the indenture (the parties thereunto only being the lessor and the tenant for life) yet when he in the remainder entereth and agreeth to have the lands by force of the indenture, he is bound to perform the conditions contained in the indenture. And here is also a diversitie to be understood, that any estranger to the indenture may take by way of remainder, but he cannot in this case take any present estate in possession, because he is an estranger to the deed." So in *Gilby v. Copley*, 3 Lev. 139, the same doctrine is laid down by Levins Justice, who says, "est un common erudition que un que n'est party a un fait inter parties ne peut prendre per un fait nisi per voy de remainder;" and he cites *Cooker v. Child*, which is to be found 2 Lev. 74. Lord Holt also in *Salter v. Kidgely*, Carth. 77, held, "that one party to a deed could not covenant with another who was no party, but a mere stranger to it."

elapsed: That the prisoner had no other means of knowing that the declaration had been entered at the office, and could therefore take no steps to obtain his supersedeas, even where the Plaintiff had neglected to declare within the Term. He urged also, that the delivery of the declaration was the most essential part of declaring, *Strickland v. Hodgson*, Coke's Cas. Prac. 114, and that the Defendant could not otherwise know what to plead.

The Court entertaining some doubt on the effect of the rule of E. 5 W. & M. s. 6, took time to consider: And on this day the unanimous opinion of the Court was delivered by

EYRE Ch. J. This will be found to be a question upon the construction of the statute 4 & 5 W. & M. c. 21, rather than of the rule referred to. That act is entitled an act for delivering declarations to prisoners. It recites, that by the course of practice in the respective Courts at Westminster, after the Plaintiff in any writ had been at great charge to arrest a Defendant, which Defendant, for want of bail, had been committed to gaol, unless the Plaintiff should, before the end of two Terms next after the arrest, cause the Defendant by writ of Habeas Corpus to be removed, to be charged in Court with a declaration, such prisoner should upon common bail or appearance, by attorney, be discharged. It therefore provides, that if a person be taken or charged in custody at [537] the suit of another, upon any writ out of the Courts at Westminster, and imprisoned or detained in prison for want of sureties for his appearance to the same, the Plaintiff shall and may by virtue of that act, before the end of the next Term after the writ shall be returnable, declare against such prisoner in the court out of which the writ shall issue, and shall or may cause a true copy thereof to be delivered to such prisoner or to the gaoler; to which declaration the prisoner shall appear and plead, and if he does not, the Plaintiff shall have judgment in such manner as if the prisoner had appeared in the said court, and refused to answer or plead to such declaration. Here is a new mode of declaring against a prisoner substituted in the room of the old course, which was to bring him up and charge him with a declaration. The new mode is declaring in Court, and delivering a copy of the declaration to the prisoner or gaoler; as to the time, there is in effect no alteration. By the old course, they were to bring up the prisoner to charge him within two Terms; in the new mode they are to declare, &c. before the end of the next Term after the writ shall be returnable. The statute goes no further than to direct in general terms, that the prisoner shall appear and plead to this declaration, and in default the Plaintiff is to have judgment as if the prisoner had appeared and had refused to answer or plead. The prisoner is to appear and plead according to the course of the court. The effect of this branch of the statute is simply to establish, that in this form the Plaintiff is to declare, that this shall be the declaration to which the prisoner shall appear and plead. The course of the court, as to the prisoner appearing and pleading, is governed by practice, and by several rules, and amongst others, by a rule of Easter Term 5 W. & M. Reg. 3; which (after providing that the copy of the declaration shall not be delivered to the prisoner before the return of the process) provides that no rule shall be given for the Defendant in custody to appear and plead to any declaration, until an affidavit be filed with the proper secondary of the delivery of the copy of such declaration, and of the time when, and the person to whom the same copy was delivered. The filing of this affidavit, and delivery of the copy, were first introduced here for a purpose collateral to the mode of declaring. Then follows the rule, that if the declaration be not entered or left in the office before the end of the next Term after the writ be returnable, and affidavit made and filed in manner aforesaid, before the end of twenty days after such Term (Easter Term excepted, and [538] within ten days after Easter Term) the prisoner shall be discharged upon the entering of his appearance with the proper officer, by writ of supersedeas, according to the ancient practice of this Court. This rule adds a new term to the rule for declaring as laid down by the statute: by the statute they were to declare and leave a copy before the end of the next term, now they are also to file the affidavit of the delivery of the copy within a limited time. If they do not declare and leave a copy within the time limited, the prisoner is supersedeable. In the present case the Plaintiff has declared in time, and has filed his affidavit in time, but he has not left a copy in time. The 8 & 9 Will. 3, c. 27, s. 13, which respects prisoners in the Fleet, was probably made in consequence of a doubt whether the former statute extended to them, and provides that it shall be lawful for any person after filing or entering a declaration with the proper officer, to deliver a

copy of such declaration to the defendant, or to the officer of the Fleet, and after rule given thereupon, to be out in eight days at most after delivery of the copy, and affidavit made of the delivery, to sign judgment, as if the defendant had been actually charged at the bar with the action. Here filing and entering the declaration with the proper officer, and delivering the copy, is made sufficient, and from hence we may collect, that declaring in the statute 4 & 5 W. & M. and filing or entering the declaration with the proper officer in this statute mean the same thing; and to both is superadded delivering a copy, as that which shall be tantamount to the ancient mode of charging with a declaration. In the rule of Easter, 8 Geo. 1, which respects the declaring against prisoners who have surrendered in discharge of their bail, and provides that the Defendant shall be entitled to his supersedeas, unless the Plaintiff shall declare against the Defendant within two Terms after the render, the language is simply, "shall declare;" but this includes filing or entering the declaration and delivering the copy. This may be collected from the case of *Clavey and Watts*, 2 Bl. 786, where the Court ordered a supersedeas, because the declaration was not delivered to the party himself or to the turnkey in time. That was a strong case, for the declaration had been delivered in time to the Defendant's attorney, the Defendant having put in special bail by attorney, and afterwards surrendered. Respecting detainers of prisoners in the Fleet, it is ordered by another rule, that no copy of a declaration delivered at the Fleet prison against any person there shall be a sufficient charge to hold such [539] prisoner to bail, or to detain such prisoner for want of bail, unless an affidavit to hold to bail is made and filed, and an indorsement made by the prothonotary upon such copy of the declaration, signifying the sum of money specified. Here the entering and filing the declaration is dropped, and the delivery of the copy of the declaration is considered as the essence of the declaration, though doubtless the declaration would still be to be entered in the Prothonotary's office. There was a case of *Prime and others v. Moore*, in Barnes notes of practice, p. 392, where the Court set aside the proceedings against a Defendant, who had been served with a copy of process, and had become a prisoner before declaration, the Plaintiff having entered an appearance for him according to the statute, and left a declaration in the office, and given him notice of it; the Court being of opinion, that the declaration ought to have been delivered at the Fleet; which is further proof, that delivery of the copy of the declaration is considered as an essential part of declaring against a prisoner. It has been thought so essential, and so much more essential than the entry of the declaration, that in *Strickland v. Hodgson* (Cooke's Rep. 114, and Barnes, 372) it was held, that a declaration against a prisoner in a county gaol need not be entered with the prothonotary before the delivery, but that it must, before it is filed with the secondary, which, it is said, means any time before rule to plead. But to prevent mistake, I would observe, that this case does not seem to apply to the question, what shall amount to declaring in due time? We are all therefore of opinion, that the Defendant in this case is supersedeable, because the Plaintiff did not deliver a copy of the declaration before the end of the term after the process was returnable.

Per Curiam. Rule absolute.

BOLTON v. PULLER AND OTHERS, Assignees, &c. June 15th, 1796.

[Applied, *Johnson v. Roberts*, 1875, 44 L. J. Ch. 473.]

A. B. C. & D. were partners in a banking-house at Liverpool, and C. & D. also carried on a separate mercantile concern in London; J. S. having accepted bills payable at the house of C. & D. employed A. B. C. & D. to get them paid accordingly, and agreed to deposit with them good bills indorsed by him, for the purpose of enabling them so to do; A. B. C. & D. debited J. S. in account for his acceptances, and credited him for all the bills which he deposited; some of the bills so deposited by J. S. were remitted by A. B. C. & D. to C. & D. upon the general account between the two houses, and before any of the acceptances of J. S. became due both houses failed, and J. S. was obliged to pay his own acceptances; held that the assignees of C. & D. were entitled to retain against J. S. the bills remitted to them by A. B. C. & D. Held also, that it made no difference that one of the bills remitted did not

arrive in London till after the bankruptcy of C. & D. though sent by A. B. C. & D. before that event (a).

Trover for two bills of exchange ; one of 4000l. and one of 398l. 8s. 3d.

[540] The Defendants pleaded the general issue, and at the trial before Eyre Ch. J. at the Guildhall sittings after Michaelmas Term, 1795, a special verdict was found to the following effect: John Bolton was a merchant at Liverpool; John Forbes and Daniel Gregory, for some years, and until they became bankrupt, were copartners, and carried on business as merchants in London, under the firm of Burton, Forbes and Gregory. On the 1st of May, 1774, Forbes and Gregory entered into partnership with one Charles Caldwell and one Thomas Smith, in the trade and business of bankers, to be carried on at Liverpool, under the firm of Charles Caldwell and Co. and so continued to trade till that house became bankrupt. The house at Liverpool had dealings and transactions with Forbes and Gregory, carrying on business as merchants under the firm of Burton, Forbes and Gregory, in London; and between the two houses in Liverpool and London, there was an open account current. Bolton for some years, and until the house at Liverpool became bankrupt, employed that house as his bankers; and they used to procure bills which had been accepted by him, payable at the house in London, to be there paid when they fell due. Those payments when made were carried by the house in London to their account with the house at Liverpool, and by the house at Liverpool to their account with Bolton. In the banking account between Bolton and the house at Liverpool, Bolton was made debtor for cash received of them, and for bills accepted by him payable at the house in London; and was credited in such account for all bills and cash paid by him into the said house. An interest account was kept between Bolton and the house at Liverpool, which was balanced every three months; and the latter was also allowed a profit on the said account of one-quarter per cent. on bills and cash paid, either by them or by the house in London, on their account, for the use of Bolton. Bills having been accepted by Bolton to the amount of 19,702l. payable at the house in London, on the 28th of February 1793, he proposed to the house at Liverpool, that they should procure the same to be paid as they fell due by the house in London, and that to enable the house at Liverpool to provide for such payments, he should deliver to them certain other bills of exchange whereof those mentioned in the declaration were parcel with his indorsement thereon; to this proposal the house at Liverpool agreed. In pursuance of this agreement, Bolton on the 1st of March 1793, and on other days between that day and the 16th of March in the same year, delivered to the house at Liverpool, several bills of exchange, amounting in the whole to the [541] sum of 11,583l. 2s. 9d.; among these was the bill for 4000l. mentioned in the declaration. On the 16th of March 1793, he delivered to the same house other bills, with a check on that house (which they received as cash), to the amount of 912l. 1s. 0d.; among these was the bill for 398l. 18s. 3d. also mentioned in the declaration. All these bills were the property of Bolton, and duly indorsed by him; the bill for 4000l. having also previously to the delivery been accepted by him. On the 4th March 1793, the bills accepted by Bolton, payable at the house in London, were by the house at Liverpool entered on the debit side of the account between them and Bolton; and the bills delivered by Bolton to the house at Liverpool, were by them carried to his credit in the same account at the times when they were respectively delivered. On the debit side of the books of the house at Liverpool, it appeared that Bolton's acceptances, amounting to 19,702l. 13s. 10d., were entered thus:—"March 4th, 55 acceptances due in April, 19,702l. 13s. 10d.;" and on the credit side, the bills delivered to the house by Bolton were entered, some with the date of their delivery and the day on which they were to fall due, and some with the former only. On the 2d of March 1793, the house at Liverpool remitted the above-mentioned bill for 4000l. together with other bills to the amount in the whole of 30,000l. and upwards, to the house in London, to be carried to the account of the house at Liverpool; and on the 16th of March, they remitted the above-mentioned bill for 398l. 18s. 3d. together with other

(a) Vide *Carstairs v. Bates*, 3 Campb. 301. *Collins v. Martin*, post, 649. *Jacaud v. French*, 12 East, 317, 323. *Williams v. Everett*, 14 East, 582-594. *Scott v. Franklin*, 15 East, 428, 436. *Bosanquet v. Wray*, 6 Taunt. 597. *Thompson v. Giles*, 2 B. & C. 422, 426.

bills, amounting in the whole to 8000l. and upwards, to be carried to the same account. This last bill for 398l. 18s. 3d. was received by the house in London on the 18th of March 1793. Some of the bills delivered by Bolton to the house at Liverpool were negotiated by them, and the value received to their own use. On the 28th of February 1793, and from thence till the bankruptcy of the house at Liverpool, the house in London was largely in advance to the house at Liverpool. On the 16th of March 1793, the house at London became insolvent, and on the 18th of the same month a commission of bankruptcy issued against them, under which the present Defendants were assignees. On the same day the house at Liverpool also became bankrupt, and a joint commission of the same date issued against Charles Caldwell, Thomas Smith, John Forbes, and Daniel Gregory, as partners in the banking-house at Liverpool. The house at Liverpool at the time of their bankruptcy was indebted to Bolton in the sum of 2000l. and upwards; and [542] none of that parcel of bills, amounting to 19,702l. 13s. 10d. accepted by Bolton, payable at the house in London, were paid either by that house or by the house at Liverpool, but were paid by Bolton himself. The Defendants possessed themselves of the two bills in question as assignees of Forbes and Gregory, and refused to deliver them on demand.

This case was first argued in Easter Term last by Williams Serjt. for the Plaintiff, and Heywood Serjt. for the Defendants, and a second time in this term by Adair Serjt. for the former, and Le Blanc Serjt. for the latter.

Arguments for the Plaintiff. In the first place Caldwell and Co. at Liverpool, and Forbes and Gregory in London, are, with respect to the transactions on which this case arises, to be considered as the same persons. Secondly, the bills for which this action was brought, were appropriated by Bolton to the particular purpose of answering his acceptances at the house in London, and not paid in on the general account. Thirdly, trover is the proper form of action. First, though a separate trade was carried on by Forbes and Gregory in London, yet as they were also partners in the banking house at Liverpool, they were parties to the acts of Caldwell and Smith, and therefore the agreement made by them with Bolton was the joint engagement of the four partners, and binding on them all in law. The demands of third persons on the house at Liverpool, cannot be affected either by the distant residence of Forbes and Gregory, or by their separate concerns. Secondly, it is settled law that the property of goods deposited with a factor and not disposed of, continues in the principal, and may (subject to the factor's lien) be recovered in trover either against him or his assignees. In the present case the Defendants have no lien; for the balance of account is in the plaintiff's favour. Bolton therefore is entitled to recover, unless precluded by the preferable right of the creditors of the house in London to the separate estate of Forbes and Gregory. Admitting that the bills were remitted by the house at Liverpool to the house in London on the general account, and thereby became the separate property of the latter, still, whatever rule courts of equity may have adopted in the apportionment of the joint and separate estate to the respective creditors, it has never been held in a court of law, that an action will not lie because the thing demanded has in this manner become the several property of a single partner; for private agreements made between partners, as to their claims upon each other, cannot affect the creditors of the firm. *Waugh* [543] v. *Carver*, 2 H. Bl. 235. But this is not a question between creditors of the two houses, but an action by Bolton for the recovery of specific goods. Though, therefore, the remittance of the bills might have transmuted the property to the house in London as against the house at Liverpool, it cannot have that effect as against Bolton. The house at Liverpool had it not in their power to negotiate these bills generally without a breach of their agreement. For it is to be observed, that the house at Liverpool were not parties to the bills which Bolton had accepted, payable at the house in London; so that these bills were not deposited with the house at Liverpool, to indemnify them against those acceptances (to which they were not liable) but to be applied specifically in their discharge. Herein consists the difference between this and the case of a banker who draws on his correspondent in favour of a customer, and takes bills as an indemnity. And by this it is also distinguished from the case of *Bent and another v. Puller and others*, 5 Term Rep. 494. In that case Caldwell and Co. had made themselves liable on their drafts in favour of Bent, and had therefore a lien on the bills deposited by him: but in the present instance they had no such lien on the bills deposited by Bolton, who might if he pleased have recalled them at any time before they were applied to the discharge

of his acceptances. This distinction is also supported by the case *Ex parte Dumas*, 2 Vez. 582. 1 Atk. 232, S. C. At all events the Plaintiff is intitled to recover the lesser bill for 398l. 18s. 3d., that not having arrived in London till the 18th of March, which was two days after the failure of Forbes and Gregory. Thirdly, if the property of these bills be in the Plaintiff, trover is the proper remedy. Lord Hardwicke, indeed, in the case *Ex parte Dumas*, seems to express a doubt upon this point, because the legal property follows the chose in action which is assigned by the indorsement. In the present case, however, the indorsement was not intended to transfer the property at all events, but only to enable the house at Liverpool to apply the bills to the purpose for which they were deposited. Now that application was not made, and therefore the property of the bills remains as if they had never been indorsed. In *Bent v. Puller*, if the bills had been appropriated, trover might have been maintained for them; and in *Tooke v. Hollingworth*, 5 Term Rep. 215 (and 2 H. Bl. 501), though the Court differed in opinion on the case, no objection was taken to this form of action, and judgment was given for the Plaintiff.

Arguments for the Defendants. First, the bills in question were paid in upon the general account between Bolton and the house at [544] Liverpool. It appears from the special verdict, that during the intercourse between Bolton and that house, previous to this transaction, the bills lodged by the latter with the former were always paid to the general account. Had they ever been appropriated in this case, they would not have answered the object of that appropriation; for the bills accepted amounted to 19,702l. 13s. 10d. whereas those deposited amounted to 12,495l. 3s. 9d. only. Besides, it appears from the dates of the latter, that they were not to become due till after the acceptances, and therefore were not calculated either in amount or time to be employed specifically in their discharge. This transaction was merely a continuation of the general dealings between Bolton and the house at Liverpool. No particular account was either agreed upon or kept; had there been any such it must, as in the case *Ex parte Dumas*, have been distinguished by some characteristic title or appropriate mark. If the bills had been meant as a deposit, they would not have been indorsed by Bolton. They were in fact paid in with a view to swell his credit with the house at Liverpool, to a level with the large disbursements about to be made on his account. The bill for 398l. 18s. 3d. is not distinguished from that for 4000l.; for though it was not received in London till after the separate bankruptcy of Forbes and Gregory, it was put into the post-office, and the postage paid, during the solvency of the house at Liverpool; the property, therefore, here was as effectually changed as the property of goods delivered to a carrier, which has been held to vest in the assignees of the vendee unless stopped in transitu. *Haswell v. Hunt*, cit. per Buller J. *Tooke v. Hollingworth*, 5 T. R. 231, and *Ellis v. Hunt*, 3 Term Rep. 464. Secondly, the house in London was distinct from that at Liverpool, and the acts of the former were not binding on the latter. Indeed, the Plaintiff himself engaged the house at Liverpool to do a separate act by the terms of his agreement; the house in London being only known to him as the correspondent of that at Liverpool: at least it does not lie with him who has treated them as distinct, to make them responsible as one. Though the funds of the house in London as belonging to two of the partners in the house at Liverpool be liable to the Plaintiff's demand upon the latter house, yet against the assignees of Forbes and Gregory as the separate firm, this action cannot be maintained. Suppose the house in London to have consisted of four partners, two of whom were strangers to the house at Liverpool; the four would not have been liable because Forbes and Gregory were members of the latter partnership; and even if the [545] strangers were removed, the houses would remain equally distinct. Forbes and Gregory in their separate capacity were no parties to the agreement between Bolton and the house at Liverpool. If the latter had got the bills discounted with a third person, and sent the cash arising therefrom to London to answer the acceptances, such person might have returned the bills whether the acceptances were paid or not. The house at London stands in the place of such person, and therefore this action cannot be maintained against their assignees. The case of *Waugh v. Carver* only decides, that the private agreements of partners individually between each other, cannot affect the rights of creditors to sue them all upon the joint account. Thirdly, trover is not the proper remedy. It is immaterial whether the bills were indorsed in blank, or to the house at Liverpool. The object of the indorsement was to pass the property on the faith of the subsisting agreement. Had the bills been entered short in the account,

they would then, according to the opinion of Blackstone J. in *Zinck v. Walker*, 2 Bl. 1156, have been only a deposit, and have remained the property of Bolton. In this case they were meant to be converted into cash, and therefore cannot be recalled. It has been decided, that if a man deliver money to another to buy cattle, the property of the money is in the bailee, 3 Leon. 38, *Anon.* So if goods be delivered to A. to pay a debt to B., A. may sell them. *Bridget Clarke's Case*, 2 Leon. 30. If then the legal property passed by the indorsement, Lord Hardwicke's opinion in the case *Ex parte Dumas* is decisive, even though the Plaintiff be deemed to have an equitable lien; for though it cannot be recovered by the legal owner against one having an equitable lien, yet it has never been held that trover will lie against the legal owner by him who hath an equitable lien. Neither in *Tooke v. Hollingworth*, or in *Bent v. Puller*, are the bills stated to have been indorsed, nor was there any question on the nature of the remedy.

Cur. adv. vult.

On this day the opinion of the Court was delivered by

EYRE Ch. J. (who, after stating the case, said): The question is, Whether the Plaintiff can maintain this action upon this case? For him it is urged, that the house in London is a house of trade, carried on by two of the partners in the banking-house at Liverpool; though it is admitted, that the trade carried on in London is the separate estate of those two partners. It is insisted, that [546] the bills in their hands remained in the same state, subject to the same rules of law and equity, as would have applied to them in possession of the house at Liverpool; and that, having been appropriated (as it is called), or delivered to the house at Liverpool for a special purpose, and not having been ultimately applied to that purpose, and remaining in specie in their possession, Bolton would have been entitled to demand to have them delivered up to him by the banking-house at Liverpool, or by the assignees of that house, supposing them to have come to the hands of those assignees. I take it to be now settled, that bills in the hands of a banker, like goods in the hands of a factor, in the event of a bankruptcy are to be delivered up, subject only to the lien, which the banker may have upon them for the balance of his account. On the other hand it is clear, that, if indorsed bills are deposited with a banker, and they are by him negotiated to a third person, though the purpose, for which they were deposited should be ever so cruelly disappointed by his becoming bankrupt, the original owner can have no claim to recover them in trover against such third person (a). The present seems to be a middle case, and, I believe, is a new one. We must endeavour to ascertain to which class it belongs.

There can be no doubt, that, as between themselves, a partnership may have transactions with an individual partner, or with two or more of the partners having their separate estate, engaged in some joint concern, in which the general partnership is not interested; and that they may by their acts convert the joint property of the general partnership into the separate property of an individual partner, or into the joint property of two or more partners or e converso. And their transactions in this respect will, generally speaking, bind third persons, and third persons may take advantage of them in the same manner, as if the partnership were transacting business with strangers; for instance—suppose the general partnership to have sold a bale of goods to the particular partnership, a creditor of the particular partnership might take those goods in execution for the separate debt of that particular partnership. In some respects therefore an individual partner, or a particular partnership consisting of two or more of those persons, who are partners in some larger partnership, may be considered as third [547] persons in transactions, in which the general partnership may happen to be engaged with their correspondent. On the other hand it will be difficult, if not impossible, for individual partners, or for particular partnerships composed of individual partners, to shake off privity in all the transactions of the general partnership, or to avoid all the consequences of privity. Each partner is a party, as well as privy, to the transactions of the general partnership, though the general partnership is not a party to the separate transactions of the individual partners. Forbes and Gregory were therefore parties to the agreement, which Caldwell and Smith entered into with Bolton, and were as much bound by it as Caldwell and Smith were. And I hold, that if Bolton had sued the house at Liverpool for a breach of

(a) Vid. *Collins v. Martin*, post 648, Hill. Term 1797.

that agreement and had recovered, he might have taken any part of the separate estate of the house in London in execution, in satisfaction of his judgment. But this will not touch the question, what shall be deemed the joint property, and what the separate property of persons so circumstanced. Joint or several, Bolton's claim upon it in the case supposed would be equally available to him.

Bankruptcy, when it intervenes, may very much change the situation of these parties. Mr. Justice Heath suggested this consideration at the close of the first argument. It is a very important consideration.

If all become bankrupts, all the joint and all the separate property will vest in the assignees, whether the commissions are joint or several. If a separate commission issue against one partner, his assignees will take all his separate property, and all his interest in the joint property. If a joint commission issues against all, the assignees will take all the joint property, and all the separate property of each individual partner. In the distribution to creditors, a rule of convenience has been adopted. To understand it, we should see, what the rights of creditors were as to execution for their debts before bankruptcy. A separate creditor might take at his election the separate estate of his debtor, or his debtor's share of the joint estate, or both, if necessary. A joint creditor might take the whole joint estate, or the whole separate estate of any one partner. But the rule of convenience, which has been adopted, restrains the separate creditor from resorting in the first instance to his debtor's share [548] of the joint property; and also restrains the joint creditor from resorting in the first instance to the separate property of his debtor. Bankruptcy has been called a statute execution; but, if it has any analogy to an execution, it is certainly very much modified, and, as I take it, by the authority of the Chancellor, who is to take order for the distribution of the effects of a bankrupt. Under the rule the separate creditors have a right to be satisfied for their debts out of the separate property, in preference to the joint creditors (*a*). But what shall be deemed separate property, or what effect the claims of third persons upon that which (as between one partner and the partnership) would be separate property, are questions, which neither bankruptcy nor the rule of distribution seems to touch. The assignees stand but in the place of the bankrupts, and take the effects subject to every legal and equitable claim upon those effects. And therefore I conclude, that though bankruptcy very much alters the situation in which I have placed Mr. Bolton, in the course of the argument, as a creditor having obtained a judgment against the banking-house at Liverpool on the ground of this agreement; the question now made between him and the assignees of Forbes and Gregory remains undecided, and must (as it appears to me) depend on an inquiry into the effect of the privity and participation of Forbes and Gregory in the transaction between Bolton and the banking-house at Liverpool, in which they were partners.

The true nature of that transaction has been warmly disputed in the course of the argument: but it comes out to be simply this: Bolton paid into his banker's hands these bills on his general account for a particular purpose. This has been called an appropriation; and legal consequences are deduced from thence, as if appropriation was a technical term, or at least was used in some definite or precise sense: whereas no term in popular use can be more general, or more uncertain in its import. In truth, when I say, these bills were paid in on a general account for a particular purpose, I mean only to say, that the object which the parties had in their view was, that the bankers [549] might be enabled to provide for the payment of Mr. Bolton's acceptances in London. So far from being appropriated to any particular purpose in the strict sense of the word, the bills in specie were not intended to be applied to any other purpose than to be converted into cash, in order to increase Mr. Bolton's credit with his bankers; and in the nature of things they could not be applied in specie to the particular purpose of paying Mr. Bolton's acceptances in London. These bills, at least the bills in question, were remitted to the house in London on the general

(*a*) This rule was adopted by Lord Chancellor Hardwicke, and acted upon till overturned by Lord Chancellor Thurlow. The subject has since been fully considered by Lord Chancellor Loughborough, in the case *Ex parte Elton*, 3 Vez. jun. 238, but does not appear to have been altogether settled, though the inclination of his Lordship's opinion was strongly in favour of the old rule adopted by Lord Hardwicke. For the cases on this point see Cooke's B. L. from page 237 to 250, ed. 4.

account of the banking-houses. We cannot think that this was a misapplication; or that the confidence of Mr. Bolton was abused. It may be asked, assuming that Mr. Bolton considered both houses to be in full credit, was it not the very thing he meant? was not this the probable mode by which the banking-house would be enabled to provide for the payment of Mr. Bolton's acceptances at the house of Forbes and Gregory? Then what effect can the privity and participation of Forbes and Gregory in the agreement between Bolton and the banking-house have on this transaction? which, as between the two houses, undoubtedly changed the property in these bills; a circumstance which distinguishes this case from all the cases which have been determined on this subject, and puts it out of the reach of the principle upon which the case of *Zinck v. Walker*, and the late case of *Tooke v. Hollingworth*, in the Court of Error were determined. The privity of Forbes and Gregory to the transaction at Liverpool rather created a demand upon them to do what they did, than to take any other course; for there is no pretence to say that it was intended that a separate account of these bills should be kept by any body. The business went on in the regular channel upon the foot of the agreement, without the least imputation upon it, up to the moment of the bankruptcy, when the adverse rights of the creditors of the two houses attached.

If up to the moment of the bankruptcy nothing affected the right of Forbes and Gregory to hold these bills on their separate account, that right must vest in the assignees of Forbes and Gregory with nothing to affect it. The assignees of Forbes and Gregory are bound to admit that Forbes and Gregory knew that Mr. Bolton's object, and that the object of the partnership at Liverpool was, that by means of these bills the acceptances were to be provided for. But how were these bills to operate as means? They were to be dealt with as the banking-house [550] thought fit to deal with them; to be negotiated, if they thought fit; to be discounted at Liverpool, if they pleased, or remitted to whom they pleased; and were necessarily to be converted into money, in order to be means effectual to the purpose even of the parties who deposited them.

If then Forbes and Gregory were parties capable of acquiring a property in these bills, as capable as any third party, and did acquire it without reproach, and in truth in pursuance of that agreement upon which they were delivered to the banking-house; why are not Forbes and Gregory to be considered as third persons, with whom these bills have been negotiated? If they were to be so considered, this determines the class to which I said in a former part of the argument, we were to endeavour to reduce this middle case between the case of original parties to the transaction and the case of third persons holding such bills as these in the ordinary course of the negotiation of bills of exchange.

A circumstance belonging to the lesser bill of 398l. 18s. 3d. was taken notice of in the argument; namely, that it came to the hands of Forbes and Gregory on the day when they became bankrupt. We are of opinion, that the bill having been remitted, as far as concerned the house remitting, before the bankruptcy, and to a creditor, cannot be recalled, and must follow the fortune of the other bill.

It is a great misfortune to Mr. Bolton to have been so deeply concerned with these falling houses. In such cases it too often happens that heavy losses fall somewhere. The only consolation is, that it is the law of the land, and not the caprice, or even error of any man, which can ultimately decide where they shall fall.

Our opinion upon this case is, that the judgment must be for the Defendants.
Judgment for the Defendants.

In this Term, Mr. Serjt. Cockell and Mr. Serjt. Shepherd were made King's Serjeants.
End of Trinity Term.

[551] CASES ARGUED AND DETERMINED IN THE COURTS OF COMMON PLEAS, AND EXCHEQUER CHAMBER, IN MICHAELMAS TERM, IN THE THIRTY-SEVENTH YEAR OF THE REIGN OF GEORGE III.

LIGHTFOOT AND ANOTHER v. TENANT. Nov. 14th, 1796.

To debt on bond the Defendant pleaded that the bond was given to secure payment of the price of goods agreed to be sold and delivered in London by the Plaintiff

to the Defendant, to be by the latter shipped to Ostend, and from thence re-shipped for the East Indies, and there trafficked with clandestinely. Held a sufficient bar to the action; the case being within the 7 Geo. 1, c. 21, which avoids all contracts for supplying cargoes to foreign ships in such a trade (a).

Debt on bond. The Defendant prayed Oyer of the bond and condition; and then pleaded non est factum, and five other pleas, stating the bond to have been given on an illegal consideration, on all of which issues were joined.

At the trial before Eyre Ch. J. at the Guildhall sittings after Easter Term 1796, a verdict was found for the Plaintiff on the plea of non est factum, and on the 2d, 3d, and 5th, pleas; and a verdict for the Defendant on the 4th and 6th pleas, which were as follow. Fourth plea, that "the Plaintiffs and the Defendant long before the making of the said writing obligatory were and still are subjects of this realm; and that before the making of the said writing obligatory to wit, on &c. at &c. it was unlawfully agreed by and between the Plaintiffs and the Defendant, that the Plaintiffs should sell and deliver to the Defendant certain goods, [552] wares, and merchandizes of a large value, to wit, 363l. 10s. to be by the Defendant shipped on board certain ships or vessels in the port of London, and to be carried and conveyed on board of such ships and vessels to parts beyond the seas, that is to say, to the port of Ostend, to be there shipped on board certain other ships or vessels destined to sail to and trade in certain parts in the East Indies beyond the Cape of Good Hope, without the licence and authority of the United Company of Merchants of England trading to the East Indies, and to be carried and conveyed in and on board the said last-mentioned ships or vessels from the said port of Ostend to a certain place in the East Indies beyond the Cape of Good Hope, that is to say, to Calcutta, to be there sold, trafficked with, and disposed of in a course of trade, clandestinely and without any licence and authority from the said Company; and that in pursuance of such unlawful agreement the Plaintiffs well knowing that the said goods, wares, and merchandizes were to be carried to Calcutta aforesaid to be there sold, trafficked with, and disposed of in the course of trade, did afterwards, to wit, on &c. at &c. sell and deliver to the Defendant the said last-mentioned goods, wares, and merchandizes, in order that the same so to be shipped on board the said ships or vessels in the port of London aforesaid might be carried on board such ships or vessels to the port of Ostend aforesaid, and there shipped on board the said other ships or vessels, and that the same might be carried and conveyed on board such last-mentioned ships or vessels to Calcutta aforesaid, and to be there sold, trafficked with, and disposed of in a course of trade clandestinely and without any licence or authority from the said Company. And that the said goods, &c. were accordingly carried and conveyed on board, &c. from the port of London to the port of Ostend, and there shipped on board, &c. to be carried and conveyed, &c. to Calcutta to be there sold, &c. And that for the securing the payment of the price of the said goods, &c. the Defendant on &c. at &c. did make and seal, and as his act and deed deliver to the Plaintiffs the said writing obligatory in the said declaration mentioned with the condition thereunder written; and which said writing obligatory for the cause aforesaid is wholly void in law." Sixth plea: that "the said writing obligatory was made, sealed, and delivered by the Defendant to the Plaintiffs for securing the payment of the price of certain goods, wares, and merchandizes before then sold and delivered by the Plaintiffs to the Defendant to be by him the [553] Defendant shipped on board certain ships and vessels to be carried and conveyed therein from the port of London aforesaid to parts in the East Indies beyond the Cape of Good Hope, that is to say to Calcutta, the Plaintiffs well knowing that the said last-mentioned goods, &c. at the time of the sale and delivery thereof as aforesaid were to be so carried and conveyed to Calcutta aforesaid to be there sold, trafficked with, and disposed of in the course of trade clandestinely and without any licence or authority from the United Company of Merchants of England trading to the East Indies; whereby the said writing obligatory was and is wholly void in law.

The bond was dated on the 1st of February 1794, and the condition was, that the Defendants should pay to the Plaintiffs 363l. 10s. on or before the 1st of August

(a) Vide *Parton v. Popham*, 9 East, 408. *Langton v. Hughes*, 1 M. & S. 593, 598. *Wilkinson v. Londonsack*, 3 M. & S. 117. *Cannan v. Bryer*, 3 B. & A. 179. *Bensley v. Bignold*, 5 B. & A. 335.

1795, with interest at the rate of 5l. per cent. from the expiration of six months after the date of the bond. On the bond was the following indorsement: "London, 20th March 1794. A policy of insurance per the ship 'Kaunitz,' from Ostend to Bengal on account of Mr. James Tenant rests in my possession, in which the within mentioned account of 363l. 10s. is included. T. Bundock." This last person appeared at the trial to have been the Defendant's agent for the purchase of the goods, the Defendant himself residing at Ostend. He proved that it was originally stipulated by the Plaintiffs that there should be the above indorsement made on the bond when the policy was effected, which was not to be done till after the arrival of the goods at Ostend.

A rule nisi having been obtained for entering a judgment for the Plaintiff notwithstanding the verdict found for the Defendant on the 4th and 6th pleas,

Le Blanc and Marshall Serjts. shewed cause. 1st, The agreement stated in the Defendant's pleas is illegal, being within 7 Geo., Stat. 1, c. 21, by the 2d section of which act all contracts and agreements whatsoever made by any of his Majesty's subjects for the loan of any money by way of bottomry, "on any ship or ships in the service of foreigners, and bound or designed to trade to the East Indies, and all contracts and agreements whatsoever made by any of his Majesty's subjects, or any person or persons in trust for them, for the loading or supplying any such ship or ships with a cargo or lading of any sort of goods, merchandize, &c." are declared to be void. The agreement there described is precisely that stated [554] in the plea. 2dly, Supposing this agreement not to be made void by the 7 Geo. 1, still the trade itself being illegal, the Plaintiffs cannot recover. The case of *Holman v. Johnson*, Cowp. 341, will probably be cited on the other side. There the goods were sold in the ordinary course of trade, and though the Plaintiffs knew they were to be smuggled into this country, they did not sell them for that purpose; the illegal use made no part of the contract. But the case of *Biggs v. Lawrence*, 3 Term Rep. 454, is an express authority against the Plaintiffs' recovery. The ground of that determination was, that the goods were sold for the purpose of being smuggled into England. The distinction between these two cases establishes the Defendant's plea, for the goods here were sold for the purpose of being smuggled into India, and the agreement was that they should be sent to Ostend, and from thence to Calcutta. *Clugas v. Penahuna*, 4 T. R. 466, and *Waymell v. Reed and another*, 5 T. R. 599, are also authorities to shew that a Plaintiff who takes any part in an illegal transaction cannot recover.

Adair and Shepherd, Serjts. contra. 1st, The contract on the part of the Plaintiffs being only to deliver these goods at Ostend, this bond is not made void by 7 Geo. 1, which does not apply. Here the vendors had full power over the goods, and might have resold them at Ostend, since the Plaintiffs' interest in them cease on their arrival at that place. 2dly, The cases decided on this subject do not preclude us from recovering. The principle of *Holman v. Johnson* is, that where the contract of sale is complete before the illegal part of the transaction commences, the bare knowledge in the vendor of the vendee's intent does not vitiate the contract. In each of the three other cases cited, the Plaintiffs had taken some step to effectuate the illegal intention. It has never yet been determined that bare knowledge of an illegal intent in the vendee, bars the vendor's recovery.

Cur. adv. vult.

The judgment of the Court was this day delivered by

EYRE Ch. J. We are all of opinion, that the 4th plea is good and a sufficient bar to the Plaintiffs taking any thing by this application. The ground of the defence to be collected from this plea is thus opened by Lord Mansfield in *Holman v. Johnson*, Cowp. 343. "The objection that a contract is immoral or illegal sounds at all times very ill in the mouth of a Defendant. It is not for [555] his sake however that the objection is ever allowed; but it is founded in general principles of policy, which the Defendant has the advantage of contrary to the real justice as between him and the Plaintiff, by accident, if I may so say. The principle of public policy is this *ex dolo malo non oritur actio*. No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If from the Plaintiff's own stating, or otherwise, the cause of action appears to rise *ex turpi causâ*, or the transgression of a positive law of this country, there the Court says, he has no right to be assisted." After this introduction His Lordship stated the question in that cause to be "whether the Plaintiff's demand is founded upon the ground of any immoral act or contract; or upon the ground of his being guilty of any thing which is prohibited by a positive

law of this country?" And this is the question which arises between the parties to this record upon the 1th plea. The substance of this plea is, that it was agreed between the Plaintiffs and the Defendant that the former should sell and deliver goods to the latter, to be by him shipped in the port of London, to be carried to Ostend, to be there shipped on board ships destined to trade in the East Indies without licence from our East India Company, to be carried to Calcutta, to be there sold clandestinely; that in pursuance of this agreement, the Plaintiffs sold and delivered goods to the Defendant, knowing &c. and in order &c. and that in fact the goods were carried to Ostend, and shipped for Calcutta to be there sold; and that this bond was given for securing the payment of the price of those goods, and so void in law. It was agreed in the argument, that it is prohibited by the positive law of this country to furnish goods to be shipped on board foreign ships trading to the East Indies. By the 7 Geo. 1, c. 21, s. 2, all contracts and agreements for the loading and supplying such ships with a cargo are declared to be void. For the Plaintiffs it was contended, that the above admission must be taken with this reserve, that the prohibition attaches only on the person who has the immediate interest in the supply. I admit that the person who has the benefit of the supply is the immediate object of the act, the title of which is "for the further preventing His Majesty's subjects from trading to the East Indies under foreign commissions." Very probably those who are more remotely concerned in furnishing the supply, may not be directly within the scope of the act. But it will not follow, that their contracts will be valid. Upon the principles of the common law, [556] the consideration of every valid contract must be meritorious. The sale and delivery of goods, nay the agreement to sell and deliver goods is *prima facie* a meritorious consideration to support a contract for the price. But the man who sold arsenic to one who he knew intended to poison his wife with it, would not be allowed to maintain an action upon his contract. The consideration of the contract in itself good, is there tainted with turpitude, which destroys the whole merit of it. I put this strong case because the principle of it will be felt and acknowledged without further discussion. Other cases where the means of transgressing a law are furnished with knowledge that they are intended to be used for that purpose will differ in shade more or less from this strong case; but the body of the colour is the same in all. No man ought to furnish another with the means of transgressing the law, knowing that he intends to make that use of them. And it will seldom happen that this will be the whole for which he will have to answer. The man who knows that an illegal use is intended to be made of that which he is selling, will be thereby impelled to use his knowledge to make the contract more beneficial to himself, and it may become his interest to stipulate for himself that the illegal use shall be made of the goods he sells; and so the illegal use may be the very gist of the contract. It is a possible case, that a tradesman may wish to speculate in this contraband trade, and to do it by dividing the profits with some man of spirit and enterprise but without capital. Such a man would stipulate that the goods which he sold should be put on board a ship under a foreign commission, and should be sent to Calcutta to be there sold. His share of the profits would be found in the price originally fixed on the goods, but his hopes of payment would rest entirely on the returns of this contraband trade. Such a man would not advance five pounds worth of goods which were not to be employed in the contraband trade. It is essential to his views and it enters into the spirit of his contract that the goods shall be employed according to their destination. Doubtless the buyer of goods, having them in his possession, may divert them from the intended channel; but then he is not the honest man whom the seller of the goods took him for, and in truth he breaks his contract. This is a supposed case. But this supposed case is not immaterial to the argument: because the strength of the Plaintiffs' case, as it has been argued for them, is, that supposing the transaction to have been as it is stated to have been in this 4th plea, their share in it necessarily ended with the deli [557]-very of the goods, and by no possibility could they have any thing to do with their future destination. By possibility most certainly the Plaintiffs might be very deeply interested in the future destination, though the conduct of the speculation was unavoidably entrusted to the buyer. And a possible case of interest in the future destination is an answer to the argument that of necessity they could have nothing to do with it. But the plea having been found by the jury the Counsel for the Plaintiffs were driven to that argument. The proper time to insist that the Plaintiffs had nothing to do with the future destination of the cargo was when the plea was

before the jury; and if the truth of the case would have warranted it, the fact might have been negatived by evidence, demonstrating that the Plaintiffs' part in the transaction did really end with the delivery, and that the future destination had nothing to do with their contract. They might have disproved all knowledge; indeed it was necessary that they should disprove it. Knowledge affords a strong ground to infer participation in the whole transaction. Communications of such a nature are not made unnecessarily. From the price fixed, the situation of the buyer, his ability to pay, a fair account of the extraordinary credit given to him, and other particulars, inferences of fact might have been made by the jury favourable to the ground now taken for the Plaintiffs, that in fact they were not involved in any part of the transaction subsequent to the delivery; and upon this ground the jury might have been warranted in finding against the plea. But the jury having found for the plea, the Court cannot say that the Plaintiffs had nothing to do with the future destination of the goods, unless it was impossible to state a case in which he could have any thing to do with it. I think it was not disputed that if the Plaintiffs' contract extended to the future destination of the goods such a contract would be void. It seems therefore hardly necessary to enter into an examination of the four cases which were cited from Cowper and the Term Reports. The result of the cases is, that knowledge, in the seller of the goods delivered, of the future destination of those goods, with the further circumstance of packing the goods in a form convenient for smuggling, will avoid the contract if sued upon here, and *a fortiori* if the seller be resident in this country. The case now in judgment is certainly not in terminis this case. And I use the cases only as authorities for the principle. Upon this plea, the Plaintiffs do not merely assist another, they must be taken to be principals in the [558] illicit transaction. In that view of the case they are directly within the act of parliament. But if the plea had been that the Plaintiffs had sold these goods to the Defendant for the purpose of enabling him to trade with them clandestinely to the East Indies, that would have been a case of assistance within the scope of the authorities cited.

Per Curiam. Rule discharged.

(In the Exchequer Chamber.)

DENN EX DEM. MELLOR *v.* MOOR; IN ERROR. Nov. 16th, 1796.

[Reversed in House of Lords, 7 Bro. P. C. 607; 2 Bos. & P. 247.]

A. after giving a life estate in certain copyholds to B. devised as follows; "All the rest of my lands tenements and hereditaments either freehold or copyhold whatsoever and wheresoever and also all my goods &c. after payment of my just debts and funeral expenses, I give, devise, and bequeath the same unto my wife S. C." Held that under this devise S. C. took a fee. N.B.—An estate only for life, vide 2 Bos. & Pull. 247, where this judgment is reversed in Dom. Proc. and the judgment of B. R. established (a).

The Defendant in this case having obtained judgment in his favour in the Court of King's Bench (see 5 T. R. 558), on a former ejectment in which he was Plaintiff, this second ejectment was brought by the present Plaintiff in error, with a view to question that judgment (see 6 T. R. 175). The special verdict in this was the same as in the former case, and the question was, Whether under the will of J. Carr who was seized in fee of the premises in question, Sissily Carr under whom the Plaintiff in error claimed, took an estate in fee or for life only? The words of the devise were, "I give and devise unto N. Lister, of &c. all that my customary or copyhold messuage or tenement with the appurtenances situate &c.; All the rest of my lands tenements and hereditaments either freehold or copyhold whatsoever and wheresoever and also all my goods chattels and personal estates of what nature or kind soever, after payment of my just debts and funeral expences, I give devise and bequeath the same unto

(a) Vide *Goodtitle v. Maddern*, 4 East, 496. *Robinson v. Grey*, 9 East, 1. *Doe d. Wright v. Child*, 1 N. R. 335, 345. *Doe v. Ramsbotham*, 3 M. & S. 516. *Roe v. Dwy*, 3 M. & S. 518. *Doe d. Penwarden v. Gilbert*, 3 B. & B. 85.

my wife Sissily Carr; and I do hereby nominate and appoint her my said wife sole executrix of this my will."

The case was twice argued; 1st, in Trinity Term 1796 by Lambe for the Plaintiff in error, and Wood for the Defendant, and now by Chambre for the former, and Law for the latter.

Arguments for the Plaintiff in error. To any common mind it is clear upon the face of the will that the testator intended to give to his wife all which he had not given to N. Lister, and the words which he has employed are sufficient to pass a fee. The word "hereditaments," (which is used in the clause of devise to S. Carr, though not in that to N. Lister) imports a description not of the thing but of the interest; it means an inheritance, and had the testator given "all his inheritance," a fee would have passed in the [559] same manner as if he had said "all his estate (a)." [Eyre Ch. J. observed that the words "all his estate" may, but do not necessarily pass a fee, and Heath J. that where they are words of description they do not.] In *Holdfast v. Marten*, 1 T. R. 411, the word "estate" was held to carry a fee though it denoted locality, being "my estate at B." and in *Fletcher v. Smiton*, 2 T. R. 656, the word "estates" in the plural number, had a like import given to it though the case was still stronger as the testator had before by the same description given an estate for life. The meaning of the word "hereditaments" in a will, may be collected from *Lylcott v. Willows*, 3 Mod. 229, where Powell J. contrary to the opinion of the rest of the court, held that it imported an inheritance and would carry a reversion; and his opinion was afterwards confirmed in the Exchequer Chamber, where the judgment below was unanimously reversed, 2 Vent. 285, S. C.; and though Gould J. in *Smith v. Tindal*, 11 Mod. 103, 4, where the word "hereditaments" was used in a devise and a perpetual charge created upon the estate, decided entirely on the charge in favour of a fee, yet Holt Ch. J. expressly founded his opinion on the word "hereditaments," as carrying a fee. So in *Frogmorton & Wright v. Wright and another*, 3 Wils. 418. De Grey Ch. J. held the word "hereditaments" in a will may be a fee. Of *Canning v. Canning*, Mos. 240, which has been cited to shew that a fee will not pass under this word, it may be observed that the Master of the Rolls there went on the case of *Hopewell v. Ackland*, Salk. 239 (which does not apply here, as the decision proceeded on other words there used in the devise) and on the intention of the testator. Besides Lord Mansfield, 5 Bur. 2629, treats Moseley as a book of no authority. It was indeed truly observed by Buller J. in *Doe d. Palmer v. Richards*, 3 Term Rep. 360, that different opinions had been entertained on the operation of the word "hereditaments (b)." The strongest authorities are however in our favour. If indeed the word be limited it may carry an estate for life; but where used generally it will pass a fee. If however the word "hereditaments" will not pass a fee, still the generality of the sweeping clause in this devise will do it. The testator had but two objects of his bounty, N. Lister and his wife; the latter was the principal object, [560] as he made her executrix and residuary legatee. If then his intention is clear and there is no rule of law to control it, that intention must prevail. What that is, appears clearly from the clause directing the payment of debts and legacies; for where the executorship might possibly become a burden without a fee, the Court will imply that a fee was intended to be given. 3 Bur. 1535, arg. It cannot be said that nothing but the personalty was charged, for if that were not sufficient any Court would hold the land liable. The devise of the realty does not end at the word "wheresoever," for no words of disposition occur until after the description of the personalty. The sentences are coupled by the word "and;" and the word "same" in the disposing part refers to the real as well as personal estate. [Heath J. *Cliffe and others v. Gibbons*, 2 Ld. Raym. 1324, is in point; the testator there having devised to his wife the residue of his estate after debts and legacies paid, Lord Chancellor Cowper was clearly of opinion that a fee passed.] The cases cited to shew that the executrix does not take a fee in respect of the charge are not applicable; in *Eyles v. Cary*, 1 Vern. 457, no question was raised about the fee, and in *Dickins v. Marshall*, Cro. Eliz. 330, the effect of charging debts, &c. on the land was not considered. Besides the reporter of the latter case was at that time young, and it may be further

(a) Vid. Willis, 296, and the cases on this subject there collected by the learned Editor in the note. Vid. etiam *Hogan v. Jackson*, Cowp. 306, and what is said by the Court on the operation of the word "estate," in *Whitelock v. Haddon*, ante, 247, 8.

(b) Vide what is said by Buller J. ante 248.

impeached by the improbability of the 2d resolution, viz. that the parties took as joint-tenants. The case of *Doe d. Palmer v. Richards* is decisive, for the words "thereout paid" as applied to payment of debts, &c. used in that case, are equivalent to the words here "after payment," &c.

Arguments for the Defendant in Error. The Court will not disinherit the heir at law without express words to that effect. Now whatever the testator's intention might have been, there are no words which can be held to give more than an estate for life to Sissily Carr. Indeed the devise to N. Lister and to her are nearly alike, and the former is admitted on all hands to pass only an estate for life. The words "whatsoever and wheresoever" in the latter devise apply only to quality and place, not to duration of interest; and as to the word "hereditaments" not being used in the devise to N. Lister, the subject of that devise was but a messuage. In all the cases cited to shew that the word "hereditaments" carries a fee, there was a perpetual charge on the estate, and that weighed with the judges. The case of *Hopewell v. Ackland* is precisely similar to this; there the fee was expressly held not to pass under the clause in which the word "hereditaments" was used, but under [561] that which gave all that the testator had not before disposed of. The terms "rest and residue" occurred in *Cunning v. Canning*, yet there only a life estate was given; and though the principal point in that case is not perhaps applicable to this, and the reporter not good, still the Master of the Rolls cannot well have been mistaken who treated it as a settled point that the word "hereditaments" would not pass a fee. The definition of *hereditas* by the civilians is, "what a man inherits;" *hereditamentum* is used to express "what a man transmits." *Hopewell v. Ackland* is expressly in our favour. All the cases which have been cited to explain the word hereditaments as carrying a fee, were attended with other circumstances which influenced the judgments. In *Lydcott v. Willows*, as reported in 3 Mod. 229, there was some comment on the word "hereditaments," but no decision; and in 2 Vent. 285 that word was not discussed. Besides, the decision was to enable the wife to pay legacies, and went upon the charge. So in *Smith v. Tindal* there were words of charge, and the case was not determined on the meaning of the word "hereditaments." So De Grey Ch. J. in 3 Wils. 418, and Buller J. 3 Term Rep. 360, only say that "hereditaments" may pass a fee when coupled with other words. Are there then other words in this devise sufficient to give that effect to "hereditaments?" The devise of the realty ends at the word "wheresoever;" nor is it common to charge funeral expences on the real estate. The charge therefore only relates to the personal estate, which is the proper fund, as appears from *Eyles v. Cary*. And even supposing the realty to be charged, a fee will not necessarily pass, because the estate may be given subject to the charge into whatever hands it may come. In *Merson v. Blackmore*, 2 Atk. 341, the debts being charged on the realty on the contingency of the personalty only not sufficing, it was held that such a charge would not raise the estate into a fee. In *Doe d. Palmer v. Richards*, the devisee was to pay out of the particular estate devised. Here if the devisee had died in the life of the devisor, the lands would have gone to the heir, subject to the charge. The only difference between this case and *Dickens v. Marshall*, is that here the devise is after payment of debts and funeral expences, and there it was after payment of debts and legacies; and yet it was there held that an estate for life only passed. With respect to the words "all the rest of my lands," &c. though *Wheeler v. Walroone*, Alleyu, 28, is an authority to shew that such words pass a fee not expressly devised, yet the authority of the report in Alleyu is much shaken by the observation in [562] 3 P. Wms. 63, note [E], that on inspection of the record it appeared to have been found by the special verdict, that unless the reversion in fee passed by the will there would not be sufficient to pay the testator's debts.

EYRE Ch. J. I should feel much difficulty in deciding this case upon the technical meaning of the word "hereditaments." I am disposed, however, to agree that the word "hereditaments" imports only to be a description of that in which the devisor has an inheritance, not of his interest in it. No doubt a life estate may be given to the devisee out of an estate in which the devisor has himself a fee. But the question will be, Whether the rest and residue of my lands, &c. may not include all the interest, when used in a residuary clause? Undoubtedly a life estate might have been expressly given in the rest and residue, &c. and then the words "rest and residue" would have been merely descriptive of the lands. The question before us is a question of intent, and does not arise upon the technical sense of the words. It does not indeed appear to me that an intent to give a fee can be implied from the words "after payment of

my debts and funeral expences," for no such absolute charge is created as will render it necessary that a fee should pass. But it is fairly to be collected that the testator intended to give his wife all that was not before devised. For this purpose he employed the most comprehensive words: "hereditaments" imports all that in which he had an estate of inheritance; and the words "rest and residue" are sufficient to pass the whole interest, if the intent be clear. This appears from the cases where an intent has been raised from introductory words (a)¹. Here one copyhold is given to N. Lister, and then comes this sweeping clause: "All the rest of my lands, tenements, and hereditaments whatsoever and wheresoever, and also all my goods, chattels, and personal estate of what nature or kind soever, after payment of my just debts and funeral expences, I give, devise, and bequeath the same unto my wife S. Carr." The whole personal estate, together with all the rest of the real estate, after payment of debts and funeral expences, is given to the devisee in this one clause. What is this but saying, "I will first have my debts and funeral expences paid, and then I give what is left to the [563] devisee?" If the intent be clear, there are apt words sufficient for the purpose. Therefore, without defining the meaning of the word "hereditaments," we think that the plain intent of the testator makes it necessary to give this import to the devise.

Per Curiam. Judgment reversed.

(In the Exchequer Chamber.)

HAILLE v. SMITH AND ANOTHER, IN ERROR. Nov. 16th, 1796.

[Distinguished, *Patten v. Thompson*, 1816, 5 M. & S. 359. See *Bryans v. Nix*, 1839, 4 Mee. & W. 792; *Burdick v. Sewell*, 1884-85, 13 Q. B. D. 173; 10 App. Cas. 74.]

A. of Liverpool wishing to draw upon the banking-house of B. in London to a large amount, agreed among other securities given, to consign goods to a mercantile house consisting of the same partners as the banking-house, though under the firm of B. and C.; accordingly he remitted the invoice of a cargo and the bill of lading indorsed in blank to B. & C. but the cargo was prevented from leaving Liverpool by an embargo; A. then became bankrupt, being considerably indebted to B. and the cargo was delivered to his assignees by the Captain; held that B. & C. might maintain trover for it against the Captain (a)².

This was an action of trover brought in the King's Bench by the Defendants in Error, to recover from the Plaintiff in Error, as Captain of the ship "Hawke," a cargo of iron and hemp. The cause was tried before Lawrence J. at the summer assizes for Lancaster 1794, and a verdict found for the Defendants in Error for 4710l. 18s. Upon this a bill of exceptions was tendered by the Counsel for the Plaintiff in Error, and sealed by the learned Judge. From that bill of exceptions, when annexed to the record in this court, the case appeared to be as follows:

The Defendants in Error were merchants and bankers residing in London and carrying on business under two different firms, namely, the banking business under the firm of Samuel Smith, Sons, and Co. and the business of merchants under the firm of Smiths and Atkinson. George and Henry Brown, merchants at Liverpool, some time since opened an account with Samuel Smith, Sons, and Co. as bankers, in the regular course of business, remitting bills, and drawing against them as occasion

(a)¹ On the general effect of introductory words in a will, see *Ibbelton v. Beckwith*, Cas. temp. Talbot, 160. *Mawly v. Maudy*, Cas. temp. Hardw. 142. 2 Str. 1020, S. C. *Frognorton d. Wright v. Wright*, 2 Bl. 889. 3 Wils. 414, S. C. *Loveacres d. Mulge v. Blight et ux.* Cowp. 352. *Denn d. Gaskin v. Gaskin*, Cowp. 657. *Goodright d. Baker v. Stocker*, 5 Term Rep. 13, and *Doe d. Child et ux. v. Wright*, 8 Term Rep. 64. For their effect as operating on the residuary clause of a will, see *Grayson v. Atkinson*, 1 Wils. 333. *Hogan v. Jackson*, Cowp. 299. *Doe d. Burkitt v. Chapman*, 1 H. Bl. 223, and *Frognorton ex dim. Bramstone v. Holyday*, 3 Burrow, 1618.

(a)² Vide *Vertue v. Jewell*, 4 Campb. 31. *Cuming v. Brown*, 9 East, 509. *Williams v. Everitt*, 14 East, 582, 592. *Martini v. Coles*, 1 M. & S. 140. *Patten v. Thompson*, 5 M. & S. 350, 356. *Faith v. E. I. Company*, 4 B. & A. 630, 640.

required. In January 1793, G. and H. Brown wishing to increase their drafts to a much greater amount than had been at first desired or intended by Samuel Smith, Sons, and Co. entered into an agreement with them to the following effect: that G. and H. Brown should be at liberty to draw 5000l. per week from the 1st of February to the 12th of March upon Samuel Smith, Sons, and Co. remitting them good bills of exchange on London to cover the amount; and that as a further security they should lodge a credit with two houses at Hamburgh against goods consigned to those houses to the amount of 20,000l. of which Samuel Smith, Sons, and Co. might avail themselves as they should think proper; and also as a collateral security consign to the house of Smiths and Atkinson hemp and iron to the amount of 10,000l. on sale for their account. This agreement was entered [564] into for the accommodation of G. and H. Brown, and entirely at their request. In consequence of this G. and H. Brown did draw upon Samuel Smith, Sons, and Co. to a considerable amount; and in pursuance of the agreement on the 13th of February 1793 remitted to Smiths and Atkinson the invoice and bill of lading indorsed in blank of the ship "Hawke" of which the Plaintiff in Error was captain, and for the cargo of which this action was brought. In the correspondence which took place between Smiths and Atkinson and G. and H. Brown, subsequent to this remittance, the former applied to the latter for directions respecting the disposal of the goods and the prices they might be willing to take. An insurance was effected on the cargo in the name of Smiths and Atkinson, who were to receive the usual commission on the sale. At the time when the invoice and bill of lading were remitted the "Hawke" was in the port of Liverpool and ready to sail for London, but was prevented from sailing by an embargo. Samuel Smith, Sons, and Co. having in consequence of the credit lodged in their favour with the houses at Hamburgh drawn upon those houses, and having had several of their bills returned from thence protested for non-payment, immediately applied to their own use a parcel of bills remitted to them by G. and H. Brown on the 2d of March 1793, and refused to accept the bills drawn by G. and H. Brown upon them at the same time. At this period, and on the 5th of April 1793, when G. and H. Brown were declared bankrupts, the balance of accounts was considerably in favour of Samuel Smith, Sons, and Co. In consequence of the bankruptcy Smiths and Atkinson having demanded of the captain the cargo of the ship "Hawke" which was still lying in the port of Liverpool, and tendered the charges, the latter refused to deliver it to them, alleging orders to that effect from the assignees of G. and H. Brown, to whom he afterwards delivered it. The Defendants in Error called two eminent merchants to prove that bills of lading, when made out to the order of the shipper or his assigns, are negotiable or transferable by the shipper's indorsement, which vests the property in the indorsee: and that when such bills of lading are transmitted from abroad, it is usual for merchants to accept bills in consequence of them, before the arrival of the goods. Upon this evidence the learned Judge directed the jury that the consignment of the cargo of the ship "Hawke" to Smiths and Atkinson was not a consignment to them as the factors or agents only of G. and H. Brown acting merely for the benefit of their principals, but was a consignment to Smiths and [565] Atkinson not only to sell the same under the direction of G. and H. Brown, but also by the produce therefore to protect and indemnify the banking-house of Samuel Smith, Sons, and Co. against their advancements and acceptances on account of G. and H. Brown, and that the law, as between principal and factor, did not arise in this case: that if, therefore, they believed the evidence shewn of the custom of merchants with respect to the transfer of a bill of lading, then the Plaintiffs (now Defendants in Error,) were entitled to the cargo, and the captain's refusal to deliver was evidence of a wrongful conversion. To this direction the bill of exceptions was tendered.

This case was twice argued; in Easter Term 1796, by Chambre for the Plaintiff in Error, and Lowndes for the Defendant; and again on this day by Law for the former and Wood for the latter.

Arguments for the Plaintiff in Error. The first observation that presents itself in this case arises on the negotiability of a bill of lading by indorsement; with respect to which point we must refer the Court to the several reports of *Lickbarrow v. Mason* (a),

(a) Judgment for the Plaintiff in K. B. 2 Term Rep. 63. That judgment reversed in the Exchequer Chamber, 1 H. Bl. 357. Venire de novo awarded in the House of Lords, 2 H. Bl. 211, and 5 Term Rep. 367. Special verdict on the second trial and judgment for the Plaintiff in K. B. 5 Term Rep. 683.

where the subject was completely exhausted. We contend, indeed, that the direction of the learned Judge upon that point was incorrect; for the question, Whether such an instrument be negotiable or not? is part of the law of merchants, and as such ought not to have been submitted to the jury. *Grant v. Vaughan*, 3 Burr. 1523, and *Pillans & another v. Van Meop & another*, 3 Burr. 1669. The next consideration will be, whether, under the circumstances of this case, there was such a negotiation or assignment as amounted to a complete transfer of the property, or whether the consignee did not stand in that relation to each other, in which the law, as between principal and factor, applies. Admitting that by virtue of the indorsement of a bill of lading property *prima facie* passes, still that indorsement is capable of being so explained by evidence as to shew the indorser's intent to pass some minor interest, or qualified authority, in respect of the goods. In support of this the opinion of Lord Mansfield in *Wright v. Campbell*, 4 Burr. 2050, may be referred to. The effect of an indorsement on a bill of lading cannot be more general than that of an indorsement of a bill of exchange: now the latter may be indorsed for various purposes; as to apply [566] the contents to the indorser's use, to a servant to bring the contents to his master, or to an agent for the purpose of enabling him to execute some particular business to which he is bound to apply it. In any of these cases, if the bill has not passed into the hands of a third person, the indorsee is precluded from maintaining an action on the bill against the indorser; for the latter is at liberty to shew the purpose for which it was indorsed. The present transaction is confined to the original parties; and however third persons who might have given credit to the instrument in question, would have been protected, that consideration does not arise here. From all the facts of this case taken together, it is clear that these parties do not stand in the relation of vendor and vendee; nor was it understood, at the time when the indorsement was made, that a complete transfer of the property would thereby be effected. By the original agreement the consignments of goods were only to rest with the house of Smiths and Atkinson as a collateral security for the benefit of the banking house. The goods themselves, therefore, were to continue the property of the consignee till the sale, and the money arising from thence was either to be retained by Smiths and Atkinson, or paid into the banking-house as occasion should require. Up to the time of the sale the charges attending these goods, and the risk of the consignment, lay upon the consignee. It is true that the consignees may have had an insurable interest in respect of their commission; but still, if the consignors also had an insurable property, trover is not maintainable by these parties for a conversion by the captain acting under the orders of the owners. Did the consignors, in consequence of remitting the bill of lading to persons standing in the qualified relation to them in which Smiths and Atkinson stood, lose all power and controul over the cargo? The right of the consignee attaches only on the arrival of the cargo at the port of destination, and till that period the consignee has such a property as enables him to detain; for if he has a property which may be the subject of insurance, that, accompanied with possession, enables him to detain. That G. and H. Brown had an insurable interest appears from *Hibbert v. Carter*, 1 Term Rep. 745. Considering the consignment to Smiths and Atkinson in the light of a consignment to them as factors, and made by way of indemnity for advances, the case comes within all the reasons upon which that of *Kinloch v. Craig*, 3 Term Rep. 119 & 783, was decided: there it was held, that if a factor, in consideration of goods being consigned to him, accept bills drawn by the consignee, and pay part [567] of the freight, and become insolvent before the bills are due, and before the goods get into his actual possession the consignee may stop them in transitu. The principal case is even stronger than that, for there the ship had arrived at the port of delivery, whereas here it had never migrated from the port of loading. In *Lickbarrow v. Mason*, 2 Term Rep. 72, Mr. J. Ashurst observes, that where delivery is to be at a distant place, the contract, as between the vendor and vendee, is ambulatory till delivery, though not as between the vendor and third persons if a bill of lading has been remitted. If therefore this case be considered as between vendor and vendee, no third persons having intervened, the contract must here be considered ambulatory till actual delivery. It is the course of trade to make out two or three bills of lading; according to the terms of the bill of lading the captain is to deliver to the shipper or his assigns; and when there are different claimants upon different bills of lading, it is not his business to examine who has the best right. *Fearon v. Bowers*, cited per Lord Loughborough in *Lickbarrow v. Mason*,

1 H. Bl. 365. The captain, therefore, in the present case, satisfied his contract by a delivery to the assignees of the shipper. In addition to this, it may be contended, that the property never vested in Smiths and Atkinson, because the banking-house never executed their part of that agreement under which the consignment was made. The bills of G. and H. Brown having been dishonoured, they were entitled to stop the consignment in the port of Liverpool.

Arguments for the Defendants in error. When a custom has once been found to be a custom of merchants, it becomes by that finding the law of the land. This doctrine was acted upon by Lord Kenyon in the case of *Hunter v. Buring* (tried at the same sittings in which the second trial of *Lickbarrow v. Mason* had taken place), who refused to hear any evidence respecting the negotiability of a bill of lading, it having been already admitted upon record in the special verdict in *Lickbarrow v. Mason*. That special verdict, therefore, as reported 5 Term Rep 683, is an authority to shew that bills of lading are negotiable. If Smiths and Atkinson had stood in the mere relation of factors to G. and H. Brown as their principals, undoubtedly they could have had no lien upon the goods for the balance of their account until they had come into their actual possession. But though that be law as between principal and factor, yet where one transfers goods to another in trust to indemnify a third person against money which he may advance that law does not apply, because the [568] property immediately vests in the trustee in whom it is intended to vest. Here the agreement was that G. and H. Brown should consign hemp and iron to Smiths and Atkinson, the meaning of which agreement was, that the former should transfer to the latter, by the usual mercantile mode of transfer, goods in trust to be sold, and the produce to be retained as a collateral security for what the banking-house should advance. The mode of transfer adopted, namely, the indorsement of a bill of lading in blank, was an adequate mode of transfer. For a mere agreement for one to sell and the other to buy a specific thing will pass the property in chattels without actual delivery if the consideration be paid. It is true that the vendor has a right to stop in transitu where the consideration has not been paid and is not likely to be paid; but that law cannot affect this case where there was no pretence to stop in transitu, as the banking-house had actually paid by advances the value of the goods. Upon this head there are many cases. In *Keilw.* 77, pl. 25, it is said that if a man buy twenty quarters of malt which is put into sacks or otherwise severed from the other malt, the property is altered. So in *Evans v. Martell*, 12 Mod. 156, the Court say that the consignment in a bill of lading gives the property; and in *Grips v. Ingledew*, Farresley, 89, it was held that under an agreement to pay so much for every hundred stacks of wood lying in such a wood, and so far more as it should be felled, the property of every hundred cut at the time of the agreement vested in the purchaser, and so of the rest as they were cut down. There is also a case cited in *Evans v. Thomas*, Cro. Jac. 172, "one covenants with another, that if he will marry his daughter he shall have such a flock of sheep; he marries his daughter; the property of the sheep was presently in him, because it was but a personal thing and the covenant is a grant (a)." Again, in an action on the case upon mutual agreements a note was given in evidence in the nature of a bill of parcels, expressing that A. had bought of B. one hundred pieces of muslins at forty shillings per piece, to be fetched away by ten pieces at a time, and paid for as taken away; there Holt C. J. at Guildhall held that the pieces being marked and sealed, the property was altered immediately, and that they remained only as a security for the money. *Knight v. Hopper*, Skinn. 647. Indeed in *Lickbarrow v. Mason*, Lord Loughborough says, "A destination of the goods by the vendor to the use of the vendee, the marking them, or [569] making them up to be delivered, or removing them for the purpose of being delivered, may all entitle the vendee to act as owner to assign and to maintain an action against a third person into whose hands they have come." 1 H. Bl. 363, 364. Upon these authorities it may be contended, that the instant the destination of these goods was ascertained, and they were put on board in order to be delivered to Smiths and Atkinson, the property was immediately transferred to them, because a valuable consideration had already moved from them. This specific property being once ascertained, they were thereby enabled to maintain trover for the goods, unless G. & H. Brown or their assignees could have shewn a just cause for retracting the delivery. It may also be argued, that the cargo having been delivered by G. and H.

(a) See Fitz. Abr. Monstrans de faits, pl. 144.

Brown to the Defendant for the use of the Plaintiffs upon a good preceding consideration, the Defendant may be looked upon as a trustee for the benefit of the Plaintiffs. In *Brand v. Lisley*, Yelv. 164, A. being indebted to the Plaintiff in 100l. for the satisfaction of the debt, delivered to the Defendant sundry goods amounting to the value of the debt; and it was adjudged, that by the delivery of the goods to the defendant to satisfy the Plaintiff, the Plaintiff acquired a property and interest in the goods. To the same effect are 1 Bulstr. 68. 2 Leon, 89. Dyer, 49 a. Nor can any distinction be made on the ground of the property having been transferred to Smiths and Atkinson as consignees, instead of the very house whose advances the consignment was designed to cover. The former were to sell the goods for the special purpose of indemnifying the latter by the proceeds, and till that sale G. and H. Brown were to stand the risk, and to provide the fund from which the contingent charges were to be defrayed. This accounts for the insurable interest in both parties. The consignors had an interest in that property, which when sold was to pay their debt, and the consignees were interested in the same property because it was the security on which their advances were made. In the case of *Kinloch v. Craig*, principally relied on by the Plaintiff in Error, the bill of lading was not indorsed; indeed that was merely a case of principal and factor, whereas here there was an actual transfer of the property in trust to indemnify the banking-house, and that property was paid for before the transfer took place.

EYRE Ch. J. The case is now brought to a point in this one short proposition, viz. That the property was transferred to Smiths and Atkinson upon a trust in which those who transferred the property, and the banking-house were concerned. If this can be [570] maintained, all the objections which occur so forcibly upon the notion of a bargain and sale, will be removed. Had it been a bargain and sale accompanied with a sufficient delivery to transfer the property, from that moment the risk of the consignment and the loss and profit upon it ought to have belonged to the buyers. But if we can suppose that this transfer of property was to stand simply upon the agreement that the cargo should go to Smiths and Atkinson, and should be in effect their property only, for the purpose of their applying the net proceeds by way of indemnity to the banking-house, then the circumstances of the risk and of the profit and loss refer to the trust with which the property was charged, and are thereby accounted for. The trust being, that the proceeds, whatever they might be, should remain with the consignees applicable to the debt of the banking-house, the risk must necessarily remain with the consignors notwithstanding the change of property, and they must suffer or be benefited by the loss or profit upon the sale. The question then is, Whether upon the case before us we are authorised to decide, that by the agreement of the parties for a valuable consideration this, which was originally the property of the consignors, did become the property of Smiths and Atkinson, charged with the above-mentioned trust? And here the bill of lading operates as in my poor judgment it ought to operate. It operates as evidence of the change of property, and as such I have no difficulty, nor ever had, in giving it its full effect. Ninety-nine times in an hundred the indorsement of a bill of lading will be conclusive evidence of the alteration of property without ascribing to it the effect of a legal instrument as a bill of sale. Cases may arise in which it will be difficult to understand that such was the meaning of the parties. Here, however, there was an agreement, that as a large credit was to be given by the banking-house to G. and H. Brown, they should put it into the hands of Smiths and Atkinson, as merchants, a certain quantity of goods, the proceeds of which should remain as a deposit in order to secure that credit. From the moment then that the goods were set apart for this particular purpose, why should we not hold the property in them to have been changed, it being in perfect conformity to the agreement, and such an execution thereof as the justice of the case requires? One difficulty had indeed occurred to me, namely, that if this bill of lading so indorsed was at all events to change the property; if of its own force, without reference to any particular agreement it was to operate as a transfer, then if the [571] banking-house had become debtors to the consignors, and had become insolvent, the effects of the consignors would have gone to pay their debts. The injustice of this seemed so flagrant, that I felt great difficulty in acceding to a proposition attended with such consequences. But I see no reason why we should not expound the doctrine of transfer very largely upon the agreement of the parties, and upon their intent to carry the substance of that agreement into execution. This will lead to the conclusion, that the moment

the goods were put on board the "Hawke," and the bill of lading was indorsed and remitted to Smiths and Atkinson, the property was changed, and was to remain in their hands clothed with the trust expressed in the agreement. In this view of the case, the circumstance of the risk remaining in the consignors will only relate to the manner in which the trust was to be carried into execution. The profit or loss at which the goods might be sold would affect the advantage which the consignors were to derive from the trust; but still the risk of the consignors in that respect affords no objection to the existence of the trust itself: I therefore feel the ground of argument, as it now stands before us, much changed from what it appeared to be; and shall have no difficulty in holding that this cargo was vested in Smiths and Atkinson, notwithstanding the risk remained in those who transferred the cargo, and notwithstanding that cargo was to be sold with a view to the profit or loss of the consignors. Those circumstances will not prevent a transfer of the property under the agreement, which was for a valuable consideration; though I can by no means assent to the proposition, that the agreement, though for a valuable consideration, will amount to any thing like a bargain and sale.

Per Curiam. Judgment affirmed.

WAGHORNE v. LANGMEAD. Nov. 18th, 1796.

If a fi. fa. be teste'd before Defendant's death, but delivered to the sheriff and executed after, the execution is regular.

Judgment in this case was signed on the 23d of May: on the 29th of the same month the Defendant died, and on the 31st a fi. fa. teste'd previous to the Defendant's death was lodged in the office of the sheriff of Middlesex: under this the sheriff levied.

Clayton Serjt. on a former day obtained a rule to shew cause why the fi. fa. should not be set aside for irregularity, and why the money produced by a sale of the goods which remained in the hands [572] of the sheriff should not be restored to the administrator of the Defendant. He contended, that the fi. fa. being lodged in the office subsequent to the death of the Defendant, the execution thereon was irregular, and cited *Heapy v. Parris*, 6 Term Rep. 368, where the teste was after the death of the party; and *Walker v. Drawwaters*, E. 36 Geo. 3, in Scacc.(a), where the same doctrine was held, though the teste was before the death of the party. He insisted also that the judgment here should have been revived by scire facias, since the administrator, who was a stranger in this case, was to be affected by it. In support of this he relied on *Pennoir v. Brace*, 1 Salk. 319 (b), where it is said by the Court, that "where any new person is either to be better or worse by the execution, there must be a scire facias, because he is a stranger, to make him party to the judgment, as in case of executor and administrator;" and on Lord Kenyon's opinion in *Heapy v. Parris*. He added, that the Defendant here died insolvent, leaving bond and other creditors, for whom the administrator was to be considered as trustee; and therefore, by the statute of frauds, the writ could only bind from the delivery to the sheriff (c).

Shepherd Serjt. contra, cited *Houghton v. Rushby*, Skin. 257. Comb. 33, S. C. *Springer v. Somerville*, Bunb. 271, and *Dr. Needham's case*, ibid. in the note.

BULLER J. read a case of *Dakin v. Cartwright*, Hyl. 12 Geo. 2, K. B.(d) from a manuscript note, and said that *Walker v. Drawwaters* was decided on a misconception

(a) See 3 Anstruth. Rep. 680.

(b) But it was also held in that case that the death of a party is not material, if subsequent to the teste.

(c) 29 Car. 2, c. 3, s. 16.

(d) The case of *Dakin v. Cartwright* was not precisely in point: but according to Mr. Justice Buller's note, Lee C. J. there said; "There was a case, Mich. 13 W. 3, B. R. *Gill v. Parsons*. Judgment was entered between Hilary and Easter Terms, after which Defendant died. Execution was taken out teste'd the first day of Hilary Term, and the goods in the hands of the executor were taken. And on motion it was holden, that though a judgment in respect of purchasers binds only from the signing, yet as to the party and his representatives it binds as it did before at common law, and that the execution so teste'd was therefore regular."

of what had been done in the King's Bench. He referred also to 3 P. Wms. 400, and 2 Eq. Cas. Abr. 381.

The Court were of opinion, that the current of authorities was against the application on the 1st ground, and that to make a scire facias necessary to support this execution, the process must appear to have issued after the death of the party: that with respect to the creditors, though the property in the goods of the deceased was not bound till the delivery of the writ to the sheriff, yet the right [573] of the creditors to pursue that property till the delivery of the writ would not make this execution irregular.

Rule discharged (a).

FENN EX DEM. BLANCHARD v. S. WOOD, Executor of W. Wood. Nov. 21st, 1796.

If a declaration in ejectment be served upon a tenant, and his landlord be admitted to defend, the Plaintiff can only recover such premises as the tenant is proved to be in possession of.

Ejectment tried at the summer assizes for Kent before Lord Kenyon: Verdict for the Plaintiff.

Early in this Term a rule nisi for a new trial was obtained on an objection arising out of the following circumstances: On the 13th February 1795, W. Wood the Defendant's testator purchased of one Farar the remainder of a term of sixty-one years in certain premises at Sydenham. A small part of those premises, with a wooden house standing thereon, had been previously underlet for a term of fifty years to one Blanchard at the yearly rent of 17l. who had again underlet a part exclusive of the wooden-house for a term of forty-eight years and three-quarters to one Oozman at a ground rent of 2l. 2s. Blanchard had covenanted with Farar to build a substantial house on some part of the premises demised to him; Oozman, when he took his lease from Blanchard, covenanted to perform this agreement for him. When W. Wood purchased of Farar it was supposed that Blanchard had surrendered his interest, he having failed in the payment of his rent and delivered up the keys of the wooden house to Farar's servants; but the lease still remained in his possession. W. Wood purchased of Oozman his interest in the house which he had built in pursuance of his agreement with Blanchard, but suffered him to continue in possession as his tenant. He also pulled down the wooden house. Upon this Blanchard, with a view to recover his premises, served Oozman alone with a declaration in ejectment; and the present Defendant, as executor to W. Wood, (who was deceased,) was admitted as landlord to defend. No ground-rent was in arrear from Oozman to Blanchard. The lessor of the [574] Plaintiff only proved a title to the wooden house, and had a verdict for that. The objection to this verdict was, that Oozman alone having been served with the ejectment, the rule under which the Defendant, as landlord, was admitted to defend, extended only to the premises of which Oozman was proved to be tenant in possession, and not to any of which the defendant himself was in possession.

Le Blanc Serjt. shewed cause. It is objected to this verdict that the premises recovered were in Oozman's possession. If a declaration be served on several tenants, and one landlord comes in to defend for one tenant, he must specify the premises for which he defends; but in *Doe ex dem. Jesse v. Bacchus*, Mich. 30 Geo. 2, at sittings Bull. N. P. 110, this distinction was taken, "that if there be but one Defendant as tenant in possession, the Plaintiff need not prove him in possession; because if he

(a) Vide etiam *Parkers v. Mosse*, Cro. Eliz. 181, which was before the statute of frauds, and the following cases which were after: *Anonymous*, 2 Vent. 218. *Pennoir v. Brace*, 3d Res. 1 Ld. Ray. 244. 1 Salk. 319, S. C. *Robinson and others, v. Tongue and others*, 2d Res. 3 P. Wms. 399. *Lord Winchelsea's case*, note, Ibid. *Fawkes v. Atkinson*, Barnes, 268, ed. 3, and Tidd's Pr. K. B. 728, ed. 1, 932, ed. 2. In *Robinson v. Tongue* it was said that the statute of frauds concerns purchasers only, and not creditors; and in *Houghton v. Rushby*, and *Springer v. Somerville*, that an execution of this kind is regular under the statute of frauds, which extends only to creditors and purchasers, but not to executors and administrators who stand in the place of the party.

was not, why did he enter into the rule (a)." The whole, therefore, of these premises having been specified in the margin of the common consent rule, and not restrained by any description in the rule by which the landlord was admitted to defend, he cannot complain of want of notice.

Shepherd Serjt. *contrâ*. The common consent rule must be construed by the subsequent rule under which the landlord is admitted to defend. If that be not the case, the Plaintiff in ejectment may recover from the landlord lands at two different ends of the county holden by different tenants. Though by the common consent rule the Defendant is bound to "confess lease, entry, and ouster of so much of the tenements specified in the Plaintiff's declaration as are in possession of the Defendant or his tenant, or any person claiming by or under his title," yet those general expressions must, where the landlord defends for his tenant, be restrained to the premises in his tenant's possession, and for which he has been served. Besides, the declaration in ejectment is narrowed by the notice of the casual ejector. In *Smith ex dem. Taylor v. Mann*, 1 Wils. 220, it was expressly ruled, that where the landlord defends, the tenant must be proved to be in possession of the premises; for it was said that he does not admit himself to be landlord of any premises but of such only as are in the possession of his tenant.

[575] EYRE Ch. J. Perhaps this verdict may be right on principle: but it is objectionable on the ground of many practical difficulties. If a Plaintiff serve his declaration on one of several tenants, and the one served appear and defend, he should specify in the rule for how much he defends; then if his landlord comes in, the declaration will be narrowed by the rule. But if this be omitted, as the declaration states an ouster from all the premises, and lease, entry, and ouster is confessed generally, this seems to warrant the conclusion that the Defendant will lose all to which the Plaintiff can make title. It is true, indeed, that on this theory, though the Plaintiff fail in his real object, yet he may recover other premises for which he did not intend to sue. It is therefore proper that they should be narrowed by the rule. The theory of the case in *Wilson* may be wrong; but I think the decision highly convenient.

BULLER J. The action of ejectment is founded on a fiction, and must not be allowed to work a wrong. It is brought for lands in possession; and the tenant in possession must be served. If it be brought for five hundred acres, and four hundred and ninety-nine only are proved to be in the possession of the Defendant, the odd acre cannot be recovered. Shall a Plaintiff, for the purpose of entitling himself to costs, be allowed to take a verdict for that on which he can have no writ of possession? It appears from the case in *Wilson*, that when a landlord is made Defendant his tenant must be proved to be in possession, and the Plaintiff can only recover the premises whereof he is possessed. Possession is the basis and foundation of the action.

HEATH J. The 11 Geo. 2, c. 19, s. 13, was passed to enable landlords to defend that which their tenants only could have defended before the passing of the act, viz. that of which they were in possession. The words of the act are, "If the landlord of any part of the lands, &c. for which such ejectment was brought, shall desire to appear &c.;" that is, any part of the lands of which the tenant was possessed. It is true, the rule under which the landlord is admitted is general, and if construed literally would entitle the Plaintiff to recover more. That rule therefore must be narrowed by the act which was meant to benefit landlords, who before that time had no remedy if their tenants did not chose to defend. *Goodright v. Hart et ur*, 2 Str. 830.

ROOKE J. The Plaintiff's right to recover in ejectment is founded entirely on the service of the declaration upon the tenant in possession: he must therefore shew possession in the tenant to [576] entitle himself to recover. Though the rule be general, he cannot demand premises of which the tenant is not possessed; for if the landlord could defend for a tenant not served, he might thereby contrive to deprive him of his term.

Rule absolute.

(a) Vide tam. *Goodright v. Rich*, 7 Term Rep. 333, where that case was overruled. There Lord Kenyon alluded to the principle case as having been ruled by him upon the home circuit on the authority of *Jesse v. Bacchus*, but acknowledged his having adopted a contrary opinion upon reflection,

GOODTITLE ON THE SEVERAL DEMISES OF HOLFORD, JERVOISE, AND CAVE, BART.
v. OTWAY. Nov. 25th, 1796.

[Affirmed, 7 T. R. 399.]

A. seised in fee of the manors of Stamford &c. and also of the manors of Swinford and South Kilworth, entered into marriage-articles to secure a jointure to his intended wife upon the above estates, and to make provision for younger children, and agreed to settle the Stamford estate upon his eldest son in strict settlement, subject to part of such jointure and provision; he then devised those estates, in case he should happen to die without issue, and subject to such jointure as he might make, to the lessors of the plaintiff for five hundred years, upon certain trusts in the devise expressed; afterwards, by separate deeds of lease and release, he conveyed, 1st, the Stamford estate to trustees in fee to the use of himself in fee till the marriage, with divers limitations, in pursuance of the articles, and subject to a term of five hundred years, for securing part of his wife's jointure, remainder to himself in fee; 2dly, the Swinford and South Kilworth estate to trustees in fee, to the use of himself in fee till the marriage, to the use and intent that his intended wife should take the other part of her jointure thereout if she survived him, and after his death remainder to trustees for five hundred years, to secure such jointure, remainder to himself in fee; he afterwards married, and died without issue. Held that the will was revoked as to both estates by the deeds of settlement, though they were consistent with the provisions of the will, and though the devisor took back the estate he parted with by the same instruments; and also held that the latter estate was not excepted from this revocation by the circumstance of the conveyance of that estate to trustees, being merely for the purpose of creating a term to secure the wife's jointure (a).

The facts of this case having twice appeared in print; 1st, in the report of the trial at bar, 2 H. Bl. 516, and 2dly, in the report of the case in error, 7 Term Rep. 399, they are here altogether omitted. There were two arguments in this court; one in Trinity Term, 1795, by Williams Serjt. for the lessor of the Plaintiff, and Heywood Serjt. for the Defendant; and another in Easter Term 1796, by Le Blanc Serjt. for the former, and Adair Serjt. for the latter; but as they were much commented upon in the following judgments, (each of which comes from the highest authority,) they are not inserted in this report.

The Court took time to consider of their opinions; and on this day delivered them seriatim, there being a difference upon the bench.

ROOKE J. On this verdict it appears, that Sir T. Cave made his will and devised all the premises contained in the declaration to trustees in fee upon certain trusts and uses, that he afterwards, by two deeds of lease and release, conveyed the same premises to trustees in fee upon certain other trusts and uses, with remainder to the use of himself in fee, and that he died without republishing his will.

The question is, Whether by both or either of these deeds the devise of the premises contained in either of the counts in the declaration is rendered ineffectual; or, according to the common language of our books, is revoked?

[577] To decide this question, it is necessary to consider the general nature and effect of a will of lands. A will of lands is a conveyance, authorised by the stat. 32 H. 8, c. 1. It is not to be considered as a declaration of uses, or as conveying uses which are executed by the stat. 27 H. 8, c. 10. It is a conveyance of the land itself; or, in the words of Lord Trevor Fitzg. 239, it is a provision and direction by the testator how his estate and land shall go when he can keep them no longer. This is plain from the words of 32 H. 8, c. 1, s. 1. "Every person having lands, &c. may give, dispose, will, and devise, as well by last will and testament, in writing or otherwise, by acts lawfully executed in his life, all his said lands, &c. at his free will and pleasure." No interest passes till the death of the testator. When he dies the will conveys to the devisee such interest as the testator has devised to him out of that estate or legal interest of which the testator was seised when he executed the will; but under this restriction, that the testator has continued to be seised or possessed of

(a) Vide *Doe v. Dilnot*, 2 N. R. 404. *Beckett v. Harden*, 4 M. & S. 1, 9. *Fawser v. Jeffery*, 3 B. & A. 462.

it from the time of executing the will to the hour of his death. To understand this operation of a will, we must bear in mind, that in contemplation of law there is a distinction between, first, the land itself; secondly, the legal fee-simple or possessory right of inheritance in the land; and thirdly, the use or equitable right of inheritance. A man may at this day make a conveyance of the fee-simple of his land, without parting with the actual possession; and though the legal fee will pass from him, yet it may be revested in him, under the statute of uses, together with his old use or right of inheritance. But though he is seised of his old uses, still if he has by any conveyance for one moment passed away the fee-simple of his land, the law considers him as having another seisin, and not the same which he had before he made the conveyance.

If, therefore, a testator having executed his will, conveys away his whole fee-simple, though it be to his own use, and though he is seised again of his old use, yet, according to the rules of law, as I understand them, this conveyance renders the will ineffectual; not because the testator intended to revoke it, but because by the rules of law it cannot operate; for he has altered his legal seisin. The rule is laid down by Lord Trevor Fitzg. 240. "One necessary qualification which goes to the power of disposing by will, is the ownership of the land: the law requires that to be complete at the time of making the will. Consider, as to this point, the law is very strict that [578] the testator should have a disposing power at the time of making the will; for it is so far from allowing a subsequent power by acquisition after to make the will good, that it requires a continuance of the same interest the deviser had at the time of making the will, to remain unaltered, even to the time of his death; for that any, even the least alteration of the interest, is an actual revocation of such will." Lord Hardwicke expresses himself to the same effect, and almost in the same words, according to the report of *Sparrow v. Hardecastle*, 3 Atk. 803. Lord Mansfield lays down the rule in these words, 4 Burrow, 1960: "When a man seised of an estate makes his will and devises it, and afterwards conveys it entirely away; though he takes it back by the same instrument, or by a declaration of uses, it is a revocation; because, as it is said in the books, he has parted with his whole estate." In confirmation of this rule, we may observe, that the form of pleading a devise of lands is, that the testator was seised, &c. and being so seised he made his will, and thereby devised, &c. and of such his estate in the said lands died seised. The devise then operates upon that seisin which the testator had at the time of making his will.

This rule of law is very ancient. The books refer us to a case in the 44 Ed. 3, which is reported both in the year book (fol. 33) and the book of assize (lib. 44, pl. 36). In assize the tenant pleads in bar a devise made by the father of the Plaintiff; the lands being devisable by custom. The Plaintiff entitles himself as heir, and says, that the father after the devise made a feoffment to defeat the devise, and took back the estate. The tenant rejoins, that he re-published the will by delivering it to the vicar: and issue was joined on the delivery. It is to be remembered, that at this time a parole revocation or republication was sufficient. This will, therefore, might have been revoked without the ceremony of alienation and taking back: it might also have been re-published without a delivery to the vicar. It seems doubtful from Fitzh. Abr. tit. Devise, pl. 16, whether Thorp and Wilby thought that a feoffment and taking back would revoke; and also in Bro. Abr. tit. Devise, pl. 8, a quære is made as to the alienation and taking back; and it is said, that it ought not to defeat the will made before; for it is no will till death. It appears from the year book and book of assize, that a doubt was entertained as to the propriety of the form of the issue; because the heir does not deny that it is the last will, but denies that the testator delivered it to the vicar. Whatever doubts might be entertained of the authority of [579] this case, if it stood alone, or long series of authorities from very early time, forbids us at this day to doubt the principle, which is supposed to be established by it, viz. that a feoffment or alienation, and taking back, is a revocation of a prior will. Dyer (fo. 143, P. 3 & 4 Ph. & M.) cites the case 44 Ed. 3, and considers it as a settled point that the will is void, without a new agreement; because the alienation was a disagreement to it; and without other express agreement it shall not be taken as his last will, for it was once revoked. That a man must have the lands at the time he devises them has been long settled; it was so agreed in *Butler and Baker's case*, M. 33 & 34 Eliz. 3 Co. 30 b.; and was the common law of the land, as to customary devises, before the statute 32 H. 8. Lord Mansfield assigns this reason for it: That a will is

in the nature of a revocable appointment, or limitation of the land, mortis causa; and is not, like the Roman testament, a constitution of an heir. 3 Burr. 1497.

But the question in the present case is, as to the change of interest, though the testator dies seised of the same uses which he had at the time he made his will. The cases are strong to shew that this is a revocation. In 1 Roll. Abr. 615, Q. pl. 1, is this case: "If a man devises lands to J. S. and after makes a feoffment in fee thereof to a stranger, to the use of himself in fee, though he has his old estate, yet it seems this is a revocation; for his intent was to have it by the new limitation, and by the feoffment he passed the estate, and the statute revested it in him, which is as a new purchase (a)."

Lord Trevor cites this case as good law, Fitzg. 241. Lord Hardwicke considers the point as settled; and he so states it in *Parsons v. Freeman*, 3 Atk. 740, and observes, that it is a prodigious strong case. So when a man devises lands to J. S. in fee and after makes a feoffment thereof to another to the use of himself for life, remainder to his wife for life, remainder to his own right heirs; though here he hath his old reversion, yet it seems it was his intent to have it pass by the livery and to be in by the statute and the limitation, and so as a new purchase, 1 Roll. Abr. 616, Q. pl. 2. This last point is stated by Roll to have been settled in the case of *Montague v. Jeffries*; but according to the statement of that case in Popham 108, this was not the direct point in question before the Court; but, however, it is adopted by Lord Chief Justice Roll as good law. It is also cited by Yelverton, arguendo Cro. Car. 24, [580] and not denied by the Court. *Hussey's case*, 2 Jac. 1. Scae. Moor, 789, is still stronger: it proceeds upon the same principle. H. a bastard having purchased a manor of the Queen, made a will and devised the manor: he then made a feoffment to the use of such persons and for such estates he had, as declared by his will, bearing date, &c. It was adjudged that the feoffment was a countermand of the will, but that the countermand will was sufficient to declare the uses of the feoffment, so no escheat. In some of these cases, the intent of the party has been mentioned. But we must remember to distinguish between an intent to have the land by a new limitation, or as a new purchase, and an intent to revoke the will, 1 Roll. Abr. 615. There is a sort of revocation which does not depend on the intent of the testator; as where a man only takes back the very estate which he had devised by a new conveyance; per Murray Solicitor General, arguendo *Parsons v. Freeman*, 3 Atk. 745 b. If it is clear that the party took the land by a new purchase, the consequence of law is, that the will is annulled without any regard to the question, whether the party intended to revoke it or not? There are other cases of revocation stated in the books prior to the stat. 29 Car. 2, c. 3: thus where a man has intended to revoke his will, but has made use of a mode of conveyance which was not completed: as where A. having devised a reversion to B. granted the same by deed to C., this has been held a revocation, though the lessee never attorns; so where having devised lands to B. he bargains and sells to C., and acknowledges it before a doctor to be inrolled within six months, though it be not inrolled within the time, this has been held to be a revocation; for he hath fully shewn his intent that the devisee should not have it, 1 Roll. Abr. 615.

But the revocation applicable to the present case is, that, where the testator alters his legal interest in the land, without any intent to revoke his will. In such a case, I understand the rule of law to be, that if he conveys for years or for life, it is only a revocation pro tanto; but if he convey the whole fee, it entirely annuls the effect of the will, unless he republishes. This rule seems established by the cases I have already cited, and by the inferences drawn from them by Lord Trevor, Lord Hardwicke, and Lord Mansfield. And to these authorities may be added a series of cases from the time of Lord Chief Justice Roll to this day; all of which appear to have been decided upon this principle. Of these, *Dister v. Dister*, P. 35 Car. 2, 3 Lev. 108, was a case of [581] ejectment, and special verdict found. Tenant in tail made his will and devised his land; and after, by bargain and sale inrolled, conveyed away the land to make a tenant to the præcipe, against whom a common recovery was had, with voucher of tenant in tail to the use of himself in fee. Whether by this recovery the will was made good, so that by virtue thereof the devisee should have the land, or whether the devise was revoked by the recovery, was the question: And by Pemberton Ch. J. and the whole Court, it was adjudged, upon argument, that this was a revocation; for, by the bargain and sale and recovery, the whole estate was changed and altered

(a) But the book adds; Contra M. 38 & 39 Eliz. B. R. per Popham.

after making the will ; yet here is no change of the use ; for if he inherited the intail ex parte maternâ, the estates shall descend to his heirs ex parte maternâ ; see the case of *Martin ex dem. Tregonwell v. Strachan and others*, reported correctly 5 Term Rep. 107, in the note. The cases of *Lord Lincoln* (Eq. Cas. Abr. 411. Show. Parl. Cas. 154, S. C. 202. Freem. 2, S. C.), *Parsons v. Freeman* (b), and *Sparrow v. Hardcastle* (3 Atk. 798. Ambl. 224, S. C. 7 T. R. 416, note S. C.), are well known, and need not to be stated at large. These in my judgment confirm the rule of law. And in *Sparrow v. Hardcastle*, 3 Atk. 806, Lord Hardwicke observes, that there having been an uniform series of opinions on this point, it ought not to be varied. In *Brydges v. Duchess of Chandos* (2 Ves. jun. 433), the learning as to this rule is very ably and elaborately discussed, and the point is confirmed by Lord Loughborough : his Lordship asserts as his own opinion, and states from a more correct note of *Parsons v. Freeman* than is given in Atkyns, that it was the opinion of Lord Hardwicke, that where the whole fee is conveyed, it is a revocation of the whole devise ; where part only is conveyed, it is a revocation pro tanto.

To this rule there are some exceptions ; but these exceptions admit and prove the general rule. The first exception is as to partition. This does not respect joint-tenants ; for, if joint-tenant devises and makes partition afterwards, it does not help the devise, which was void in its creation. *Swift ex dem. Neal v. Roberts*, 3 Burrow, 1488. But parceners and tenants in common being seised only of their respective portions in an undivided whole, would by writ of partition retain their seisin in the portion allotted them. Now, if instead of dividing by writ of partition, which they may be compelled to do, they proceed to divide by [582] deed and fine ; the law has so far indulged them, as to declare that such partition shall not revoke a prior devise, *Luther v. Kulby* (1 Vin. Ab. tit. Devise, (R. 6) pl. 30), certified by Raymond Ch. J., Page Probyn, and Lee, Js., on a reference from Lord Chancellor King, 9th April, 1730, 3 P. Wms. 169, note [B]. But the courts of law are rigid even in this indulgence ; for in the case of *Tickner v. Tickner* (cit. 3 Atk. 742), where parceners in gavelkind made partition by deed and levied a fine, and one of them declared the use to himself, and such person as he should appoint by deed or writing ; and in default of such appointment, to himself in fee ; Lord Ch. J. Lee held it a revocation ; and this case is adopted by Lord Hardwicke, *Parsons v. Freeman*, 3 Atk. 750. There are other exceptions ; as the case of a mortgage, and of a conveyance to pay debts. These, however, are revocations at law, though not in equity.

Notwithstanding these exceptions, I take it as a general rule of law, that where a testator conveys his whole interest by feoffment, lease and release, bargain and sale, or by fine and recovery, (it makes no difference which, see 3 Atk. 749) it renders his will ineffectual at law. It is often very contrary to the intent of a testator that his will should be annulled by such a conveyance ; and it often bears hard upon individuals that the rule of law should be strictly adhered to. But while it is a rule, judges are bound to adhere to it ; and if it produces more mischief than good, the legislature in its wisdom may alter it. In vindication of the rule, however, we may observe ; first, it is in favour of the heir-at-law, who is always an object of judicial favour ; and it results necessarily from the technical operation of a legal conveyance. A will is a conveyance to the prejudice of the heir-at-law. If the law took its ordinary course, he would inherit the seisin of his ancestor. If the ancestor being seised, makes his will, and afterwards changes his seisin, it follows by technical consequence that the old seisin is at an end, and that the new seisin descends to the heir, without being affected by the prior will. Secondly, it is ancient, and as much a part of our legal system, as to landed property, as the rules which exclude the father from the inheritance of his son, and the half-blood from inheriting at all. Thirdly, it cannot operate upon one who is inops consilii, or who has no opportunity of being advised ; for if a man is sufficiently strong in mind and body, and well enough assisted to execute a solemn deed which passes away his legal [583] fee-simple, he surely may, if he will pay attention to it, republish his will. Fourthly, it is a plain, simple, and perfectly intelligible rule, and amounts to no more than this, that after a man has made his will, if he execute a conveyance of the legal fee-simple of the lands he has devised, he must republish his will, or it cannot take effect. If, with so plain a rule to direct

(b) 3 Atk. 741. Ambl. 115, S. C. 1 Wils. 308, S. C. 2 Ves. jun. 4, cited per L. Loughborough.

them, the parties omit to republish, the disappointment of the devisees is surely not to be imputed so much to the rigour of the rule, as to the neglect of the parties, who either take no advice, or apply to such persons only as are unable to advise them properly.

Having thus stated the law as to this head, let us now see what is the case before the Court. I will first consider the two last counts which apply to the Swinford and South-Kilworth estates. The testator being seised in fee, conveys by lease and release to trustees in fee, to the use of himself till marriage; then to suffer Lady Lucy to receive 1400*l.* a-year; then he creates a term of five hundred years for better securing her jointure, then to the use of himself in fee. I lay the articles out of the case, for they are to be performed after marriage, and this is a voluntary conveyance before marriage; besides, if this were merely a performance of articles, it might be a case rather for a Court of Equity than for a Court of Law. I consider this as a conveyance to trustees in fee, for the special purpose of securing a jointure to his wife; had he conveyed to trustees during the life of the wife only, I should have thought it, according to the cases already decided, to have been a revocation *pro tanto* only; but having conveyed to the trustees in fee, I think I am bound, by the uniform series of authorities, to hold that the will cannot operate, or (in the language of our law), that it is revoked as to these estates. If I am right in this, the rule may be applied with equal, if not with greater force, against the claim of the devisees as to the Stanford estate.

I am therefore of opinion that judgment should be given for the heir-at-law (the Defendant) on all the counts.

HEATH J. (after stating the case). We are all agreed, that the settlement of the Stanford estate which passed by lease and release, dated the 25th and 26th of March 1791, operated as a revocation of the devise of the same. We are divided in opinion concerning the operation and effect of the settlement of the Swinford and South-Kilworth estates, whether or no it had the same effect on the devise of those estates? The rule of law which is to govern us must be extracted from the series of authorities to be found in the books on [584] this point, and for that purpose it would be material to take an historical review of the principal cases, if it had not been done by my brother Rooke; I shall only allude to them. Before the statute of wills, where lands were devisable by custom, if a man seised of lands in fee, devised the same, and then made a feoffment in fee, and afterwards retook a fee in the same lands, it was holden to be a revocation, Brook, tit. Devise, pl. 8. So if a man devise the use of lands whereof he had made feoffment, and took back the fee, it amounted to a revocation.

After the statute of wills when a testator, after making his will, parted with the whole fee, though part of the old use was expressly reserved to himself, or resulted by operation of law, it was still a revocation, because all re-vesting by the statute of uses operates as a new feoffment, 1 Roll. Abr. 615, at the bottom, and the party elected to take by a new limitation; so that he was in of a new estate. The revocation was effected by law, and sometimes against the intent of the testator, 1 Roll. Abr. 614, 615. In order to shew that any change of the testator's estate will operate as a revocation of his will, as well after the statute of uses as before, it will be sufficient to allude to the several cases of *Montague and Jefferies, Earl of Lincoln's case, Parsons v. Freeman, Sparrow and Hardcastle, Darley and Darley* (3 Wils. 6), and *Brydges v. Duchess of Chandos*; some of these cases were decided in Courts of Law, others of them in Courts of Equity. It is on the authority of these cases that we are of opinion, that the settlement of the Stanford estate is *pro tanto* a revocation of the devise of the same. It remains to be discussed, whether the settlement of the Stanford estate essentially differs from that of the Swinford and South-Kilworth estates, so as to receive a different construction? It is material to observe, that in both settlements the whole legal fee is vested in trustees to the use of the settlor until the marriage. The subsequent limitations are mere springing uses to arise out of the legal estate of the trustees from and after the marriage. In this mode of considering the subject, this is precisely the same case as those of *Montague and Jefferies*, and of *The Earl of Lincoln*. The circumstance of the marriage having taken effect is totally immaterial. The revocation was complete on the execution of the deeds of settlement in the cases last cited, as well as in the present case. It is scarce material to observe, that in both of them there are several limitations made in pursuance of the articles, with an express remainder in fee to the settlor.

[585] There are two cases which remain to be discussed, and which I find difficult to reconcile with each other, namely, *Luther v. Kidby*, and *Tickner v. Tickner*; both cases of partition.

In the case of *Luther v. Kidby*, it was held, that a partition by fine and deed, leading the uses of the fine, did not operate as a revocation of an antecedent devise of the same lands, though the whole fee passed. We are left to conjecture the ground of decision. It might influence the opinion of the judges, that a partition is compulsory and not voluntary. To refuse to make partition is stated in the writ as an injustice. It had been held that a partition by a writ did not operate as a revocation of an antecedent will, because the land is not in demand, but the writ is merely brought to affirm the possession, as it is expressed in Dyer 79 b. or to ascertain the possession as it is expressed by Lord Hale in his commentary on that passage, in his note on the writ de Partitione faciendâ, in Fitzherbert's *Natura Brevium* (page 61), and the legal estate of the parties is not revoked by the judgment. It might have been the opinion of the judges that a partition by deed ought not to have a greater effect than a partition by writ, and that no act of the testator that was not merely voluntary, ought to operate as an implied revocation of his will. However that may be, I find it difficult to reconcile it with the case of *Tickner v. Tickner*, which only differs from it in reserving a power of appointment. Though the execution of the power would operate as a revocation of a will, yet I doubt very much whether the mere revocation could have that effect. A power unexecuted seems to be the same as no power at all. It is material to consider, whether this reservation makes any real difference. In the case of *Montague and Jefferies*, it was ruled, that covenant to make a feoffment was no revocation of a writ though the feoffment itself was so. The case of the covenant is much stronger than that of the power; for the covenant declared the intention of the testator to do an act inconsistent with the antecedent devise: but the power was simply a reservation by the grantor of part of his antient dominion over his property; the execution of it is merely optional, and it has no effect until it is executed. We are relieved from considering the effect of such deeds which pass the fee-simple, and yet are made for partial and particular purposes, because it is a consideration which belongs to a Court of Equity, and of which we can take no cognisance. Though in many instances the [586] Courts of law take notice of the use, yet they never do it in deciding on the power of devising or revoking a devise. Thus, for instance, if a testator seised in fee of lands descended to him ex parte maternâ, after devising the same, make a feoffment thereof to his own use, it operates as a revocation of his will according to the authorities before cited, nevertheless at the death of the testator the lands descend to his heir ex parte maternâ, Co. Lit. 13 a. The reason is this, that before the statute of uses the heir ex parte maternâ of the feoffor in the case put, was intitled to the subpœna against the feoffee; afterwards when the statute of uses was enacted, which executed the possession to the use, the legal estate had the same descendible quality as the use, so that the judges must of necessity take notice of the use. The statute of wills attaches on the legal estate without reference to the use, and when the legal estate is altered, the devise is revoked. For these reasons, I am of opinion, that there exists no essential difference between the limitations in the settlements of these two estates, and I think myself bound by a series of decisions, with the single exception of the case of *Luther v. Kidby*, if that will not admit of the explanation which I have attempted to give it, to declare, that the testator, by changing the legal estate of the lands in question, though the old use had remained untouched, has thereby revoked his will.

BULLER J. The principle ground of argument relied on by the Counsel for the Plaintiff was, that the articles, will, and deed, are all to be taken as one transaction, and therefore, upon the authority of *Selwin v. Selwin*, 2 Burr. 1131, the deed was not a revocation of the will.

But when the present case, and the case of *Selwin v. Selwin*, are considered, I think they will appear to be as different as any two cases which can be cited.

In the case of *Selwin v. Selwin*, the deed to make the tenant to the præcipe was the most essential part of the recovery, and therefore the recovery when suffered related back to that deed, which was executed long before the date of the will. Besides we are told by Sir James Barrow (who certainly had the highest assistance in stating what he calls the probable grounds of the judgment), that one reason was, that the testator took a use under the deed of bargain and sale, which use was devisable, and

therefore the point of that case was no more than that a will, made by a person having a legal estate, was not revoked by a confirmation of that estate made [587] by a conveyance partly executed before the will, and partly executed and completed after the will.

In this case the articles formed no part of the deed. The parties, if they pleased, might have made very different provisions in the deed from those contained in the articles, and if done before marriage, neither law or equity could have altered the deed. Though, in the present case, the deed was made in pursuance of the articles, yet it could not relate back to the date of the articles, or give the legal estate from that time; which was the case in *Schwin v. Schwin*; for when the recovery was completed, the testator was considered as having the legal estate from the date of the bargain and sale.

The will in the present case has neither an express or necessary reference to the articles or to the settlement. It does not profess to carry the articles into execution, but is made with a more general view to the situation and circumstances of the testator and his relations. By the articles Sir Thomas Cave agreed only to settle the estate on his eldest son, and his heirs male in strict settlement: but by the settlement the estate is limited to the first and other sons of that marriage only; which, I presume, was the subsequent agreement and intention of the parties. The will is made *diverso intuitu*, and is not to take effect, if Sir T. Cave had any issue either male or female by Lady Lucy or any other wife. Again, the will is subject to any jointure which he might make at any period of his life, and is not confined to that jointure which he had agreed to settle on Lady Lucy.

If I were at liberty to form a conjecture from what appeared at the trial and from the ill state of health in which Sir Thomas Cave was described to be, I should conclude that his intention was, that his will should only take effect if he died before he married. But the words of the will and the special verdict do not admit of that construction, and therefore I lay that out of the question.

I also lay wholly out of the question what might have been the effect, if the articles had been recited in the will, or the will had been in any other form from what we find it on this record; for, it is upon that we are to pronounce. Whether a mere recital of an agreement, or what words would suffice to make a contingent devise to confirm that agreement, or to make other devises depending on that agreement, are points which do not arise here, and if they did, a modern authority, which I shall mention hereafter, would decide them.

[588] We are now to pronounce our opinions on different instruments conveying a legal estate. The articles did not convey any legal interest, and they are not noticed in the will; and therefore I think now, as I thought at the trial, that they ought not to have formed a part of the verdict, and we ought not to take any notice of them. If they are incorrect, we cannot correct them. If there be any mistake in them or in the deed, we cannot set it right, but are bound to pronounce on the effect of the deed, as it stands on this record.

This brings the case simply to the question, whether the deed make such an alteration in the estate, which Sir T. Cave had at the time of making his will, as to be a revocation of that will?

All the estates were conveyed to the use of trustees in fee, and therefore I can make no difference between the different parts of the property. Considering the case in this light, the point of revocation is so fully established by ancient and modern authorities, that to doubt about it at this time of day would be shaking rules of property.

The cases on this head are so numerous, that I shall only mention some of them, and those I will state very shortly. In 1 Roll. Abr. 616 is this case: If a man devise lands to T. S. in fee, and afterwards makes a feoffment of it to another to the use of himself for life, remainder to his wife for life, remainder to his own right heirs in fee, though he hath his old reversion, yet it seems that his intent was to have it pass by the livery, to be in by the statute and limitation, and so as a new purchase; and therefore it seems, that this shall be a revocation of the fee, as well as for the life of the wife. *Godbold v. Freestone*, 3 Lev. 406, was a feoffment to the use of the feoffor for life, to the use of his wife for life, to the heirs of his body on his wife begotten, remainder to his own right heirs; and it was held, that the old use and estate should go to the heirs *ex parte maternâ*; for the old use was never

drawn out of the feoffor. So in *Abbot v. Burton*, 2 Salk. 590, where the party seised in fee levied a fine, and suffered a recovery with limitations in fee to his own right heirs; it was held, that the heirs ex parte maternâ took, and that there was no difference between an express limitation and a use resulting by law.

There was no question in either of those cases about a revocation of the will; and the authority of Roll's Abridgment is left untouched. Under that authority, there is no doubt but a previous will in either of the two last cases would have been revoked by the feoffment, or fine and recovery; and so the law has been [589] considered ever since. The case in Roll's Abridgment goes beyond *Abbot v. Burton*, because, in the latter case the use was out of the party and vested in trustees, but in the former case the use never was conveyed to any other person, and it was holden to be a revocation.

In *Lord Lincoln's case* the limitation in the deed was to the use of himself and his heirs till the marriage, which marriage never took effect, nor was ever proposed, and yet it was holden that a prior will was revoked by that deed. In *Doe v. Pott*, Doug. 722, Lord Mansfield said, the absurdity of *Lord Lincoln's case* was shocking, but that it was law. Perhaps the misfortune in that case was, that the deed was not attacked on the ground of insanity. Lord Trevor in Fitzg. 241, puts the case thus: "If tenant in fee devise, and afterwards make a feoffment to the use of himself and his heirs; though this to some purpose is no alteration, (for he is absolute owner as before,) yet it is a revocation;" which plainly shews, that he thought the case turned on the first limitation only, without regard to the limitations on the marriage, which never took effect. It has been quoted in the same manner by other judges. *Parsons v. Freeman*, Ambl. 116. *Sparrow v. Hardcastle*, Ambl. 224.

In 3 P. Wms. 165, "Where a man having lands, devises them, and afterwards makes a feoffment of them, though to the use of himself and his heirs, and though this use be the old use and the old estate, yet according to the several cases in Roll's Abridgment, 614, tit. Devises revoked, this is a revocation; and *Dister v. Dister*, 3 Lev. 108, was cited as in the very point; of which opinion was also the Lord Chancellor." But in the principal case the deviser was tenant in tail male, remainder to himself in fee. To the same effect is *Darley v. Darley*, 3 Wils. 13.

In the case of *The Duchess of Chandos and Lady Anna Eliza Brydges*, the facts were, that the Duke of Chandos on the 20th of June 1777, by articles previous to his marriage, covenanted to convey lands in such manner, that he should be seised in fee, and his wife entitled to dower if she survived him; and that he would convey all those lands to the use of himself for life, to trustees to preserve contingent remainders, remainder to the first and other sons of the marriage in tail male, remainder to his own right heirs. The marriage took effect; and on the 29th January 1780 the Duke by his will confirmed the articles, and devised all his real estate to his wife for life, with remainder to such person as she should by will appoint; and in default of appointment, with re-[590]-mainders over. Afterwards, by lease and release, dated 29th and 30th October 1780, reciting the marriage and articles, the Duke conveyed all his real estates to trustees and their heirs, to the use of himself for life, remainder to trustees to preserve contingent remainders, remainder to other trustees for a term to raise 2000l. per annum for the Duchess for her jointure, and in bar of dower, remainder to the first and other sons of the marriage in tail male, remainder to the Duke and his heirs. It was determined both in the Court of Chancery and in the House of Lords, (where all the Law Lords attended,) that the will was revoked by the settlement of the 29th and 30th of October. That was a decision in equity; and if the will were revoked in equity a fortiori, it was so in law.

As to the case of partition, that is sui generis, and therefore if no satisfactory distinction could be made between that case and others, yet I should not hold myself at liberty upon that ground to overturn all the decisions which are to be found, and which are uniform upon this subject. But the case of partitions is materially distinguishable, and the determinations are founded wholly on that distinction. One tenant in common has a right to his part of the estate only, though he occupies the whole in common with others. He can sell, devise, or give that part only; and by law any one of the tenants in common has a right to have his part set out by metes and bounds if he pleases, instead of occupying in common. When his proportion is so set out, he has the same estate and the same interest which he had before, and the partition only affects the mode of occupying that estate. The ground of the decision

in *Webb v. Temple*, Freem. 524, was, that there was no material alteration in the estate; and notwithstanding that, one Judge held that a partition and a fine to corroborate it was a revocation; but the partition there was not by the fine, but previous to it. If a partition by writ against the will of the testator was no revocation, it was but one step more to hold, that the same thing done by deed or fine should have a different effect. Whether that step were right or not may be a different question. In the case of *Luther v. Kidby* in Vin. Abr. and 3 P. Wms. the deed, as stated, was merely a covenant to levy a fine; no interest passed by the deed to the trustees; and if the partition were made wholly by the fine, the authority of that case may be questionable, for reasons which I will state hereafter. But putting that case in its strongest light, and supposing it to be law, it goes no farther than to say that there is no difference [591] between a writ of covenant to make partition, and a fine levied thereon, and a writ of partition. That transaction was solely for the purpose of making partition, and not a word is stated to shew that the Court meant to lay down any rule which could be applicable to any other case. On the contrary, it is there stated as law, "that if A. devises land, and levies a fine, and the caption and deed of uses are before the will, but the writ of covenant is returnable after the will, that is a revocation of the will. Perhaps the case there put would not be so decided since the case of *Selwin v. Selwin*, but taking the whole of the case of *Luther v. Kidby* together, it seems as if the Court thought there was a difference between a fine for a partition and a fine in any other case. If the fine were the operative instrument in *Luther v. Kidby*, the authority of that case seems to be considerably shaken by *Tickner v. Tickner*, and by what Lord Hardwicke said in *Parsons v. Freeman*, and *Sparrow v. Harlecastle*. In *Tickner v. Tickner*, the fee and the old use vested in the testator, and yet because the partition was made by means of a conveyance to a trustee, it was holden to be a revocation. I say the fee vested in the testator, because that is established in different cases. In *Doe ex dem. Willis v. Martin*, 4 Term Rep. 39, by a marriage settlement lands were conveyed to trustees to the use of the wife for life, remainder to the use of the husband for life, remainder to the use of all and every the children of the marriage or such of them, and for such estates as the husband and wife should appoint, and for want of such appointment, to the use of all and every the child and children equally, if more than one as tenants in common, and if but one, then to such only child his or her heirs and assigns remainder over; the remainder to the children was held to be vested remainder in fee, liable to be divested by an appointment of the parents. Lord Kenyon there says, "the estate was there limited to Bethia Willis and to her heirs until the marriage, it was therefore intended that the legal estate should not be taken out of her unless the marriage took effect." If the legal estate was not taken out of her till the marriage, neither was it taken out of Lord Lincoln by his deed, and yet that deed was holden to be a revocation. But the doctrine of the fee being vested, was settled before by Lord Chief Justice Holt, in *Idle v. Cook*, 2 Ld. Raym. 1150, and by Lord Hardwicke in *Cunningham v. Moody*, 1 Ves. 174. Now, if we apply these authorities to the case of *Tickner v. Tickner*, it is clear that the limitation in fee vested in the testator, notwithstanding the previous powers of appointment, and if it did, the deed and fine, and not the limitation of any new use, [592] were the sole grounds of revocation in that case. Thus it seems to be a direct contradiction of the case of *Luther v. Kidby*; and that it was considered at the time as an impeachment of the doctrine contained in *Luther v. Kidby*, appears clear from Ambl. 117, because Sir Tho. Raym. 240, is there referred to as contra; and the same thing is said in Sir Tho. Raym. as in *Luther v. Kidby*, though not determined. In *Parsons v. Freeman*, Lord Hardwicke approved of *Tickner's case*, and said it was the same as the case before him; and if there be no distinction between partition and other cases, where the partition is made by deed and fine, *Luther v. Kidby*, supposing the estate there to have passed by the fine, must fall. What were the reasons of the decision in that case we are not informed, and whether at this day it be or be not law, I think it cannot govern our present decision. If it be law, it is because partition is a single and excepted case, and it is no matter in what way it is effected: but it must be remembered, that in *Sparrow v. Harlecastle*, Lord Hardwicke expressly denies any distinction on account of a particular purpose.

In the case of a partition, where no estate moves out of the party, I agree there is no revocation, but if the partition be made by fine or deed, and the estate be conveyed to a trustee, though for an instant only, and though the old use remains, I think that

the latter cases establish that to be a revocation. *Tickner v. Tickner* was decided by Lord Ch. J. Lee, who was one of the Judges who concurred in *Luther v. Kidby*, and seems to be a revision and correction of his former opinion, made probably after conferences with Lord Hardwicke, who on all occasions approved of the last judgment. That decision supports all the other authorities in favour of the revocation, and plainly shews, that the cases on a pure and simple partition proceed on a different ground, and are no impeachment of those decisions which hold that any alteration or conveyance of the estate by deed subsequent to the will, is a revocation of that will. The reason of which is, that when a man makes a conveyance, he not only actually transfers the estate he has, but he means that the estate should pass under that deed, and not under any other former deed or will.

Upon the whole, I am of opinion, that there ought to be Judgment for the Defendant.

EYRE Ch. J. (after stating the case). Though the doctrine of revocation has been carried to a very inconvenient extent, in consequence of which many wills have been cruelly disappointed, [593] and many families greatly distressed; I agree, that Judges are not to be wiser than the law, and that it is their duty to declare and to execute the law as it is, and to strain nothing in order to mould it to their conceptions of what it ought to be. I therefore declare in the outset, that I distinctly acknowledge every principle which governs the law of revocation, and that I submit to the authority of all the numerous cases that are to be found in the books upon this subject in the points to which the cases go. But where the cases are urged as illustrations of those principles, and as furnishing rules for the application of those principles to the particular case now under consideration, I conceive, that without incurring the imputation of removing land-marks, or breaking in upon rules of property, I may, and that I ought to inquire, whether the cases are sufficiently uniform, or approaching in point of circumstance sufficiently near, to controul my judgment in a case which appears to me to be new in circumstance, and to depend upon a principle in the law of revocation which has never undergone much legal discussion.

To reduce the argument at once to the point in which I differ from all my Brothers, I think the case of *The Earl of Lincoln*, which having been very solemnly settled, ought not now to be open to any further discussion, and the late case on the will of the late Duke of Chandos, do approach sufficiently near in point of circumstance to this case, to be an authority for our deciding that the deeds of lease and release first stated in this special verdict, do amount to a revocation pro tanto of the will. My doubt is, upon the effect of the second conveyance by deeds of lease and release stated in the special verdict. And I conceive, that let the operation of this last-mentioned conveyance by lease and release be what it may, Sir Thomas Cave died seised of that estate which he had at the time when he made his will, and that there is no ground to raise a presumption in law from the conveyance, that Sir Thomas Cave intended to revoke his will, and therefore that his will may operate upon it. And that I may be clearly understood, I state, that when I use the words "the same estate," I do not mean to describe the identity of the land, but the quality of the estate and interest in that land. I mean to argue, that Sir Thomas Cave died seised of the old use to which the new estate, right, title, and possession, in the words of the stat. of H. 8, that was for a moment in the trustees under the conveyance by lease and release, had united itself not as a new estate, title, right and possession, but [594] according to the quality, manner, form, and condition of the old use which was in Sir Thomas Cave. Here I take my ground. If I can be driven from it, I agree, that the will is revoked as to the whole. If I maintain it, it appears to me to follow, that upon the principles of the law of revocation, the will is not revoked, and that the authorities in our books will be better reconciled by a judgment, declaring, that the will is not revoked, than by a contrary declaration.

Wills are said to be revoked first, in the proper sense of the word "revoked," when the testator has signified his intention that the will which he has made shall not be his last will and testament, or when he has done certain acts, or certain alterations have taken place in his situation, so necessarily inferring an intention to revoke that the law will presume such an intention, and this is what we call an implied revocation.

Some of the instances of this last sort of revocation are dispositions of the testator's property subsequent to the date of his will, inconsistent with the will, such as the giving a greater or a lesser interest by a subsequent deed to the same person to whom

he had devised some interest by his will. In such a case the intended devisee cannot have both interests : that which is conveyed by the deed must take effect, and therefore the law makes a necessary implication, that the first disposition, which is by the will, is revoked. So if the testator make a feoffment upon which no livery is afterwards had, or execute a bargain and sale which is never enrolled ; though these work no alteration in the estate of the testator, the law will imply from them a revocation of the will, because the going so far towards an alteration of his estate, manifests in the judgment of the law, his intention that the disposition he had made by his will should not stand. Marriage, and the birth of a child, is an instance of an alteration of circumstances, working a revocation upon the same principle, by raising a presumption of law, that the testator intended to revoke his will. These are modes of revocation in the proper sense of the word. But, secondly, wills are also said to be revoked in an improper sense of the word, where there is no actual or presumed intent to revoke proved, or to be collected from the acts or circumstances of the testator, as, where after making his will he has parted with the whole estate which he had at the time of making his will, or where the same lands have come back again to him under modifications of the interest in them, and by force of some legal conveyance. In this last case it will be seen, that the will cannot take effect for technical reasons, but in the former [595] case it is obvious that the will is rather annulled, as Wentworth (Offi. of Exc. c. 1, s. 6), terms it, than revoked. The language of our books, however, is, that the will is revoked. Lord Hardwicke in 2 Atk. 272, calls the extinguishing or destroying the thing devised a virtual revocation. How improperly it is called a revocation will appear from this consideration : If a testator parts with his estate, after making his will, the subject is gone, and therefore the will cannot operate : not that the will is revoked ; properly speaking it is not revoked, no, not even virtually. A revoked will may be re-established by republication, but republication will not bring back the estate upon which it is to operate, and therefore it was that I said, that this is a revocation in an improper sense of the word.

By a construction on the statute of wills, a will can only operate on those estates which the testator had at the time of making the will, and therefore in pleading, it must be stated that the party was seised, that he made his will, and thereby devised the lands, and that he afterwards died so seised. If therefore the estate has been parted with after the making of the will, but comes back again to the testator with modifications of the whole interest in it, or if he should afterwards take the whole estate back again by purchase, the will could not operate upon the new estate independent of the law of revocation. The new modified estate, strictly speaking, is not the same estate ; and the very same quantity of estate newly acquired, suppose it were a fee-simple, is not that fee-simple which the testator had at the time of making his will, but another derived by a different title, and perhaps descendible in a different course of descent. For instance, to put a case clear of all subtlety : suppose a man seised in fee-simple by descent *ex parte maternâ*, were to sell his estate, and should afterwards think fit to buy it again (I avoid the equivocation of the word purchase), he would take his estate back again as a new estate, and he would take it as a purchaser, and it would descend to his heirs *ex parte paternâ* ; this is a legal quality inherent in a new purchased estate, and distinguishes the purchased estate from the old estate ; and if we would try the estate by that test, we should be relieved from the senseless jargon of the quasi the old estate, which, in some of the cases of revocation, is a term used to denote something which is supposed to be neither the old estate nor a new estate, but something between both, something perfectly anomalous and unintel-[596]-ligible, with no legal qualities attached to it, and wholly inoperative, except for the mischievous purposes of disappointing a will.

I have stated the principles of the law of revocation as I understand them. I am also to acknowledge that there is a rule in the same law, which, whether fairly deducible from those principles, or not, has been adopted and acted upon, and is therefore become a rule of property, and for that reason is sacred. The rule is this : if the testator after making his will, make a feoffment to the use of himself in fee, or suffer a recovery, or otherwise convey his estate to the use of himself in fee, his will is revoked. When the case in *ipsissimis terminis* occurs, we have nothing to do but to state and apply the rule ; but it is a very different consideration, when the rule is attempted to be applied to another case not *ipsissimis terminis*. A principle must then be extracted from the rule, or from the cases which have been decided upon

the rule, in order to apply the rule and the authority of these cases to the case in judgment.

The Counsel have argued in this case, that the rule which has governed the case of the feoffment, and other conveyance to the use of the feoffor &c. in fee, is bottomed in another rule, viz. that if after the will the testator parts with his estate for a moment, or once divests himself of his estate, he has revoked his will; and they say truly, that this rule will reach to cases beyond the precise case of feoffment, or other conveyance to the use of the feoffor, &c. in fee. But they can find that rule exemplified nowhere but in the very cases which they supposed to flow from it. This is therefore arguing in a circle. When Lord Hardwicke, in the case of *Parsons v. Freeman*, 3 Atk. looked for the principle of this prodigious strong case, as he called it, of the feoffment, he found it to be this: "It must," says he, "arise from presumed intention to revoke the will; it must be presumed, that the testator would not have made a new conveyance without an intention to revoke his will." If this be the reason of the rule, I understand it, and I perceive very distinctly under what head of revocation I am to class these cases; they are not then anomalous or *positivi juris*, they are only applications of a clear principle in the law of revocation, that where the testator has demonstrated an intent to revoke his will he has revoked it. If any man feels disposed to reject Lord Hardwicke's reason for the rule, let him reject it, but then he must be content to understand these cases of the feoffment &c. as governed by a rule *positivi juris*, which is confined to those cases. [597] These few observations upon the doctrine of revocation will serve to shew the bearings of my proposition, that Sir Thomas Cave died seised of his old estate, of that estate which he had in him at the time when he made his will, and that he has made no demonstration of an intent to revoke his will; from whence I conclude, that he has not revoked it. As to this last part of the proposition, demonstration of intent to revoke, I consider the case as destitute even of a pretence of revocation upon the ground of alteration of intention, express or implied; indeed it was expressly laid out of the case in the last argument, and I think very judiciously, by my Brother Adair.

In considering the present case, for a time I felt a difficulty in my own mind as to the old use during the time when Sir Thomas Cave was seised of a base fee only, a fee determinable on the event of his marriage. Mr. Hargrave in one of his notes in the new edition of Coke upon Littleton (*a*), has entered into a laborious discussion of this difficulty. In strict law the reverter seemed to be a possibility which vested in the relesees of these deeds: and on the determination of that base fee, when the seisin did revert to the relesee for the purpose of giving effect to the rent-charge, and the term for securing it; I doubted whether the use of the fee-simple subject to that rent charge, was to be considered as the old use, or as a new springing use; but as that use did not arise to a stranger, but was to be considered as an interest which had never been disposed of, and all this perplexity arose merely from the form of the conveyance, and after considering the case of *Abbot v. Burton*, I ultimately satisfied myself that it was the old use, and in construction of law never out of Sir Thomas Cave, from whom the conveyance moved, and that that is the true idea which the word "resulting" is to be understood to express. I proceed to shew that it was really the old use and the old estate of which Sir Thomas Cave died seised. This, I think, cannot be denied, that the intent of the parties to the conveyance by lease and release, last-mentioned in the special verdict, and the whole substantial effect of it, be its formal operation what it may, was simply to secure a rent charge of 1400l. a year, by way of jointure for Sir Thomas Cave's intended wife; and that Sir Thomas Cave's estate, subject to that rent-charge, was not intended to be altered or in any manner affected; and that as far as the form of the conveyance purports to alter the nature and quality of the estate, it [598] goes beyond the object of the conveyance. Now courts of justice not only do not incline to allow the form of conveyance to operate beyond the intent of the parties, but they will be ready to adopt all manner of expedients to prevent it; and to confine the operation of every conveyance to the special purpose for which it was made. The case of *Abbot v. Burton*, which I shall have occasion to state with some particularity hereafter, may be referred to as an authority for the general doctrine; and in the case of *Parsons v. Freeman*, 3 Atk., Lord Hardwicke applies it to the particular case of revocation, laying it down as a

(a) Vid. p. 271 b. note 1, Head iii. § 1, though indeed that note is by Mr. Butler.

general rule in the law of revocation, that a conveyance for special purposes, whether it be lease and release, feoffment, fine, or recovery, shall not operate beyond that purpose, and against the intent of the party to revoke his will. In this case it must be admitted that, by the form of the conveyance, Sir Thomas Cave took a base fee under it which determined upon the marriage, when the seisin reverted to the relesee for the purpose of executing the only use of the conveyance, the jointure to his wife, and for that purpose only: for though the conveyance also affected to dispose of the rest of the use, I take the law to be perfectly clear that it was in Sir Thomas Cave, independent of that disposition. The purpose to be effected by all this form is then simply the securing a jointure to the lady whom Sir Thomas Cave should marry; and if this purpose had been effected by another mode of conveyance, the law is clear that the will had not been revoked. But Lord Hardwicke has said, that be the form of conveyance what it may, this is instrumental only if the conveyance be for a special purpose which is not revoked. I do not mean to adhere to the letter of my Lord Hardwicke's expression "for the special purpose," it must be a purpose which leaves the substance of the fee untouched to go according to the will, a purpose therefore not inconsistent with the will. If the special purpose require that the whole fee should even eventually be disposed of by the conveyance, then I agree the will is revoked.

Upon this single ground that this is a conveyance for a special purpose which does not exhaust the fee, but in truth leaves the fee undisposed of, and in construction of law not limited by the instrument, I take it to be clear, that this is not a case of revocation; but still it will be necessary for the lessor of the Plaintiff to make out, what he must have averred in pleading, that the testator died seised of the estate which he devised. Now, put the case that these deeds of lease and release had not even purported to limit the remainder of this estate at all; what would have become of the [599] interest in this estate, subject to the jointure, and the term created for securing it? Must not the use have resulted to Sir Thomas Cave as that which never had been disposed of by him from whom the estate moved? At the common law the use was always intended to be in the feoffee or conusee; and it is stated by Lord Ch. J. Holt, in *Ld. Anglesea v. Ld. Altham*, 2 Salk. 676, that for that reason, in pleading, it was never averred: whereas, if the use was to the feoffor or conusor, it must be averred. I admit, that there is in this case an express limitation of a remainder in fee to Sir Thomas Cave. What difference will this make? There is another proposition in law, that the use which is declared, and which would have resulted if it had not been declared, is one and the same. And this is not a dry proposition, productive of no legal consequence, the course of descent is regulated by it. For instance, the use which results would be deemed the ancient use, and if the estate were in the party by descent ex parte maternâ the estate which resulted would continue to descend in that course. And so it is where the use is expressly limited to the party from whom the estate moved, it will be in him as his old estate, and continue descendible to his heirs ex parte maternâ. This is the doctrine of Coke upon Litt. fo. 13; it is recognized and acted upon in the case of *Abbot v. Burton*, which was in this court upon a special verdict, and is reported in 2 Salk. 590; and that case was recognized and a similar determination made in the case of *Martin ex dem. Tregonwell v. Strachan*, Hil. 16 Geo. 2, in B. R. a full note of which case is to be found in 5 Term Rep. fo. 107. The rule of descent, says Lord Ch. J. Lee, in this last case is known and will be agreed: "If a man seised as heir on the side of the mother make a feoffment in fee to the use of himself and his heirs, the use being a thing in trust and confidence, shall ensue the nature of the lands, and shall descend to the heir on the part of the mother, Co. Litt. 13 a., 3 Lev. 406, *Godbolt v. Freestone*." He goes on, "and it will be the same if the limitation be by fine and recovery; it is still the ancient use, and there is no difference, whether upon the conveyance of an estate any part of the use results by implication of law, or whether it be reserved by express declaration to the party from whom the estate moved. And so is the case of *Abbot v. Burton*, Salk. 590." In *Abbot v. Burton*, they attempted to alter the descendible quality of the use by arguments drawn from the form of the conveyance which was fine and recovery. To this the Ch. Justice said, that the fine and common recovery were both to be taken as one entire [600] conveyance consisting of these several parts, and directed as to the use of them by the same covenants. That though the conusees had a seisin in fee of the estate and use vested in them by the fine for a special purpose, and upon that seisin

the common recovery was had, and in strictness the estate passed by it was their estate, yet upon consideration of the whole conveyance the estate did originally move from J. S. who was the conusor of the fine. And for that reason, if there had been no limitation at all of this remainder of the use upon this recovery, he took it to be very clear, that so much as remained unlimited, should result to the conusor and his heirs, and not to the conuzee, in whom the estate was not vested with a purpose to create him an interest, but in order to forward and complete the conveyance of the conusor's estate which was taken as one conveyance. "Then," says the Ch. Justice, "does the use limited upon the common recovery as properly arise out of the estate that moved from the conusor of the fine as if he had made a feoffment, or fine, or any single conveyance to that use." This doctrine relieves us from all difficulties arising from the form of the conveyance, and abundantly justifies my observation, that courts of justice are not inclined to allow the form of a conveyance to operate beyond the intent of the parties: but it goes a great deal further. Lord Ch. Justice Trevor had said in a former part of this case what Lord Ch. Justice Lee repeated in *Martin v. Strachan*, that it was the ancient use, and that there was no difference when upon the conveyance of an estate any part of the use results by implication of law, and when it is referred by express declaration to the party from whom the estate moved. In the part which I have copied from the book, he says, that the use limited upon the common recovery arises out of the estate which moved from the conusor of the fine, and not out of the estate of the conuzee. We know that it is the definition of a use when separated from the land, that it is collateral to the seisin of the land, and that when the statute unites the seisin to the use, the union is of the seisin to the use according to the quality of the use, and not according to the quality of the seisin: from which premises the conclusion appears to me to be direct, that if the use is the old use, when the seisin is united to it, it must be the old estate; and my farther conclusion is, that Sir Thomas Cave died seised of that estate of which he was seised at the time when he made his will, with this alteration (I am ready to admit), that by means of these deeds of lease and release, he has created a charge upon it of 1400l. a-year, [601] with a term of five hundred years for securing the payment of it.

Alterations in the estate of the testator will, I admit, in many instances work a revocation of his will. It is one of the general heads of revocation; but I have said that the law is clear, that an alteration in the estate of this nature will not revoke the will. It has been settled over and over again, that a lease made for years, or even for life, after a devise in fee, will not revoke the will; both these cases are put in the case of *Montague v. Jefferies*, Roll. Abr. and agreed to be good law. And there are several modern cases to the same effect. In *Coke v. Bullock*, Cro. Jac. 49, it was held, that where A. by will devises to B. in fee, and afterwards by indenture makes a lease for years of the same land, this lease if not made to the same person, (where upon another principle it would be a revocation) shall be a revocation pro tanto only. They call it a revocation pro tanto, but this is using the word in an improper sense. The truth is, that a part of the thing devised is gone, and therefore the will cannot operate upon it. It happens that in our case there is no pretence to call this even a partial revocation, for the will purports to operate only upon that part of the fee which should remain with Sir Thomas Cave, after making such a jointure upon any wife whom he might marry, as he should think fit to make, in which respect this case is perfectly new in circumstance, and unlike every other case to be found in our books. And it happens too, that the circumstance in which it is new, goes to exclude all pretence for presuming an intent to revoke; for the deeds of lease and release respect nothing but that which was expressly reserved out of the will, so far from being inconsistent, or in any manner interfering with each other, they amount in effect to one conveyance of Sir Thomas Cave's estate to those uses which he has himself declared by the will and subsequent settlement.

These cases which I last mentioned, and have alluded to, were not denied to be law in the argument at the bar, nor was it insisted that an alteration of the estate by a mere interposition of an estate for life or years, to some stranger, would work a revocation. How is it then, that Sir Thomas Cave's will is revoked not upon the ground of an intent to revoke? That ground was abandoned, and, I repeat, judiciously abandoned by my brother Adair on the second argument. He stated the ground of the revocation to be, that a positive rule of law, settled by a series of decisions, had

pronounced that certain acts done by a testator would be a revocation of his will, let his intent be what it [602] might, and even against his manifest intent. To that proposition I entirely agree. But we must see what those acts are. He considered it as admitted, that the change of the estate of the testator, a new estate and new uses, would be a revocation; I admit it would. He stated that it was a rule of law, that where a testator has for a moment parted with the estate, whether it comes back or no, the mere divesting of that estate is a revocation, and this even though he is in again of the old use, and he stated it to be law, that the taking back an estate through the channel of a trustee, is a change of the estate, and within the rule. To a certain extent, I admit every one of these instances of revocation, except that I do not agree that the mere divesting of the estate where the party is in again of the old use, will be a revocation; and I can agree that even that case was good law, before the statute for transferring of the uses into possession; for, I do agree, that if the testator who had the fee in him when he made his will, divested himself of that estate, and took back nothing but the old use, that old use was not that which he had devised, and could therefore not pass by his will, and that in the improper sense of the word "revoked" the will might be said to be revoked. By putting cases upon the rules laid down by my brother Adair, it will be understood to what extent I agree with him. If a testator makes a feoffment in fee to a stranger, and afterwards (the next minute if you please) takes back a fee by reconveyance, this taking back the estate through the channel of a trustee would be changing the estate. That fee will not be the fee which he devised, and so his will may be said to be revoked. If he made a feoffment in fee to the use of himself and his heirs, or declaring no use so that the use resulted, before the statute of H. 8, that use would not be the estate which he devised, and could not pass. So of the converse of that case which is a case adjudged. But the rule stands upon a much broader bottom than this momentary divesting of the estate. The estate in these instances never comes back again at all, and therefore there is nothing for the will to act upon. I can put one case where the estate is divested perhaps for a considerable length of time, and yet does afterwards come back again, in which I take the law to be clear, that the will is not revoked. The case I allude to is, where the testator after making his will is disseised, and in consequence of his entry afterwards, is remitted. The subject is discussed by Lord Ch. Justice Holt, in 11 Mod. fo. 128. I am aware, that this remitter is by the act of law, and I am not arguing that the party can by his [603] own act remit himself in the same manner. This is not the use I propose to make of this case of disseisin. Let us pursue the subject a little further. Put the case that the party disseised dies without having entered. His will is revoked. I ask, why is it revoked? The answer is, because he has not died seised. In that case the will is not revoked because he intended to revoke it, nor because his estate was once divested; but because he died without revesting it, and therefore did not die seised, and as I conceive it is only when it is followed up with that consequence, and only in respect of that consequence, that in any case parting with the estate, independent of intent, does amount to a revocation.

For the purpose of maintaining and enforcing this doctrine, that the parting with the estate for a moment is a revocation, it was said, that the party must not only have the estate in him when he makes his will, and must die seised of it, but he must continue to have the same estate from the time of making the will to the time of his death. This proposition, to whatever extent it can be maintained, does not appear to me to advance the argument; it seems to be the former proposition in other words. If a testator must not part with his estate for a moment he must continue to have the estate; if he parts with the estate he does not continue to have it; if he continues to have it he does not part with it. There are not many possible cases in which a man could be said to die seised of the estate which he has parted with in his life-time. The case of the disseisee remitted is the only adjudged case I know of which comes near it, and that case does not touch the question; for by the aid of a fiction of law to which we are obliged to resort, we say that the estate was never out of the disseisee, and therefore he died seised of the same estate.

Pursuing the argument of my Brothers Adair and Heywood, I am ready to admit, that alterations of the estate ordinarily will revoke; in many cases they will do so because they afford an implication of intent to revoke. The man who devises the whole fee-simple, and afterwards makes a settlement of his estate, leaving himself only an estate for life, and a reversion far removed by intermediate estates, has so altered

his estate, as to demonstrate that he does not mean that his will should take effect, and therefore, though, after all his alterations, there is something of the old estate left upon which the devise might by possibility operate, it is fair to conclude, that he did not mean his will should have any effect at all. This would be a revocation, but upon a [604] ground very different from that which is taken by my brothers in their arguments: it does not proceed simply upon the alteration of the estate working by a mere arbitrary rule a revocation, it is a revocation upon a solid acknowledged principle in the law of revocations, a presumed intent to revoke. Alteration of estate which is not powerful enough to raise an implication of intent to revoke and yet does revoke, will bring us back to the ground which we have already trodden, it must be that which will shew that the estate of which the party died seised is not that estate which he took upon himself to devise, and this will bring it within the scope of another principle of revocation to which I have declared my assent, and which indeed is self-evident, that a will cannot operate upon an estate which a man has parted with after making his will. It will most frequently happen, that where the estate of which the testator was seised at the time of making his will, is afterwards changed by whatever form of conveyance, whether it passes from him and returns by re-conveyance, or whether the modification is produced by one conveyance so as to be a substantially different estate from that which he had before, the will may be said to be revoked upon all the grounds of revocation. It may be said that it was intended to be revoked, or whether intended or not, the old estate is gone, and as to that which is taken in the room of it by a technical rule of law, now not to be controverted, a will cannot operate upon an estate in land acquired since the making of the will, and therefore the new estate cannot pass. My Brother Adair, under this head of alteration of estate, laid it down as a rule, that taking back an estate through the channel of a trustee alters the estate. This is true, taken literally, and understanding the taking back to be by re-conveyance; which is the explanation given of a passage in Coke on Litt. where he speaks of a feoffment, and the feoffor taking back an estate to him and his heirs. But if it was meant to extend to the case of the use which results upon a conveyance, it is begging the question, and in truth the proposition seems wholly inapplicable to a resulting use. First, a resulting use is not taken back through the channel of the feoffee, conuzee, &c. but is a thing collateral to his estate, and arises out of the estate of the feoffor as a thing never disposed of; and secondly, the use which results, by whatever channel it results, is not altered, but is the old use, and I think I have proved, when united to the seisin, becomes the old estate, and I think it a contradiction in terms to assert, that the old use and the old estate, is an altered use and an altered estate, and that the sanction of the greatest names will not make it out.

[605] From this examination of the argument at the bar, I am led to conclude, that there is no such positive rule of law, as that every alteration of an estate, every parting with an estate, every divesting of an estate, will amount to a revocation, but that there are certain principles which govern the law of revocation, to which the several instances which occur of alteration, of parting with, and divesting of estates, are to be referred, and by which the effect of them is to be determined. When we are trying cases by principles, the law is indeed a science. What shall we say of it, if it is to be argued with success, that if a testator having devised the fee-simple of his estate, makes a lease for years or for life, the will as to the reversion in fee is not revoked, but that if he should be so unfortunate as to be advised to do the same thing by lease and release, it shall be revoked? It shall because it shall; the rule is positive, and we must not presume to ask for the reason of it. It is certainly prudently done to shield it from all examination, because examination will point out the falsehood and absurdity of it. The old cases state the principles of the law of revocation most correctly. They say a will can only operate upon the estate which the man has at the time of making his will, and of which he died seised: they say by necessary consequence a will cannot operate upon an estate purchased by the testator after making his will; therefore according to the case of 44 E. 3, which my Brother Heywood states to be the oldest case on the subject, if a deviser aliens the land and re-purchases, yet is the will revoked. By the way, what a refinement is it to say, that the divesting of the estate for a moment, though the party is in again of the old use, shall be a revocation? Is this alienation? Is it re-purchasing? We know them by their fruits.

They say, that if a testator intends to revoke his will, the will is revoked, and they say that all acts done by the testator after the making of his will, which are inconsistent

with his will, are grounds upon which a presumption of law arises that the testator does intend to revoke his will.

Had the series of cases with which we are loaded, as they occurred, been brought fairly to the test of these principles, we should not have been at this day entertaining different opinions upon the case now in judgment, but unfortunately these principles are so jumbled together, and confounded in the cases as they are reported, that in many of them I find it difficult and almost impossible to develop the particular principle upon which they are determined. This gives them the appearance of mere arbitrary [606] decisions; and then it is said, with great colour, I admit, of authority, that by a positive rule of law, certain acts done by a testator, do amount to a revocation of his will. The cases which were selected from the mass by my Brothers Adair and Heywood, will be a very good specimen of the whole; it will be necessary for me to take some notice of them, that it may be seen how far they go towards establishing this positive rule of law which they rely on. My Brother Heywood stated the case 44 E. 3 (which I have just now referred to) to be the oldest case on this subject. If a testator, say the books, aliens and re-purchases, yet his will is revoked. I agree that this case is good law; I rely on it as a main security to the foundation of my argument; to borrow Lord Ch. Justice Wilmot's metaphor, it is my polar star. If a testator aliens and re-purchases, I agree that his will is revoked: but if he dies seised of the same estate, I am of opinion, that he has neither aliened nor re-purchased. My Brother Heywood's next case was *Winkfield's case*, Mich. 29 Eliz. in C. B.; it is reported in Owen (p. 76, there called *Gibson v. Mutess*), Goldsborough (p. 32, there called *Gibson v. Platlesse*) and Godbolt, 132. I cite it from Godbolt. Winkfield devised lands in Norfolk to one Winkfield in London, goldsmith, and to his heirs in fee, and afterwards he made a deed of feoffment thereof to divers persons unto the use of himself for life, without impeachment of waste, remainder unto the devisee in fee: but before he sealed the deed of feoffment he asked one if it would be any prejudice to his will; who answered no. And the deviser asked again if it would be any prejudice, because he conceived he should not live until livery was made: and it was answered, no. Then he said, he would seal it; for his intent was, that his will should stand; and afterwards livery was executed upon part of the land, and the deviser died. Rhodes and Periam, Justices—The feoffment is no countermand of the will, because it was to one person, but, perhaps, it had been otherwise, if it had not been to the use of a stranger, although it were not executed. Anderson C. J. and others—The will is revoked in part where the livery is executed; and he said, it would have been a question if he had said nothing. And all the Justices agreed, that a man may revoke his will in part, and in other part not, and he may revoke it by word, and that a will in writing may be revoked by word. Periam said, it is no revocation by the party himself, but the law doth revoke it; to which Windham agreed, but he said, that if the party had said nothing when he sealed the feoffment, it had been a revocation of the party, and not of the law. Periam—If the witnesses die so as he can [607]—not prove the words spoken at the sealing of the feoffment, the feoffment will destroy the will, and so he spake to Anderson who did not deny it. All this was delivered by the Justices upon evidence given to a jury at the bar. From this conversation, in the shape of directions to a jury at a trial at bar, in which they seem to have mooted rather than to have gravely resolved any point of law, it may be collected, that the distinction between a revocation by the party, and a revocation by operation of law, was at that time sufficiently familiar. The doubt which seems to have arisen was, whether so much of the lands included in the feoffment, whereof no livery had been made, would pass by the will or not. I collect, though it is not distinctly stated, and though some of the Judges thought that the express declaration would prevent the incomplete part of the conveyance from operating as a revocation, in which the good sense of the case was certainly with them, that the Judges were ultimately of opinion, that the lands would not pass, but upon what principle they meant so to resolve it, is not stated in the case, nor does it seem to have been agreed. But reduce the case to its principle, and it will be found to be a very plain case upon very clear principles. The testator preferred that the devisee should take his estate under the feoffment in preference to his will, or why did he propose to make a feoffment? The moment he had demonstrated that preference, the will was revoked upon the ground of an implied intent to revoke it. Apprehensive that he might not live to finish the work he had begun, he desires to know, whether the making this deed of feoffment would revoke

his will, saying, that he did not mean to do that. But he certainly did mean to revoke his will, if he lived to complete the feoffment: what he was anxious about was, that his will should not be revoked until the feoffment could take effect. They gave him bad advice upon this subject. The law and his wishes were in direct opposition to each other. Having once demonstrated an intention to revoke his will, that did revoke his will, not only as to that part of the estate which he had effectually given to the devisee by the feoffment, but also as to that part of it which he had begun to give him by a conveyance which never took effect, because he died before the livery was completed. This is supposed to be a case in which the will was revoked by operation of law against the intent of the party; the contrary is the truth. The testator did intend to revoke his will, but he also meant to make terms with the law, that it might not be revoked till what he was doing was completed. Those [608] terms he could not impose. He had revoked his will upon the ground of an implied intent to do it as soon as he begun to do an act inconsistent with the will, in its operation inconsistent with the operation of the will. For when we speak of the intent of the will, we do not mean to speak of the general intent of the testator, that his devisee should some how or other have his estate, but that he shall have it by the operation of that will, and when he has resolved afterwards that he shall have it by the operation of a feoffment, he has certainly altered his mind, and no longer intends that he shall have it by the operation of his will, and consequently he has revoked his will. As to that part of the land respecting which the feoffment was complete, he has revoked his will, upon both grounds of revocation: he intended to revoke, and he has parted with the estate, which would annul his will, whether he intended it or not. With respect to the lands of which livery had not been made, and therefore the conveyance is incomplete, the will is revoked upon ground of intent only, and the case of a bargain and sale without inrollment proceeds upon the same principle. This case of a bargain and sale without inrollment, and another case upon the effect of an incomplete conveyance as a revocation are to be found in 1 Roll. Abr. 615, P. pl. 5 & 6, and the ground upon which they are held to be a revocation is there expressly stated. If a man seised of a reversion, expectant upon an estate for life, devise it to J. S. and afterwards by his deed grant the reversion in fee to J. D., though the lessee never attorn, yet this is a revocation inasmuch as he hath fully shewed his intent that the other should have it, and put it in the power of the lessee. Mich. 38, 39 El. B. R. per Popham and Gawdy. So if a man devises lands to J. S., and after bargains and sells to J. D., and acknowledges it before a doctor, to be inrolled according to the statute, though it be not inrolled within the six months, yet that shall be a revocation of the will, for the cause aforesaid. M. 38, 39 Eliz. B. R. per Popham & Gawdy agreed. I have dwelt the longer upon this case from Godbolt, because it is a very clear and satisfactory illustration of almost the whole doctrine of revocation.

The next case in the order of time cited by my Brother Heywood was from Moore, 789, and was in the 2d year of the reign of James I. It was a case in the Exchequer, and seems to have arisen upon a question of escheat. Hussey made his will, by which he devised a manor; afterwards he made a feoffment of the same manor, to the use of such persons, and for such estates as he had declared by his [609] will: it was adjudged, that the feoffment was a countermand of his will, but that the countermanded will was a sufficient declaration of the uses of the feoffment, and therefore though he was a bastard, there was no escheat to the crown. This case is also a good illustration of this doctrine of revocation. The book says, that the feoffment countermanded the will, which word "countermand" is equivalent to "revoke;" in the improper sense of the word it did countermand or revoke the will, because the testator parted with his estate. This was said to be a revocation against the intent of the testator, and put as one of the strongest cases of revocation by operation of law, upon the mere ground of alteration in the estate. Whereas, first, the testator intended that his estate should pass not by his will, but by the feoffment, and secondly, it was not merely because the estate was altered that the will was revoked, but because it was so altered, that according to the rules of law, which govern the operation of wills, it was absolutely impossible that the will could operate as a conveyance of the estate, for this unanswerable reason, because the testator did not die seised of it: yet was not his will revoked in the proper sense of the word altogether; and even as to these lands, it could not operate as a conveyance of the estate, for the reason I have assigned, but it was allowed to operate as a declaration of the use of

that very instrument which had prevented it from operating upon the estate itself; whereas, if the will had been actually revoked in the proper sense of the word as to this manor, it could have had no operation at all. The Court of Exchequer carried this odious doctrine of revocation no further than they were absolutely obliged to go. They could not give the will effect upon an estate which was gone from the testator, but they still considered it as a will, and gave it all the effect that it could have, namely as a declaration of the uses of the feoffment.

My brother Adair cited a case of *Lutwyche v. Mitten*, in the Court of Wards, Trin. 16 Jac. 1, from 1 Roll. Abr. tit. Devise, 614, which, though not resembling the case in Moore, in circumstance, and though the debate upon it arose upon a point collateral to the doctrine of revocation, seems referable to the same class of cases. If a man covenant by indenture to levy a fine, and that it shall be to the use of such person as he shall name by his will, & afterwards makes his will, and thereby devises his land to certain persons, and after that levies a fine in performance of this covenant, this is said to be a revocation of the will, though it was levied in performance of the covenant which was entered into before the making the [610] will. The reason given is, that the land cannot pass by relation to the time when the covenant was made, but only to the time when the fine was levied. Now this appears to me to differ in circumstance from the case in Moore, but as far as it concerns the present argument to be in effect the same case. Here the fine was levied in pursuance of a covenant to the use of such persons as the party should name by his will; there the feoffment was made without any such covenant, but to the same uses. That seems to have been admitted here, which was resolved there upon debate, that by the fine made after the will the lands passed, and that this countermanded, revoked, or annulled, by whatever name we call it, the will. If the land did pass, I have agreed, that this would be the consequence. There was a struggle to avoid the consequence, by giving the time of the estate's passing from the devisor a relation back to the time of the covenant. The Court thought that could not be, and I am not at present called upon to debate that point, as I agree with my brothers, that the articles stated in this special verdict are to be laid out of the case. The debate might, I think, have taken a turn more favourable for the devisee, if upon the authority of the case in Moore, they had insisted that the will was a good declaration of the use of the fine.

One other old case was referred to in the argument, which I take to have been the case of *Montague v. Jeffries*, and it is to be found in Roll's Abridgment, under the same title Devise. The case is put two different ways. If a man devises lands to J. S., and after makes a feoffment in fee thereof to a stranger, to the use of himself in fee, though he hath his old estate, yet it seems this is a revocation, for his intent was to have it by the new limitation, and by the feoffment he passed the estate, and the statute revested it in him, which is as a new purchase. *Contrà* Mich. 38, 39 El. B. R. per Popham. So if a man devises lands to J. S. in fee, and after makes a feoffment thereof to another to the use of himself for life, the remainder to his wife for life, the remainder to his own right heirs in fee, though here he hath his old reversion, yet it seems that it was his intent to have it pass by the livery, and to be in by the statute and limitation, and so as a new purchase, and therefore it seems that this shall be a revocation of the fee, as well as for the life of the Feme. *Contrà* M. 38, 39 Eliz. B. R. between Montague and Jeffries, per curiam agreed. The case first stated, appears not to have been decided with the approbation of the whole Court. My Lord Ch. Justice Popham, who was a very able Judge, was of a different opi-[611]-nion. Though he hath his old estate, says the book, yet it seems this is a revocation, for his intent was to have it by the new limitation, and by the feoffment he passed the estate, and the statute revested it in him, which is as a new purchase. Two reasons are given here for the judgment, and I agree with my Lord Ch. J. Popham, that neither of them is satisfactory. What is meant when it is said that a man intends to have an old estate by a new limitation, or what consequence would an intent to have the estate by a new limitation be of, if in truth, whatever was his intent, he had it not by a new limitation, but it was the old estate? By the feoffment, it is said, he passed the estate, and the statute revested it in him, which is as a new purchase, but most clearly this is not as a new purchase; that point has been decided over and over again, and so lately as in the case of *Martin v. Strachan*, by my Lord Ch. Justice Lee, in a solemn judgment upon a special verdict, which case I have before had occasion to take some notice of. In the second case, there was, I must confess,

a new limitation, for there is an estate in remainder to his wife for life, interposed between the limitation to himself for life, and the remainder in fee. If any thing turns upon this circumstance, I am not called upon to debate it, for there are in our case no such estates for life interposed. In every other respect, it is the same case with the former, supported by the same very bad reasons. It is observable, that the same point is said to have been adjudged in a subsequent case, Cro. Car. 24; but there another reason is given for the judgment, namely, that because he departed with all the estate, it shall be a revocation, and shall not be good without a new publication. Here the ground of the argument is shifted, and I must conclude, that it was shifted because the reasons assigned in the case of *Montague v. Jefferies* were unsatisfactory. To my apprehension, however, the reason for the judgment which is now assigned is equally unsatisfactory. I take it, that in this case, the testator had not departed with all the estate; that in the first of the two cases the whole of the old use (and which had force enough to draw to it the legal seisin which had been departed with for a moment), never had been departed with, but remained with him from whom the estate moved, and in the second case, part of the old use had never been departed with, but remained with him from whom the estate moved; and no more of the use was parted with, in either case, than what might be parted with according to the authorities which I have before referred to, and might produce a revocation pro tanto, without [612] revoking the will generally. This observation, however, arises upon the two cases stated in the case of *Montague v. Jefferies*, that they do not lay down an arbitrary rule by which they revoke the will: they refer the case to a principle in the law of revocation. His intent, the book says, in the first case, was to have it by the new limitation; in the other case, it is said, it seems that it was his intent to have it pass by the livery, and to be in by the statute and limitation. The principle of the cases is therefore right, though the application of that principle in the particular instances may be deemed very erroneous. The case of *Dister v. Dister*, which was in this Court in E. 35 Car. 2, was also cited from 3 Lev. 108. Tenant in tail makes his will, and devises his land, and then by bargain and sale inrolled, makes a tenant to the præcipe, against whom a common recovery is suffered, with voucher of tenant in tail, to the use of himself in fee. This was held to be a revocation, and the reason of the determination is, that by the bargain and sale, and the recovery, all the estate was altered after the will. I take for granted, that this tenant in tail had at the time of the will the reversion in fee also in himself, and that this was the estate which the will was intended to operate upon; otherwise, I do not see what it was that he could devise; if it were so, the case is the same with a subsequent case also cited from 3 P. Wms. of *Marwood v. Turner*, 163, and they are both very clear cases of revocation, though perfectly inapplicable to the present case. The reversion in fee was the thing devised, but the effect of the recovery was absolutely to destroy that reversion in fee, and to introduce a new fee-simple in the room of the estate tail. This is proved by the well established difference between tenant in tail, with reversion to himself in fee, levying a fine, and suffering a recovery. If he levies a fine he extinguishes the estate tail, and lets in the reversion which becomes the fee-simple absolute, instead of the fee-simple expectant, and in consequence lets in all the incumbrances of his ancestors upon that reversion. Whereas, by suffering a recovery, the recoveror destroys the reversion and all the incumbrances upon it, and gains a new fee-simple to himself. The effect of the recovery, therefore, is rightly described to be that by the bargain and sale, and recovery, all the estate is altered after the will, and where all the estate is altered, I am quite ready to agree, that this is a revocation, not that the word "altered" has any force to revoke the will, but because it is ex rei necessitate, to use the words of another case which I shall have occasion to take [613] notice of hereafter, a revocation. The party does not die seised of the estate which he devised, and therefore, by no possibility can his will take effect. The case of *Gulton v. Hancock*, reported by Mr. Tracey Atkyns, in his second volume 425, was determined by my Lord Hardwicke, upon the same principle of necessity. There one devised his lifehold estate, and afterwards purchased the reversion in fee; the lifehold estate merged and was gone, and the will pro tanto revoked. Some older, and some still more modern cases, have proceeded upon the same principle. Cestuy que trust devises his trust estate, and afterwards gets in the legal estate in which the trust merges: the thing he devised is gone; the will is therefore revoked at law. There is an older case which is stronger, and not quite a clear case, but it proceeds upon the

same principle, and therefore I take notice of it. Cestuy que use, before the statute of H. 8, devises the use, then comes the statute of H. 8, which unites the seisin to the use; the use merges and is gone: the thing devised being gone the will is revoked. This is certainly the reason of the determination, though it is not so expressed. The judges are only made to say that the will is revoked, because the King's subjects are parties to an act of parliament, and bound to take notice of it. (1 Roll. Abr. 616, R. pl. 2.)

The Counsel then put the case of a testator, who, after his will made, surrenders his lease for lives, and accepts a renewal, which has been held to be a revocation. We are now approaching to modern decisions, and I must agree, that hard as this case is, such is the law. A part of the case of *Marwood v. Turner* was decided on this very point. The surrender puts all out of the testator that he had, and he never gets that back again; of necessity, therefore, his will is annulled. That which it should have operated upon is gone, and that which he has acquired in the room of it, it cannot operate upon: this is a revocation, therefore, upon the most acknowledged principles of revocation. But I cannot conceive that this case has the most remote application to the present. The surrender of a lease means to part with all that he has, and to accept an equivalent for it. Sir Thomas Cave did not mean to part with his estate, and had nothing but his own, the very thing he had before, after he had made his conveyance.

Among the modern cases which have been cited, the case of *Lord Lincoln* stands first in point of authority, as a determination by a very great man, Lord Somers, assisted by the Judges [614] of the King's Bench, upon great consideration, and afterwards in the dernier resort, (for the judgment was affirmed in the House of Lords) after a struggle and against the wishes, as far as Judges were at liberty to entertain wishes, of all those who concurred in the decision. A determination extorted from them by the stubborn and inexorable rules of law. The case, as it is stated in Shower's Parliamentary Cases, was this: Edward late Earl of Lincoln, by his will devised his estate to go with the honours of his family, and afterwards by deeds of lease and release of 27th and 28th April 1691, conveyed his whole estate to the respondents, Davenport and Townsend, and their heirs, to the use of him and his heirs, till his then intended marriage should take effect, and after such marriage had, then as to part, in trust for his intended wife and her heirs and assigns for ever; and as to the rest in trust, to permit the said Earl to receive the profits during his life, and after his decease to sell the same for the best price, and out of the money raised by sale, to defray the funeral expences and pay his debts, and deliver the surplus (as he should by his last will and testament in writing, attested by three witnesses, or by another deed in writing so attested,) appoint; and for want thereof to the executors and administrators of the Earl; with a proviso that the said Earl by his last will and testament, or any other deed in writing, (to be by him thereafter made and executed and attested as aforesaid) might alter, change, determine, or make void all, or any of the trusts aforesaid. And for want of such after to be made will or deed, then in trust for the said Earl Edward, his heirs and assigns for ever. There is some perplexity in this statement of the proviso, and I think it is not to be found in the statement of the case in Equity Cases Abridged, and therefore, most probably, whatever it was, it was thought to have no effect upon the question. Earl Edward died without issue of his body, and without the marriage taking effect. The appellant exhibited a bill to have the said deeds of lease and release set aside, and to have the will executed. The prayer of the bill is probably more correctly stated in Equity Cases Abridged to be, to have the redemption of a mortgage, and the conveyance of the estate; and there was a cross bill by the co-heirs of Earl Edward with a prayer to the same effect. It seems to have been admitted on all sides that at law the will was revoked; the struggle was, whether upon equitable grounds the effect of the revocation at law could be avoided, and the devisee let in to redeem as standing in the place of the testator. In this respect this case resembled that of *Lutwych* [615] v. *Mitten*, upon which I have already observed. In a case so circumstanced we are not to expect a very accurate examination of the grounds upon which this revocation at law was supposed to stand, and in this respect, therefore, this case, however solemnly adjudged, goes but a very little way indeed towards ascertaining the principles upon which the revocation at law stood. The ground was stated very shortly indeed by those who argued for the plaintiff. It was rather alluded to than stated that the

reason upon which the law goes in judging it a revocation is, that the lease and release is a conveyance of the estate and so ex necessitate rei a revocation of the devise.

This did very well for the occasion when very little discussion was likely to take place, and though very loose and incorrect in the expression, was not far from being precise and accurate. The proposition taken literally imports that every lease and release is a conveyance of the estate, and as such ex rei necessitate is a revocation. That proposition is certainly not true, but if we understand the words to import, that the deeds of lease and release in that particular case were such a conveyance of the estate as ex rei necessitate would be a revocation, the proposition is true and stands upon very solid ground, for all these revocations which proceed upon the ground of alteration of estates are ex rei necessitate, and stand upon no other ground whatsoever. They are implied revocations, and there is not a maxim in our law better established than this, that all implications are ex necessitate; upon any other ground they would be capricious and arbitrary. When the estate is so conveyed as to undergo such an alteration, that is no longer the same estate, and therefore the party does not die seised of that estate which he had at the time of making his will; it becomes impossible consistent with the rules of law for the will to act upon it, and this is all that is meant when it is said that ex rei necessitate the will is revoked, and such was this case of *Lord Lincoln*. By his lease and release, he who had the absolute fee-simple in him (or what was considered as precisely the same thing, an equitable estate of fee-simple in him,) converted that absolute fee-simple into a base fee, and if that base fee had happened to determine by the marriage taking effect, the whole fee-simple was immediately taken out of him by force of the conveyance for ever; he never could get back that fee-simple again which he had at the time of making his will; if he died unmarried, he died seised of a base fee, if he married, the whole estate beyond his life interest was taken out of him and vested in the trustees for the purposes of the settlement, [616] with no use either declared or resulting to himself. It was impossible he could die seised of his old estate; it was therefore most true, that ex rei necessitate these deeds of lease and release were a revocation of his will. With this explanation I agree that Lord Lincoln's will was revoked, and upon the authority of that case, as far as it goes, I argue that Sir Thomas Cave's will was not revoked. Ex rei necessitate that will could not take effect; there is no such necessity occurs in this case. My Lord Lincoln did not die seised of his old estate; Sir Thomas Cave did die seised of his old estate, the charges which were introduced by the subsequent conveyance upon it being such as in no case could amount to more than a revocation pro tanto, and in this case did not touch the will at all. If it should be said that Sir Thomas Cave's will resembles that of Lord Lincoln in this particular, that Sir Thomas Cave also did for a time take a base fee by force of these deeds of lease and release, I say that the difference between the two cases is, that Sir Thomas Cave's base fee determined in his life-time, and he was in effect, though not according to the strict letter of the law, remitted to his old fee of which he died seised, whereas Lord Lincoln's base fee did not determine in his life-time; he never did get back his old estate, and he died seised of that base fee. This is the technical difference: the substantial difference is, that the whole effect of the lease and release in the one case respects the jointure only, whereas the instruments in *Lord Lincoln's case* were intended to make a disposition of the whole fee. My opinion, therefore, upon the present case does not in the least interfere with this famous case of *The Earl of Lincoln*.

In the case of *Marwood v. Turner*, which I have already observed is in principle the same case as *Dister v. Dister*, the argument for the revocation is thus summed up by Mr. Peere Williams:—"With respect to the freehold estate, the common recovery, and the deed by which the premises were conveyed to trustees and their heirs, declaring the use of the recovery to Sir Harry Marwood and his heirs; these being all subsequent to the will, and inconsistent therewith as declaring the premises should go to his heirs at law, and not to his devisee; it seemed to be not much opposed, but that the same were a revocation. Besides, a common recovery, as it is a solemn conveyance upon record and stronger than a feoffment, must needs be a revocation; the recovery being suffered by the tenant in tail plainly gains an absolute fee derived out of that estate tail, and which fee was never devised; conse[617]quently it must be even stronger than the case where a man having lands devises them, and afterwards makes a feoffment of them, though to the use of himself and his heirs, and

though this use be the old use and the old estate, yet according to the several cases in 1 Roll's Abr. 614, title 'Devises revoked,' this is a revocation; and the case in 3d Levinz, 108, *Dister v. Dister*, was cited as in the very point, of which opinion was also the Lord Chancellor." Of what opinion was the Lord Chancellor beyond the conclusion from this argument that the will was revoked I am not able to collect. The conclusion I agree to. The premises (beyond the state of the fact) are some very good reasons, and, as it appears to me, some very bad ones. The common recovery, and the deed to lead the uses of it, declaring the uses to Sir Henry Marwood (who suffered the recovery,) and his heirs, being all subsequent to the will and inconsistent therewith, as declaring the premises should go to his heirs at law, and not to his devisee, appears to me to be a very bad reason; they declare no such thing, they are mere words of limitation. "The recovery being suffered by the tenant in tail plainly gains an absolute fee," (I will not quarrel with the words "derived out of that estate tail," though they are not quite correct,) "and which fee was never devised," is a very good reason, and, as I take it, the true reason of the decision, and that which brings it exactly within the scope of the case of *Dister v. Dister*, which was cited as in the very point, as it certainly is. When this case is stated as being a stronger case than the case where a man having lands devises them, and afterwards makes a feoffment of them, though to the use of himself and his heirs, I confess I cannot perceive it. In truth it is neither stronger nor weaker than that case considered as a case neither depending upon the intent or inconsistency with the will, or upon that much better ground that the fee which was gained was never devised: and considered as the same case it rests merely on the authority of those cases in 1 Roll's Abr. 614, upon which I have already observed.

Several other modern cases were cited for the Defendants as authorities applicable in their principles, or rather in the dicta which are scattered through them with great profusion, to the present case to prove that Sir Thomas Cave's will was revoked. I do not mean to controvert the decision in any one of them from *The Earl of Lincoln's case* down to *Darley v. Darley*, and to the last case on the will of the late Duke of Chandos; but I [618] complain of the statement given in some of the reports of the reasons of the judgment, which are sometimes so contradictory, that not only the reasons for one judgment oppose the reasons for another judgment, but the reasons for the same judgment might be mistaken for the arguments pro and con. in the same case. That it may be seen whether I over-state this, I will refer to two cases determined by Lord Hardwicke. The first shall be one of the cases cited in the argument; the case of *Sparrow v. Hardcastle*, from Mr. Ambler's Reports. That case was rightly determined. One seised as of fee in an advowson, conveyed it to trustees on trusts, with remainder to him and his heirs. He had the fee when he made his will: he died seised of a trust estate only in remainder. This was not the same estate. Lord Hardwicke is reported to have said upon that occasion: "The question is, Whether the grant is a complete revocation of the devise of the advowson or not? The general principle by which cases of this kind are governed is, that at the time of the devise, the deviser must have a disposing capacity, and an estate in the land devised; and that the estate must remain in the same plight and condition to the time of his death; even the least alteration of this interest by any act of his, makes it a different estate, shews a different intention, and is therefore an actual revocation of such will, unless in some special cases. And this," says he, "is laid down by Lord Trevor in his argument in the case of *Arthur v. Bokenham*, Fitzg. 239." These are very strong expressions, but attend to the very next passage. "A will is only the signification of a man's purpose how his estate shall go after his death, and if he does any intermediate act whence it must necessarily be inferred such intention did not continue, it is a revocation, though the owner should be in, of his old use." He goes on to enumerate instances; as if one seised in fee devises, and then enfeoffs another to the use of himself in fee, though it is the old use that remains, yet it is a revocation even though no livery is made on the feoffment. So bargain and sale without inrollment. So in *Lord Lincoln's case*, where he devised to his heirs male and then intending to marry, he settles the estate on himself; he died unmarried, and the House of Lords held the settlement to be a revocation. So if a man supposing himself to be seised in fee, devises his estate, and afterwards suspecting he is only tenant in tail, suffers a common recovery, solely with intent to confirm his will, it is such an alteration of his estate, as amounts [619] to a revocation. The law is thus settled, and it must not now be contradicted.

It cannot escape observation that here is a heap of heterogeneous instances very different in circumstances, and depending on different principles, huddled together without discrimination. If we are to refer them to the two introductory paragraphs for their principle, those paragraphs contradict each other. According to the first, even the least alteration in the estate makes it a different estate, shews a different intention, and is therefore an actual revocation. In the other, any intermediate act whence it must necessarily be inferred that the testator's intention did not continue, is a revocation: this last is the argument on the other side, correcting the extravagance of the first proposition. No man could mean to string them together as part of a series of propositions; they are absolutely contradictory. In short, there are here the materials of an edifice worthy of that eminent builder of legal systems Lord Hardwicke, but all that should bind them together is left out. If the fault lies with the reporter of the case, I must say of him, though he was a laborious and judicious man, *brevis esse laboro obscurus fio*. I must suppose that if we had Lord Hardwicke's own words, we should have had a very different statement of the doctrine of revocation from that which we are to collect from this case. Not that every thing which was really said by Lord Hardwicke in this case of *Sparrow v. Hardcastle*, was likely to be perfectly satisfactory, for it is very evident, if we follow him through this case, that he had the authority of his own great name opposed to the opinions which he then held. He takes notice of his opinion in *Parsons v. Freeman* having been cited against him on one point in this case. If that case of *Parsons v. Freeman*, as reported by Mr. Tracy Atkins, bears any resemblance to the case as it really passed, it is not in that one point only that the two cases are opposed to each other. The leading principle of the case of *Parsons v. Freeman*, and which runs through the whole argument is, that a conveyance for a special purpose is not necessarily a revocation, and the cases of estates for life, mortgages, &c. are instanced. This in *Sparrow v. Hardcastle* is encountered by this declaration: "I know of no ground for supposing that to be the principle upon which they" (meaning the case of mortgages and securities considered as revocations) "are founded. There is no case which has the words for a particular purpose as a reason for the determination." I do not quarrel with the determinations in either [620] of the cases; they are both right; the use I make of these observations is to furnish myself with an apology for abating somewhat of that excessive veneration, for some of the general loose sayings that occur in all the modern cases concerning revocation, which sanctifies and perpetuates error; so that I may be permitted to look at them steadily, and to give to them only that weight which on examination they shall be found to deserve. Lord Hardwicke, speaking of his former opinion, said, "as it is not the point in judgment, I do not think myself concluded by it." Where Lord Hardwicke was not concluded; those who follow him *haud passibus æquis* must be at their liberty. I shall take some further notice of the case of *Parsons v. Freeman*, because I think it opens the law of revocation, and because it introduces another case with which I mean to close this tedious discussion. That case is in the 3d volume of Atkyns's Reports, fo. 741. My brother Heywood informed us that my Lord Hardwicke in that case went again through this law of revocation. He did so; but with what uniformity are the doctrines stated? The abstract of that case is this: On a husband's promising to do acts for a wife's benefit, she in articles before marriage covenanted to join in suffering a recovery of the estate, and to settle it to him and his heirs. The husband made his will and devised this estate to the Defendant, but not having done what he had obliged himself to do, came to a new agreement with his wife that he should not take her estate instant in fee, but subject to an appointment of the husband and wife, and in default thereof to the use of the husband and his heirs. The recovery was suffered, and the uses declared to the purposes of this deed; he died in the wife's lifetime without making any appointment or revoking his will. The recovery suffered by Mr. Freeman and his wife, and the declaration of the uses of it to the uses of the deed, was held to be a revocation of Mr. Freeman's will. I will state to you what my Lord Hardwicke is reported to have said upon that occasion. "The cases have been determined upon very nice and artificial reasons, upon an inclination the law always shews to favour an heir, and to prevent him from being disinherited where the intention of the testator is doubtful. If the husband had been seised of the absolute legal estate at the time of making his will, and had afterwards suffered a recovery, and declared the uses to be such as he and his wife should appoint, this would have been a revoca-

tion. If a person seised in fee devises an estate in fee to J. S., and by a conveyance takes back an estate from J. S. in fee, that is a revo[621]-cation. The case of a feoffment, where the testator takes back the old use is a prodigious strong case. That construction must arise from a presumed intention that the testator would not have made a new conveyance without an intention to revoke his will; but this must be understood with restrictions and limitations. If the conveyance or recovery be for a particular purpose, then it shall revoke no further than to answer that purpose, as where a testator creates an estate for years or for life, in the lands devised, it shall operate no further. This is the rule of law." He then enters very largely into the question whether this should be considered as a revocation in equity, into which I should not follow him, but the course of the argument being, that equitable and legal estates are revoked upon the very same principles, part of the argument on this head becomes material. He goes on thus: "I am of opinion that the same conveyance which would be a revocation of a devise of a legal, would be equally a revocation of a devise of an equitable estate, and it would be very dangerous to property if it was otherwise. But still the same rule holds as at law; if for a particular purpose only, it shall be understood to be a revocation pro tanto only. In all the cases where it is a conveyance of the whole estate in law, and is only meant for a security, the revocation shall only be for that particular purpose, to let in the incumbrance; for the testator himself has drawn the line how far the revocation shall go, and his intention is plainly shewn." Speaking of the effect of the recovery he says "Mr. Freeman took a fee differently qualified, conveyed differently, disposeable differently, and it cannot be said to be only for a particular purpose, and therefore I am of opinion the recovery is a revocation of the will." In this case, with all its inaccuracies, for it certainly is not correctly reported, Lord Hardwicke has gone a great way towards putting the whole doctrine of revocation, with the exception perhaps of this single case of a feoffment where the testator takes back the old use, and even that stands on the authority of decided cases on the principle of intent, upon solid ground. His introduction sufficiently marks, that at best it was a harsh doctrine. "Mr. Freeman," says he, "took a fee differently qualified, conveyed differently, disposeable differently, and it cannot be said to be only for a particular purpose, and therefore I am of opinion, the recovery is a revocation of the will." A conclusion to which I entirely agree. Lord Hardwicke takes notice to the doctrine, that a feoffment to the use of the feoffee and his heirs is a revocation: he [622] considers it as an anomalous, "a prodigious strong case" is his phrase, and he labours to find a reason for it. That construction, says he, must arise from a presumed intention that the testator would not have made a new conveyance, without an intention to revoke his will. If that is the ground upon which this feoffment is a revocation, the feoffment may be laid out of the case; for it is admitted that in this case the revocation does not proceed upon the ground of intent, and it is perfectly clear that Lord Hardwicke was of opinion that it could have no application to a case like the present, for he goes on in the very next paragraph to say, that if the conveyance be for a particular purpose, then it shall revoke no further than to answer that purpose, and he puts this very case as an instance. He says, where a testator creates an estate for years or for life in the lands devised, it shall operate no further; and, as if he meant to meet this case in every way in which it could be put, he takes occasion to observe, that whether the conveyance be made by feoffment, by lease and release, or by fine and recovery, it makes no alteration, for that is instrumental. There is a class of cases in equity on the effect of a conveyance of the whole estate in law for particular purposes. The mortgage in fee is one of them. Being meant only for a security, the revocation shall only be for that particular purpose, to let in the incumbrance. But in this case Lord Hardwicke is express, that this is by the same rule that holds at law: if for a particular purpose only, it shall be understood to be a revocation pro tanto only. The cases are uniform, that a conveyance for a particular purpose can revoke no further than to answer that purpose. It remained only for my Lord Hardwicke to clear up the doubt, whether if the conveyance was in a form which in order to effect the particular purpose, required that the whole estate should be for a moment parted with, that would revoke a will generally, when a more guarded form of conveyance would not have done it. He says, the conveyance is instrumental only. What difficulty then remains? For surely these deeds of lease and release were only for a particular purpose, and for that particular purpose which has been repeatedly decided to be at most a revocation pro tanto. The case of *Lamb*

v. Parker, 2 Vern. 495, is a strong case of that sort; so is *Coward v. Marshall*, Cro. Eliz. 721. Lord Hardwicke shortly observes on the case of *Tickner v. Tickner*, that it was not merely to effectuate a partition, but was a new conveyance, and did not rest upon the partition only. That case is stated by one of the Counsel. Robert [623] *Tickner* seised in fee of the estate in question of gravel-kind, died intestate, and left two sons Henry and Robert, who entered on his death and became seised in gravel-kind. Robert being possessed of an undivided moiety, made his will, and devised it to his wife Elizabeth T. and her heirs; after making his will, by a deed of partition between Robert and Henry, and by fine, all the gravel-kind estates which Robert had devised, was allotted entirely to Robert to such uses as he should appoint by deed or writing, and in default of such appointment to him in fee. A verdict was found in ejectment subject to the opinion of Lord Ch. J. Lee, who, after mature deliberation, held the transaction to be a revocation of the will. It had been solemnly settled that where A. and B. were tenants in common of lands in fee, and A. by will dated 25th Jan. 1719, devised his moiety in fee, and afterwards A. and B. made partition by deed dated 16th May 1722, and fine, declaring the use as to one moiety in severalty to A. in fee, and as to the other moiety in severalty to B. in fee, this deed of partition and fine was no revocation of the will of A., and my Lord Ch. J. Lee, then one of the Judges of the court of King's Bench, appears to have concurred in that determination. The case is to be found in a note in 3 Peere Wms. 169, 70. The two cases differed in one circumstance only, the use of the moiety in severalty is in this case immediately to A. in fee, which was the resulting use, whereas in the case of *Tickner v. Tickner*, a new use was interposed, namely, such use as he should appoint by deed or writing, and that new use extended to the whole fee. This was thought to be a new conveyance, and beyond the particular purposes of partition, which was consistent with the old use.

Whether the case of *Tickner v. Tickner* was well or ill-determined, it proceeded upon a distinction between that and the former case, and it affirmed the principle of the former case, which principle was certainly understood by Lord Hardwicke to be that the conveyance being a conveyance for a particular purpose, consistent with, and not disturbing any part of the old use, was no revocation at all, though the form of the conveyance being a fine and a deed to lead the uses of it, necessarily in point of formal operation, divested the estate of both the tenants in common in the first case, and the heirs in gravel-kind in the last for a moment, in order to the vesting of the respective moieties in severalty in those who before held them undivided. It appears that at an earlier [624] period (see Sid. 90, Keble, 357, Freeman, 542) this case of partition by conveyance, and even without conveyance had created some puzzle. Reasoning from the doctrine of a feoffment to the use of a feoffor and his heirs being a revocation, the judges could hardly deny that, consequently, a tenant in common conveying his whole interest to the conusee of a fine, in order to take it back again to himself and his heirs, would thereby revoke his will; in truth it seems a stronger case than the case of a feoffment to the use of the feoffor and his heirs, for the estate taken back is in some respects a different estate from that which was conveyed; an undivided moiety of the whole is not precisely the same thing as an equivalent in part of the land to be holden in severalty; but in this instance, fortunately common sense got the better of legal subtleties, and it was held to be no revocation. We have not the argument of the four Judges of the King's Bench who concurred in this opinion, but if my Lord Hardwicke understood the ground of that opinion to be that a conveyance for particular purposes which may stand with the whole or some part of the old use was not a revocation in toto, I say if Lord Hardwicke understood it so, we may presume that this was the principle of the determination, and it was a solid principle; it had all the analogies of law to support it, and it had the authority of all the cases of partial revocations which proceed upon the same principle. They wisely determined that the purpose of the conveyance was every thing, and the form nothing, and that there was no difference as to the point of revocation between effecting the partition by lease and release, or fine and deed to lead the uses of the fine, and the doing the same thing by matter in pais by metes and bounds, the way in which the Sheriff must have done it if he had been called upon by writ, and in which the parties were at liberty to do it without writ. The principle of this determination ought not to be confined, and in my opinion cannot be confined to that particular case. If the parting with the estate, the divesting of the estate did not work a revocation in that case, neither ought it

to work a revocation in any case in which the purpose to be effected is consistent with the will, and consistent with the nature and qualities of the estate, and leaves the whole untouched or charged only to a certain extent. This case ought not in my judgment to be called an excepted case or an anomalous case, it ought to be considered as a leading case, as proceeding upon a sound principle, which principle ought to be considered as my Lord Hardwicke has considered it, as a wholesome restriction and limitation of a doctrine which has been carried to a most unreasonable extent upon the narrowest of all grounds, reasoning merely technical and artificial. I consider this case in its principle as a case directly in point to the present, that it is impossible to distinguish it, and supported by the authority of this case, together with the case of *Parsons v. Freeman*, I think I have made out that the authorities in our books will be better reconciled by a judgment declaring that this will is not revoked as to the estates comprised in the deeds of lease and release in the special verdict last mentioned, which I take to be the estates in Swinford and South Kilworth, than by the contrary declaration.

Judgment for the Defendant.

(In the Exchequer Chamber.)

REYNOLDS ONE, &C. v. DAVIES; IN ERROR. Nov. 26th, 1796.

In an action on a promissory note by the indorsee against the maker, notice of the indorsement need not be averred (a).

Error from a judgment of the Court of King's Bench, in an action of assumpsit by the indorsee of a promissory note, payable to M. M. or order, against the maker. The declaration, after stating the making of the note and the delivery thereof to the payee, proceeded to aver, that it was indorsed to the Defendant in Error by the payee, "who by the said indorsement appointed the said sum of money in the said note specified to be paid to the said Francis, (the indorsee), and then and there delivered the said note, with the said indorsement, so made thereon as aforesaid to the said Francis, by reason whereof and by force of the statute in that case made and provided, the said Martin (the maker) became liable to pay to the said Francis, &c. and being so liable, promised," &c. In the breach a request to pay was stated to have been made on a particular day and often times afterwards. To this declaration there was a special demurrer in the King's Bench, stating several causes not now assigned as errors, and omitting the following one, which was now assigned on the judgment for the Plaintiff below, viz. "for that it is not in and by the said declaration alleged, nor does it thereby appear that any notice was given to the said Martin, or that he the said Martin had any notice of the said indorsement of the said note in the said declaration, mentioned to have been to the said Francis, without which notice the said Martin was not liable by the law of this kingdom to the payment of the money in the said note mentioned to the said Francis as such indorsee of the said note."

[626] Barrow for the Plaintiff in Error. The objection in this case is, that no notice of the indorsement and delivery to the indorsee is stated to have been given to the maker. The omission of notice precludes the maker from tendering payment, since he cannot know to whom it is due. Where any extrinsic circumstance creates or destroys a liability, the party affected is entitled to notice, *Rushton v. Aspinall*, Doug. 680; where omitting to allege notice to the indorser, in an action against him, of refusal by the acceptor to pay, was held to be error. In *Henning's case*, Cro. Jac. 432, judgment on an assumpsit "to pay so much for barley as the Plaintiff should have of any other," was arrested, because the Plaintiff, though he shewed that J. S. after this agreement paid a certain sum for barley, yet did not aver that the Defendant had notice thereof. And the Court there took this difference, that if the agreement had been that Defendant should pay as much as J. S. in particular should pay, notice need not have been given, but where the person is altogether uncertain the Plaintiff to entitle himself to the action ought to give notice.

Holroyd for the Defendant in Error. Notice in this case is not necessary: but if it be, the averment of the maker's liability and promise to pay, being followed up

(a) Vide *Blicke v. Dymoke*, 2 Bing. 105, 108.

by an averment of a special request to pay, amounts to an allegation of notice, *Bradley v. Toder*, Cro. Jac. 228. The promise contained in the note being to the payee or order, the maker's liability attaches immediately on indorsement. In Com. Dig. Condition L. 9, it is said that lessee of a feme sole is bound to take notice of her marriage, and pay his rent to the husband. So where a lessee covenanted to deliver possession upon request to the lessor his heirs or assigns, and entered into a bond conditioned for the performance of his covenants, the lessor having bargained and sold the reversion to J. S. and T. D., the lessee was, in debt on bond for not delivering the premises to J. S. and T. D., held bound to take notice who were the assigns of the lessor. *Hengen v. Payn*, Cro. Jac. 475. At any rate, however, the promise to pay in the declaration being averred to be made to the indorsee, that promise after judgment must be taken to have been an express promise, *Atkins et Ux. v. Hill*, Cowp. 284, *Hawkes v. Saunders*, Cowp. 289. And if this be intended, notice becomes unnecessary.

EYRE Ch. J. No case precisely in point has been cited: and therefore we are not bound by any authority to say, that notice is essential to the gist of the action. The promise to pay con-[627]-tained in this note is to the payee or his order: immediately then on the order being made to the indorsee the promise attaches. Nor can we add the qualification of notice to a promise which was not originally qualified with that circumstance. The case of *Rushton v. Aspinall* does not apply. There the engagement of the indorser to the indorsee was raised by the law merchant, not by the positive promise of the former. In *Henning's case*, the Court thought that notice was part of the undertaking, and that it was reasonable, that the party claiming the benefit of the undertaking should shew himself entitled. This is a mere question of form: on which we think that as the maker's liability was not originally qualified with notice, it was not necessary to aver notice in the declaration.

Per Curiam. Judgment affirmed (a)¹.

End of Michaelmas Term.

[629] CASES ARGUED AND DETERMINED IN THE COURT OF COMMON PLEAS, IN HILARY TERM, IN THE THIRTY-SEVENTH YEAR OF THE REIGN OF GEORGE III.

TAGG v. MADAN. Jan. 27th, 1797.

If an attorney sue as a common person, the Court will give the Defendant leave to plead that the cause of action arose within the jurisdiction of the court of requests, together with other matters (c).

The Plaintiff, who was an attorney, having sued as a common person to recover the amount of his bill from the Defendant: the latter moved for leave to plead several matters, viz. Non assumpsit, and that the cause of action arose within the jurisdiction of the Court of Requests:

Le Blanc Serjt. opposed the 2d plea, saying that as the Plaintiff was an attorney, he was entitled to sue in this Court (a)².

Shepherd Serjt. contrâ insisted that the Plaintiff had waived his privilege by suing as a common person, and could not now therefore set it up: *Jones v. Bodeenor*, 1 Ld. Raym. 136, and *Crossley v. Shaw*, 2 Bl. 1088, where De Grey Ch. J. says, "an attorney may waive his privilege either when Plaintiff by suing as a common

(a)¹ Vid. Bayley on Bills, 108, where it is said to be unnecessary to aver notice of indorsement, and an *Anonymous case* from Pract. Reg. 358, is cited to that effect. Also *Skipp v. Hook*, Com. 563, where this precise point was determined on demurrer to a declaration on a promissory note. In that case *Lawrence v. Jacob*, reported 1 Mod. Case, 43, was cited, in which the judgment is said to have been reversed in error for this very cause; but Fortescue J. produced the paper-book, and said that the case was mis-reported, &c. and that the judgment was affirmed.

(c) Vide *Parker v. Vaughan*, 2 B. & P. 30. *Johnson v. Bray*, 2 B. & B. 698.

(a)² Vid. *Gardner v. Jessop, One, &c.* 2 Wils. 42. *Silk v. Rennett, un, &c.* 3 Bur. 1583. Contra, *Willshire v. Lloyd*, Doug. 381, where *Silk v. Rennett* was over-ruled, and *Hussey and Another v. Jordan*, B. R. Trin. 25 Geo. III. Doug. 382, in the notes to the same effect.

person, as in the case now at bar, or when Defendant by not claiming it in a proper time or in a proper manner" (b).

Per Curiam. We cannot know from this record that the Plaintiff is an attorney. Rule absolute.

[630] CHEETHAM AND OTHERS, Executors, v. JAMES WARD. Feb. 3d, 1797.

[Applied, *Freakley v. Fox*, 1829, 9 B. & C. 133; *Nicholson v. Revill*, 1836, 4 Ad. & E. 683. Referred to, *In re Wolmerhausen*, 1890, 62 L. T. 545. Principle not applied, *Blyth v. Fladgate*, [1891] 1 Ch. 353. Referred to, *In re Bourne*, [1906] 1 Ch. 710.]

If the obligee in a joint and several bond, make one of two obligors his executor, with others, the action on the bond is discharged as to both obligors.

Debt on bond brought by John Cheetham, James Grugeon, Thomas Fenner, and William Ward, executors of Abraham Cheetham, against the Defendant. On oyer craved it appeared to be a joint and several bond given by William Ward (one of the Plaintiffs) and James Ward (the Defendant) to Abraham Cheetham (the testator) in the penal sum of 1600l. conditioned for the payment of 800l. by the obligors, on the 24th day of December then next ensuing. The Defendant pleaded "That the said William Ward mentioned in the said writing obligatory and in the condition thereof is the said William Ward one of the now Plaintiffs, and not another or different person; and that after the making of the said writing obligatory, and after the said 24th day of December next ensuing the date of the said writing obligatory, and in the condition thereof mentioned to wit on &c. at &c. the said Abraham Cheetham in the said writing obligatory, and the condition thereof mentioned, duly made his last will and testament in writing, and thereby nominated and appointed the said J. C. J. G. T. F. and William Ward executors thereof, and afterwards to wit on &c. at &c. died without altering or revoking his said will, and that after the death of the said Abraham, to wit on &c. at &c. the said J. C. J. G. T. F. and William Ward duly proved the said last will and testament of the said Abraham, and took upon themselves the burthen of the (a) execution thereof, and that [631] by reason of the

(b) Vid. also *Hetherington, m, &c. v. Louth*, 2 Str. 837, and *Welland v. Frument, Barnes*, 479, ed. 3.

(a) When the obligee makes his obligor his executor, the latter is thereby discharged from any action on the bond, whether he administer or not. 20 Ed. 4, 17. 21 Ed. 4, 3 b. Plowd. 184, and agreed by all the Judges in *Wankford v. Wankford*, 1 Salk. 299. Whether an actual refusal to accept the executorship will prevent the discharge from taking effect or not, seems a nice point. In Hargrave and Butler's valuable edition of Co. Lit. 264 b. note 1, the latter gentleman lays it down that the debt is discharged, "whether the executor accepts or refuses the executorship." This doctrine is indeed supported by the opinion of Twysden J. in *Abram v. Cunningham*, 1 Vent. 303. But three of the Judges in *Wankford v. Wankford* (where Twysden's opinion was mentioned,) held the contrary to be law; Powell J. declining to give a decided opinion on the point. In that case also Holt Ch. J. made this distinction, that where the obligor is appointed sole executor to his obligee, and refuses the executorship, there his debt is not discharged, but where he is appointed executor with others and refuses, if his co-executors act, his debt is discharged; and he gives as a reason for this distinction, that his refusal in the latter case is void, and cites *Lord Petre's case*, 1 Salk. 311. This reason is a strong corroboration of the notion that a refusal to accept the executorship does prevent the discharge from taking effect; for where the refusal is valid, there the release is ineffectual, and *è contra*. It seems doubtful, therefore, whether the averment of the Defendant on this record, that W. Ward took upon himself the burthen of the execution was necessary. Where indeed the obligor makes his obligee his executor, the action of the latter is only discharged by his accepting the executorship: and there such an averment would be necessary. 20 Ed. 4, 17. 21 Ed. 4, 3 b. Bro. Ab. Executor, 114. Plowd. 184 b. Sir W. Jones, 345. Wentworth's Office of Executor, c. 2, s. 5. *Rawlinson v. Shaw*, 3 Term Rep. 557. In this latter case it would also be necessary to aver that assets of the obligor to the amount of the debt came to the hands of the obligee, for

premises the said debt in the said writing obligatory mentioned then and there became wholly extinguished in law, and the said James and William Ward then and there became and were, and still are, and each of them is wholly acquitted and discharged from the payment thereof, to wit, at, &c. and this, &c. wherefore, &c."

To this plea there was a general demurrer and joinder.

Shepherd Serjt. in support of the demurrer. The question on this record is, whether the obligee in a joint and several bond by making one of the obligors his executor extinguishes the debt? I admit that when the bond is joint only, and the debt is extinguished as to one co-obligor it is extinguished as to the other: and also that if it be joint and several, and a release is executed to one, it will operate as a release to both. But the release in this case is not by deed, but by operation of law: for though the obligee made the obligor his executor, it is the law which makes that act operate as a release. Now in Co. Litt. 264 b. where the diversity between a release in deed and a release in law is treated of, it is said "a release in law shall be expounded more favourable according to the intent and meaning of the parties than a release in deed, which is the act of the party, and shall be taken most strongly against himself." Where the obligee makes a co-obligor his executor, it is improper to say, that the debt of the latter is thereby released; for if it were, not only the action but the debt would be extinguished. But that is not the case: for the co-obligor will be debtor to himself as executor for the benefit of the creditors and legatees, and the debt will be assets in his hands. *Dorchester v. Webb*, Cro. Car. 373. *Wankford v. Wankford*, 1 Salk. 303. *Brown v. Selwin*, Cas. temp. Talb. 240. 4 Brown Parl. Rep. 179. *Cary v. Goodinge*, 3 Brown Chan. Rep. 110 (a)¹. The action is only gone because the debtor [632] cannot maintain an action against himself. But though William Ward, in his personal character is unable to sue, the Defendant being a co-obligor he may be able to sue him in his official character. William Ward as executor of Cheetham, may declare against the Defendant, though he cannot indeed declare against himself. Had the bond been only joint, both the obligors must have been made Defendants in the action, which would have prevented William Ward as executor from suing: but the bond being several he may well join himself with the other executors as a co-plaintiff in this action against one of the obligors. In the case of *Dorchester v. Webb*, the executrix of one of the co-obligors of a bond, having also become executrix to the obligee, was permitted in her latter character to maintain an action against the surviving co-obligor. [Rooke J. cited *Hammon v. Roll*, March, 202, where A. and B. being bound jointly and severally to C. and C. having released A., it was held that B. also was discharged.] Probably the release in the case of *Hammon v. Roll* was by deed, and was therefore to be taken most strongly against the releasor; whereas in the present case there is only a quasi release, and it has been so called because it suspends the action. Cro. Car. 373.

Le Blanc Serjt. contra. This point has been already expressly decided in very old times. The case in 21 Ed. 4, 81 b. (a)² also abridged Bro. Ab. Executors, pl. 118, is precisely the same as this, and in favour of the Defendant's plea. It has also been established by other cases that a release of one co-obligor by operation of law, is a release of the others (b). Thus in 21 H. 7, 30, it was laid down that if two be bound to a feme sole, and she take one of them to husband, who dies, she shall not have an

without that circumstance it appears that his debt is not extinguished. Per Holt Ch. J. and Powell J. 1 Salk. 304, 305, and *Cock v. Cross*, 2 Lev. 73.

(a)¹ See also note (1) in Hargrave and Butler's Co. Litt. 264 b.

(a)² The case translated is as follows: "Note, that Copley, prothonotary, asked of Brian (Chief Justice), if three be bound to a man in an obligation jointly and severally, and the obligee make one of the obligors his executor and die, whether he who is made executor shall have an action against any of the others? And Brian said that he should not, for if one was discharged, all shall be discharged; because the making one of them executor is as perfect a discharge in law, as if he had released to one in deed. Copley. Sir, the obligation is several. Brian. This does not matter; for a recovery against one of them and execution sued, will be a discharge to the others. And so of a discharge made to one of them &c." This case is recognized by Gould J. in *Wankford v. Wankford*, 1 Salk. 300.

(b) In 21 H. 7, 29 b. it was held that if A. have a right of action against B. and C. jointly, and A. and B. submit all trespasses and actions, &c. to the award of arbitrators;

action against the [633] other, for the duty and debt were extinguished. This last case was cited and recognized in *Sir John Needham's case*, 8 Co. 136, 3d resolution, where it was held, that the committing of administration does not extinguish the debt, but that if the obligee make the obligor his executor, it is a release in law of the debt, because it is the act of the obligee himself. With respect to *Dorchester v. Webb*, the 2d resolution there, as reported in Sir W. Jones, 345, shews, that where the obligee makes the obligor executor, the debt of the latter is absolutely discharged, for the reason given is, that an action personal once suspended by the act of the party, is gone for ever. The 3d resolution of the same case is, "if the obligee make one of the obligors executor who administers, in this case the obligor cannot sue the other obligor although he survive, and although the bond was joint and several." Indeed from the 4th resolution of that case, it also appears, that the only ground of the decision in favour of the Plaintiff was, that she was executor of the co-obligor, and not the co-obligor herself. In *Wankford v. Wankford* it was said by Powell J. that a personal action once suspended by the act of the party is gone for ever, and though in some cases it may be suspended and revive again, yet never where that suspension arises from the act of the party.

EYRE Ch. J. Having heard the argument in support of this plea, I am satisfied that this case may be decided in favour of the Defendant on the principle now acknowledged, that where a personal action is once suspended by the voluntary act of the party entitled to it, it is for ever gone and discharged (a). This was admitted to be the case where there is but one obligor in a bond. But a distinction was attempted between the case of a single obligor, and that of two who have become bound jointly and severally. The very point in issue was however decided in the year-book: and Brian there gives a satisfactory reason for the decision. In fact there is but one duty extending to both obligors; and it was therefore pointedly put that a discharge of one, or satisfaction made by one, is a discharge of both. This puts an end to the argument that the action is not necessarily suspended as to both: for it is the effect of the suspension as to one that releases, discharges, and distinguishes the action as to both. This case, therefore, must be decided by the year-book, [634] and the principle there laid down, which has never been doubted since, whether founded in reason or not.

HEATH J. I am of the same opinion. It is of no consequence whether the release be by operation of law, or by deed demonstrating the intent of the party. For when the obligee actually releases to one as matter of favour, that release affects both.

ROOKE J. The general principle that if the action be once suspended in the case of a single obligor, it is gone for ever, is not now disputed: and the case in the year-book shews that if the action be gone as to one obligor, where two have become bound, it is gone as to both. Now the obligee has it not in his power to elect to discharge one obligor without discharging the other.

Judgment for the Defendant.

CURLING AND OTHERS v. LONG AND OTHERS. Feb. 6th, 1797.

[Dictum disapproved, *Beale v. Thompson*, 1803, 3 Bos. & P. 430.]

A ship bound for London after taking in her cargo, but before breaking ground was cut out of her port of lading in Jamaica by a French privateer, but was afterwards re-captured and carried into another port in the same island, where the cargo was sold by order of the Court of Admiralty for the benefit of the freighters: held that

by the award the right of action which A. has against C. will be discharged also. And in *Wentworth's Office of Executor*, c. 2, s. 4, it is said, that if testator make his debtor and others his executors, the debt is released; for they must all join a suit. Vide etiam *Hargrave and Butler's Co. Lit.* 232 a. note (1) for a manuscript note of Lord Nottingham on this subject.

(a) 20 Ed. 4, 17. 21 El. 4, 3 b. Dy. 140. Hob. 10. Cro. Eliz. 150. Cro. Car. 373, and Sir W. Jones, 345.

the owners of the ship were not intitled to any part of the freight. Though by the usage of the trade the ship was loaded at their expence (a).

Assumpsit for freight claimed under the following circumstances. The Plaintiffs were owners of the ship "The Earl of Effingham," and the Defendants the consignees of nine hogsheads of sugar shipped on board her while lying in Salt River, Jamaica, and bound for London. The goods were put on board on the 18th of September 1795, and four several bills of lading were duly signed by the captain. On the 2d of December following, having completed her lading, the ship cleared out for her voyage. On the 31st of December, while waiting for convoy, she was cut out of the river by two French privateers, and carried out to sea, but was re-captured on the same day by a British schooner, and carried into Port Royal. The ship was afterwards libelled in the Admiralty Court of Jamaica, and appraised and sold under an order of that court. The proceeds of the sale, after deducting one-eighth for salvage, were remitted to the Defendants as agents for the several owners of goods on board. The whole of the cargo, including the goods in question, was brought to the ship in Salt River for the purpose of being loaded, and was actually put on board at the expence of the Plaintiffs as owners of the ship according to the usage of the Jamaica trade. This amounted to 310l. The Plaintiffs also expended 455l. 18s. according to the same usage, for the provisions and wages of the crew, between the time when the ship began to take in her loading, and the time of the capture. The Plaintiff's demand was shaped in different ways so as to recover a proportion of the freight either from the 1st of [635] September 1795, when the goods were put on board to the 1st of January 1796, when the ship was re-captured, or from the 2d of December 1795, the day the goods were shipped, to the 1st of January 1796, the day she was recaptured; or to recover a proportion of the sums expended by the Plaintiffs as above mentioned.

The cause was tried before Eyre Ch. J. at the Guildhall sittings after Michaelmas Term 1796, who directed a non-suit.

A rule Nisi for setting aside this non-suit, and entering a verdict for the Plaintiffs having been obtained on a former day,

Adair and Heywood Serjts. now shewed cause and contended that no freight could be claimed, there having been no inception of the voyage, which does not commence from the loading but from the time of breaking ground; that although no express case was to be found upon this subject, yet that several passages in Molloy afforded a strong implication in support of this position, as Lib. 2, c. 4, s. 3. "By the law marine chance or some other notorious necessity will excuse the master, but then he loseth his freight till such time as he breaks ground, and till then he sustains the loss of the ship;" so s. 5, "if goods are fully loaded abroad, and the ship hath broke ground, the merchant on consideration afterwards resolves not on the adventure but will unlade again, by the law marine the freight is due;" and in s. 6, it is said, that if the party agree to sail with the first wind and opportunity, "the ship departs not with the first wind and opportunity, yet afterwards breaks ground and arrives at her port, the freight in this case is become due, for there is nothing can bar the ship of her freight, but the not departure." They observed that with respect to the case of *Luke v. Lyle*, 2 Bur. 882, the proportion of freight there allowed was calculated from the day of sailing, and that Lord Mansfield explained "a rateable freight" to mean pro ratâ itineris; and that as here there was no "iter," so there could be no freight; that as to the usage of the Jamaica trade, since all the expences incurred by the Plaintiffs were to be covered by the freight, the Plaintiffs could have no demand where no freight was due.

Le Blanc and Shepherd Serjts. in support of the rule, argued that in a contract where part of the consideration is performed, the party is intitled to a remuneration for such part-performance, and that in Molloy the freight only and not the loading was considered; that the right to freight pro ratâ itineris depends on the circumstance [636]-stance of the inchoate right having commenced or not, and that this circumstance depends on the inception of the contract. They referred to the case of *Tonge v. Watts*, 2 Str. 1251, where Lee Ch. J. non-suited the Plaintiff in an action on an

(a) Vide *Hunter v. Prinsep*, 10 East, 378, 385. *Blakey v. Dixon*, 2 B. & P. 321. *Birley v. Gladstone*, 3 M. & S. 205,

insurance for freight because "the goods were not actually on board, so as to make the Plaintiff's right to freight commence," and to the observations of *Ld. Kenyon* upon that and the case of *Montgomery and Egginton*, 3 Term Rep. 362, in the course of his judgment in *Thomson v. Taylor*, 6 Term Rep. 481, 2.

EYRE Ch. J. This is a case of the very first impression; and it appears to me that the demand of the Plaintiffs is neither warranted by the marine or by the common law. The former has settled what freight is, what services it includes, and also that it is divisible, which is contrary to the principles of the common law. At common law all the expences of loading are included in the freight, and if the party be not intitled to freight he can demand no satisfaction for loading. The inception of freight is breaking ground (a)¹. In the law of insurance, indeed, this doctrine is not holden so strict, for there if the goods be so situated as to create a well-grounded expectation of freight being raised, it is decided that the freight is insurable, and recoverable. But that does not affect the marine law as to freight in cases between the ship-owners and freighters, by which this case must be decided. According to that law no right to freight commences till the ship has broken ground; here the ship had not broken ground, having been captured in the river. The situation of the places where cargoes are taken in materially varies the labour, cost, and pains taken by the shipper and master. In some places there is little difficulty and expence, in others a great deal. On these circumstances, depends the price of freight; if the master incurs this cost and trouble he takes a larger freight, if the shipper, a smaller. In either case the freight is his reward. If therefore by the marine law he be intitled to no freight, he can claim no remuneration. So stands the case by the marine law. Let us now view it upon the principles of the common law. The contract was to load these goods on board and bring them to England for a certain price. Upon this contract, how could a declaration be framed for the Plaintiffs' demand either [637] in *assumpsit* (a)², or in an action on a charter party (b)? Could the Plaintiffs state a part-performance of the contract and insist on payment for it? This could not be done, for by the law of England the contract is intire and indivisible. By the marine law, indeed, parties may recover *pro ratâ*, if the voyage be interrupted. And by the common law where a contract cannot be performed such a meritorious consideration may arise as will sometimes intitle a party to recover in the form of an action of *assumpsit* for work and labour even after the contract has been broken (c). Such is the case where a ship after capture and re-capture completes her voyage; for there the shipper has his goods with the advantage of carriage, and upon that, though the original contract be gone, a meritorious consideration arises which intitles the master to a recompence; not, however, on the foot of the old contract, but on a new contract which springs out of it. Here the ship never arrived at the port of destination, but put into a port in Jamaica, without having conferred any benefit on the freighters by the carriage, or bettered the goods in the smallest degree by the expences incurred. I am therefore of opinion, that neither by the marine, or the common law, are these Plaintiffs, however unfortunate, entitled to recover.

(a)¹ Though breaking ground be the usual inception of freight, yet an exception to this general rule has been stated by a writer of some authority; "In case a ship is freighted out, and in consequence of the agreement, receives her lading aboard, if an embargo happens afterwards, and her cargo is taken as forfeited, yet the owners shall notwithstanding receive the freight, as the fault was not in them, but in him whose property the goods were." *Beawes Lex. Merc.* 87, and with this agrees the civil law. *Dig. Lib. 19, tit. 2, c. 61.*

(a)² This agrees with the doctrine laid down in *Cutter v. Powell*, 6 Term Rep. 320, where a sailor having taken a promissory note for a certain sum from his employer on condition of performing the voyage, died before the arrival of the ship. There the Court held, that no wages could be claimed either by virtue of the contract or upon a *quantum meruit*.

(b) If one covenant for such a sum to carry goods to such a place, and being prevented by the act of God from delivering them at that place, deliver them elsewhere and they are accepted, yet he cannot recover upon the covenant *pro ratâ*. *Cook v. Jennings*, 7 Term Rep. 381.

(c) Said to *obiter dictum*. 3 Bos. and Pull. 413. *Vid. Thompson v. Rowercroft*, 4 East, 47. *Beale v. Thompson*, 4 East, 553.

HEATH J. This is a demand for a proportion of freight. The contract for freight is technical in its nature. By the marine law an inchoate right to freight attaches from the ship's breaking ground, and is consummated upon her arrival at the port of destination. If the voyage be interrupted the party may claim *pro ratâ*. Freight commences at the same time in all parts, since it depends on the same principle here and at Jamaica. It is true, indeed, that by the customs of different ports, duties more or less onerous, may be imposed on the master, and recompensed by the freight. But that does not vary the principle. This case is only new in its circumstances. The law of insurance does not apply to this case: for the mere hope or expectation of interest is sufficient to intitle the assured in a policy of insurance to recover against the underwriters (*d*).

[638] ROOKE J. This is a new case, and therefore I take the demand not to be founded on the usage of trade. The contract in a bill of lading is for freight. The expression is, "they paying freight;" and though the master may have been at the expence of loading, and the freight was higher on that account, yet as it had not commenced, the Plaintiffs cannot demand a recompence. The text writers all agree that freight commences from the breaking ground. This is clear and intelligible: the ship begins to earn when she begins to move; and we cannot introduce new principles. The writers also say, that there may be cases where the ship-owners may be entitled to a proportion of what the ship has earned; but that cannot include what has been earned by the master before the commencement of the voyage. This doctrine is founded in good policy, for it tends to expedite the sailing of the ship. Did the freight commence sooner, it might induce the master to stay a longer time in port and so delay the voyage. Insurance is a contract of indemnity; the cases, therefore which are founded on such a contract are not applicable to this case. Upon these grounds I think the non-suit right.

Rule discharged.

HOLMES AND ANOTHER v. RHODES. Feb. 8th, 1797.

Non damnificatus cannot be pleaded to debt on bond, conditioned for the payment of a sum of money at a certain day, though it appear by the condition that the bond was given by way of indemnity.

Debt on bond; and the common counts in debt.

The Defendant cravedoyer of the bond, which was a joint and several bond of the Defendant and one T. R. for the payment of the penal sum of 600l. to the Plaintiffs and one W. H. since deceased; and also of the condition, which was as follows: "Whereas the above-named Plaintiffs and W. H., at the special instance and request and for the only proper debt of the above-bound defendant and T. R. in and by one bond or obligation bearing date &c. became jointly and severally bound together with the said Defendant and T. R. unto R. Wright, of &c. in the penal sum of 600l. with a condition there-under written that if the said Plaintiffs and W. H. and the Defendant and T. R. or some or one of them their or some or one of their heirs executors or administrators should and did well and truly pay or cause to be paid to R. Wright 300l. with lawful interest for the same in manner following that is to say 100l. on the 10th of January 1788 with lawful interest on 300l., 100l. on the 10th [639] of January 1789 with lawful interest on 200l., and the remaining 100l. on the 10th of January 1790 with lawful interest on the same, then the said obligation to be void: now the condition of the above-written obligation is such, that if the said Defendant and T. R. or one of them their or one of their heirs executors or administrators do and shall well and truly pay or cause to be paid to the said R. Wright his executors administrators or assigns the said sum of 300l. and the interest thereon on the days and times and in the manner limited and appointed in and by the condition of the said in part recited obligation and according to the true intent and meaning thereof, and thereby acquit release and discharge the said Plaintiffs and W. H. their and each and every of their heirs executors and administrators' goods and chattels lands and tenements of and from the said recited obligation and all sum and sums of money

(*d*) To this effect see *Le Cras v. Hughes*, Park Insur. 269. *Crawford v. Hunter*, 8 Term Rep. 13, & *Boehm and Others v. Bell*, 8 Term Rep. 154.

therein and in the condition thereof mentioned and thereupon to grow due for the same, and also of and from all actions suits payments costs charges damages and expences which may arise happen or accrue to them the said Plaintiffs and W. H. their or any of their heirs executors administrators or assigns for or by reason of their becoming bound with the said Defendant and T. R. to the said R. Wright, as aforesaid then the above-written obligation to be void otherwise to be and remain in full force and virtue." The Defendant then pleaded to the first count "that the said Plaintiffs have not nor hath either of them at any time since the making of the said recited writing obligatory and condition thereof hitherto been in anywise damnified by reason or means of the said recited writing obligatory or the said condition thereof. And this &c. wherefore" &c. To the other counts he pleaded nil debet and a set off.

The Plaintiffs replied, that they were damnified in consequence of having been obliged to pay the sum of money for which they had become jointly bound with the Defendant and T. R., and also the costs of a certain action for the recovery of the same brought against them by the executors of R. Wright.

To this replication there was a special demurrer and joinder.

Williams Serjt. first argued in support of the demurrer; but as the Court gave no opinion upon the replication, the causes of demurrer and argument thereon are here omitted. He then contended that the bond on which the Plaintiffs had declared being in [640] substance an indemnity bond, though not precisely expressed to be so in the condition, the plea of non damnificatus was therefore proper. He observed that the Defendant's bond was conditioned for the payment of the principal and interest, for which the Plaintiffs had engaged themselves, and thereby to acquit, release, and discharge them; that the object of the condition was indemnification, and that the having pointed out the mode by which the indemnification was to be made would not alter the nature of the condition.

Shepherd Serjt. was to have argued on the other side;

But the Court were of opinion, that the plea of non damnificatus was no answer to that part of the condition by which the Defendant undertook to pay the sum for which the Plaintiffs bound themselves (a)¹, and was therefore bad.

Judgment for the Plaintiffs (b).

SHUM AND OTHERS v. FARRINGTON. Feb. 10th, 1797.

[Followed, *Calest v. Gordon*, 1829, 7 Barn. & Cress. 812. Distinguished, *Hichinbotham v. Leach*, 1842, 10 Mee. & W. 363.]

Debt on bond conditioned for J. S. rendering account to the Plaintiffs of all monies which he should receive as their agent. Defendant pleads performance in the words of the condition. Plaintiffs reply that J. S. received divers sums of money amounting to 2000l. belonging and relating to the Plaintiffs' business as their agent, and hath not rendered to the Plaintiffs an account of the said 2000l. or any part thereof. This replication being specially demurred to for generality, was held sufficient (a)².

Debt on bond for 2000l.

Upon oyer craved it appeared that the Defendant and one Robert Spratlin, the

(a)¹ It seems, however, that non damnificatus would not have been a good plea in this case, even if the condition had not been for payment of a sum of money. For in a note to *Culler v. Southern*, 1 Saund. 116, by Mr. Serjt. Williams, this distinction is taken. Where the condition is to discharge or acquit the Plaintiff from such a bond or other particular thing, the Defendant must set forth affirmatively the special matter of performance: but when the condition is to discharge and acquit Plaintiff from any damage by reason of such bond or other particular thing, then non damnificatus is a good plea. See the authorities there cited.

(b) Analogous to this case in principle are those decisions where it has been holden, that if a bond be conditioned for the payment of a sum of money at a certain day, though really given by way of indemnity, the debt accrues from the day mentioned in the condition, and does not await the damnification. *Touissant v. Martinnant*, 2 Term Rep. 100. *Martin v. Court*, 2 Term Rep. 640, and *Holgson and others v. Bell*, 7 Term Rep. 97.—Nothing debars the bond can be pleaded to shew that it is an indemnity bond. *Mease v. Mease*, Cowp. 47.

(a)² Vide *Gale v. Reed*, 8 East, 80. *Wilcocks v. Nicholls*, 1 Price, 109.

elder, became jointly and severally bound to the Plaintiffs, as brewers and copartners, in the above sum, conditioned for the good behaviour of Robert Spratlin the younger, employed by the Plaintiffs as their agent or factor in their business as brewers, and for his duly rendering and paying to the Plaintiffs a true, and just, and fair account, payment, and delivery of all monies, bills, &c. belonging or relating to their trade as [641] such agent or factor, wherewith he should be entrusted or which he should receive or be concerned in as agent for the Plaintiffs. The Defendant pleaded that Robert Spratlin, the younger, was employed as the Plaintiffs' agent at Colchester, and averred performance in the words of the condition.

Replication, That "the said Robert Spratlin the younger whilst he so continued to manage and conduct the said business of the Plaintiffs as their agent or factor to wit on the 30th of October 1793 and on divers other days and times between that day and the 1st of July 1796 at the town of Colchester aforesaid under and by virtue of the said appointment received divers sums of money amounting to a large sum of money to wit the sum of 2000l. belonging and relating to the said trade and business as such agent or factor as aforesaid, and hath not given rendered and paid unto the Plaintiffs or either of them a true just and fair account payment and delivery of the said sum of 2000l. or any part thereof but then and there wholly refused and neglected so to do contrary to the form and effect of the said condition. And this &c. Wherefore" &c.

To this the Defendant demurred specially "for that it does not appear in and by the said replication of the Plaintiffs from whom or in what manner, or in what proportions the said sums of money in the said replication mentioned amounting to the said sum of 2000l. in the said replication mentioned were received by the said Robert Spratlin the younger."

Joinder in demurrer.

Le Blanc Serjt. in support of the demurrer. This demurrer is drawn on the authority of *Jones v. Williams and another*, Doug. 215. One cause of demurrer there was, that it was not shewn from whom the money was received; and according to my note of that case, when it was insisted upon in argument that it was not necessary to particularize the receipt, Lord Mansfield said, that it clearly was necessary, and mentioned the 8 & 9 Will. 3, c. 11. This case is stronger than that in *Douglas*, for there the embezzlement was charged as having been committed on one day, whereas here a space of three years is comprehended, and divers sums are laid as having come to R. Spratlin's hands without shewing whence they came. This allegation is so general, that the Plaintiffs may prove the receipts in any way they please, and the Defendant cannot know what evidence it will be necessary for him to produce in order to meet the charge. The case of *French v. Pearce*, [642] 1 Lev. 94 (cited by Mr. J. Heath) where a general replication of this kind was held good, is open to two observations, first, that it is not the note of Levinz himself who was ill during the whole term in which it was decided; secondly, that the Court said that such a replication was well enough in debt on bond where on any breach the penalty and not the damages, was to be recovered, but that it would be otherwise in covenant (*a*), where the recompence is in damages. Now since the 8 & 9 Will. 3, c. 11, s. 8, the Plaintiff in debt on bond can only obtain damages for such breaches as he assigns (*b*): debt on bond and covenant therefore now stand upon the same footing in this respect, and this probably was Lord Mansfield's reason for alluding to the 8 & 9 Will. 3, according to my note of *Jones v. Williams*. The Plaintiffs should have specified the nature of the receipt: as whether the money was received of them, or their customers: had they alleged that R. Spratlin received so much in the retail way, that would have been sufficient to inform the Defendant what charge he had to meet. The parties cannot go to issue on the general plea of performance, *Sayre v. Minns*, Cowp. 578, and this replication is little less general than such a plea.

(a) Vid. tam. *Farrow v. Chevalier*, 1 Salk. 139. 1 Ld. Raym. 478, S. C. where Holt Ch. J. and Gould J. say, that more certainty is requisite in the replication in debt on bond than in the breach in covenant. In that case, which was covenant, the breach laid was for selling diversis diebus et vicibus between such a day and such a day to H. and several persons unknown, and it was moved in arrest of judgment that the breach was uncertain as to times and persons; but held well enough.

(b) See a very full note on this subject in 1 Saund. 58, by Mr. Serjt. Williams.

Clayton Serjt. contra. In Lutw. 421 it is said by the Court that when matter tends to great prolixity, a concise manner of pleading ought to be admitted (c). Had we stated the account between R. Spratlin and the Plaintiffs, it would have rendered the pleadings intolerably prolix. Previous to the case of *Jones v. Williams*, the form of pleading was the same as that here made use of. That case was little discussed, and no authorities were cited in support of the determination. In *Lord Arlington v. Meyrick*, 2 Saund. 413, which was debt on bond for the performance of covenants, and performance pleaded, the replication was general that the Defendant had received a certain sum for letters and packets, and had not accounted for the same with the post-office, and though Saunders took exception to the replication upon other grounds, no objection was made to its generality. So in Lally's Entr. 114, there is a precedent of the same kind. The same form was fol-[643]-lowed in *Cornwallis v. Savery*, 2 Burr. 772, and held good on demurrer. The averment there was, that the Defendant as agent to a regiment had received several sums of money amounting in the whole to 14,000l. on account of the regiment, and had not paid them over. To the same purpose may be cited the several replications in *Simmons v. Langhorne (a)*, 2 Wils. 11, *Wright v. Russell*, 3 Wils. 535, and *The Irish Society v. Needham*, 1 Term Rep. 483.

Le Blanc in reply. None of the cases cited are authorities to govern the present. The dictum of the Court in Lutwyche must be read with this qualification: that the conciseness alluded to be consistent with justice. In Saunders the averment that the money was received for letters and packets was sufficiently precise. With respect to *Cornwallis v. Savery*, it was there averred, that the money was received from the Paymaster General, which differs it from this case, where it is not stated from whom the sums were received. There also the demurrer, though professing to be special, was in fact but general, since the epithets do not amount to an assignment of any special cause. So the cases of *Wright v. Russell*, and *The Irish Society v. Needham*, were both on general demurrer, and this point was not raised.

EYRE Ch. J. When I read this demurrer, it appeared to me a point of extreme consequence, since any departure from the general way of stating the breach used in this replication would lead to an inconvenient length of pleading, which the Court will not determine to be necessary unless compelled by a series of authorities. One decided case only has been cited; but that case does not direct how the statement should be made, for the extent of *Jones v. Williams* is, that enough was not there stated. I confess I am not satisfied that the decision of that case was consistent with the general rules of pleading. Whether a breach be sufficiently assigned or not, is to be decided by the rules of law and the forms of pleading. By the former the party must shew some fact which is a breach in the words of the condition. Where many sums [644] have been received, it is not each sum, but all taken together, that constitute the breach, which must therefore be so stated. All the sums so received, are, according to the condition to be duly delivered. Here then the plaintiff states, that R. Spratlin has received divers sums of money, and has not given, rendered, and paid, &c. in the words of the condition. This allegation is indeed general, but from the nature of the fact it could not be otherwise. It was not contended in argument that extreme particularity was requisite, or that every sum need be stated; but it was said that the description of the receipt should have been shewn, that the money received by R. Spratlin must be divided into two classes, viz. money received from his employers and money received from the customers, and that it should have been shewn to which of these classes the sums received belonged. This, however, is but an imaginary division, for still the particulars would be unknown. The Defendant only experiences

(c) Vid. etiam *Mints v. Bethil*, Cro. Eliz. 749. *Braban v. Bacon*, Cro. Eliz. 916. *Cryps v. Bainton*, 3 Bulst. 31. *Banks v. Pratt*, Sty. 420, 428. *Jenny v. Jenny*, Sir T. Raym. 8, and *J. Anson v. Stewart*, 1 Term Rep. 753, per Buller J.

(a) Quere tam. For there, to debt on bond to save harmless from expences by reason of naming one to a curacy, or from suits by reason thereof, non damnificatus being pleaded, the Plaintiff replied that he was obliged to pay such sum by reason of such nomination, without saying how he was obliged to pay; and though the replication was held well enough on general demurrer, the Court seemed to intimate that it might have been otherwise on special demurrer. But the circumstances of the damnification were in that case more within the knowledge of the obligee than of the obligor, whereas that observation does not apply to the principal case.

the same difficulty which occurs in all matters in pais which come before the Courts, especially on the general issue. This difficulty is unavoidable, for in pais facts may be either single or accumulated. Though the books afford no express decisions on this subject, yet a series of similar replications are sufficient to establish the form of pleading. Had the form adopted in the cases cited been thought deficient by the profession, an exception to it would certainly have been taken. None having been taken, we may infer a concurrence of opinion sufficient to outweigh the authority of one vague case like that in Douglas, which points out no way of framing a replication, and which necessarily tends to load the record with a multitude of allegations. I am therefore of opinion, that this replication is agreeable to the rules of law and precedents. It is a rule that issue cannot be taken on a plea of general performance, because such a plea goes to a multitude of facts, one of which the Plaintiff must select. But where a covenant relates to one fact only, issue might be taken on the plea of performance without any objection, were it not for the general rule, which requires that to such a plea the Plaintiffs must reply. The argument, therefore, which has been drawn from that rule, affords no objection to this replication when the plaintiffs have shewn one breach in the words of the condition. I think we ought to discourage demurrers of this kind.

HEATH J. This demurrer rests solely on the case in Douglas, and the cases cited the other way prove that the rule there laid down is neither consistent with the current of authorities previous [645] to that time, nor has since been universally acted upon. My Brother Le Blanc admitted that it was not necessary to state each particular sum, but according to the case in Douglas such a statement would be necessary, for no rule can be laid down limiting the degree of particularity to be employed. The breach in substance is, that R. Spratlin has not accounted for what he has received. These parties might have divided the condition of the bond into distinct parts, which would have compelled the Plaintiff to select his breach, and assign it separately. The method of averring Barratry is a strong instance of the conciseness allowed in pleading.

ROOKE J. The authorities cited of a date previous to the case in Douglas, shew the practice before that decision to have been in favour of this replication. It is sufficient that the breach is assigned in the words of the condition.

The Court were about to give judgment (a)¹ for the Plaintiffs, but on the application of Le Blanc, gave him leave to withdraw his demurrer and rejoin.

MURRAY v. HUBBART. Feb. 11th, 1797.

Defendant being arrested by the name of F. H. put in bail by the name of S. H. : Plaintiff then declared thus: "S. H. arrested by the name of F. H. was attached to answer, &c." Defendant without craving oyer pleaded in abatement of the writ that his name was S. H. ; Plaintiff having treated this plea as a nullity, and signed judgment accordingly, the Court refused to set it aside (a)².

The Defendant in this case being arrested on a *capias ad respondendum*, issued against him by the name of Francis Hubbard, put in bail by the name of Samuel Hubbard. Upon this the Plaintiff declared against him thus: "Samuel Hubbard arrested by the name of Francis Hubbard was attached to answer George Murray of a plea of trespass on the case" &c. and throughout the declaration called him Samuel. The Defendant pleaded as follows; "And the said Samuel Hubbard against whom the said original writ of the said George hath been sued out by the name of Francis Hubbard in his proper person comes and pleads that he was baptized by the name of Samuel Hubbard at Boston in the State of Massachussets in North America and by the name of Samuel Hubbard hath always hitherto since his baptism been called and known, to wit at London aforesaid in the parish and ward aforesaid; without this that the said Samuel now is or at the time of suing forth the said original writ

(a)¹ A similar case of *Barton and Another v. Webb and Another, Executors*, came on in B. R. Hill. 40 Geo. 3, and received a similar decision. 8 T. R. 459, approving the above decision against the case in Douglas.

(a)² Vide *Deshans v. Head*, 7 East, 383. *Hopgood v. Wright*, 2 N. R. 188. *Rex v. Sheriff of Suffolk*, 4 Taunt. 818.

of the said George was or ever before had been, or ever since hath been called by the Christian name of Francis, as by the said writ is above supposed. And this he the said Samuel is ready to verify. Wherefore he prays [646] judgment of the said writ and that the same may be quashed." In support of this plea in abatement, there was the usual affidavit of the truth of its contents.

Early in this term an application was made to the Court on the part of the Plaintiff for leave to treat this plea as a nullity, and to sign judgment notwithstanding. But the Court refused to make any rule in that stage of the proceedings, saying that the Plaintiff might sign judgment if he thought proper, and leave it to the Defendant to move to set that judgment aside.

Accordingly judgment having been signed by the Plaintiff, and a rule nisi obtained by the Defendant to set it aside for irregularity ;

Clayton Serjt. shewed cause and contended that the Defendant having appeared by the name of Samuel, the Plaintiff had a right to declare against him by that name. *Hole v. Finch*, 3 Wils. 393, and *Doo v. Butcher*, 3 Term Rep. 611. That this plea was a nullity, for there could be no plea to the writ without oyer ; Com Dig. tit. Abatement (H. 1) (a)¹, that the Court would not now grant oyer of the writ ; *Boats v. Edwards* (b), Doug. 228, and that if the plea were a nullity the Plaintiff might sign judgment. *Wagstaffe v. Long*, Barnes, 263, ed. 3. He also cited *Sir William Hick's case*, 1 Vent. 154.

Heywood Serjt. contra insisted, that if the plea were bad it ought to have been demurred to : that there was no authority in the books in which oyer of the writ had been craved in order to [647] plead misnomer in abatement ; and that this therefore was an experiment, for if the Plaintiff had demurred he could only have had a judgment of respondeas ouster. He urged that this was not a plea to the jurisdiction, but to the person, and that no plea to the person could be pleaded after oyer. Theloall's Dig. l. 14, c. 5, and that a precedent of such a plea pleaded without oyer was to be found in Aston's Entries (a)², 1, pl. 2.

Cur. adv. vult.

The judgment of the Court was this day delivered by

EYRE Ch. J. On looking into the record, it appears to us that the plea proceeds upon a mistake of the statement of the writ in the declaration : it supposes the writ to have been sued out against the Defendant by the name of Francis, whereas the plea alleges that his name is Samuel. But the writ as recited at the head of the declaration is not against Francis, but against Samuel ; it is that Samuel was attached to

(a)¹ So in Theloall's Digest, lib. 10, cap. 2, s. 1, it is said "homme ne puit dire riens al Briefe devant oier eu del Briefe ; pur que demandons oier del Briefe," and Bracton lib. 5, cap. 17, is there cited.

(b) See also Reg. Gen. T. 19 Geo. 3, B. R. to the same effect, and *Spalding v. Mure*, 6 Term Rep. 364, where the Court said "formerly a variance between the writ and declaration might have been taken advantage of by the Defendant's craving oyer of the writ ; but the Court have laid down a rule that the Defendant shall not have oyer of the writ for the purpose of setting aside the proceedings." According to the report in Douglas of *Boats v. Edwards*, a case in the common pleas was much relied on, which case, as appears from the note, was *Ford v. Burnham*, Barnes 340, ed. 3. There Defendant having pleaded a tender ante diem impetrat : brev : orig : Plaintiff replied an original before the tender ; upon which Defendant prayed oyer, which was denied ; and it was said, that "the Court never make rules for oyer of originals which are matters of record." It is to be remarked, however, that the Defendant in that case, by the regular course of pleading, instead of praying oyer, should have rejoined nul tiel record : and that in two subsequent cases, viz. *Vanderplank v. Banks*, C. B. 2 Wils. 85, and *Hole v. Finch*, 2 Wils. 293, the Court of Common Pleas held, that a variance between the writ and count cannot be taken advantage of without craving oyer of the writ : but in neither of those cases was it said, that if oyer had been craved, it would have been refused, though in the latter it was said, that in such a case the Master of the Rolls on application would order right originals to be made out.

(a)² Vid. etiam Rastall's Entr. fo. 107. Herne's Pleader, 1, and 1 Wentworth's Syst. of Plead. 3, 38, 47. However, in *Hole v. Finch*, 2 Wils. 293, where the objection was grounded on a misnomer in the writ, the court seemed to think that oyer should have been craved.

answer; Samuel arrested indeed by the name of Francis; the arrest, however, is not the operation of the writ, but of the mesne process, which is out of the question after appearance. Now, taking it that the writ is recited to be a writ against Samuel, the plea only affirms the writ: taking the plea to amount to a denial that the writ was against Samuel, and an averment that it was against Francis, it is clear, (without entering into the question of oyer, and the learning on that subject,) that the Defendant must offer in some manner to make out the contents of the matter of record; this he has not done, mistaking, as we suppose, the import of the recital of the writ in the declaration. If it be said that the writ ought not to have been so recited, it may be answered, first, that is not now the question; and secondly, there is no reason why it should not be so recited; for the objection to the mesne process being cured by appearance in the true name, the writ, whenever it is properly called for, will be found to be a writ against the party by his true name. In the case of *Hole v. Finch*, the parties being probably aware how easily the mistake in the mesne process would be rectified upon the record after appearance, applied to set aside the mesne process for irregularity. The application before appearance would in all probability have been granted. But the Court refused to do it after appearance, and intimated that the mistake might be cured in the way which I have mentioned. The case, therefore, comes to this, that so long [648] as it is the practice of the Court to issue the mesne process first, and to allow an original to be sued out afterwards, if necessary to substantiate the proceedings, no advantage can be taken after appearance of a misnomer in the mesne process. If, indeed, the Plaintiff carry the same mistake into the declaration, the plea of misnomer will still be open to the Defendant, for then both the writ and the declaration will appear upon the record to be against the Defendant by a different name from that which the plea states to be the name of baptism, and so the plea will be an answer to the writ and declaration. Here, as I have observed, it says no more than the writ and declaration have said; it is not an exception to, but an affirmation of the Plaintiff's proceedings as they appear upon the record. The plea, therefore, being bad and wholly unavailing, we think the judgment was properly signed; but as the case is involved in some perplexity, it may be right to let the party in to plead upon proper terms.

On a subsequent day, however, the rule was discharged without costs.

COLLINS v. MARTIN AND OTHERS. Feb. 13th, 1797.

[S. C. 2 Esp. 520. Distinguished, *Treuttel v. Barandon*, 1817, 8 Taunt. 103.

See *Goodwin v. Roberts*, 1875-76, L. R. 10 Ex. 350; 1 App. Cas. 476.]

If A. deposit bills indorsed in blank with B. his banker, to be received when due, and the latter raise money upon them by pledging them with C. another banker, and afterwards become bankrupt; A. cannot maintain trover against C. for the bills (a).

This was an action of trover for two bills of exchange deposited with the Defendants under the following circumstances: The bills were sent by the Plaintiffs to Messrs. Nightingales, his bankers, indorsed in blank, in order to be received by them when due, and to be carried to his account. In the bankers' book they were entered short: and the balance of account between the bankers and the Plaintiff was in favour of the latter. The Nightingales being in want of money deposited the bills in question, among others, with the Defendants, who were also bankers; and gave them an acknowledgment in writing for a sum of money received upon this deposit. The Nightingales having failed, this action was brought to recover the bills. Eyre Ch. J. before whom the cause was tried at the Guildhall sittings after Michaelmas Term 1796, finding upon enquiry that there was no evidence to shew that the Defendants knew the circumstances under which the bills came into the hands of the Nightingales, or the situation of the account between them and the Plaintiff, directed a nonsuit. To set aside this nonsuit, a rule nisi having been obtained upon a former day;

Le Blanc and Palmer Serjts. in the course of the Term shewed cause. This case

(a) Vide *King v. Milsom*, 2 Campb. 5. *Carstairs v. Bates*, 3 Campb. 301. *Davis v. Bowsher*, 5 T. R. 491, 494. *Glyn v. Baker*, 13 East, 509. *Treuttel v. Barandon*, 8 Taunt. 100. *Wookey v. Poole*, 4 B. & A. 1, 6. *Gorgier v. Mievill*, 3 B. & C. 45.

may be decided without breaking in upon the doctrine of pledges, or denying that bankers are in some respects [649] factors. The fallacy upon which the motion to set aside the nonsuits proceeds is this; that bankers are to be taken absolutely as factors in every case. To that extent, however, the cases have not gone; though, where a question has arisen between the assignees of a banker who has failed and his customer, the Courts have compared the banker to a factor; as in *Zinck v. Walker*, 2 Bl. 1154. The analogy does not hold between bills and goods, for the possession of goods does not vest the property, since the transferee's title can never be better than the transferor's. But with respect to bills the whole property in them passes by indorsement; and it is immaterial to the person who takes a bill with a blank indorsement, whether the title of him from whom he takes it be good or not. This distinction has been acknowledged even in cases where the title to a bill has been derived to the holder from persons who obtained it by finding or theft. *Grant v. Vaughan*, 3 Burr. 1516, and *Miller v. Race*, 1 Burr. 452. It makes no difference whether the conveyance of these bills was absolute, or whether it was only sub modo as to the time or conditions under which they were to be held. The Plaintiff having parted with the whole property in the bills, and put them into the hands of the Nightingales like a marked guinea or a bank-note, the only question is, Whether the Defendants, when they received them from the Nightingales, paid a valuable consideration for them? That indeed is not denied; but the exception taken is to the mode of transfer. In fact, the Defendant discounted the bills for a part of the time which they had to run, the Nightingales reserving to themselves the power of redemption. In the case of *Goldsmid and Another v. Gaden and Another* in Chanc. 13th June 1796, the Plaintiffs, who were brokers, advanced money on three navy bills and a deposit of scrip; and though it afterwards appeared that both navy bills and scrip were left by the Defendants in the hands of the party depositing, for a particular purpose, and were not his property, but the property of the Defendants, yet on a bill filed in equity, it was referred to the Master to take an account of what was due to the Plaintiffs, and an issue at law was refused by the Chancellor, who thought the question too clear to be disputed. Now as navy bills pass by an indorsement in blank, and are not filled up till the holder comes for the money, they may be compared to bills of exchange indorsed in blank by the payee. The only question which has ever arisen in cases of this kind has been, Whether the holder came honestly by the bills? As in *Hinton's Case*, 2 Shower, 235, & *Crawley* [650] v. *Crowther*, 2 Freem. 257, both cited by Lord Mansfield, in *Grant v. Vaughan*, 3 Burr. 1524, and *Peacock v. Rhodes*, Doug. 633.

Shepherd and Heywood Serjts. in support of the rule. It may be admitted, that there is a distinction between goods and bills, though not to the extent contended for. Generally speaking, the property in goods sold does not pass by the sale, where the vendor is not entitled to sell; but if they be sold in market-overt, it does, because the sale is in the ordinary course of trade. So the property in these bills did not pass to the Defendants, because they were not negotiated in the ordinary course, and therefore they are subject to the same restriction as goods. It is true that the Nightingales themselves gained such a property in these bills as would have enabled them by transfer to convey the absolute property to a third person: but they were not entitled to deposit them with a third person by way of pledge. If the factor, who has a lien upon goods or bills of his principal, cannot transfer that lien to another, *Daubigny v. Dural*, 5 Term Rep. 604, much less can he who has no lien, as in this case, create a lien in his transferee. The use which was made of these bills was clearly a fraud in the Nightingales, to whom they were remitted for safe custody, and were by them entered short in their books. An attempt has been made to liken bills of exchange to navy bills; but in *Malish v. Ekins*, Sayer, 73, it was held, that a navy bill would not pass without an assignment. The negotiability of any instrument depends on the nature of the instrument. Now, it is the nature of a navy bill to be passed without any indorsement, and therefore it is the usual course to pledge them. In *Ford v. Hopkins*, 1 Salk. 283, where lottery tickets had been lodged with a banker that he might receive the money due on them, it was held that he could not exchange them. A bill indorsed in blank to a banker, is so indorsed, either to enable him to receive the amount, or to assign it absolutely: third persons know that a banker has these two powers, but they also know, that he has not the power to pledge. If, therefore, they take a bill from a banker indorsed in blank as a pledge, they take it at their peril, for the indorsement is not even *prima facie* evidence of a right to pledge.

Cur. adv. vult.

The opinion of the Court was this day delivered by

EYRE Ch. J. We are all of opinion that this Plaintiff was properly nonsuited ; and that there ought to be no new trial. I have little to add to what I stated to be the ground of this nonsuit when I made my report. The Counsel for the Plaintiff admitted that [651] the bankers might have sold these bills, but it was argued that they could not pledge them ; and the case of a factor pledging the property of his principal, was urged as an authority ; for it was said, that bankers have been considered as factors. In questions between bankers, or those representing them, and their customers, they have been considered to some purposes as factors or in the nature of factors ; upon the same principle as in other cases, between holders of bills of exchange, and acceptors, or the first indorser of bills payable to a man's own order, the truth of the transactions between them has been allowed to be entered into to destroy the *prima facie* consideration of a bill, the supposed value received. But no evidence of want of consideration, or other ground to impeach the apparent value received, was ever admitted in a case between such an acceptor or drawer, and a third person holding the bill for value. And the rule is so strict, that it will be presumed, that he does hold for value until the contrary appears. The onus probandi lies on the Defendant. If it can be proved that the holder gave no value for the bill, then indeed he is in privity with the first holder, and will be affected by every thing which would affect that first holder. This all proceeds upon an argumentum ad hominem ; it is saying, you have the title, but you shall not be heard in a Court of Justice to enforce it against good faith and conscience. In strict law, and with respect to third persons, bankers do not at all resemble factors ; nor will the rule that factors cannot pledge, apply to the case of a banker pledging indorsed bills. That rule is grounded on the strict rule of property ; the goods are not the factor's, and therefore he cannot pledge them. He may sell them, because, though they are not his, he is intrusted to sell them for his principal. He manages the sale, but it is his principal who through him sells them. For the purpose of rendering bills of exchange negotiable, the right of property in them passes with the bills. Every holder with the bills takes the property, and his title is stamped upon the bills themselves. The property and the possession are inseparable. This was necessary to make them negotiable, and in this respect they differ essentially from goods of which the property and possession may be in different persons. The property passing with the possession, it is admitted that a banker who receives indorsed bills from his customers to be got in when due, and carried to his account, may discount or sell them. Why may he not pledge them ? Either is a breach of the confidence reposed in him. He may sell because the property has been entrusted to him,—and he [652] may pledge for the same reason ; for he who has the property has a disposing power, and the law has not limited it to be used in any particular manner. Perhaps the confidence reposed in bankers may be abused, and it might be wished that they could be restrained from abusing their trust. But an arbitrary restriction cannot be imposed : any restriction would possibly check the facility of negotiation. As in cases of other property we say *caveat emptor*, so in this particular case we may say to the customer who prefers to entrust his banker with his bills and his cash, rather than to be at the trouble of doing his own business, *caveat*.

Per Curiam. Rule discharged.

WALWYN AND OTHERS v. ST. QUINTIN. Feb. 10th, 1797.

[S. C. 2 Esp. 515. Disapproved, *Cory v. Scott*, 1820, 3 B. & Ald. 622.]

Notice of non-payment of a bill by the acceptor need not be given to the drawer, if the latter have no effects in the hands of the former ; though the indorser have. If the holder after protest for non-payment and notice to the drawer, forbear to sue the acceptor, the drawer is not thereby discharged. So after protest only, if the drawer be not entitled to notice. Seeus before protest ; or if the holder take security from the acceptor after protest. If the holder receive part-payment of the indorser, he may still recover the residue against the drawer ; if not the whole (a).

Assumpsit on a bill of exchange drawn by the Defendant on one Deane, by whom

(a) And see *English v. Darley*, 3 Esp. Rep. 49, 51. *Gould v. Robson*, 8 East, 576.

it was accepted, in favour of one Thomas, by whom it was indorsed to the Plaintiffs. At the trial before Eyre Ch. J. at the Westminster sittings after Michaelmas Term 1796, it appeared, that the bill was drawn to accommodate the indorser who had placed securities on which he wished to raise money in the hands of the acceptor, but that the drawer had no effects in his hands; that the bill not being paid when due, was protested, but no notice was given to the drawer of the non-payment till four days afterwards; that in April last, the Plaintiffs having threatened to proceed against the indorser and acceptor, the indorser paid 40l. 5s. to the Plaintiffs' attorney, which the latter swore was upon account only, though the indorser himself gave in evidence (but was not believed) that it was paid upon a promise that no proceedings should be instituted against him; that the Plaintiffs having received a letter from Mr. Annesley, representing the probability of the acceptor's being able to pay at a future period, returned an answer in which they agreed not to press him; and that the drawer before the bill fell due having become insolvent and assigned over his effects to his creditors, quitted the usual place of his abode, and went to reside elsewhere. The jury having in answer to questions put by the Lord Chief Justice, found, first, that the bill was not a mere accommodation bill, the indorser having effects in the acceptor's hands; secondly, that the Defendant did not quit his place of abode with a view to abscond; and thirdly, that the 40l. 5s. were paid by the indorser upon account, not upon any [653] agreement,—proceeded under his Lordship's direction to give a verdict for the Defendant; but if the Court should be of opinion that the Plaintiffs were entitled to recover, then the verdict to be entered for them for so much of the bill as was unpaid. Accordingly a rule nisi having been obtained for that purpose,

Clayton Serjt. shewed cause, and contended, first, That if any notice to the drawer of non payment by the acceptor was necessary, the notice given in this case was too late and therefore insufficient, and that although it appeared that the drawer had no effects in the acceptor's hands, still as the indorser had, notice was not to be dispensed with; for that the ground on which it had been dispensed with where the drawer has no effects in the hands of the acceptor had been, that the transaction is fraudulent, there being nothing to represent the bill, *Bickerdike v. Bolman*, 1 Term Rep. 405; and that although in this case the drawer had left his place of abode before the bill fell due, still notice should have been left at his last place of residence; secondly, That the holder having given time to the acceptor, had thereby discharged the Defendant, for even admitting notice in this case not to have been necessary, in order to shew that the note was not paid, yet it was necessary for the purpose of shewing that the holder looked to the Defendant for payment and meant to sue him, *Tindall v. Brown*, 1 Term Rep. 167; thirdly, That the defendant was discharged by the Plaintiffs' receiving part-payment of the note from the indorser, *Kellock v. Robinson*, cor. Eyre Ch. J. Guildhall, 2 Str. 45, and *Tassel and Another v. Lewis*, cor. Holt Ch. J. N. P. 1 Ld. Raym. 744.

Shepherd Serjt. in support of the rule insisted, first, That the ground on which it had been held necessary to give notice to the drawer of non-payment by the acceptor was, that the former might be able to withdraw those effects which he had placed with the acceptor to answer his acceptance, and that *Bickerdike v. Bolman* proceeded on this principle; that in this case, therefore, the drawer having no effects in the hands of the acceptor, no notice was necessary, nor if necessary could it have been given, the drawer having left his place of abode; secondly, that the Defendant was not discharged by the indulgence given to the acceptor, for that is only a discharge in cases where notice is necessary; where it is not necessary the drawer is not discharged but by an express renunciation on the part of the holder, of his right to sue him, *Dingwall v. Dunster*, Doug. 247, and *Black v. Peele*, cit. *ibid.*; that although those were cases of acceptors, yet that the drawer after [654] notice, or in a case where no notice is required, stands precisely in the same situation as the acceptor; thirdly, that the same principle might be applied to the objection of the Plaintiffs having received part-payment of the note from the indorser, for that in *Johnson v. Keyson*, Bull. N. P. 271, ed. 3, it was held, that the receipt of part of the money from the acceptor or indorser without notice to the drawer discharges him, but that with notice it does not; that here, therefore, where

the drawer was entitled to no notice, a receipt of part-payment from the indorser would not discharge him.

Cur. adv. vult.

The opinion of the Court was this day delivered by

EYRE Ch. J. In this case we did very little more at nisi prius than establish the matter of fact upon which the points of law were to arise. Many have arisen. This being an action against the drawer, the first point made relates to the want of notice being given to him of the acceptor's refusal to pay. The Plaintiffs insist that it was not necessary to give this notice for two reasons: first, because the drawer had no effects in the hands of the acceptor; and secondly, because before the bill became due he had left his place of abode, and the holder of the bill did not know where to find him. If the first reason is sufficient we need not go further. The jury have found that the acceptor had effects in account with the payee. But the true fact is, that this was the acceptor's bill, and not the drawer's. In a regular bill transaction the drawing by A. payable to B., or payable to A.'s own order, and indorsing the bill to B., is a mode by which the drawer pays a sum of money to his payee or indorsee through an acceptor. The transaction in this case, as far as it had pretensions to be deemed a real transaction, was a mode by which the acceptor advanced a sum of money to the payee, and the drawer was a mere instrument of the acceptor. This is reversing the order of things. As far as concerns the drawer, it is what it has been called, a mere accommodation; and all consideration of effects of the drawer in the hands of the acceptor may be laid aside. It seems clear, that notice can be of no use to him; his situation being this, that if the acceptor does not pay he must, and may then and not till then resort to the acceptor to be reimbursed: notice therefore can amount to nothing, for his situation cannot be changed. If there be any case in which notice should be dispensed with, surely it is this. Perhaps, indeed, it ought never to be dispensed with, since it is a part of the same custom of merchants which creates the duty; especially [655] as the grounds for dispensing with it are such as cannot influence the conduct of the holder of the bill at the time when he is to determine whether he will or will not give notice; for ninety-nine times in a hundred he cannot know whether the drawer have or have not effects in the hands of the acceptor, or for whose accommodation the bill was drawn. It has, however, been resolved in many cases where the drawer has had no effects in the hands of the acceptor, that notice might be dispensed with. But it may be proper to caution bill-holders not to rely on it as a general rule, that if the drawer has no effects in the acceptor's hands notice is not necessary. The cases of acceptances on the faith of consignments from the drawer not come to hand, and the case of acceptances on the ground of fair mercantile agreements, may be stated as exceptions; and there may possibly be many others. Where the drawer has no effects, and has no fair pretence for drawing, or where he draws without having effects intended to be applied in payment, and only for the purpose of raising money by discount for himself, and a fortiori for the acceptor, which is this case, it is fairly deducible from the cases which have been resolved, that notice need not be given. And this makes it unnecessary to inquire whether the drawer's absenting himself from his place of abode before the bill became due, will excuse the want of notice. The second point necessary to be considered is, whether the holder of the bill has discharged the drawer by forbearing to proceed against the acceptor on the application of Mr. Annesley. Had this forbearance taken place before noting and protesting for non-payment, so that the bill had not been demanded when due, it is clear that the drawer would have been discharged: it would have been giving a new credit to the acceptor; and the holder not having pursued the custom, this would have been deemed, as between the holder and the drawer, laches sufficient to discharge the drawer. But after protest for non-payment, and notice to the drawer, or what has been held equivalent to notice, a right to sue the drawer has attached, and the holder is not bound to sue the acceptor: he may therefore forbear to sue him. Is then the answer to Mr. Annesley's letter more than mere forbearance? If the holder enters into a new agreement with the acceptor for securing the payment of the bill, that may satisfy the bill as between him and the drawer, and may be considered as a new credit to the acceptor. There was in this case a treaty for such security, but it went off. Proposals for a security bind no one unless they can be made use of to impute laches: and after the protest no laches can be imputed. [656] The last point is, that the holder having accepted 40l. 5s. from the payee on account of this bill, the drawer is thereby discharged. I

do not recollect that this point was urged at *Nisi Prius*. It is supposed to be supported by the authority of very great names. In *Tassel & Lee v. Lewis*, 1 Ld. Raym. 743, the custom of merchants was stated by merchants in evidence as was then the course; and it was there agreed by Holt Ch. J. that if the indorsee of a bill accept but two-pence from the acceptor, he can never after resort to the drawer. *Kellock v. Robinson*, 2 Str. 745, was an action brought by the indorsee of a promissory note against the indorser: it appeared, that the Plaintiff after the indorsement had received part of the drawer of the note, and it was held to be a taking upon himself to give the whole credit to the drawer, and absolutely to discharge the indorser; so the Plaintiff was nonsuited. The rule in both cases is laid down in the most general terms without qualification or exception, and down to that time must have been considered as settled law. On the other hand, there is in Mr. Justice Buller's Introduction to the Law relative to the Trials of *Nisi Prius* (p. 271, ed. 3), a note of the case of *Johnson v. Kenyon* in this Court, Hil. 5 Geo. 3, which is probably Lord Bathurst's own note. In that note the rule is stated with this exception; "unless he give timely notice to the drawer that the bill is not paid: For," it is said, "where a man takes part of the money only, and does not apprise the drawer that the whole is not paid, he gives a new credit for the remainder. But where timely notice is given that the bill is not duly paid, the receiving part of the money from the acceptor or indorser will not discharge the drawer or other indorsers: for it is for their advantage that as much should be received from the others as may be." I will not say that this is not a reasonable qualification of the rule: but it requires some further investigation; and the rather as the want of notice recurs, and furnishes the appearance of an objection to the application of that case to the case now in judgment. That case supposes timely notice to have been given to the drawer that the bill is not paid. In our case we have got to the length of resolving that notice is dispensed with for one purpose, viz. to make the drawer answerable. Will it follow, that in respect of the consequence of receiving part of the money from the acceptor or indorser, according to the language of the case in Mr. Justice Buller's book, the notice shall also be dispensed with? This would be carrying that case a step further than the case itself goes; when, perhaps [657] the reason why notice is necessary in the latter instance is not the same as in the former. Notice is required in the one to make the drawer responsible: it seems necessary in the other to prevent his being discharged from his responsibility. The effect of certain circumstances may be, that he may become responsible without notice: but being responsible, is not his responsibility to remain, or be discharged in the same manner as the responsibility of any other drawer who is made responsible by having notice? Giving a new credit to the acceptor would undoubtedly discharge a drawer made responsible without notice. Then is not the receiving a part of the money considered as giving a new credit? The note in the Introduction to the Law of *Nisi Prius* (a) says, the indorser is discharged because "the indorsee has made his election to have his money from the 'drawer.'" This is not very intelligible. In *Kellock v. Robinson* (as reported in 2 Str. 745), the reason given is, that the holder takes upon himself to give the whole credit to the drawer. In one respect the two notes in Lord Raymond and Strange are imperfect; namely, that they do not state whether the money was received before, or at the time when the bill became payable, or whether after protest, and perhaps notice also, when the rights of the holder had attached. In the latter case possibly a payment in part might be received from one without prejudice to the right to proceed against another for what remains unpaid, upon the ground stated by Mr. J. Buller, that it is for the interest of all who are liable, that as much should be received as can be got. And doubtless receiving part is a different thing from taking a security for the whole. The party gives no credit in respect of what he actually receives, and as to what remains unpaid, he is in the same situation as he was in before. The fact sworn to by Thomas the indorser, in opposition to the Plaintiff's attorney, if it had been believed, would have saved the trouble of discussing this part of the case. He swore that it was agreed that in consideration of 40l. 5s. to be paid, the holders would proceed no further on the bill. This must have discharged the drawer. But the attorney swore, and the jury found, that the money was received generally on account of the bill. We come now to a very material consideration. Of whom was the money received? The answer is, of the payee; that is, it was paid by an

(a) P. 273, where *Kellock v. Robinson* is referred to.

indorser to his indorsee, to whom he was responsible. But one indorser may pay the whole money due upon a bill to another indorser without satisfying the bill as between him [658] and the acceptor and the drawer. It is every day's practice for a dishonoured bill to be thrown back upon the first indorser; each indorser taking back from his immediate indorser what he has paid on account of the bill, and at the same time delivering up the bill to him, and the latter again throwing it back on his immediate indorser till it at last arrives at the first indorser. They may arrange the matter among themselves; and any one indorser may sue the acceptor or drawer instead of any of the preceding indorsers, striking out all the names upon the bill below his own. According to the very perplexed report of the case of *Johnson v. Kenyon*, in 2 Wils. 262 (a), the first indorsee of a dishonoured bill for 1000l. after receiving 232l. from the payee who indorsed it to him, and getting back the bill from Baldwin to whom he had indorsed it for value, and to whom he returned the money, recovered the whole 1000l. against the drawer; and on a motion for a new trial the verdict was confirmed: and very rightly. It was nothing to the drawer how the indorsers arranged the business among themselves. The point of notice supposed to be an ingredient in the case in Mr. Justice Buller's note did not arise. It was assumed that the drawer was liable. The question, as far as I can collect it, was, Whether the indorsee should recover the whole 1000l. against the drawer, having received 232l. upon the bill from the first indorser? which is exactly our case: and it was held that he should; that he might recover for the first indorser the 232l. which the latter had paid and that the Defendant could have no reason to complain, for he only paid what we ought to pay. If the acceptor had paid any thing on account of the bill, it had been otherwise: so much of the bill would then have been satisfied, and at furthest the residue only could be recovered against the drawer (b). According to the two notes in Ld. Raymond and Strange, nothing could have been recovered in that case against the drawer. But they are very short notes; and possibly the rule may have been meant to be laid down only in respect of payment by acceptors when the bill is demanded. But whether that be so or not, they do not apply to this case; for they both speak of the holder receiving a part-payment of the acceptor of a bill, or of the drawer of a promissory note who is an acceptor: whereas the [659] case now in judgment is a case where an indorser has accepted a part of the bill from his indorsee, which in reason and justice, and according to the constant course of business, and upon the authority of the case of *Johnson v. Kenyon*, will not prevent the whole bill from being recovered against the drawer.

The verdict is therefore to be entered for the Plaintiff, who as he is certainly not connected with the first indorser, will of course be content with the balance due to him.

Per Curiam. Postea to the Plaintiff.

English v. Darley, 2 Vol. p. 61.

Mr. Justice BULLER was absent the whole of this Term from indisposition.

End of Hilary Term.

(a) In *Bacon v. Searles*, 1 H. Bl. 90, Wilson J. observes, that the case of *Johnson v. Kenyon* is inaccurately reported in 2 Wils. and that he was disposed to think that the Chief Justice never said what he is there reported to have said.

(b) So vice versâ, if part be received from the drawer, the residue only can be recovered against the acceptor. *Pierson v. Dunlop*, Cowp. 571, and *Bacon v. Searles*, 1 H. Bl. 88.

REPORTS of CASES ARGUED and DETERMINED
in the COURTS of COMMON PLEAS and EX-
CHEQUER CHAMBER, and in the HOUSE of
LORDS; from Michaelmas Term 40 GEO. III.
1799, to Michaelmas Term 42 GEO. III. 1801, both
inclusive. By JOHN BERNARD BOSANQUET,
of Lincoln's Inn, Esq. Barrister at Law; and
CHRISTOPHER PULLER, of the Inner Temple,
Esq. Barrister at Law. The Third Edition,
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[1] CASES ARGUED AND DETERMINED IN THE COURT OF COMMON PLEAS IN
MICHAELMAS TERM, IN THE FORTIETH YEAR OF THE REIGN OF GEORGE III.

BAMFORD *v.* BURRELL. Nov. 6th, 1799.

A debt accrued subsequent to an act of bankruptcy, and previous to the issuing
of the commission, is not barred by the certificate (*a*).

This was an action for goods sold and delivered.

At the Sittings in Michaelmas Term 1797 a verdict was found for the Plaintiff on the plea of the general issue, and judgment was signed. Previous to this verdict, viz. on the 9th of August in the same year, a commission of bankruptcy issued against the Defendant; and on the 4th of December following he obtained his certificate. In Easter Term 1798 the Defendant applied to the Court to order 48l. 12s. the debt and costs in the above cause, paid into the hands of the sheriff of London, by his bail, to be returned to them on payment of the costs of a *scire facias* issued against them, to enter an exoneretur on the bail-piece *nunc pro tunc*, and to set aside the judgment on the *scire facias*, on the ground of his having obtained his certificate before the return of any *ca. sa.* issued against him before the bail were fixed. The court at that time directed the parties to go to trial on the question of bankruptcy, the Defendant pleading his certificate; and accordingly at the Guildhall Sittings after that term the cause came on before Eyre, Ch. Just. when the material facts in evidence were; that the act of bankruptcy was committed by the Defendant on the 8th of March 1797; that the debt in question accrued to the Plaintiff in April following; and that the com-[2]-mission issued on the 9th of August in the same year. A verdict having been found for the Plaintiff, and a rule nisi obtained by the defendant in Trinity Term following for setting aside that verdict and entering one for the Defendant, the case stood over till Easter Term 1799.

(a) Vide *Stacey v. Federici*, post, 390. *Brett v. Levitt*, 13 East, 213. *Buss v. Gilbert*, 2 M. & S. 70. *Ex parte Bowness*, *ibid.* 479.

Cockell and Shepherd, Serjts. then shewed cause. The question in this case arises upon the construction of the words of the 5 Geo. 2, c. 30, s. 7, where it is said, that "the bankrupt shall be discharged from all debts by him, her, or them due or owing at the time that he, she, or they did become bankrupt." Now a manifest distinction appears as well in the statutes relating to bankrupts as in the proceedings themselves between the time of the act of bankruptcy being committed, and of the commission issuing. The 13 Eliz. c. 7, s. 1, directs, that certain persons committing certain acts shall be deemed bankrupts, without referring to any adjudication. In 21 Jac. 1, c. 19, s. 14, the time of suing forth the commission is expressly distinguished from that in which the party becomes bankrupt; it being there enacted, that no bonâ fide purchaser shall be impeached, unless the commission to prove the party a bankrupt be sued forth against such bankrupt within five years after he shall become a bankrupt. So in 7 Geo. 1, c. 31, s. 1, which empowers creditors having debita in presenti solvenda in futuro to prove under the commission, the words used are "becoming bankrupts, and commissions of bankruptcy being taken out against them," evidently considering the party as bankrupt independent of the commission. Where it has been the intention of the legislature to give relief against all debts due at the time of the commission, a phrase has been employed expressive of such intention, as in 12 Geo. 3, c. 47, s. 2, by which persons then in custody were discharged from debts due before the issuing of their commissions. The same distinction is preserved in the commission, which states, that whereas the party by exercising trade, &c. did become bankrupt, therefore the commission issues. And it is to be observed, that in pleading, the expression always used is, before the party became bankrupt, not before the issuing the commission. It is the invariable practice of the Court of Chancery to expunge debts which have been proved under a commission where it appears that such debts have been contracted subsequent to an act of bankruptcy. And many commissions have been superseded upon proof of an act of bankruptcy antecedent to the time when the petitioning creditor's debt accrued. As in *De Gols v. Ward*, Cas. Temp. Talb. 243. Cooke's B. L. 20, ed. 4. The reason there [3] given by Lord Talbot is, that "the commission must issue on the petition of some creditor who could be relieved under it: but if the debt is subsequent to the act of bankruptcy, the creditor cannot come in under the commission against the effects of the bankrupt, though the person of the bankrupt will be liable." And though that decision was afterwards reversed in the House of Lords, yet it appears by 4 Brown's Parl. Cas. 327, and *Ex parte Wainman*, Cooke's B. L. 21, that the reversal proceeded on the ground of the old acts being in force at the time when the commission issued; and it is said by the Lord Chancellor in *Ex parte Wainman*, that if the case had been on the new acts, the Judges would have been of a contrary opinion. There is an anonymous case in 2 Wils. 135, C. B. which shews that the petitioning creditor's debt must be due from the bankrupt at the time of the act of bankruptcy committed, though it do not become due to the petitioning creditor till afterwards. The act of bankruptcy puts an end to the trading; it subjects the stock and effects of the bankrupt to be assigned; and from that period his accounts ought to be closed.

Le Blanc, Serjt. in support of the Rule. The effect of the construction contended for by the Plaintiff will be to work an injustice to the creditors of the bankrupt whose debts have been incurred between the committing the act of bankruptcy and the issuing the commission. For if a merchant after a secret act of bankruptcy carry on trade for any length of time, and obtain goods in the course of that trade to a considerable amount, the creditors anterior to the act of bankruptcy will be entitled by the above construction to a distribution of all those goods, to the exclusion of the very persons by whom they were furnished. The 1 Jac. 1, c. 15, s. 6, enacts, that upon lawful warning left "at the dwelling-place or house where the bankrupt, his wife or family, for the most part of his abode, did lodge, or remain within one year before he, she, or they became bankrupt," the commissioners may proclaim the party a bankrupt. In this case, therefore, it is clear, that the words of the statute must refer to the time previous to the issuing of the commission, and not the committing the act of bankruptcy; for the latter may have taken place by an assignment of the party's effects five years before it was discovered; and the statute could not intend that if he had changed his abode during that time, the warning should be left at the place where he lived when the act of bankruptcy was committed. By 5 Ann.(a) [4]

(a) Vid. Ruffhead's Statutes, Appendix, p. 235.

c. 22, s. 1, if any person who shall become bankrupt shall remove, conceal, &c. any effects whereof he is possessed to the value of 20l. or any books, bonds, &c. with intent to defraud his creditors, every such person so becoming bankrupt, and being thereof lawfully convicted, shall suffer as a felon without benefit of clergy. Now, supposing a man to have committed an act of bankruptcy by an assignment of his effects, and afterwards to remove his goods with an intent to defraud creditors, but not to elude the statutes in force against bankrupts, he not considering himself to be a bankrupt, would such a man be liable to an indictment and execution as a felon? The becoming bankrupt is compounded of the two facts; of his committing an act of bankruptcy, and of the commission issuing against him. The second section of the same act directs, that the certificate shall be signed by four-fifths of the creditors in number and value, who shall have proved their debts: and the 5 Geo. 2, c. 30, s. 27, directs the assignees to be chosen by the major part in value of the creditors according to the debts then proved; but if proof of an act of bankruptcy, committed prior to the time when debts of such creditors as have signed the certificate, or voted in the choice of assignees, accrued, be sufficient to destroy their right to prove under the commission, the certificate may be overturned, and the whole proceedings under the commission unravelled, when every thing is supposed to be settled, the bankrupt having obtained his discharge and a dividend having been actually made. So the 41st sect. of the 5 Geo. 2, c. 30, enacts, that "all certificates which have been allowed and confirmed and entered of record, or a true copy of every certificate signed and attested as therein mentioned, shall and may be given in evidence in any of His Majesty's Courts of Record, and be without any further proof deemed, &c. to be a full and effectual bar and discharge of and against any action or suit which shall be commenced or brought by any creditor of such bankrupt, for any debt or demand contracted, due, or demandable before the issuing of such commission." Again, in the 19 Geo. 2, c. 32, s. 2, which entitles obligees in bottomree and respondentia bonds, and the assured in policies of insurance, to prove their debts where the contingency happens after the issuing of the commission, the expression used is, that "the debt shall be proved, the dividend received, and the bankrupt be discharged, in like manner to all intents and purposes as if such loss or contingency had happened, and the money due in respect thereof had become payable before the time of the issuing of such commission." Nothing can more [5] strongly shew the opinion of the legislature, that the time of issuing the commission is the true period up to which all other debts may be proved. With respect to the 12th Geo. 3, c. 47, s. 2, which discharged bankrupts in custody previous to 25th March 1772, from debts due before their respective commissions issued; it is not probable that the legislature intended to put those who had not obtained their certificate, probably in consequence of some misbehaviour, on a better footing than all those who had conformed themselves to the bankrupt laws. From these expressions therefore of all these statutes, it is clear that the legislature has used the term "becoming bankrupt," as synonymous with the term "when the commission issued;" at least in those acts which relate to the proof of debts, and the effect of the certificate, though perhaps in those which describe the circumstances constituting a bankrupt, the act of bankruptcy and the commission may sometimes have been treated as distinct. It is also to be observed, that the Court of Common Pleas in *Perkins v. Kempland and others*, 2 Bl. 1107, refer to the date of the commission as the period beyond which a debt cannot be proved, and to which the operation of the certificate as a bar is confined.

EYRE, Ch. J. It is agreed on all hands that this case is new: we must therefore consider of it; and in entering into that consideration we must look through all the bankrupt laws, and construe the exceptions used in the 5 Geo. 2, with reference to the construction which has prevailed upon the rest of the bankrupt laws. The 5 Geo. 2, c. 30, s. 7, directs that every bankrupt conforming, &c. shall be discharged from all debts due or owing at the time he did become bankrupt: and yet in the 41st section of the same statute it is said, that the certificate, or a true copy thereof, shall be given in evidence, and be a bar to any action brought for a debt due before the issuing of the commission. Again, the 7 Geo. 1, c. 31, s. 1, which allows holders of bills payable at a future day to prove under the commission, describes the bills in question as bills not due or payable at the time of such person becoming a bankrupt; and yet the 19 Geo. 2, c. 32, s. 2, allows the obligees in bottomree and respondentia bonds, and the assured in policies of insurance to prove in respect of such bond or policy as if the loss had happened before the time of issuing the commission. So 12 Geo. 3, c. 47,

which continued the 5 Geo. 2, c. 30, then near expiring, in the second and third sections discharges persons against whom commissions had issued previous to 25th March 1772, from all debts due before the commission issued. In some therefore the ambiguous expression "becoming bankrupt" is [6] used, and in others, that of the "issuing of the commission" without any reference to the act of bankruptcy. It should seem, therefore, that the two expressions must control and expound each other. Doubtless it is a circumstance of considerable weight that a practice of expunging debts accrued subsequent to the act of bankruptcy, has prevailed in that Court, to which the general jurisdiction arising under the bankrupt laws belongs. Whatever rule has been adopted in that Court sufficient to afford us a ground for reasoning by analogy is entitled to considerable attention. This however being a new case upon an act of parliament the decision belongs to the courts of law, and I shall not hold myself concluded by any practice of the court of Chancery. The practice alluded to appears open to many observations. As soon as a single instance had occurred of a debt being expunged, on account of its having been contracted subsequent to the act of bankruptcy, it ought to have been considered as an universal rule to which all the commissioners were bound to conform, that no proof of debts should be received unless the time were also shewn when they accrued. It appears however to be the usage of the commissioners, to require no other proof than that the debt was due at the time of issuing the commission; and I am much surprised to find this usage in some degree sanctioned by the observation of Lord Chancellor Hardwicke, "that commissioners very rightly declare a man a bankrupt only before issuing the commission, without specifying any precise time" (a)¹. Suppose a creditor to have proved a debt accrued subsequent to the act of bankruptcy, and to have received a dividend: could that dividend be taken from him? Possibly the Court of Chancery might hesitate to interfere: but how would the case stand in a court of law? I was much struck with the apparent injustice of excluding the proof of debts accrued subsequent to an act of bankruptcy, and thus allowing the few creditors who existed when the act of bankruptcy was committed to sweep away all the effects acquired since that time, to the prejudice of those very persons by whom they had probably been furnished. Besides the person of the bankrupt himself, after the surrender of all his property, might still remain liable to the majority of his creditors. I may find myself obliged to say, that the rule which has been adopted, must be adhered to, [7] and that it is for the legislature, not for the court, to make an alteration. Still, however, the consideration of inconvenience will weigh against a great deal of practice in forming my opinion.

Cur. adv. vult.

On this day the opinion of the Court was delivered by

BULLER, J. The question in this case is, whether the certificate be a bar to the plaintiff's demand? We who were in Court last term (a)² have considered the point, and are all of the opinion which I shall now deliver.

By the 5 Ann. c. 22, s. 2, no person becoming a bankrupt shall be discharged from all or any debts owing at the time of such bankruptcy, unless the certificate be first signed by four-fifths in number and value of the creditors who have proved debts. The 3 Geo. 1, c. 12, recites the same words, and the 5 Geo. 1, c. 24, says, that bankrupts conforming, &c. shall be discharged from all debts due or owing to at the time they became bankrupt, and may plead that the cause of action did accrue before such time as they became bankrupt. The 5 Geo. 2, c. 30, has the same words. Use has sanctioned them, and it is most clear that they have not been employed unadvisedly or inconsiderately. In pursuance of these statutes the words of the plea have always been, that on such a day the Defendant became a bankrupt; under such a plea, it has been the constant practice and usage to prove that the day on which the act of

(a)¹ Vid. 1 Atk. 119.—In 1 Atk. 78 Lord Hardwicke, speaking of the clause in the 13 Eliz. which directs the commissioners to pay creditors in proportion to their debts, says: "The question is, what debts are here meant? And I am of opinion, it means debts due at the time of the bankruptcy, or when the commission issued, which is the same; for to prevent disputes about the time when he becomes a bankrupt, the commissioners always find in general, that he was a bankrupt at the time the commission issued."

(a)² Buller, Heath, and Rooke, Js.

bankruptcy has been committed, was subsequent to the contracting of the debt. We think the words of the statute are so explicit that they admit of no doubt, and if there were room for doubt, the usage and practice which have prevailed must decide. The practice of the Court of Chancery to expunge debts which have become due since the act of bankruptcy, is likewise founded on the same construction of the statute, and that affords a very long list of authorities, entitled to the greatest weight and consideration, because the whole business of bankruptcy is the almost daily subject of decision in that Court. I think, it was admitted, that a debt which was not contracted till after the act of bankruptcy, would not be a good foundation for a commission, and if it will not sustain the commission, the proposition, that it may be proved under the commission at all, becomes extremely difficult. The proof of a debt is the same, whether it be the debt of a petitioning creditor or of any other creditor, for the creditor must in every case swear, that the bankrupt was indebted before, and at the time of suing out the commission (b).

[8] But the two grounds of argument insisted on for the Defendant were, first, that a person is not a bankrupt till a commission has issued against him; secondly, that some statutes make use of the words "at the time of issuing the commission," and that all statutes made in *pari materia* ought to be considered together, and expounded by each other. As to the first ground, undoubtedly a man does not fall within many of the provisions of the bankrupt laws till he is declared a bankrupt, and therefore there is the same reason for extending the discharge to that time as to the date of the commission. But that has not been contended for. The commission and the declaration of the bankruptcy relate to the act of bankruptcy, and when a man is declared a bankrupt, he is so to all intents and purposes from the time that the act of bankruptcy was committed. But speaking of a bankrupt in the sense of the objection is a technical use of the word, whereas in the natural sense, it means only having committed an act of bankruptcy. In the affidavit to obtain the commission, the petitioner swears, that he believes the party is become a bankrupt, within the intent of the statutes, which being previous to the commission, of course cannot include it. It is impossible to read the case of *Goddard v. Vanderheylen* without seeing that this point was then considered as clear. It is stated as a thing before settled, that the cause of action must be such as would produce a proveable debt, which, it is said, was not the case there at the time of the bankruptcy committed, a term very inapplicable to the issuing of the commission. Lord Ch. J. de Grey (a) states the question to be, what [9] debt was

(b) 2 Co. B. L. 1, 33.

(a) The judgment of Lord Ch. J. de Grey in the above case was cited by Mr. J. Buller from a manuscript note of the late Mr. J. Gould, to the following effect:

DE GREY, Ch. J. The Defendant in this action being arrested, the present Plaintiff became his bail to the Sheriff, in consideration of which the Defendant promised to save him harmless. The Defendant not having put in bail, the Plaintiff in the original cause sued this Plaintiff on the bail-bond and obtained judgment, and he was obliged to pay the debt and costs. To recover this he sued the Defendant, who pleaded that he became bankrupt before the cause of action accrued; at the trial before Lord Camden, a case was reserved, which stated; that in May 1763, the Defendant was arrested; that the Plaintiff became bail for him; that in Mich. Term 1763, judgment was obtained against the Plaintiff on the bail-bond so given by him; that on the 10th of March 1764, the Defendant became a bankrupt; that at that time a writ of error was depending on the judgment obtained on the bail-bond, which having been carried from the Exchequer Chamber into Parliament, was there nonprossed in January 1765; that on the 21st of the same month a *fieri facias* issued against the present Plaintiff at the suit of the Plaintiff in the original action, and thereupon the debt due from this Defendant with the costs was paid, and that on the 2d of May 1765, this Defendant obtained his certificate.

The question made is, whether the debt recovered by the Plaintiff was a debt which could be proved as such against the Defendant under the commission, and was therefore discharged by the certificate? There are three provisions in the bankrupt laws relative to this subject; the first directs what debts shall be admitted; the second, what debts shall be discharged, and the third, how the discharge is to be pleaded. By the old acts of 34 & 35 Hen. 8, c. 4, and 13 Eliz. c. 7, it is generally provided, that the effects of the bankrupt shall be divided amongst the creditors. The 1 Jac.

due from the Defendant to the Plaintiff on the 10th of March 1764, which was the very day on which the act of bankruptcy was committed. Now this plainly shews what [10] his opinion was. On the second objection the statutes 12 Geo. 3, c. 47, & 14 Geo. 3, c. 77, were mentioned and relied on. But those are particular insolvent

c. 15 directs, that they shall be divided amongst those that come in within four months. No positive rule is laid down in former acts to distinguish who are to be admitted to share, but the principle is to divide equally. The commissioners have a power to take order according to wisdom and discretion, and to fix which debts were owing when the party became bankrupt. The succeeding act of 1 Jac. c. 15, takes it up so: and so it is understood in the 21 Jac. c. 19, except where execution has been executed at the time of the bankruptcy. The subsequent statutes of 5 Ann. c. 22, 5 Geo. 1, c. 24, & 5 Geo. 2, c. 30, consider it in the same light, making all securities given by the bankrupt to creditors for securing debts due at the time of the bankruptcy as a consideration for obtaining his certificate, void. With respect to the discharge of debts, the old statutes did not release the person or future effects, but provided that the same remedy should subsist as before for what remained unsatisfied. By 4 Ann. c. 17, bankrupts are made subject to imprisonment, and in some cases to capital punishment: but if they conform, then (amongst other things) they are discharged from all debts due and owing when they became bankrupts. The subsequent statutes make the same provision. And when they direct how the discharge is to be pleaded, they provide that if the bankrupt be sued for debts due, &c. he shall be discharged, and may plead that the cause of action accrued before the bankruptcy. Now, may not a cause of action accrue where there is no debt due and owing? Yet the debt must be proveable under the commission, or it cannot be discharged: and to be so, it must be a debt due and owing, which is the same thing as demandable, which a note payable at a future day is not. The first thing which a creditor must swear to is a sum due: and by 5 Geo. 2, c. 30, he is guilty of perjury if he swear to what is not due, or to more than is due. Therefore, future debts, not then demandable, nor then due and owing, could not be proved. The 7 Geo. 1, c. 31, which directs that securities payable at a future day shall be proveable under the commission, and discharged by the certificate, has been held to extend to all kinds of certain debts. *Swaine v. De Mattos*, 2 Str. 1211. Contingent debts, however, still remained unprovided for. Therefore, in *Tully v. Sparks*, 2 Str. 867, the Court of K. B. held, that a bond for the payment of a sum after the death of the obligor, if he married M. L. and she survived him, was not proveable. Parliament then interposed in favour of trade, and by 19 Geo. 2, c. 32, made bottomry and respondentia bonds proveable. On the principle of these two statutes, the Court of Chancery endeavoured to introduce another case of compassion. Tradesmen generally provide for their families by personal securities: they enter into a bond to pay so much money to trustees on the contingency of the wife or children surviving the obligor. If the contingency had not happened during the commission, these bonds could not come in. But in cases where the bankrupt has died during the proceedings, the bond or covenant becoming due, the Court of Chancery has admitted it; *Ex parte Caswell*, 2 P. Wms. 497. This has been done several times; and Lord C. King held, that the distribution of the estate should not wait for the contingency, but that if the contingency happened before distribution made, or even before the second dividend, the creditor should come in. Lord Hardwicke on the 6th of August 1740, in the case *ex parte Neuburgh*, held, that where a bond on marriage was given to trustees to pay a sum of money, if the wife survived, and no dividend had been made before the husband's death, held that the commissioners were right in admitting the trustees. But *ex parte Groome*, 1 Atk. 115, where the husband covenanted before marriage to leave his wife 600l. in case she survived him, and the husband became bankrupt, and died before any dividend made, Lord Hardwicke decided, that the wife should not be admitted, because it was not a debt which would be discharged by the certificate; but observed, that creditors and parties have often been compassionate. *Ex parte Mitchell*, 1 Atk. 120, was a like covenant and a bond; the bankrupt paid 9s. in the pound and died; the wife petitioned Lord Hardwicke, who admitted her, there being no opposition, and declared, that if there had been a judgment the wife would have been entitled to come in as a claimant before the death of the husband, and the assignees must have retained enough to answer a dividend. The bar much doubted of the propriety of the order; Lord

acts, and do not [11] at all alter the general system of the bankrupt laws. The insolvent acts are temporary merciful laws, discharging men from their debts because they have nothing to pay, and the legislature undoubtedly may discharge them from what time they think fit. They might have extended the discharge to the time of

Hardwicke recollected the impropriety himself, ordered it to be spoken to again, and was satisfied that it would have been a dangerous precedent. He said that a like order in *Greenaway's case*, 1 Atk. 113, was made by consent of the assignees, and that Lord King's opinion in *ex parte Caswell*, 2 P. Wms. 497, was merely obiter, and had been doubted both by Lord Talbot and himself. It is now settled that such family provisions cannot come in unless the contingency happen before the act of bankruptcy. Yet even here the Court has introduced exceptions; for where a bill is brought to recover the wife's fortune, the Court will oblige the assignees to do reasonable justice. It was said in *Mitchell's case*, that if there be a judgment it becomes a legal debt; but I doubt whether it was admitted as such. In *Jacob's case*, 1759, the husband tried an experiment, and confessed a judgment in contemplation of bankruptcy; but Lord Northington refused to admit the wife a creditor, it being an open fraud. There is another species of debts which comes nearer to the present, viz. debts not only contingent but uncertain in point of liquidation. In these cases it is not necessary that the specific sum should appear as the balance of account; the claim may be admitted, and the Court will take a method to ascertain what was due at the time of the bankruptcy. But where it is uncertain whether the cause of action will ever be authenticated; or, if it be, whether it will produce a debt to any particular amount, it is otherwise. Thus an assault and battery committed before the bankruptcy is a good cause of action. But where a verdict in such a case was recovered during the proceedings under the commission, and judgment was not obtained till after the certificate, the Defendant having applied to K. B. to be discharged, it was objected that the bankrupt had nothing to do but to plead that the cause of action arose before the bankruptcy. But the Court held, that to do that, the cause of action must be such as produces a proveable debt, which was not the case there at the time of the bankruptcy committed. It was then urged; that the verdict having ascertained the amount should have relation to the cause of action, but the Court said, that the debt must be due and owing, and decided in favour of the Plaintiff. I never knew an instance of an attempt to prove a debt where the cause of action arose on a breach of covenant in a lease. In *Berkely and Another v. Kemstow*, Cro. Eliz. 123, a promise to keep a prisoner safely, and to save the gaoler harmless, was held by the Court to be a promise on which the party might sue presently upon the escape. But that sort of case differs from what was mentioned at the bar, of a right of action before a special damnification. For where a bond is given to indemnify bail, and on the party not appearing, the surety immediately brings an action, the indemnity bond may be held forfeited, because of the danger which the surety incurs of being sued. I will not say how such bonds as these could be admitted. But these cases are strong authorities. And if in the case at the bar judgment had been obtained against the bankrupt, it would have been similar in principle to them; for then there would have been a legal debt, though the damnification would have been uncertain. On the 10th of March 1764 what debt was due from the Defendant to the Plaintiff? It is true the latter was to be saved harmless; but if he had gone in under the commission, he must have proved some debt due. Can I imply a damnification? It is a probable loss; but it is difficult to say what the Plaintiff would have sworn to, and more so to say what he would have demanded. Suppose no bankruptcy had happened, the Defendant could not have been held to special bail, unless the Plaintiff had suffered a special damnification. What damage would a jury have given? At any rate judgment could only stand as a security, for no execution could be taken out till the party were actually damnified, 6 Mod. 77. Though there was no actual subsisting debt on the 10th of March 1764 due and owing, yet the judgment in this case is evidence of the debt, and may be a measure for the damnification, but that damnification may not be what is now complained of, namely, paying the whole sum. The original Plaintiff might have come in under the commission and proved the debt, and then the bankrupt would not have been indebted for it to this Plaintiff also. Or suppose the Defendant to have paid 10s. in the pound, the remainder would have been the damnification. Or suppose the Defendant had been taken in execution by the original Plaintiff, that would have been a discharge of

the certificate, if they had pleased, with equal reason. And yet all cases, except those depending at the time when the particular acts passed, would remain to be decided under the general bankrupt laws. Under those general laws, we are of opinion, that debts proveable under the commission, and debts to be discharged by the certificate, are convertible terms; and that debts not due at the time of the act of bankruptcy, except in the cases specially provided for by particular statutes, are not affected by the com-[12]mission.

This case admits of many other observations, both on the statutes and the judicial determinations upon them: but, perhaps, I may be thought to have been too prolix already on a point which appears to have been long and fully settled, and I should not have occupied so much time, but from respect to a great opinion which seemed to differ from that which I now deliver, and to which opinion we all owe the utmost deference. Let the judgment be entered for the Plaintiff.

Judgment for the Plaintiff.

LECHMERE v. RICE. Nov. 12th, 1799.

To debt on bond the Court will permit the Defendant to plead non est factum, and usury (a).

Williams, Serjeant, shewed cause against a rule nisi for pleading to an action of debt on bond; first, non est factum; and, secondly, that the bond was given upon an usurious consideration: and contended, that although usury was not, strictly speaking, an unconscientious plea, yet, that as it is the constant practice of the Court to refuse a rule of this kind where the pleas are inconsistent (b), they would not depart from that rule in the present instance. He also relied on an affidavit, stating, that the witness to the bond lived in Worcestershire, and that the Plaintiff would be put to great expence, if he were obliged to bring him to London where the venue was laid.

Shepherd, Serjt. in support of the Rule, insisted, that the object of pleading non est factum was to oblige the Plaintiff to produce the witness to the bond, in order that the Defendant might have the opportunity of cross-examining him as to the usury.

The Court were of opinion that the two pleas were not more inconsistent than

the bail. Indeed, how could the Plaintiff come in under the commission, when by his writ of error he had asserted that he had not paid nor ought to pay the debt? that would have precluded him from proving the judgment. Suppose this Plaintiff had proved the debt, and received 20s. in the pound before the certificate allowed, and then run away, and that the original creditor had also, before the certificate allowed, taken the bankrupt in execution, in that case the latter would have got nothing. Suppose this Plaintiff had not paid the debt, but had suffered himself to be taken in execution, could he have come in as a creditor for the money? Such a case, I believe, never happened. In the cases cited, the Court held, that there was a cause of action even from the terror of an execution. In the present case there was also a cause of action from the Defendant's non-appearance; but the damnification is not money paid, and therefore it is not a cause of action upon a debt due and owing, which is the only kind of debt proveable under a commission. I think the judgment does not add any material circumstance to the case. In *Chilton v. Wiffin* (3 Wils. 13) the acceptor of a bill of exchange, who had no effects in his hands, but was only a surety, on the failure of the drawer his principal, was only admitted a creditor for what he had paid; but as to the rest, it was held not to be a debt due and owing, and therefore he could not have come in under the commission. That case is strong in principle: and it is in point with the present, except as to the circumstance of the judgment, which I lay out of my consideration.

Per Curiam.—Judgment for the Plaintiff.

(a) Vide *Thyatt v. Young*, post, 72. *M'Connell v. Hector*, post, 549.

(b) See 1 Sellon, 298, 299. But in *Steele and Others v. Pindar*, Barnes, 347, where not guilty, and a general release were allowed to be pleaded together, a reason was given by the Court which applies to the principal case; viz. that the second plea could not be given in evidence under the general issue; and with this agrees *Shaw v. Everett*, ante, vol. i. p. 222.

many which are allowed to be pleaded together, as not guilty to an assault and a special justification: and that probably the true reason for opposing this rule was, as had been suggested, to keep the attesting witness out of the way. They observed, that the Court of Common Pleas only continued to exercise an authority over applications for pleading several [13] matters (which had originally been the practice of the King's Bench also) in order to prevent an oppressive use being made of that liberty which is given by the statute (4 Anne, c. 16, s. 4).

Rule absolute.

BROWNING v. S. WRIGHT AND OTHERS, Executors of J. Wright. Nov. 13th, 1799.

[Referred to, *Budd v. Fairmaner*, 1831, 8 Bing. 53; *David v. Sabin*, [1893] 1 Ch. 532.]

A. after granting certain premises in fee to B. and after warranting the same against himself and his heirs, covenanted, that notwithstanding any act by him done to the contrary he was seised of the premises in fee, and that he had full power, &c. to convey the same; he then covenanted for himself, his heirs, executors, and administrators, to make a cart-way, and that B. should quietly enjoy without interruption from himself, or any person claiming under him; and, lastly, that he his heirs, and assigns, and all persons claiming under him, should make further assurance. Held, that the intervening general words, "full power, &c. to convey," were either part of the preceding special covenant; or, if not, that they were qualified by all the other special covenants against the acts of himself and his heirs (a)¹.

Covenant against the representatives of James Wright. The declaration stated, that the said J. Wright by indenture in his life-time, fully, clearly and absolutely granted, bargained, sold, enfeoffed, and confirmed to the Plaintiff, his heirs and assigns a certain piece or parcel of arable land (describing it), and all ways, waters, &c. and all his estate, right, title, &c. in law or equity, to have and to hold to the Plaintiff, his heirs and assigns, absolutely and for ever; that he warranted it against himself and his heirs, and for himself and his heirs, and covenanted that he was, notwithstanding any act by him done to the contrary, lawfully and absolutely seised in fee simple, and that he had a good right, full power, and lawful and absolute authority to convey; that by virtue of this conveyance the Plaintiff entered and was possessed and fulfilled all his covenants and agreements. "Yet protesting that J. Wright did not in his life-time well and truly observe, &c. and that the said Defendants have not nor have any of them since the death of the said J. Wright well and truly observed, &c. any of the covenants, clauses and agreements in the said indenture contained on their part and behalf respectively to be observed, &c.; in fact the said Plaintiff says that the said J. Wright had not at the time of making the said indenture nor at any time before or since good right, full power, and lawful and absolute authority, or any right, power, or authority whatsoever to convey or assure the said piece or parcel of arable land or any part thereof to the said Plaintiff his heirs and assigns in manner [14] aforesaid or in any manner whatsoever (a)²: by reason whereof afterwards and after the making

(a)¹ Vide *Tuttersall v. Groote*, post, 253. *Howell v. Richards*, 11 East, 633. *Seddon v. Senate*, 13 East, 63-71. *Barton v. Fitzgerald*, 15 East, 530. *Hesse v. Stevenson*, 3 B. & P. 565. *Nind v. Marshall*, 1 B. & B. 319. *Foord v. Wilson*, 8 Taunt. 545, 546.

(a)² As the Plaintiff in this case meant to rely on the covenant by J. Wright that he had good right, full power, and lawful authority to convey, it seems that after negating the Defendant's title to convey he need not have proceeded to state an eviction; for, on a general covenant, the breach may be as general as the covenant. *Bradshaw's case*, 9 Co. 60 b. Co. Ent. 117 a. Cro. Jac. 304. *S. C. Muscot v. Ballett*, Cro. Jac. 369. *Glinester v. Audley*, Sir T. Raymond, 14. *Wooton v. Hele*, 1 Mod. 292, agreed, Per Cur. *Holder v. Taylor*, Hob. 12. Indeed, it may be questionable whether the averment, that E. Child and Mary his wife claimed to be lawfully seised of the premises, and required the Plaintiff to deliver up possession or to become tenant to them, and that unless he had accordingly become their tenant, he would have been evicted, and that he did become their tenant, without shewing any entry by E. Child and his wife, or any actual disturbance by them to authorize him in so doing, can be said to be such an averment of eviction as the law requires in cases where any averment of

of the said indenture and the death of the said J. Wright, to wit on, &c. one Edward Child and Mary his wife then being and claiming to be lawfully and rightfully seised of and in the said piece or parcel of arable land with the appurtenances in their demesne as of fee in right of the said Mary, and having a lawful right of entry into the same in right of the said Mary by a lawful (b) and rightful title not derived by from under or by means of the said indenture or by from or under the said Plaintiff, required the said Plaintiff to deliver up the possession of the said piece or parcel of arable land to them the said Edward and Mary, or to become tenants thereof to and to hold the same of the said Edward and Mary at and under a certain yearly rent, to wit the yearly rent of thirteen pounds to be therefore paid by the said Plaintiff, and would then [15] and there, unless the said Plaintiff had so delivered up the possession thereof or become such tenant of and so held the same, have ejected, evicted, expelled, put out and amoved the said Plaintiff from and out of the possession thereof, whereupon the said Plaintiff to prevent his being obliged so to deliver up the possession thereof or being so ejected, evicted, expelled, put out and amoved, then and there was forced to and did become such tenant thereof to and so held the same of the said Edward and Mary, whereby," &c. alleging the Plaintiff's loss in being deprived of his fee-simple, and being obliged to hold as tenant; his having laid out money on the premises previous to his knowledge of the badness of J. Wright's title, and his having paid a large sum to E. Child and Mary his wife for the mesne profits.

The Defendants prayed oyer of the indenture, and it was read to them in these words, to wit, "This indenture made, &c. witnesseth, that the said J. Wright, for and in consideration of the sum of 180l. of lawful money of Great Britain, to him in hand paid by the said Plaintiff, at or before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, hath granted, bargained, sold, enfeoffed, and confirmed, and by these presents doth fully, clearly, and absolutely grant, bargain, sell, enfeoff, and confirm unto the said Plaintiff and to his heirs and assigns, all that piece or parcel of arable land (describing it) with the appurtenances and the reversion and reversions, remainder and remainders, rents, issues, yearly, and other profits of the said premises, and every part and parcel thereof; and all the estate and estates, right, title, interest, use, trust, claim and demand whatsoever, in law or equity, of him the said J. Wright, of, in, to, or out of the said premises, every or any part or parcel thereof; To have and to hold the said piece or parcel of arable land, hereby granted, bargained, sold, enfeoffed, and confirmed, or mentioned, or intended so to be, and every part and parcel thereof, unto the said Plaintiff, his heirs, and assigns for ever, to and for the only proper use and behoof of the said Plaintiff, his heirs and assigns, absolutely and for ever, without any condition, redemption, trust, or revocation whatsoever, and to and for no other use or uses, intents, trusts, or purposes

this kind is necessary. In *Foster v. Pierson*, 4 Term Rep. 620, n. (a) it was admitted that the eviction need not be alleged to have been by legal process; but some eviction must be shewn; for Shepherd's Touchstone, c. 7, p. 170, speaking of a covenant for quiet enjoyment, and disturbances lawful and unlawful, says, "and in all cases where any person hath title, the covenant is not broken until some entry or other actual disturbance be made by him upon his title." So in *Hunt v. Cope*, Cowp. 243, where the Plaintiff, to an avowry for rent, pleaded certain acts of the lessor, "whereby he was deprived of the use of the premises," without averring eviction, Lord Mansfield said, that the lessee certainly should have pleaded eviction, and the facts stated might have been sufficient for the jury to have found a verdict in his favour; and the plea was held ill.

(b) The cases of *Foster v. Pierson*, 4 Term Rep. 617, and *Hodgson v. The East India Company*, 8 Term Rep. 278, have now completely settled that an allegation of "lawful title" is sufficient, without setting out that title. But the Plaintiff must shew in some manner that the title of the person entering upon him is not derived from himself; and a mere averment that he had "lawful title," without this qualification, would be bad after verdict. *Kirby v. Hansaker*, Cro. Jac. 315. *Wooten v. Hele*, 2 Saund. 177. 1 Lev. 301. 1 Sid. 466. 1 Mod. 290. S. C. Jenkins, 340. This may be done however by averring generally, that the person evicting had lawful title before the date of the grant to the Plaintiff. *Skinner v. Kilbys*, 1 Shower, 70. *Proctor v. Newton*, 2 Lev. 37. *Buckby v. Williams*, 3 Lev. 325. *Jordan v. Twells*, Cas. temp. Hardw. 172, per Ld. Hardwicke, and this mode was adopted in *Foster v. Pierson*.

whatsoever; and the said J. Wright and his heirs, the aforesaid piece or parcel of arable land, hereby granted or mentioned, or intended to be hereby granted unto the said Plaintiff, or his heirs, against him the said J. [16] Wright, and his heirs, shall and will warrant and for ever defend by these presents. And the said J. Wright for himself, his heirs, executors, and administrators, doth covenant and agree to and with the said Plaintiff, his heirs and assigns in manner and form following, that is to say, that he the said J. Wright for and notwithstanding any thing by him done to the contrary is lawfully and absolutely seised of the said piece or parcel of arable land hereby granted, of a good, sure, perfect, lawful, absolute, and indefeasible estate in fee-simple, without any manner of condition, limitation, use, or trust, or any other restraint, matter, or thing whatsoever, to alter, change, charge, defeat or determine the same; And that he hath good right, full power, and lawful and absolute authority to convey and assure the same to the said Plaintiff, his heirs and assigns, in manner aforesaid: and the said J. Wright for himself, his heirs, executors, or administrators, doth further covenant and agree to and with the said Plaintiff, his heirs and assigns, that he the said J. Wright shall and will, as soon as convenient, set out, at the expence of the said Plaintiff, a cart-way to the said piece or parcel of arable land, through another field in the possession of William Triggs; which cart-way, when set out, the said J. Wright and his tenants are to have a free passage to and from the farm belonging to the said J. Wright, now in the occupation of the said William Triggs, without allowing any thing for the same; And that he, the said Plaintiff, his heirs and assigns, shall and lawfully may, at all times hereafter, peaceably and quietly hold and enjoy the said piece or parcel of arable land hereby granted, and receive the rents and profits thereof to his and their own use and uses, without any manner of let or interruption of the said J. Wright, or any other person or persons claiming under him: And, lastly, that he the said J. Wright, his heirs and assigns, and all other persons claiming, or to claim any estate or interest of, in or to the said premises, or any part thereof, by, from, or under him, shall, and will from time to time, and at all times hereafter, make, suffer, and execute, or cause to be suffered and executed, all and every such further and other lawful and reasonable act and acts, assurance and conveyances in the law whatsoever, for the better and more perfect assuring and confirming of the said piece or parcel of arable land, unto the said Plaintiff, his heirs and assigns, as by his or their Counsel learned in the law of this realm, shall be reasonably devised, advised, or required. In witness [17] whereof the said parties to these presents have hereunto set their hands and seals the day and year first above-written."

The Defendants then demurred, and assigned for causes, "that the said indenture here brought into Court and in the said declaration mentioned doth not contain any covenant or warranty of title to or of right power or authority to convey or assure the said premises in the said declaration mentioned or any part thereof or for the enjoyment of the same by the said Plaintiff or his heirs other than against the said J. Wright deceased and his heirs or other persons claiming under him. And for that the said Plaintiff hath not in the said declaration alleged or shewn any defect of title to the said premises or any part thereof arising from or by reason of any thing done by the said J. Wright or his heirs or any person or persons claiming under him, or any eviction, interruption, molestation or disturbance done committed or occasioned by the said J. Wright or his heirs or any person or persons claiming under the said J. Wright. And also for that the said declaration is in other respects defective and insufficient."

Joinder in demurrer.

Williams, Serjt. in support of the demurrer. The great question in this case is, Whether the covenant on which the breach is assigned ought or ought not to be confined to the acts of James Wright and his heirs? We contend, that eviction by a stranger is no breach of the covenant. In construing this covenant the Court will collect the intention of the parties, not merely from the words of the covenant itself, but by contrasting it with the other parts of the indenture: and it was with the view of enabling the Court to do this that the Defendant prayed oyer. The intention of the parties appears to have been, that the words "notwithstanding any act by him done to the contrary" in the first covenant should qualify and restrain the second covenant. When the grantor has in the first clause only covenanted that he was seised in fee notwithstanding his own acts, it would be a very strained construction

to hold that he intended in the next clause to covenant that he had a right to convey, notwithstanding the acts of all the world. The covenant for title, and the covenant for a right to convey, are synonymous covenants, and must receive the same construction. The meaning of the covenant in question is further explained by the warranty, and by the covenant for quiet enjoyment; the former being only a qualified warranty against himself and his heirs; and the latter a special covenant that the [18] grantee shall enjoy without interruption from him or any person claiming under him. It is not an unusual thing for the Court, in construing covenants, to put a sense upon them which is against the words, provided it be warranted by the apparent intention of the parties. Thus in *The Earl of Clanrickard's case*, Hob. 273, a covenant for further assurance of an estate was restrained to a third part. In *Broughton v. Conway*, Moore, 58, a condition that the vendor would not do, nor had done any act to disturb the vendee, but that the vendee should hold and enjoy without the disturbance of the vendor or any other person, was held to be confined to acts done by the vendor, on the ground of the latter words being referable to the former. So in an action on a covenant "that lands were of the value of 1000l. per annum, and should so continue notwithstanding any act done or to be done by the covenantor," the covenant was construed by the restrictive words in the second member of the sentence, and though the lands were not worth 1000l. per annum at the time of the covenant made, yet as no act was shewn to have been done by the covenantor to make them worthless, the breach was held ill. *Rich v. Rich*, Cro. Eliz. 43. Still stronger, however, is the case of *Nerrin v. Munns*, 3 Lev. 46. There were four covenants: the first for seisin in fee; the second for right to convey; the third against incumbrances, and the fourth for quiet enjoyment. The first, third, and fourth, were expressly restrained to the acts of the grantor, his father, and grandfather, and the second was unlimited. The whole Court agreed that the covenants were distinct and several, and three Justices, in opposition to North, Ch. J., held that the first and second covenants, though distinct were synonymous; and therefore, as the grantor had first covenanted against his own acts, it could not be intended that he should immediately afterwards, in a covenant to the same effect, covenant against all the world. And they also took a distinction which will afford an answer to all the cases which may be cited on the other side, as well as to *Crayford v. Crayford*, Cro. Car. 106, and *Hughes v. Bennett*, Cro. Car. 495. Sir William Jones, 403, relied on by North, Ch. J., namely, that in those cases the covenants were of divers natures, and concerned different things, although relating to the same land.

Shepherd, Serjt. contra. The argument of the other side amounts to this, that as some of the covenants in this deed are of a special nature, the Court must borrow the restrictions introduced into them, and engraft them on the general covenant. [19] But this mode of construction cannot be adopted without laying down a general rule that wherever a covenant against the acts of the grantor only is inserted in a deed, all other covenants, however general, must be restrained thereby. The question, therefore, must be, not whether the Court shall borrow from a special covenant in order to restrain a general one, but whether both are not in effect one covenant. The distinction seems to depend on the words with which the second member of the sentence is introduced. Thus in *Broughton v. Conway*, Dyer, 240, where the covenant against the acts of the covenantor was followed by the words "but that the assignee may enjoy without disturbance of any person;" the Court considered the latter words to be only a continuation of the covenant. To the same effect is *Piles v. Jervies* (a), Dyer, 240, in the margin. These cases expressly proceeded on the meaning of the word "but," and cannot therefore be applied to this case, where the second member of the sentence is introduced by "and that," which disjoins it from the first, and makes it a separate and distinct covenant. In *Rich v. Rich* the covenant seems clearly to have contained but one sentence; and as to *Lord Clanrickard's case*, it cannot apply; for, as only one third part of the estate was conveyed, the covenant for assurance of the estate could only extend to that third part. Of *Nerrin v. Munns* it is sufficient to observe that, after stating a difference of opinion in the Court, it concludes with sed adjournatur. The case of *Sir George Trenchard v. Hoskins*, Winch, 91, 92, 93, was a covenant that there was no reversion in the Crown notwithstanding any act done by

(a) See this case set out in a note to *Gainsforth v. Griffith*, 1 Saund. 59, by Mr. Serjt. Williams.

the covenantor, and the Court held, that the words "notwithstanding any act done," restrained the general sense of two preceding covenants, for seisin in fee and power to sell. But that case was afterwards reversed, as appears from a manuscript copy of that book, as well as from 1 Sid. 328, though Saunders, who was Counsel for the Plaintiff in *Gainsforth v. Griffith*, 1 Saund. 60, by attempting to distinguish that case on the grounds of the first judgment, does not seem to have been aware of the ultimate decision (b). In *Gainsforth v. Griffith*, it was agreed, that a particular covenant in fact may restrain a general covenant in law; as in *Nokes's case*, 4 Co. 80. But it was laid down, that an express general covenant in fact cannot [20] be restrained by a particular covenant in fact, unless the latter can be construed as part of the former. Therefore, in a covenant on the assignment of a lease, that it was a good and indefeasible lease, and that the assignee should quietly enjoy, &c. without any let or disturbance of the assignor, the first covenant was held to extend to the act of a stranger, unrestrained by the latter covenant. So where A. covenanted that he was seised in fee notwithstanding any act by him done, and that the lands were of a certain annual value; the latter was held an absolute covenant, that the lands were of such a value. *Hughes v. Bennett*, Cro. Car. 495. Sir Wm. Jones, 403, S. C. To the same effect is *Crayford v. Crayford*, Cro. Car. 106, a vendor is always at liberty to covenant for such an estate as he really has, or for an indefeasible estate; if he adopts the latter method, he must be responsible accordingly. Thus where A. covenanted that he was seised of a good estate in fee according to the indenture made to him by W. (of whom he had purchased), the covenant was held absolute; for the reference to the conveyance by W. served only to denote the limitation and quality of the estate, and not the defeasibleness and indefeasibleness of the title. *Cooke v. Fowlds*, 1 Lev. 40. 1 Kel. 95, S. C. The strongest case, however, on the construction of covenants to secure title, is *Johnson v. Proctor*, Yelv. 175, where A. having granted the whole of a leasehold estate of which he had but a moiety, and covenanted for quiet enjoyment of it against his own acts, was, under this covenant, held liable on the entry of those who were entitled to one moiety. The only difference between that case and the one on this record is not much in the Defendant's favour, viz. that J. W. instead of having a moiety only, had no estate to convey. Should this demurrer prevail, it will establish this principle, that wherever there is any one special covenant in a conveyance, all the general covenants in the same deed must be restrained thereby.

LORD ELDON, Ch. J. This case comes before the Court on demurrer, under the following circumstances. The action is brought by Thomas Browning, who appears on these pleadings to be the purchaser of an estate of inheritance in fee, and it is brought against the present Defendants who are the personal representatives of the vendor James Wright, and are bound by certain covenants which are set forth upon this record. The Plaintiff declares, that by indenture made on the 12th of October 1787 between James Wright the testator of the Defendants on the one part, and Thomas Browning the present Plaintiff on the other part, [21] in consideration of 180l. paid, James Wright fully, clearly, and absolutely granted, bargained, sold, enfeoffed, and confirmed a certain piece of land, describing it. Now these words "granted, bargained, sold, enfeoffed, and confirmed," certainly import a covenant in law, the effect and meaning of which would be affected by the subsequent words of the indenture. After the habendum to Thomas Browning, his heirs and assigns, follows this qualified warranty: "And the said James and his heirs, the aforesaid piece of land, &c. to the said Thomas Browning and his heirs, against him the said James and his heirs, shall and will warrant and for ever defend by these presents." This is not a general warranty against all mankind, but against the acts of James Wright and his heirs only. Then follow certain covenants in these words. "And the said James Wright for himself, his heirs and assigns, doth covenant and agree to and with the said Thomas Browning, his heirs and assigns in manner and form following, that is to say, That he the said James Wright for, and notwithstanding any thing by him done to the contrary, is lawfully and absolutely seised of the said piece, &c. hereby granted of a good, sure, perfect, lawful, absolute, and indefeasible

(b) In *Silersin* the Court, speaking of that case, say, "that on a writ of error in K. B. Jones and the other Justices, except Whitelock, held that the judgment below should be reversed;" but it is added, *mes fuit dit que nul reversal fuit enter; ideo quære.*

estate in fee-simple, without any manner of condition, limitation, use, trust, or any other restraint, matter, or thing whatsoever, to alter, change, charge, defeat, or determine the same." Then follows the covenant on which the present question arises: "And that he hath good right, full power, and lawful and absolute authority to convey and assure the same to the said Thomas Browning, his heirs and assigns, in manner aforesaid." After this comes a covenant concerning a right of way, which has no relation to this case, except that it may not be immaterial to observe, that this covenant is introduced by the words "And the said James for himself, his heirs, executors, and administrators, doth further covenant and agree," which are the initiatory words of the first covenant, and which are not used at the beginning of what is called the second covenant. Perhaps, this may be considered as a critical observation in a case which does not require it. But as what is called the second covenant is only introduced by the words "And that," and in the third (or what may be called the second) covenant, the name of the covenantor is again introduced as further covenanting, it seems to have been the intention of the parties that all the matters which are inserted before the repetition of the initiatory words should be considered as one covenant. This point, indeed, is not necessary to the decision of the case. But even on the critical [22] observation which I have suggested, it would not be unfair to hold that what has been stated at the bar as two covenants, is in fact but one. And if this were granted, there would be an end of the whole argument. The grantor then covenants for the quiet enjoyment of the grantee, "without any manner of let or interruption of the said James Wright, or any manner of person or persons claiming under him." So that it is clear, that this covenant does not apply to the acts of any persons not claiming under James Wright; and in this respect it agrees with the effect of the warranty, and with the words in the introductory part of the first covenant. The last covenant is, that James Wright, his heirs and assigns, and all persons claiming any estate or interest to, from, or under him (which tallies with the warranty, and with the introductory words to the first covenant and last covenants), would make such further assurance as should be thought necessary. It is certainly true, that the words of a covenant are to be taken most strongly against the covenantor; but that must be qualified by the observation that a due regard must be paid to the intention of the parties as collected from the whole context of the instrument. This transaction is a purchase of an estate of inheritance in fee, and the first question is, What will be the nature and effect of a conveyance carrying such a contract into execution? If a man purchase an estate of inheritance and afterwards sell it, it is to be understood *primâ facie* that he sells the estate as he received it: and the purchaser takes the premises granted by him with covenants against his acts. If the vendor has taken by descent, he covenants against his acts and those of his ancestor; and if by devise, it is not unusual for him to covenant against the acts of the devisor as well as his own. In fact, he says, I sell this land in the same plight that I received it, and not in any degree made worse by me. It was argued, that if this were so, a man who has only an estate for life, might convey an estate in fee, and yet not be liable to the purchaser. This seems at first to involve a degree of injustice, but it all depends on the fact, whether the vendor be really putting the purchaser into the same situation in which he stood himself. If he has bought an estate in fee, and at the time of the re-sale, has but an estate for life, it must have been reduced to that estate by his own act, and in that case the purchaser will be protected by the vendor's covenants against any act done by himself. But if the defect in his title depend upon the acts of those who had the estate before him, and he honestly but ignorantly proposes to another person to stand in his situation, neither hardship [23] or injustice can ensue. What is the common course of business in such a case? An abstract is laid before the purchaser's counsel; and though to a certain extent he relies on the vendor's covenants, still his chief attention is directed to ascertaining what is the estate, and how far it is supported by the title. The purchaser, therefore, not being misled by the vendor, makes up his mind whether he shall complete his bargain or not, and if any doubts arise on the title, it rests with the vendor to determine whether he will satisfy those doubts by covenants more or less extensive. *Primâ facie*, therefore, in the conveyance of an estate of inheritance, we are led to expect no other covenants than those which guard against the acts of the vendor and his heirs. With respect to the conveyance of leasehold estates, this is not always so, and there is an obvious reason why this should not be so. Some of the cases rest on the

distinction between freehold and leasehold property, and in the case cited from that excellent book the Reports of Saunders, made more excellent by a late edition, the estate was leasehold. All the muniments of a freehold estate, and every thing which can illustrate the title is in possession of the vendor: but this is seldom the case with respect to leaseholds. With regard to many estates in this town, held under the Duke of Bedford and the Duke of Portland, it would be next to impossible to shew any thing but the lease itself: the vendors could not produce the muniments of their estates which are deposited in the family chests of those noblemen. It sometimes happens, therefore, that parties require covenants in assignments of this kind of property which are not required in conveyances of freehold, such as an absolute covenant that the vendor holds a valid and indefeasible lease.

But even where covenants of this kind are introduced, if the words of the deed be that "he covenants in manner and form aforesaid," the Court will look to the former part of the instrument in order to ascertain the sense in which the covenant is to be taken. So in the case of *The Duke of Northumberland v. Errington and Others* (5 T. R. 522) where the Defendants covenanted for themselves "jointly and severally in manner following," and the deed was so inaccurately drawn, that *prima facie* some of the covenants appeared to be joint, and some several, the Court of King's Bench held, that the general intent of the parties was to be considered, and that the prior words extended to all the subsequent covenants, and made them all joint and several. In the present [24] case then we have got thus far. It is quite clear with respect to the warranty that it was not the intention of the grantor to warrant the title against any persons but himself and his heirs. It is equally clear, that it was not his intention to covenant for quiet enjoyment against the acts of any but himself and his heirs: nor was it his intention to make the covenant for further assurance extend to any other persons. We find all these limited covenants in an instrument of purchase, in which we should not expect obligations of greater extent. Then there is one part of the instrument which, if it be taken as a substantive unconnected covenant, and not part of the first covenant, which, however, I think might be done, raises the present question. It has been argued, that this demurrer cannot be allowed without laying down this principle; that any special covenant in a deed will restrain all the general covenants. If that consequence would necessarily ensue, I admit, that the demurrer is not to be sustained. But I take that to be an inaccurate statement of the case. The question is not whether a special covenant will restrain a general one, but whether the particular covenant on which the action is founded be general or special. And my opinion, upon considering the whole deed, is, that it is a special one. What would be the use of any of the other covenants if this were general? It would be of little service to the grantor to insist that the warranty, and the covenants for quiet enjoyment and further assurance were specially confined to himself and his heirs, if the grantee were at liberty to say, "I cannot sue you on these covenants, but I have a cause of action arising upon a general covenant which supersedes them all." It appears to me from the words and context of the deed, that in such case we should be driven to say, that the grantor intended at the same time to give a limited and an unlimited warranty. The true meaning, therefore, of the covenant is, that the grantor has power to convey and assure according to the terms used, to which terms he refers by the words "in manner aforesaid;" namely, "for, and notwithstanding any thing by him done to the contrary."

With respect to the cases which have been cited, it is to be observed, that when a general principle for the construction of an instrument is once laid down, the Court will not be restrained from making their own application of that principle, because there are cases in which it may have been applied in a different manner (a). The principle being once acknowledged, the only [25] difficulty consists in making the most accurate application of it. In *Trenchard's case*, the estate on which the covenants in question arose was granted under letters patent by the crown; but those letters patent are not stated in any of the reports. We know, however, that in grants of lands by the crown, it is usual to reserve a reversion, which reversion the grantee cannot bar. The grantee having enjoyed the estate for a considerable time, sold to the Plaintiff in the action, and entered into three covenants. First, that he was seised in fee: secondly, that he had good power to convey: and, thirdly, that there was no reversion in the

(a) The same doctrine was laid down by Lord Kenyon in the case of *Lord Walpole v. Lord Cholmondeley*, 7 T. R. 148.

crown notwithstanding any act done by him. The contest in the cause was to apply the concluding words of the third covenant to the two prior covenants: there was a great difference of opinion upon the subject, not only between the individual judges, but between the different Courts before whom it was argued; and the only ground upon which I can suppose that Court to have proceeded, which decided that the words were not connected with the first covenant, is this, that they considered it to have been the intention of the parties that the vendor should enter into an absolute covenant for his seisin in fee in all cases but one; namely, that he should not be liable on the objection of a reversion existing in the Crown, unless that reversion appeared to have been vested in the crown by his own acts. The case of *Johnson v. Proctor*, in Yelverton, proceeded on the principle on which this demurrer may be decided, viz. that the covenant is to be construed according to the intention of the parties. There the grantor having stated in the recital that he was interested in the whole of the premises, when in fact he was interested in a moiety only, the Court would not permit him to contend that a covenant for quiet enjoyment "notwithstanding any act done by him," was satisfied by a compliance with the mere words of that covenant in a case where the grantee had suffered eviction, not in consequence of any act done by the grantor, but in consequence of the badness of his title. The recital itself amounted to a warranty. *Gainsforth v. Griffith* was a case of leasehold property. The first covenant there was, for an indefeasible title, and was a separate and distinct covenant; and the second was for quiet enjoyment, notwithstanding the assignor's own acts. He seems, therefore, to have said, I not only covenant for the goodness of my title, but that you shall enjoy under that title without any interruption from me. The nature of the assurance shews it to have been the intent of the parties that the [26] words in the last covenant should not attach upon the first. Coming lately from a Court of Equity, I may be allowed to refer to a case there, though perhaps not of the highest authority in a Court of Law. It is the case of *Fidler v. Stulley*, Cas. temp. Finch, 90. There the deed contained one general covenant for lawful power to convey, but all the other covenants had restricted words as here. The grantee having sued the grantor on the general covenant, the Court of Chancery restrained him from proceeding. Now this must have been done on the ground of the intent of the parties appearing on the instrument; since that intent, and the consequent legal effect of the instrument, could only be collected from the instrument itself, and not from any thing dehors. In the same manner the intent of the parties to the covenant on which this action is brought, is to be collected from the warranty, from the other covenants, and from the *prima facie* nature of a purchase of a freehold estate. Upon the whole I am clearly of opinion, that this is not a covenant against all the world, but that it is either part of the first covenant which is special, or if a substantive covenant must, by reference to the whole context of the deed, be considered a special covenant.

BULLER J. My Lord has so completely exhausted the case that I need do little more than subscribe my general assent. Some things are extremely clear. In the construction of agreements and covenants, the intention of the parties is principally to be attended to. In conveyances of this sort, the usage of the profession also deserves considerable attention. According to the ancient mode of conveyance, deeds were confined to a very narrow compass. The words "grant and enfeof" amount to a general warranty in law, and have the same force and effect. The covenants, therefore, which have been introduced in more modern times, if they have any use besides that of swallowing a quantity of parchment, are intended for the protection of the party conveying; and are introduced for the purpose of qualifying the general warranty which the old common law implied. This has been clearly settled ever since *Noke's case*. We do not do justice to the parties unless we look to the whole deed, and infer from that their real intention. Covenants being intended for the benefit of the party conveying, let us see how this Defendant has protected himself. He has expressly told us in one part of the deed that he means to covenant against his own acts, and are we to say, that he has in the same breath covenanted against the acts of all the world? This would be highly [27] inconsistent. If the Court is driven to say that these two covenants must stand together, they must do so by pronouncing judgment on the words of this particular clause, and shutting their eyes against all the other parts of the deed. I am inclined to think that the person who drew this deed intended that the two clauses should form but one covenant: but that not having strength of mind sufficient to carry him through one continued sentence of so great a length, he

stopped, and introduced the words "And that," which have created all the difficulty. Strike out these words, and the case is as clear as the sun. The covenant would then stand thus: The grantor covenants that notwithstanding any act done by him, he is seised of the estate, and hath good title to convey. The two clauses are synonymous. Many words have been used, though they mean but one thing. The grantor has said I have a good right to convey. Take this to be against all the world. He has also qualified the assertion that he is seised in fee by the expression "notwithstanding any act by him done;" why say notwithstanding any act by him done, if he meant to covenant against the acts of all the world? The restriction would be inconsistent. To make sense of the deed, therefore, we must read these two sentences as one covenant. It is often difficult to distinguish between the words of the conveyancer, and those of the party conveying. In this case, however, I think it may fairly be inferred that the grantor intended only to sell what he had bought, leaving it to the purchaser to exercise his discretion respecting the title.

HEATH, J. I am of the same opinion; and shall express my reasons for that opinion very shortly. I take this case to be very clear on the construction of the instrument. Where any sentence contains distinct covenants, and there are words of restriction either in the prefatory or concluding part, those words must be extended to every part of the sentence unless the intention of the parties appear to require a contrary construction. This is laid down in 1 Saund. 60. It therefore behoves the Plaintiff to shew that it was the intention of the parties that the restrictive words in this case should not extend to the second clause of the sentence. It is certainly possible that this might have been the intention. The purchaser might have entertained suspicions of the title, and might therefore have required a general covenant. But in order to ascertain whether this were so, we must examine the other parts of the deed; and the other parts of the deed negative that idea. The second [28] clause is consequential to the first. The first asserts, that the grantor is seised of an estate in fee, notwithstanding any act done by him; and the second, that he has good right to convey the estate of which he is seised.

ROOKE, J. I have entertained some doubts upon this question: but upon the whole of the argument, I am now satisfied that the judgment of the Court must be directed by the intent of the parties; and that the intent sufficiently appears. But as the case has been very fully discussed, I shall only add, that the two clauses appear to me to constitute but one covenant, and that the restraining words must be applied as well to that member of the sentence which asserts that the grantor is lawfully seised, as to that which asserts that he has a right to convey.

Judgment for the Defendant.

HALL v. ODY. Nov. 15th, 1799.

[Applied, *Ex parte Griffin*, 1880, 14 Ch. D. 40. Referred to, *Stoomvaart Maatschappij Nederland v. Peninsular and Oriental Steam Navigation Company*, 1882, 7 App. Cas. 820. Discussed, *Edwards v. Hope*, 1885, 14 Q. B. D. 924.]

The costs of two actions between the same parties though in two different courts may be set off against each other. And in C. B. this may be done notwithstanding the lien of the attorney for his costs (*a*).

Cockell, Serjt., this day shewed cause against a rule nisi for setting off the costs of an action of ejectment recovered by the present Defendant against the present Plaintiff in the King's Bench, against the costs of an action of trespass in this Court, in which the Plaintiff had recovered a verdict; and insisted that in all the cases where a set-off of this kind had been allowed, both actions had been in the same court; as in *Thrustout d. Barnes v. Crafter*, 2 Bl. 826. *Schoole v. Noble and Others*, 1 H. Bl. 23. *Nunez v. Moligliani*, 1 H. Bl. 217. *Vaughan v. Davis*, 2 H. Bl. 440, and *Dennie v. Elliott*, 1 H. Bl. 587 (*b*). But the Court over-ruled the objection, saying that a set-off

(*a*) Vide *Emelin v. Darley*, 1 N. R. 22. *Swain v. Senate*, 2 N. R. 99. *Figes v. Adams*, 4 Taunt. 632. *Phillipson v. Caldwell*, 6 Taunt. 176. *Harrison v. Bainbridge*, 2 B. & C. 800.

(*b*) See also *O'Connor v. Murphy*, 1 H. Bl. 657,

had even been allowed between costs in a court of equity and costs in a court of law; and Heath, J. observed, that he remembered a case where an ejectment having been brought in the King's Bench, and afterwards a formedon in this court, proceedings were stayed in the latter until the costs of the former were paid.

Cockell, Serjt. then stated that he opposed the rule on the part of the Plaintiff's attorney who had not been paid his costs, and represented that the Plaintiff himself was now in prison. He cited *Mitchell v. Oldfield*, 4 T. R. 123, to shew that the attorney has a lien on the judgment for the amount of his costs (c).

[29] Shepherd, Serjt. *contrà*, relied on *Dennie v. Elliot*; where it was held, that whatever might be the rule in the King's Bench, yet according to the practice of this Court the lien of the attorney was subject to the equitable claims of the parties.

LORD ELDON, Ch. J. Finding it to be the practice of this Court that an attorney shall not take his costs out of the fund which by his diligence he has recovered for his client, where the opposite party is entitled to a set-off, it does not become me to say more than that I find it to be the settled practice with much surprise, since it stands in direct contradiction to the practice of every other court as well as to the principles of justice. In the Court of Chancery the same parties are often concerned in many suits, and I never knew the idea entertained of arranging the funds till the respective attorneys were paid their costs. However, as the attorney in this case has acted with a knowledge of the settled practice of the Court, he can have no right to claim the advantage of a more just principle; and it will only remain for the Court to consider, whether the practice of the Court of King's Bench should not be adopted here for the future.

HEATH, J. I have no objection to have the practice reconsidered.

ROOK, J. There can be no objection to reconsidering the practice, but it does not appear to me to be unfair as it stands at present. The attorney looks in the first instance to the personal security of his client, and if beyond that he can get any farther security into his hands, it is a mere casual advantage.

Rule absolute.

PARKER, ONE, &C. v. VAUGHAN AND OTHERS. Nov. 15, 1799.

If an attorney of C. B. bring an action by original in that court, against a Defendant resident in Middlesex, and recover under 40s. the Court will allow a suggestion to be entered under 23 Geo. 2, c. 33, s. 19. An action for use and occupation may be brought in the county court of Middlesex (a).

This was an action for use and occupation, in which the Plaintiff, who was an attorney of this court, sued by original, and obtained a verdict for 1l. 1s.

Shepherd, Serjt., on a former day obtained a rule nisi for entering a suggestion on the roll according to the provisions of 23 Geo. 2, c. 33, s. 19, on the ground of the Defendant being resident in Middlesex and liable to be summoned to the county court.

Cockell, Serjt. now shewed cause against that rule on two grounds: First, because the Plaintiff was an attorney of this [30] court, and was therefore entitled by his privilege to sue in this court; in support of which he cited *Gardner v. Jessop*, 2 Wils. 42, where it was ruled on demurrer that an attorney cannot waive his privilege, because he is not allowed it for the benefit of himself but for the sake of the Court and the suitors. [ROOKE J. That was the case of an attorney defendant; here the attorney is Plaintiff, and sues without naming himself attorney.] Secondly, because this being an action for use and occupation, could not be brought in the county court; and he referred to *Woolley v. Cloutman*, Doug. 245, where the words "debt for rent" in the London court of conscience act 3 Jac. 1, c. 15, s. 1, 6, were held to extend to all actions for rent.

Shepherd, *contrà*, insisted, first, That the attorney in this case having omitted to sue by attachment of privilege, had waived his privilege; and cited *Hetherington, One, &c. v. Louth*, 2 Str. 837, and *Welland, One, &c. v. Frument*, Barnes, 479. Secondly, That the case of *Woolley v. Cloutman* having proceeded entirely on the particular words of

(c) Also *Randle v. Fuller*, 6 T. R. 457.

(a) Vide *Johnson v. Bray*, 2 B. & B. 698.

the London court of conscience act, was not applicable to this; and that the jurisdiction of the Middlesex county court extended to all cases not expressly excepted. He cited *Keay v. Rigge*, ante, vol. i. p. 11.

Cockell then urged, that as the application for a suggestion was made on affidavit, the plaintiff was entitled to shew by affidavit that he was an attorney.

LORD ELDON, Ch. J. The only affidavit which the plaintiff could make in order to give a reason for his suing in this court must be, that he sued as an attorney: but it appears on the record that he did not sue as an attorney. On the second point, also, the Court are of opinion that the plaintiff might have sued in an action for use and occupation in the county court.

Per Curiam. Rule absolute (a)¹.

NATION v. BARRETT. Nov. 16th, 1799.

In this court two days' notice of justification must be given whether the bail originally put in, or added bail, be brought up.

The justification of bail in this case was opposed by Shepherd, Serjt. on the ground of two days' notice of justification not having been given.

[31] Williams, Serjt. contended that such notice was not necessary where the same bail were brought up to justify as were originally put in; though in the case of added bail it was. He observed that the distinction was founded on good sense; for the Plaintiff was supposed not to except to bail originally put in without having inquired into their sufficiency; and said that the practice of the King's Bench was in his favour (a)².

The Court finding all the officers of opinion that the practice of this Court was otherwise (b), held it too well settled to be now shaken, and rejected the bail.

COOK v. LOVELAND AND ANOTHER. Nov. 18, 1799.

The crown by letters-patent granted to the master and wardens of the corporation of bakers (there being four wardens), by themselves and their deputy or deputies, full power to overlook and correct the trade of baking. Held, that the master and one warden could not justify entering the house of a baker to overlook bread; for if they acted as principals, they did not amount to a majority of the persons to whom the power was given; and if they acted as deputies, it should have appeared that they were appointed by the majority.

Trespass for breaking and entering the dwelling-house of the Plaintiff, situate in Commerce Row, Blackfriars Road, in the Parish of Christchurch, in the county of Surry, and continuing therein a long space of time, to wit, the space of one hour, and throwing about, pulling about, and damaging divers loaves of bread of the said Plaintiff in his dwelling-house, &c.

Pleas. First, Not-guilty. Second, As to the said breaking and entering the said dwelling-house of the said Plaintiff, in the said declaration mentioned, and continuing there ten minutes, parcel of the said term, in the said declaration mentioned; and as to the throwing about and pulling about the said loaves of bread in his said dwelling-house in the said declaration mentioned the said Thomas and John by leave, &c. actionem non, because they say that the said Plaintiff before and at the time when, &c. used and exercised the trade and mystery of a baker, baking bread to be exposed to sale, and exposed bread to sale at his said dwelling-house at the parish aforesaid, in the county aforesaid, and that the said dwelling-house of the said Plaintiff, wherein he so used and exercised the trade and mystery of a baker, and made bread and exposed the same to sale, is situate within two miles of the suburbs of the city of London, and is

(a)¹ Vide *Tagg v. Madan*, ante, vol. i. p. 629, and the cases there cited.

(a)² *Wright v. Ley*, H. 15 Geo. 3, B. R. Notice in an evening to justify bail the next day is good, if the bail have before been put in and excepted to by the Plaintiff; otherwise not. Vide etiam to the same effect, Tidd's Pr. K. B. 138, 139, ed. 1, 136, ed. 2.

(b) *Teule v. Cheshire*, Barnes, 82, and *Gregory v. Reeves*, Barnes, 303.

not situate [32] within the city of Westminster, or the liberties thereof: And the said Thomas and John further say, that the late sovereign Lady Elizabeth Queen of England, by her letters patent bearing date the 26th May, in the eleventh year of her reign, for herself, her heirs and successors, ordained, that all the freemen of the city of London of the art or mystery of bakers, in the said city of London, and all the freemen of the said city, as well of the white bakers, as of the brown bakers, and all others occupying or using within the said city or its suburbs, or any of them, the mystery or art of baking any bread of any sort to be exposed to sale for the regulation and ordering of the said art or mystery, from thence for ever should be, by virtue of the said letters patent, a body corporate and politic, in deed, fact, and name, by the name of the master, wardens, and commonality of the mystery of bakers of London, and from thence for ever, should by that name have perpetual succession, sue and be sued, and have a common seal: And the said Queen did by the said letters patent for herself, her heirs and successors, grant to the said master, wardens, and commonality, or their successors, and from thenceforth for ever there should be one master of the said mystery and four guardians thereof to be chosen, named, and appointed as in the said letters patent is more fully set forth: And the said Queen did further of her free grace, certain knowledge, and mere motion, will, and by the said letters patent, grant for herself, her heirs, and successors, to the said master, wardens, and commonality, and their successors, that the master and wardens for the time being, and their successors for ever, should have, enjoy, and exercise by themselves or their sufficient deputy or deputies within the said city and the suburbs thereof, and in all other places within two miles every where round the suburbs of the said city of London, the full and entire overlooking, examination, correction, punishment, and government of the said mystery and commonalty of freemen of the said mystery, and of all other freemen of the said city of London and suburbs thereof, and of all and singular other strangers, as well within as without the said suburbs, using the art or mystery of bakers, making and exposing to sale any sort of bread within the said city or the liberties and suburbs thereof, and of all other strangers, of what sort soever, in any way exercising or using the art and mystery of a baker within the said city and suburbs, or any of them, or elsewhere, in any other place not distant more than two miles from the suburbs of the said city of [33] London, (the said Queen's city of Westminster, and the liberties thereof only excepted,) according to their sound discretion as by the said letters patent now remaining of record in his Majesty's High Court of Chancery at Westminster, reference being thereunto had, may more fully appear, which said letters patent were afterwards and after the granting thereof (to wit) on the same day and year and aforesaid by the persons to whom they were directed, accepted, that is to say, at the parish aforesaid, in the county aforesaid. And the said Thomas and John further say, that before, and at the time when, &c. the said Thomas was master of the said mystery, and that one Andrew Wright was one of the wardens thereof, to wit, at, &c. And the said Thomas and John further say, that the said Thomas and the said Andrew Wright being such master and warden of the said mystery, and the said Plaintiff so exercising and using the art or mystery of a baker as aforesaid, they the said Thomas and the said Andrew Wright for the purpose of overlooking the said Plaintiff in his said art and mystery of a baker, and of examining whether the bread by him baked and exposed to sale in his said dwelling house was of a proper and sufficient weight according to law, and the said John as their servant in their assistance, and by their command, at the said time, when, &c. entered the said dwelling-house of the said Plaintiff, situate in the parish and county aforesaid, in which he so used and exercised his art and mystery of a baker, and exposed bread so by him baked to sale, and then and there took down, and took hold of, and weighed parcel of the said bread, so being there exposed to sale, as they lawfully might for the cause aforesaid, and in so doing did necessarily stay and continue the space of ten minutes in the said dwelling-house as they lawfully might for the cause aforesaid, which are the said trespasses in the introductory part of this plea set out. And this, &c. wherefore, &c.

To this there was a general demurrer and joinder.

Runnington, Serjt. in support of the demurrer. First, it does not appear that the Defendants had any authority to enter the Plaintiff's house; for such an authority can not be incident to the power of overlooking, &c. given by the charter, since even if it had been given in express terms, it would have been void. If derived from custom

such an authority might possibly be good, for the distinction is taken in the case of *The City of London*, 8 Co. 125 a. that fortior et potentior est vulgaris consuetudo quam regalis concessio, and accordingly it is there stated that there is a custom of London "to enter a house of another which [34] is his castle" (a)¹. Besides the plea states, that the defendant exposed the bread to sale at his house; the Defendants therefore might have overlooked it without entering the house. Secondly, it appears, that the persons incorporated by the charter were all the freemen of the city of London, using the mystery of baking within the city and its suburbs; they were the only persons to whom the charter was directed, and by them only therefore can it have been accepted. *Rex v. Amery*, 1 Term Rep. 584, per Ashurst J. But the authority given by the charter is not only to be exercised within the city and the suburbs, but in all other places within two miles every where round the city. To the persons without the city the charter was not directed, by them therefore it was not accepted, and consequently they cannot be bound by it (b). *Bagge's case*, 1 Roll. Rep. 226, 2 Brownlow, 100, and *Rex v. Dr. Askeu*, 4 Bur. 2200. It is clear from the pleadings, that the Plaintiff's house is not within the city or the suburbs, the venue being laid at Christ Church, in Surrey, and the plea averring the house to be "within two miles of the suburbs of the city." Thirdly, the authority has not been strictly pursued. The charter created one master and four wardens, and the authority is to be executed by the master and wardens for the time being "by themselves or their sufficient deputy or deputies;" admitting therefore, that a majority of five might have exercised the authority, yet the trespass in this case being only justified as the act of the master, one of the wardens and a third person in their aid, the justification is insufficient. Nor can these persons be considered as deputies of the five, since if there was a deputation, it should have appeared to have been made by the concurrent appointment of the five, or at least of the majority. In 1 Bulst. 105, where a writ was directed to eight nominatim, and seven only certified, it was held to be bad (c).

Shepherd, Serjt. contrâ, was desired by the Court to argue the last objection, as they should not feel themselves called upon to decide upon the others, if that was well grounded. He admitted [35] that where a power is granted to a definite number of persons, it must be exercised by the majority, but contended, that the Defendants in this case acted ministerially as the agents and servants of the master and wardens, that they entered the Plaintiff's house with a view to overlook only, and that their act was afterwards to be submitted to the judgment of the majority of persons to whom the power was granted; that it might be collected from the plea that they were only acting as deputies of the others, and that although no deputation was averred, such omission could only be taken advantage of on special demurrer.

But the Court were of opinion, that the omission was a subject of general demurrer, for the authority was void if the deputies were not well appointed.

LORD ELDON, Ch. J. This declaration calls upon the Defendants to shew by what authority they entered the Plaintiff's premises. The plea refers to the letters-patent of incorporation, and asserts that the Defendants had authority in manner and form therein described; that is, a right of overlooking and correcting the trade. Now, it is obvious, that on a question, whether bread be wholesome and sound, persons may differ in opinion, and a tradesman is not to be subject to the judgment of a single person, where the authority is vested in several. With respect to the right of exercising that authority by deputy, the same joint discretion must be employed in appointing the deputy which is necessary to the execution of the authority itself.

Per curiam. Judgment for the Plaintiff (a)².

(a)¹ In 1 Lev. 15, it is said by the Court that the customs of London are of such force that they will stand good against negative acts of parliament.

(b) But a corporation enabled by charter to make bye-laws for the regulation of a particular trade in a particular place, may make bye-laws binding on persons exercising that trade in that place, though not members of the corporation. *The Butchers' Company v. Morey*, 1 H. Bl. 370.

(c) In *Norris v. Staps*, Hob. 210, a declaration in the name of A. and B. guardians, and the fellowship of, &c on a bye-law made by two guardians, and the majority of the fellowship, was held bad among other reasons, because it did not state how many guardians were appointed by the charter, and there might have been more than two.

(a)² Vid. et. *Grinley v. Barker and Others*, ante, vol. 1, p. 229.

PARIENTE v. PLUMBTREE. Nov. 18th, 1799.

The sheriff having arrested a party, permitted him to go at large without taking a bail-bond, returned cepi corpus, and before the expiration of the rule to bring in the body put in bail; held that he was not liable either to an action for an escape, or false return (a).

This was an action on the case against the Defendant as sheriff of Kent. The first count of the declaration complained that the Defendant having arrested one W. J. Stephens, at the suit of the Plaintiff, on a capias ad respondendum returnable in eight days of Saint Hilary, indorsed for bail 141l. 1s. 6d. suffered him to escape, and falsely returned cepi corpus; and the second count, that he neglected to arrest W. J. Stephens, on the capias ad respondendum, and falsely returned cepi corpus.

The cause was tried before Rook, J. at the Westminster sittings after last Trinity Term, when it appeared in evidence that the [36] Defendant had actually arrested W. J. Stephens in obedience to the writ, but had afterwards suffered him to be at large without having taken a bail bond; that the Plaintiff on the return-day ruled the Defendant to return the writ, who accordingly returned cepi corpus; that the Plaintiff having afterwards served the Defendant with a rule to bring in the body, he put in bail, and W. J. Stephens before the expiration of the latter rule surrendered himself in discharge of those bail. A verdict was found for the Plaintiff, with liberty to the Defendant to move to set it aside.

Accordingly a rule nisi for a new trial having been obtained,

Shepherd and Bayley, Serjts. now shewed cause. Before the 23 H. 6, c. 9, the sheriff was bound to have the body at the return of the writ; and since that statute the only sufficient excuse which he can offer for not having the body is, that he has taken a bail-bond. In this case he neither had the body at the return of the writ, nor had taken a bail-bond. Though the Plaintiff may proceed against the sheriff in such a manner as to make him liable to an attachment, yet his right of action commences at the time when the writ is returnable, and nothing will waive that right. Indeed, it is necessary to rule the sheriff to return the writ, in order to procure evidence to support this action, for without so doing the Plaintiff could not ascertain what return the sheriff would make; and the same thing is done in cases where the sheriff is proceeded against for extortion or any other misconduct. If the sheriff omit to take a bail-bond before the return of the writ, he cannot afterwards retake the party; for the writ is functus officio, and he will be guilty of a trespass if he attempt it. *Atkinson v. Muttonson*, 2 T. R. 172. Where a bail-bond has been taken, and the sheriff is afterwards irregular, the Court never allows the Defendant to try the cause, without directing the bail-bond to stand as a security. Now in this case the Defendant will be permitted to try, and yet there is no bail-bond to stand as a security. Merely putting in bail at a time subsequent to the return, cannot be deemed having the body at the return of the writ: and as it appeared by the bail-piece, when produced in evidence, at what time the bail was put in, the Court cannot presume the proceedings of the sheriff to have been regular when the contrary has been shewn. In *Jones v. Eumer*, Anstr. 675, it was expressly decided in the Exchequer, that putting in bail after the return of the writ, and before the rule to bring in the body had expired, was no defence to an action against the sheriff for returning cepi corpus where he [37] had permitted the Defendant in the original action to go at large without taking a bail-bond, and had him not at the return of the writ. That case proceeded on the authority of *Ellis v. Yarborough*, 1 Mod. 227.

Cockell and Runnington, Serjts. contra, were stopped by the Court.

LORD ELDON, Ch. J. In *Fuller v. Prest*, 7 T. R. 109, it was decided by the Court of King's Bench, that where the sheriff permits the party to go at large, and does not take a bail bond, it is a breach of his duty for which he is answerable, if bail are not put in within due time. The result of this case is, that putting in bail in due time is an answer to the action, and that he is only liable where he has not done so. I cannot conceive on what grounds the case in the Exchequer was decided.

BULLER, J. I never knew a more groundless application: the whole of the argument proceeds on a fallacy. The foundation of it is, that the party did not appear

(a) Vide *Turner v. Cury*, 7 East, 607. *Allingham v. Flower*, post, 246.

at the return of the writ. But the record does not shew at what period bail were put in. When once put in they are to be considered as bail of the term generally. In the report of *Jones v. Eamer*, the Court are said to have proceeded on the authority of *Ellis v. Yarborough*, as directly in point. But that case was determined upon another ground. The object of ruling the sheriff to return the writ is to ascertain whether he has taken the party or not; and if he return *cepi corpus* he must put in bail. Now if this action could be maintained, it would in fact be going to a jury to ascertain whether the Court has done right in giving the sheriff the usual time to put in bail. It is a sufficient answer to the action that an appearance was entered. As to the production of the bail-piece at the trial; that was evidence which ought not to have been admitted, and yet it is upon that evidence that the action is attempted to be supported. There is a case in *Saunders* where it is said by the Court, that if the sheriff take a prisoner and detain him in his custody, and at the return of the writ return *cepi corpus*, and have not the body in court, he shall be amerced to the King, but the party shall not have an action against him (a).

[38] HEATH, J. There is a case of *Murray v. Durand* in *Espinasse's Cases at Nisi Prius* (page 87), which shews that this action cannot be maintained: for Lord Kenyon there ruled that an allowance of bail above, subsequent to the commencement of an action against the sheriff for an escape, and for not assigning the bail-bond, was a sufficient answer to such action; saying, that though the bail were put in and justified after the proper time, still that when once put in and justified, they were subsisting bail, and must be taken *nunc pro tunc*.

ROOKE, J. of the same opinion.

Rule absolute.

JONES v. ARMYTAGE. Nov. 18th, 1799.

Copy of a writ against William Armytage: notice to appear "Catherine Waller, you are served," &c. the mistake held fatal.

The Defendant in this case having been served with a copy of the process, and notice to appear at the foot thereof, as required by 5 Geo. 2, c. 27, s. 4, the latter varied from the former, thus; in the copy of the writ the name of the Defendant William Armytage was properly inserted, but the notice was "Catherine Waller you are served, &c." On this ground, Shepherd, Serjt. on a former day obtained a rule nisi to set aside the proceedings, and Rannington, Serjt. now shewed cause.

The Court were of opinion, that the mistake was fatal.

Rule absolute.

TURNER v. BRISTOW. Nov. 18th, 1799.

If bail be brought up on the same day on which an attachment has been obtained against the sheriff, the Court will permit them to justify, and set aside the attachment, on payment of costs.

The Rule to bring in the body having expired on the 16th, (Saturday) Shepherd, Serjt. obtained an attachment this morning (Monday). Heywood, Serjt. now mentioned that he was instructed to justify bail this day, and urged, that the Court would therefore set aside the attachment, as it had been often said, they would not allow any advantage to be obtained by mere priority of motion. He cited *Thorold v.*

(a) *Posterne v. Hanson and Another*, 2 Saund. 60. The above observation was made by the Court with a view to shew, that where a sheriff takes a bail-bond, and has not the body at the return of the writ, he is not liable to an action. They reason thus. Before the stat. 23 H. 6, c. 9, if the sheriff had actually detained the party, but had him not in Court at the return of the writ, he could only have been amerced, and since that statute he is to be considered in the same condition, after taking a bail-bond, as if he had actually detained the party. But in the principal case the sheriff neither took a bail-bond, nor had the Defendant in custody.

Fisher, 1 H. Bl. 9, to shew, that had he justified before the motion for the attachment, the latter would not have been granted.

The Court said, that on payment of costs (a)¹, the attachment must be set aside.

[39] JORY v. ORCHARD. Nov. 18th, 1799.

[Applied, *Anderson v. May*, 1800, 2 Bos. & P. 237.]

If a Plaintiff's attorney previous to bringing an action for a distress under the warrant of a magistrate, make out two papers precisely similar, purporting to be demands of a copy of the warrant pursuant to 24 G. 2, c. 44, s. 6, and sign both for his client, and then deliver one to Defendant, the other will be sufficient evidence at the trial (a)².

Trespass for taking and driving away the Plaintiff's cattle.

The cause was tried before Grose, J. at the last Summer assizes for Cornwall, when it appeared that the Defendant took the cattle as a distress for non-payment of a poor-rate, by virtue of a warrant from a magistrate, which was produced and read. The counsel for the Defendant then called on the Plaintiff to prove a demand of a copy of the warrant pursuant to 24 Geo. 2, c. 44, s. 6 (b), upon which a paper was produced by a witness, who swore that it was a copy of the demand of the warrant. It was objected, however, that such copy could not be read in evidence without proof of notice given to the Defendant to produce the original: in answer to which, it was shewn, that the Plaintiff's attorney intending to deliver a demand under the above act, made out two papers for that purpose precisely to the same effect, and signed them both for his client; one of which he delivered to the Defendant, and the other, which was the paper now produced, he kept in his own possession. This the learned judge refused to receive, because no notice had been given to produce the demand delivered to the Defendant, which he thought the best evidence; accordingly he directed a nonsuit.

A rule nisi having been obtained upon a former day for setting aside this nonsuit, Bayley, Serjt. now shewed cause. First, The demand left with the Defendant ought to have been produced. There is no reason why the general rule, that a copy cannot be read without notice to produce the original having been given, should not apply to this case. If a letter be written, and the party writing it enter a copy in his letter-book and sign it, would it not be necessary to give notice to produce the original before [40] the duplicate could be admitted in evidence? A party can prove nothing by a copy, where it would be necessary after producing the original to go one step further, in order to establish its validity. Now, in the present case, the act not only requires that a demand in writing should be made, but also that it should be signed, and if the demand left with the Defendant had been produced, the signature must have been proved (a)³. Secondly, The demand ought to have been signed by the

(a)¹ Note: the rule for the attachment had not been drawn up, and it was intimated that it ought not to be drawn up; so that the costs given were only those of preparing for the rule for the attachment.

(a)² And see *Anderson v. May*, 3 Esp. Rep. 167, S. C. post, 237. *Langdon v. Hulls*, 5 Esp. Rep. 156. *Kine v. Beaumont*, 3 B. & B. 288.

(b) That section enacts, "that no action shall be brought against any constable, headborough, or other officer, or against any person or persons acting by his order and in his aid, for any thing done in obedience to any warrant under the hand or seal of any Justice of the Peace, until demand hath been made or left at the usual place of his abode by the party or parties intending to bring such action, or by his, her, or their attorney or agent in writing, signed by the party demanding the same, of the perusal and copy of such warrant, and the same hath been refused or neglected for the space of six days after such demand."

(a)³ This distinction seems authorised by *R. v. Smith*, 1 Str. 126, more fully reported Vin. Abr. tit. Evidence, A. b. 26, pl. 68, where, on a motion that a Justice of Peace might produce on a trial of an indictment for subornation of perjury, an examination taken before him from a woman who had been convicted of perjury, the Court after consideration made the order, saying "a copy of the examination is no evidence, because it deprives the party of controverting whether it were his hand

Plaintiff himself, and not by his attorney. This point indeed was not raised at the trial, but it is competent to me to insist upon it, since it would afford a sufficient answer to the action in case of a new trial being granted. The ground of the objection is, that the word "party" appears never to have been used in the act to signify any person except the Plaintiff in the cause. Having therefore obtained that peculiar meaning, it must be so understood in this instance.

The Court intimated an opinion, that the latter objection was unfounded.

Lens, Serjt. in support of the rule. The question is, whether the paper produced were in fact a copy, or whether it were not as much an original as that delivered to the Defendant. The analogy to be drawn from the case of a man writing two letters precisely to the same effect, signing both, and sending one to his correspondent, and retaining the other, is in favour of the Plaintiff, for I contend, that the letter so retained would be of equal validity with that which was sent. Here two originals were created, one of which was delivered to the Defendant, and the other was kept for the purpose of being made evidence. It is like the case of a notice to quit, where a duplicate is always admitted as evidence.

LORD ELDON, Ch. J. With respect to the only question which arose at nisi prius, namely, whether this paper is to be considered as a copy of the original notice, or as a duplicate original, the strong inclination of my opinion is, that it is a duplicate original which, under the circumstances of the case, afforded evidence [41] enough for the Plaintiff to insist that the trial should proceed. I have looked into the act of parliament with a view to discover a ground on which any distinction may be founded between the notice required by the first section, to be given to Justices of the Peace previous to the commencement of an action against them, and the demand required by the sixth section; but without success. Unless I am mistaken, it is the usual course in actions against Justices of the Peace to produce a duplicate original; and the same thing is done with respect to notices to quit. It is true, that a notice to a Justice of the Peace need not be signed either by the Plaintiff or his attorney; though on the back of it the name and place of abode of the attorney must be indorsed; but it must have certain specified contents, and the production of a copy, or duplicate of that notice therefore is not the very best evidence to prove that the notice had the contents specified in the act. So a duplicate of a notice to quit is not the very best evidence of the contents of the notice delivered; for in that case also the contents may be proved to a certainty by the production of the notice itself, and the supposed duplicate original may be inaccurate. I do not see on what ground the distinction between those cases and this can be supported, the Plaintiff having shewn, that the paper produced was signed in the manner required by the act. The practice of allowing duplicates of this kind to be given in evidence, seems to be sanctioned by this principle, that the original delivered being in the hands of the Defendant, it is in his power to contradict the duplicate original, by producing the other if they vary. We cannot hold the paper produced in this case to be insufficient, without overturning the practice in actions against magistrates, and in cases of notices to quit, unless I mistake as to what that practice is—conceiving it to be as I have stated, I think this nonsuit cannot be supported.

BULLER, J. I am confident that this question has often arisen and been decided at nisi prius. But points of this kind pass unnoticed unless afterwards moved in Court. The attorney in this case made two copies of the paper, one of which he meant to deliver; he signed both, and it was indifferent which of them he delivered, for they were both originals. It appears clearly from the report that the nonsuit was directed on the ground of the paper produced in evidence being a copy; but I think it clear, that both the papers were originals. With respect to the second point, I agree with my Brother Bayley, that if any thing appear upon the report which would be the cause of a nonsuit at the second trial, the Court will take it into [42] consideration, though not expressly reserved. But the statute in question not being a penal act, the Court are not bound to construe it strictly. I think, therefore, the demand being signed by the Plaintiff's attorney for him, is within the meaning of the statute, a demand signed by the Plaintiff.

subscribed to it or not, and therefore the original ought to be shewn, and so it is in all cases where written evidence is produced which is grounded on being under a man's hand." See also *Hoe v. Nathorp*, 1 Ld. Raym. 154.

HEATH, J. I am of the same opinion. In principle I cannot distinguish this case from that of a duplicate notice to quit, which is received in evidence.

ROOKE, J. I confess, that I cannot make up my mind to agree with my Lord Chief Justice and my Brothers. The act requires this demand to be signed. In the other cases which have been mentioned, both the notice delivered, and the duplicate retained, may be considered as originals. But here something more is to be done beyond the mere production of the paper; the signature is to be proved; and how that is to be proved, by shewing that another paper was signed by the party, I do not perceive. I think that the Plaintiff should have given notice to produce the original demand before he could entitle himself to give the counterpart in evidence.

Rule absolute.

HOLIN v. BARGUS. Nov. 18th, 1799.

In this Court notice of declaration is not necessary in bailable actions.

The Plaintiff in this case having sued out a bailable writ, filed a declaration *de bene esse*, and gave a rule to plead; on the evening of the day on which bail were perfected (the Rule to plead being then expired) he served the Defendant with a demand of a plea, and on the next day signed judgment. Williams, Serjt. having obtained a rule nisi for setting aside this judgment on the ground of a notice of declaration being necessary in this as well as in an action not bailable, and that any distinction between the two in this respect was not well founded; Cockell, Serjt. shewed cause, and relied on *Simmons v. Shannon*, 3 Wils. 147, 2 Bl. 725, S. C. and *Shuttleworth v. Feilder* (a)¹, Hil. 37 Geo. 3, C. B. where the distinction between actions bailable and not bailable with respect to giving notice of declaration, was recognized.

Williams, contra, observed, that the two reports of *Simmons v. Shannon*, in Wilson and Blackstone varied materially from each [43] other; that in the former of these books, a difference of opinion was stated to have existed among the prothonotaries and secondaries upon this point, and that the Court there intimated an intention of making a Rule to settle it. He also alluded to the practice of the King's Bench, where notice is equally required in either case (a)².

The Court agreed, that the practice of the King's Bench was the most consistent, but thinking the point settled in this Court refused to set aside the judgment unless on payment of costs.

JOHN AND CHARLES CARTWRIGHT v. AMATT AND ANOTHER. Nov. 18th, 1799.

A. by indenture (reciting that a suit was depending between him and B. respecting certain patents, and that the same could not be assigned without hazard of defeating the suit) granted absolutely the said patents together with some others to C., excepting however until the determination of the above mentioned suit, such patents as should be necessary to support A.'s legal title. Then followed a covenant that A. upon the determination of the suit, should assign the excepted patents to C. and that until such assignment, A. should stand legally possessed of the same: held, that the legal interest in the excepted patents vested in C. upon the determination of the suit, without assignment.

This was an action on the case for the infringement of a patent. The declaration, after stating the grant of the letters patent to one Edmund Cartwright, the inrollment of the specification, &c. proceeded to aver, that "the said Edmund Cartwright afterwards and before the committing the several grievances hereinafter mentioned, to wit on, &c. at &c. by a certain indenture then and there made between the said Edmund Cartwright of the first part, the Plaintiffs of the second part, and certain other persons therein respectively mentioned and referred to, of the third and fourth parts (one

(a)¹ This case was cited from a manuscript note in the margin of Impey's Pr. C. B. p. 234, ed. 4, made by one of the officers of the Court.

(a)² See Reg. T. 2 Geo. 2, B. R. also 1 Sellen Pr. 234, ed. 2.

part of which, &c.), did for the considerations therein mentioned, grant, bargain, sell, assign, transfer, and set over unto the Plaintiffs, their executors, &c. the before-mentioned letters patent, &c. saving, excepting, and reserving unto the said Edmund Cartwright, his executors and administrators, until the final determination or conclusion of a certain suit in the said indenture mentioned then depending, and now long since ended and concluded, such of the said letters patent in the said indenture mentioned, as should be necessary to be given in evidence for the support of the said suit, and the legal right and interest of the said Edmund Cartwright in and to the same to hold," &c.

The cause came on to be tried before Rooke, J. at the Guildhall sittings, after last Trinity Term, when the deed of assignment being produced in evidence, it appeared from the recital, that as there was a suit depending between Edmund Cartwright, [44] Plaintiff, and William Toplis, Defendant, respecting an infringement of certain letters patent, and until such suit had been legally tried, the legal right or property of the said Edmund Cartwright, in such letters patent as related to the inventions of combing wool and similar articles (which were the letters patent in question) could not, it was apprehended, be fully assigned or made over by him to the Plaintiffs without hazard of defeating the said suit, it was agreed, that in the mean time, and until such suit was determined, Edmund Cartwright should continue legal owner of the patents, in trust for the Plaintiffs, in whose custody they were to remain, and who were to have all the benefits arising from them: Then followed an absolute grant of the letters patent in question, together with others, to the Plaintiffs with the following exception, "save and except nevertheless, and out of these presents reserving unto the said Edmund Cartwright until the final determination or conclusion of the suit or action now depending between him the said Edmund Cartwright and the said William Toplis, all such of the said hereinbefore mentioned patents as are or shall be necessary to be given in evidence for the support of the said suit or action, and the legal right or interest of the said Edmund Cartwright in and to the same, upon the trusts," &c. After the trusts was inserted this covenant for further and better assigning the letters patent "that when and so soon as the said suit or action now depending between the said Edmund Cartwright and the said William Toplis shall have been finally determined, he the said Edmund Cartwright shall forthwith thereafter well and effectually grant, assign, and make over to the Plaintiffs upon the trusts, &c. the said hereinbefore excepted grants or letters patent, touching or relating to the said inventions, and every or any other matters, in contest, for which the same were reserved out of these presents, and the specifications thereof and all his legal and other estate and interest therein; and that in the mean time and until such last-mentioned assignment thereof, shall be made and executed, he the said Edmund Cartwright shall and will stand legally possessed of, and interested in the same reserved grants or letters patent for the behoof of them the Plaintiffs, their executors, &c. subject to the same trusts," &c. It was objected on the part of the Defendants, that as no assignment had taken place subsequent to the determination of the depending suit, the legal interest not being vested in the Plaintiffs by the deed produced, still remained in Edmund Cartwright, and therefore [45] the Plaintiffs could not recover. The learned judge being of that opinion, directed a nonsuit.

Runnington, Serjt. on a former day moved to set aside this non-suit, and contended, that it was the manifest intention of the parties that the whole legal interest should pass to the Plaintiffs as soon as the suit, which was depending, should be determined, and that the last covenant, which was only inserted *pro majori cautela* ought not to be allowed to defeat that intention; a rule nisi was accordingly granted.

On this day Shepherd and Lens, Serjts. were to have shewn cause against that rule:

But Rooke, J. said, That on a further consideration of the effect of the deed than was given to it at nisi prius, he was convinced that the legal interest vested in the Plaintiffs immediately on the determination of the suit that was depending at the time when the indenture was executed.

And the rest of the Court having expressed themselves clearly of the same opinion,

The rule was made absolute without argument.

DONNELLY v. DUNN. Nov. 19th, 1799.

Bail cannot plead the bankruptcy and certificate of their principal in their own discharge (a).

This was an action of debt on a recognizance of bail. The Defendant pleaded the bankruptcy of his principal circumstantially (b); to which there was a general demurrer and joinder.

Bayley, Serjt. in support of the demurrer. Admitting this plea to be well pleaded, I contend that it is not competent to the bail to plead the bankruptcy of their principal. By the 5 Geo. 2, c. 30, s. 7, the plea of bankruptcy is put into the mouth of the bankrupt only, and the bail, if entitled to any relief, must obtain it by application to the summary jurisdiction of the Court. The Legislature has provided for all the difficulties to which the bankrupt may be subject; if he be arrested, he shall be discharged on common appearance, s. 7; if obliged to plead, the general plea is given him; if under the necessity of supporting that plea by evidence, the 41st section of the act [46] is in his aid; and if taken or detained in execution, he shall be discharged on summary application, s. 13; but there are no provisions in favour of the bail. The mode in which they have usually been relieved may be collected from some cases on the subject. In *Ray and Others v. Hussey*, E. 24 Geo. 2, Barnes, 104, the Defendant having become bankrupt pending the action, an exoneretur was entered on the recognizance; and in a note to that case, it is observed, that it was a new practice introduced to discharge the bail in a summary way, without putting them to the trouble and charge of surrendering the principal as formerly. This shews the contemporaneous opinion of the profession respecting the act of Geo. 2, for if the Defendant could have pleaded the bankruptcy, the Court would not have interfered. A similar account of the practice is given by Lord Mansfield in *Martin v. O'Hara*, Cowp. 824; and by Buller, J. in *Southcote v. Braithwaite*, 1 Term Rep. 624. Indeed it was strongly intimated by this Court on a late occasion, that the bail could not in any case plead the bankruptcy of their principal. *Donnelly v. Dunn*, ante, vol. i. 448, and *Beddome v. Holbrook*, *ibid.* in notis. This is a new experiment, and if allowed to succeed, might in many cases be highly prejudicial to justice.

Marshall, Serjt. contra. I do not mean to controvert the authorities by which it is established, that the Court has power to discharge the bail on a summary application where the principal has become bankrupt and obtained his certificate: but I contend that if the bankruptcy and certificate be a legal discharge to the principal, it is a legal discharge to the bail; and if so, may be pleaded. Indeed, it is the only way of investigating whether there be any fraud in the means by which the certificate was obtained; and so the Court seem to have thought in *Vincent v. Brady*, 2 H. Bl. 1. The plea merely states that the bankrupt has got his certificate: and if the Plaintiffs meant to shew that it was obtained by fraud, they should have replied it. From the terms of the recognizance, which are, "that the principal shall surrender himself or pay the debt," it is doubtful whether the bail can surrender him against his will. If, then, he will not surrender himself, shall not the bail be at liberty to pray him in aid?

LORD ELDON, Ch. J. It is not the interest of the bankrupt to refuse to surrender himself in discharge of his bail. The execution of his creditors against him is barred by the certificate; but if he allow his bail to pay the debt, he thereby creates a new [47] creditor for a debt to the same amount, which is not barred by the certificate. The plea of bankruptcy is given to the bankrupt to be made use of as the means of discharging himself, if he so please. But there may be many cases in which the bankrupt may not choose to make use of his certificate. If he has been guilty of a fraud, he may be fearful of bringing it forward. If he has acquired an accession of fortune subsequent to the obtaining of his certificate, he may be ashamed to plead it. Shall he then, through the medium of his bail, be obliged to make use of his certificate

(a) Vide *Davey v. Prendergrass*, 5 B. & A. 187.

(b) He had before pleaded it more generally, and obtained leave to amend; vide ante, vol. i. p. 448. There was another action brought by *Donnelly* against *Maclagan*, the other bail, under circumstances precisely similar to *Donnelly v. Dunn*, which came on at the same time, and on which the same judgment was given.

whether he will or not? It is the duty of the bail, under their recognizance, to render the bankrupt; and it remains with the bankrupt himself to determine whether any use shall be made of the certificate. Suppose the two bail to be creditors sufficient in number and value to sign the certificate; if they could plead it also, they would have it in their power to sign their own discharge.

BULLER, J. It is of importance to the public, and to the profession, to put an end to attempts to introduce upon the record questions of practice which cannot be considered as legal defences, but which belong rather to what may be called the equity side of the Court (*a*). This action is brought for a legal demand arising upon a debt of record; and the Defendant is called upon to state a legal defence upon record, not merely to say that he has equity in his favour. Now, what legal defence has he set up? He must either shew a legal impossibility to perform the condition of the recognizance, or state something that will discharge him. Has he done either? Certainly not. Then the Plaintiff remains unanswered.

HEATH, J. It does not follow that the bail are to have all the advantages to which their principal is entitled. Suppose in an action on a judgment there be manifest error on the record, the bail cannot avail themselves of such error, though the principal may.

LORD ELDON, Ch. J. added, We do not mean to preclude any application for summary relief on the part of the bail; but the opinion of the Court is, that on this record judgment must be given for the Plaintiff.

Judgment for the Plaintiff.

[48] FOWLER v. MORTON. Nov. 21st, 1799.

If an affidavit to hold to bail state the circumstances under which a debt accrued, and conclude "by reason whereof the Defendant stands indebted in ——l. which he hath refused and still refuses to pay," it is bad. If such an affidavit negative a tender in "notes of the Bank of England, payable on demand," it is a sufficient compliance with 37 Geo. 3, c. 45, s. 9, though the words of that act are "expressed to be payable on demand."

The Defendant in this case was held to bail upon an affidavit of the Plaintiff, stating that the Defendant on or about the 9th of May 1799 agreed with the Plaintiff, who was a common carrier, that if the Plaintiff would give up to him the business of a common carrier he would pay to the Plaintiff 4l., would take his cart at a valuation, and pay the amount of all the book-debts due to the Plaintiff up to the time of making the agreement: that the cart was valued at four guineas, of which the Defendant had notice; that the book-debts amounted to 4l. 9s. 7d. of which the Plaintiff informed the Defendant; that in pursuance and performance of the above agreement, the Plaintiff did give up the business to the Defendant, who had ever since carried it on.—"By reason whereof the said Christopher Morton became indebted to him the deponent in the sum of 12l. 13s. 7d. out of which the deponent had received the sum of 1l. 1s. only: and by reason thereof the said Christopher Morton now is, and standeth justly and truly indebted to him the deponent in the sum of 11l. 12s. 7d. which he hath refused and still doth refuse to pay." The affidavit further stated that no offer had been made by the said Defendant to pay the said sum of 11l. 12s. 7d. (the debt sworn to) "in notes of the Governor and Company of the Bank of England, payable on demand."

Lens, Serjt. on a former day moved for a rule to shew cause why the bail bond should not be cancelled on the Defendant entering a common appearance. He stated two objections to the affidavit; first, that the debt was not sworn to positively, on account of the words "by reason whereof:" secondly, that in the denial of a tender in Bank-notes the notes were not described in the words of the act of parliament (37 Geo. 3, c. 45, s. 9), which are "expressed to be payable on demand."

The Court refused the rule upon the latter objection, but granted it upon the former:

Against which objection Williams, Serjt. now contended, that although the Plaintiff

(a) And see *Scholey v. Mears*, 7 East, 151.

had stated more than was necessary, yet that the debt for which he held the defendant to bail was sworn to with certainty.

[49] But The Court being of a contrary opinion made the rule absolute (a)¹.
Rule absolute.

WALLACE v. ARROWSMITH. Nov. 21st, 1799. Post. 246, 564.

If two attorneys' clerks be put in as bail, the Plaintiff may treat such bail as a nullity and take an assignment of the bail bond (a)².

Heywood, Serjt. shewed for cause against a rule nisi for staying proceedings on the bail-bond, that the bail put in were both clerks to the Defendant's attorney, and being therefore within the rule of Court (b), the Plaintiff had a right to treat the bail as a nullity, and take an assignment of the bail-bond. He cited *Cornish v. Ross*, 2 H. Bl. 350.

Bayley, Serjt. contrà insisted, that though the bail might have been rejected had they been brought up to justify, yet it was not competent to the Plaintiff to determine on their sufficiency; and relied on *Thomson v. Roubell*, Doug. 466, in notis, where it was so decided. Heywood then cited *Fenton v. Ruggles*, ante, vol. i. 356, where the Court in a similar case to this, held that the Plaintiff might take an assignment of the bail bond:

And The Court recognizing that case,
Discharged the rule with costs.

SPICER v. TEASDALE. Nov. 23d, 1799.

If a Plaintiff obtain judgment upon one of several counts in a declaration, he is entitled to the costs of the whole. And if after entering up judgment for himself upon two counts he discover an error in one of them, he may wave his judgment on that count and enter it for the Defendant (a)³.

The Plaintiff in this case declared upon a bill of exchange; the declaration contained three counts; to the two first the Defendant demurred; but judgment was given for the Plaintiff, who then entered a nolle prosequi as to the third; costs having been allowed to the Plaintiff upon all three counts, he entered up judgment for himself upon the two first; but afterwards finding a mistake in the second count, he altered the judgment by entering it for the Defendant upon that count.

The bail being sued, Shepherd, Serjt. on a former day moved to set aside the judgment on two grounds; first, because the Plaintiff was not entitled to costs upon the two last counts of [50] the declaration; and secondly, because after entering up judgment for himself on the second count he had no authority to alter it.

Cockell, Serjt. now shewed cause, and contended that by the practice of the Common Pleas, if the Plaintiff obtain judgment upon one count, he is entitled to the costs of the whole declaration (a)⁴; and that in the present case the Plaintiff, on discovering his mistake, had a right to wave his judgment on the second count, and enter it for the Defendant.

The Court were of opinion that the Plaintiff had a right to wave his judgment on the second count, and that the bail ought not to be allowed to hold him to it, against

(a)¹ Vide *Mackenzie v. Mackenzie*, 1 Term Rep. 716, and *Wheeler v. Copeland*, 5 Term Rep. 364.

(a)² Vide *Rez v. Sheriff of Surrey*, 2 East, 181.

(b) Reg. M. 6 Geo. 2, also *Laing v. Cundale*, 1 H. Bl. 76.

(a)³ Vide *Penson v. Lee*, post. 330. *Morgan v. Edwards*, 6 Taunt. 394.

(a)⁴ This was settled after much discussion in *Brylges v. Raymond*, 2 Bl. 800; and in *Norris v. Waldron*, 2 Bl. 1199, the same rule was allowed to prevail, though the counts were for different causes of action. However it is stated by Le Blanc, J. 8 Term Rep. 467, that in Tr. 32 Geo. 3, the Court of Common Pleas held, that a defendant who had suffered judgment by default as to part of a declaration in covenant, consisting of one count only, and pleaded to the residue, upon which issue was joined and found for him, was entitled to the costs of that issue.

his inclination; and agreed, with respect to the costs, that the practice of this court had been correctly stated on the part of the Plaintiff. But Buller J. added, that the practice of the King's Bench was different, and indeed more reasonable; for there, if judgment be given on demurrer for the Plaintiff on some counts, and for the Defendant on the others, the Plaintiff is entitled to costs on those counts only on which he has judgment, though costs are not allowed to the Defendant on the others^(b); and that an intention had been inti-[51]-mated in this Court of altering the practice, though he believed it had never been done.

Rule discharged.

(b) *Henderson v. Rumbold*, Hil. 4 Geo. 3, K. B. Sayer's Costs, 212. And this rule holds in B. R. where the Defendant pleads separately to different counts: as if he demur to the first count, and go to issue on the second; *Astley v. Young*, 2 Burr. 1232, or plead not guilty to the first, and a justification to the second, *Butcher v. Green*, Doug. 678. But where there are separate causes of action laid in separate counts, and the Plaintiff succeeds on some, and the Defendant on others, as separate judgments must be given, each party is entitled to the costs of so much as he succeeds in. *Day v. Hanks*, 3 Term Rep. 654. In *Tempest v. Metcalf*, 1 Wils. 331, a verdict having been found for the Defendant on the most material of three feigned issues, and for the Plaintiff on the other two, it was moved that the Plaintiff should have no costs; but the Court said, that if any one issue be found for the Plaintiff he should have his costs. By which seems to have been meant that the Plaintiff should have costs on the issues found for him, and the Defendant on the issue found for him. See also *Brathwaite v. Bradford*, 6 Term Rep. 599; though that case was partly decided on the construction of a particular statute. So if the Defendant plead a justification to a declaration consisting of one count only, and the Plaintiff traverse the justification, and also new assigns; if the Defendant suffer judgment by default on the new assignment, but obtain a verdict on the traverse, he is entitled to the costs of the issue on which he succeeds. *Griffiths v. Davies*, 8 Term Rep. 466. With respect to *Butcher v. Green*, it may be observed, that the two counts contained separate causes of action, one being in trover, and the other for words; but the case was treated as if it had been otherwise. Indeed it has been holden, that where a Defendant pleads two pleas under the statute, to the whole declaration, upon one of which judgment is given for him on demurrer, and upon the other a verdict is found against him, he shall be allowed costs on the former, but the Plaintiff shall not be allowed costs on the latter, since upon the whole he has no cause of action. *Cooke v. Sayer*, 2 Burr. 753. But it has since been expressly laid down, that if one of several pleas pleaded under the statute be held bad on demurrer, and a verdict be given for the Defendant on the others, the Plaintiff by the words of the 4 Ann. c. 16, s. 5, is entitled to the costs of the bad plea, though upon the whole record he appear to have no cause of action. *Duberly v. Page*, 2 Term Rep. 391. So, if the Plaintiff in replevin plead several pleas in bar under the statute, upon which several issues are taken, the avowant is entitled to the costs of the issues found for him. *Dodd v. Joldrel*, 2 Term Rep. 235. On both these latter points arising out of the construction of the statute of Anne, the practice of the Common Pleas agrees with that of the King's Bench. *Greenhow v. Ilsley and others*, Barnes, 136, and *Brooke v. Willet*, 2 H. Bl. 435. In *Greenhow v. Ilsley*, it was debated among the Judges, and held to make no difference, that the demurrer on which judgment was given for the Plaintiff (who was nonsuited on the general issue) was to a plea in bar pleaded by the Defendant to a new assignment, which the Plaintiff had pleaded to one of several pleas under the statute; and in *Brooke v. Willet*, the costs given by the statute were held to extend to the trial of the issues as well as the pleadings. In the King's Bench, however, if the Defendant obtain a verdict upon one of several pleas pleaded under the statute, and that plea prove to be bad, in consequence of which the Plaintiff having succeeded on the other pleas, is permitted to enter up judgment, the latter is allowed costs on the pleas found for him, and neither he nor the defendant on the bad plea; *Kirk v. Nowell*, 1 Term Rep. 118, 266, in which case the reason given for not allowing costs to the Plaintiff on the bad plea also, was, that "he should have demurred to it." Indeed in such a case the provisions of the statute of Anne, which only entitle a Plaintiff to the costs of one of several pleas found for him on verdict or demurrer, do not apply; and therefore it falls within the principle of those cases which have been decided independent of the statute.

WHALEY v. PAJOT. Nov. 25th, 1799.

No action will lie on a wager though above 50l. that a single horse shall run on the high road from A. to B. and arrive sooner than one of two horses placed at any distance the owner shall please; such a race not being legalized by 13 Geo. 2, c. 19, and 18 Geo. 2, c. 34, s. 11. If on an agreement of this kind be indorsed "N. B. to start P. P. in fifteen days from this date," and no notice be taken of such indorsement in the declaration, and no evidence be given to explain the meaning of the letters "P. P." the Court will not, after verdict, hold it to be a variance (a).

Assumpsit on a wager.

The cause was tried before Heath, J. at the Guildhall sittings after last Trinity Term, when the following agreement between the parties was proved: "Mr. Pajot bets Mr. William Whaley five hundred guineas and a dinner (to be had at Sittingbourne, in Kent) that his Mr. Pajot's brown horse called Little Devil, goes from London to the said town in the said county of Kent (rode also by himself) sooner than Mr. William Whaley's two hacks, one a brown called Billy, the other a dark bay called Allsteel, go the same distance; the two horses of Mr. W. Whaley to be placed at any distance from each other that he Mr. W. Whaley may think proper, but to be obliged, one of them, to arrive in the [52] town of Sittingbourne sooner than Mr. Pajot's horse. Mr. W. Whaley has the power of naming his rider. The meaning of this bet is, that Mr. Pajot bets Mr. W. Whaley that his Mr. Pajot's horse can go the distance above-mentioned, in a shorter time than Mr. W. Whaley's horses above-mentioned, placing one of them at a certain distance from the place from whence the other starts.

(Signed) W. WHALEY.
PAJOT."

On this agreement, which was set out in the declaration, was the following indorsement: "N. B. To start P. P. in fifteen days from this date." Of this indorsement no notice was taken in the declaration, nor was any evidence given at the trial to explain the meaning of the letters "P. P." The race was won by the Plaintiff's horses, and the Jury found a verdict in his favor.

A rule nisi having been moved for on a former day, either to set aside this verdict and enter a nonsuit, on the ground of a variance between the declaration and the agreement, because no notice was taken in the former of the indorsement, or to arrest the judgment on the ground of the wager being illegal, the Court granted a rule to shew cause in the latter shape only, saying, with respect to the former, that it was not necessary to state the indorsement, inasmuch as the letters "P. P." were merely insensible letters.

Cockell and Shepherd, Serjts. shewed cause, and relied on the 13th of Geo. 2, c. 19, and 18 Geo. 2, c. 34, s. 11, by the former of which acts they observed that matches for 50l. and upwards were legalized, provided they were run at certain places, and the horses carried certain weights, and that by the latter act the restrictions as to running at particular places and with certain weights were taken away.

Runnington and Lens, Serjts. contra. Under the 16 Car. 2, c. 19, and 9 Anne, c. 14, it is very clear that this wager would be void; unless therefore it appear to be expressly legalized by 13 Geo. 2, and 18 Geo. 2, the Court cannot support it. The preambles of the two latter statutes shew that they were passed in order to prevent the excessive increase of horse-racing, and all the provisions are calculated to effect that purpose. The regulations introduced into the 13 Geo. 2, respecting entering and starting, &c. clearly prove that the horse racing legalized by that act must be confined to horse-racing carried on in the usual manner. It is not enough that the wager depend on the speed of horses, unless that speed be exercised in the accustomed manner. In *Bidmead v. Gale*, 4 Bur. [53] 2432, the race upon which the Plaintiff recovered was of the ordinary kind. The expression "any place or places whatsoever," employed in 18 Geo. 2, c. 34, s. 11, must for the same reason be restrained to those places where races are usually run; and indeed it would be dangerous to public safety to allow

(a) Vide *M'Allester v. Haden*, 2 Campb. 438. *Thornton v. Jones*, 6 Taunt. 581. *Bate v. Cartwright*, 7 Price, 540.

matches to be run upon the king's highway. Even upon the letter of the eleventh (a) section, it may be contended that the penalties of the former act are only taken away as far as relates to the regulation respecting weights. In *Ximenes v. Jacques*, 6 Term Rep. 499, where the Plaintiff obtained a verdict on a wager that he could perform a certain journey in a post-chaise and pair, within a given time, the Court arrested the judgment: and though the reasons for their so doing are not stated in the report of that case, yet it may be presumed, that as the race was not of the usual kind, the Court did not consider it legalized by the act on which these Plaintiffs now rely.

Cur. adv. vult.

On a subsequent day,

LORD ELDON, Ch. J. said, The Court wishes to have this case argued again on that point, which seemed to come rather by surprise upon the Plaintiff's counsel, namely, whether this transaction, which is called a horse-race, be a match or race within the meaning of the 13 & 18 Geo. 2. It is the more material that this question should be again discussed, because it does not appear from the report of *Ximenes v. Jacques* to have been there considered; and yet a race with a post-chaise and pair is hardly to be deemed less a race, in the popular sense of the word, than such a race as the present one on the high road from London to Sittingbourne. The 16 Geo. 2, c. 7, in the second section, prohibited various species of gaming, horse-racing, foot-racing, &c. under certain penalties. After this the 9 Ann. c. 14, also prohibited various species of gaming under heavier penalties, and though horse-racing was not named in that statute, yet it has been holden to come within the spirit of it (b). The 16 Car. 2 does not in terms avoid any contract; but the transaction on [54] which the contract is founded being prohibited, the contract itself cannot be supported. The 9 Ann. expressly avoids the contract. These statutes were followed by the 13 Geo. 2, c. 19, & 19 Geo. 2, c. 34. Had many contracts founded in horse-racing been held illegal previous to these statutes, it might be found difficult to maintain that such horse-racing could now be deemed legal, which before had been deemed illegal. But the 13 Geo. 2 having prohibited many species of horse-racing, the law seems to have implied that such species of horse-racing as were not prohibited by that statute, by not being prohibited became legal. And the 18 Geo. 2, having taken away some of the prohibitions and penalties of the 13 Geo. 2, the same kind of reasoning seems to have been applied, namely, that these species of racing with respect to which certain restrictions were taken away, were thereby altogether legalized. There seems to be much ground for arguing from the nature of the 16 Car. 2 & 9 Ann. that these acts ought to be construed strictly in order to enforce the principle on which they are founded, namely, to prohibit all horse-racing; and that the 13 & 18 Geo. 2 are from their nature to be so construed as to encourage the breed of horses, and to permit that species of horse-racing only, called racing on the turf. It is to be observed, that the 13 Geo. 2 speaks of entering, placing, starting, &c. and that the expression "any place or places whatsoever," used in 18 Geo. 2, can hardly mean all England.

In consequence of this intimation from the Court, the case stood over for further argument; but on this day,

LORD ELDON, Ch. J. said, Upon inquiry of the Judges of the Court of King's Bench, we find that the judgment of that Court in *Ximenes v. Jacques* proceeded on an opinion, that the 13 & 18 Geo. 2 relate to bonâ fide horse-racing only. Without therefore again entering into the grounds before stated, it is sufficient for me to declare it to be the opinion of the Court, that the transaction described in this case, is not that species of horse-race or match which is legalized by the 13 & 18 Geo. 2, and consequently that this action cannot be maintained.

Per Curiam. Rule absolute.

(a) The section is, "that it shall and may be lawful for any person to run any match, or to start and run for any plate, prize, sum of money, or other thing of the real intrinsic value of 50l. or upwards, at any weights whatsoever, and at any place or places whatsoever without incurring or being liable to the penalty or penalties in the said act of the 13th of His Majesty's reign relating to weights as aforementioned, and in the same manner as might have been done if the said act had never been made."

(b) Vid. *Goodburn v. Morley*, 2 Str 1159. *Blaxton v. Pye*, 2 Wils. 309, and *Clayton v. Jennings*, 2 Bl 706. So also a foot-race; *Lynall v. Longbotham*, 2 Wils. 36, and *Brown v. Berkeley*, Cowp. 281.

[55] DOE EX DIM. BADDAM v. ROE. Nov. 27th, 1799.

Service of a declaration in ejectment on the wife of the tenant in possession at his house, is sufficient.

Heywood, Serjt. stated, that the officers objected to draw up a rule for judgment against the casual ejector on an affidavit of service, which alleged, that the declaration in ejectment was served at the dwelling-house of the tenant in possession on the tenant's wife. He cited *Doe d. Morland v. Bayliss*, 6 Term Rep. 765, to shew that the service was sufficient (a)¹.

The Court were of opinion, that the service was sufficient.

GOLDSMID AND OTHERS v. TAITE AND ANOTHER. Nov. 28th, 1799.

The Court will refer a bill of exchange to the prothonotary to compute principal, interest, exchange, re-exchange, and costs; but not charges and expences (a)².

Shepherd, Serjt. on a former day obtained a rule to shew cause why a bill of exchange should not be referred to the prothonotary to compute principal, interest, exchange, re-exchange, charges, expences and costs, or why a writ of inquiry should not be executed before the Lord Chief Justice and a special jury.

Heywood, Serjt. now shewed cause and contended, that exchange and re-exchange were damages of a special nature, and ought to be ascertained by a jury, but that the Defendants ought not to be put to the expence of a special jury, since a common jury was quite competent to ascertain the amount. He insisted, that it was altogether out of the province of the prothonotary to take account of charges and expences, since they could not be matter of mere computation.

Shepherd offered to strike out the words "charges and expences," but insisted, that unless the Defendants could shew that the computation of exchange and re-exchange was of sufficient consequence to require a special jury, he ought to allow it to be settled by the prothonotary. And

The Court being of this opinion, made the rule absolute for referring the bill to the prothonotary to compute principal, interest, exchange, re-exchange, and costs.

[56] WILTON v. PLACE. Nov. 28th, 1799.

In C. B. if the Plaintiff proceed to trial after money paid into Court, and the verdict is against him, he is notwithstanding entitled to costs up to the time of the money paid in (a)³.

The Plaintiff having commenced actions against several under-writers on a policy of insurance, the Defendant in all the actions paid money into court upon the common counts. One cause was tried, and a verdict found for the Defendant. No consolidation rule had actually been entered into, but it appearing to have been the understanding of the parties that all the causes should be bound by the event of one, the Court, at the instance of Shepherd, Serjt. were about to direct the prothonotary to tax costs to the Defendant in all the causes, as well up to the time of paying the money into Court as afterwards, according to the rule laid down in *Stevenson v. Yorke*, 4 Term Rep. 10. *Kabell v. Hudson*, *ibid.* and *Burstull v. Horner*, 7 Term Rep. 372 (b).

(a)¹ Vid. etiam *Goodright ex dim. Wadlington v. Thrustout*, 2 Bl. 800. *Smith ex dem. Lord Stourton and Others v. Hunt*, 1 H. Bl. 644, and what was said by Eyre Ch. J. in *Goodtitle ex dim. Read v. Badtill*, ante, vol. i. 384.

(a)² Vide *Denison v. Mair*, 14 East, 622.

(a)³ *S. P. Muller v. Hartshorn*, 3 B. & P. 558. *Twemlow v. Brock*, 2 Taunt 361.

(b) So in *Stodhart v. Johnson*, 3 T. R. 657, where the Plaintiff proceeded to trial and a juror was withdrawn, he was held not to be entitled to costs up to the time of paying the money into court. But in *Seymour v. Bridge*, 8 Term Rep. 408, where the Plaintiff having given notice of trial, neither entered his cause, or countermanded the notice, but took the money out of court, he was allowed costs up to the time of the money being paid in, though the Defendant was entitled to judgment as in case of a

Heywood, Serjt. opposed this, and the prothonotary stated, that according to the practice of the Common Pleas, where money is paid into court though the Defendant ultimately succeed in the cause when tried, yet the Plaintiff is entitled to costs till the time of the money being paid into court.

Upon hearing this, the Court observed, that the practice as stated by the prothonotary (c) must prevail.

End of Michaelmas Term.

[57] CASES ARGUED AND DETERMINED IN THE COURTS OF COMMON PLEAS AND EXCHEQUER CHAMBER, IN HILARY TERM, IN THE FORTIETH YEAR OF THE REIGN OF GEORGE III.

RODGERS v. LACY. Jan. 26th, 1800.

The 37 G. 3, c. 73, s. 3, having prohibited more than double monthly wages being given to seamen coming from the West Indies, unless the captain be specially licensed to give a greater rate by the chief officer of the port, a general license by such chief officer to a captain, "to procure men on such terms as he can," is void.

This was an action brought by the Plaintiff as a seaman against the Defendant who was captain of the ship "Suffolk" for wages earned on a voyage from Savannah in Jamaica, to this country. The cause was tried before Lord Eldon, Ch. J. at the Westminster sittings after last Michaelmas Term, when the following facts appeared in evidence: The Defendant being in great want of hands, to navigate the ship home, and being restricted by the 37 Geo. 3, c. 73, s. 3 (a), from engaging any seaman in the [58] West Indies at more than double monthly wages, unless the governor or other chief officer of the port should authorise him so to do under his hand, applied to the chief magistrate of the place where he was for such a permission, and obtained the following one; "Jamaica, parish Westmoreland—Whereas it appears to me G. M. Esq. Custos Rotulorum and chief magistrate in and for the parish of Westmoreland by the

nonsuit. And in *Lorck v. Wright*, 8 Term Rep. 486, the same principle was held to apply, where the plaintiff twice carried the record down to trial and withdrew it. The rule that a Plaintiff is entitled to costs up to the time of paying money into court was laid down in *Hartley v. Bateson*, K. B. 1 Term Rep. 629, where the Plaintiff had proceeded after the money paid in, but had not gone to trial: and though in *Griffiths v. Williams*, 1 Term Rep. 710, that rule was extended to the case of a Plaintiff who proceeded to trial, and obtained a verdict for the exact sum paid into court only, yet in *Stevenson v. Yorke*, 4 Term Rep. 10, Buller, J. observed, that "that part of the case of *Griffiths v. Williams* could not be supported."

(c) See *Savage v. Franklin*, Barnes, 280, *Davis v. Maunsell*, Barnes, 282. *Vane v. Mechell*, Barnes, 284, and *Bate v. Crane*, Barnes, 287, where costs up to the time of paying the money into court were allowed to the Plaintiff by the Court of C. B.; but it is to be observed, that in none of those cases had the Plaintiff proceeded to trial; and in *Davis v. Maunsell*, as reported in Willes, 191, Fortescue Aland, J. says, the Plaintiff may take out the money at any time before trial, and will be entitled to costs till the time of the money brought in.

(a) That section enacts that no master or commander of any British ship which shall sail for any port in Great Britain shall hire or engage any seaman, mariner, or other person at any port or place within his Majesty's colonies or plantations in the West Indies, to serve on board any such ship at or for greater or more wages or hire for such service, than according to the rate of double monthly wages; unless the governor, chief magistrate, collector, or comptroller of such port or place shall think that more ought to be given, and do and shall accordingly authorize and direct the same to be given by writing under his hand; that then and in such case the master and commander shall be at liberty to pay and the seamen to receive such greater or higher wages as such governor, &c. shall direct as aforesaid; (his Lordship took notice of these latter words as evidencing the intent of the legislature beyond all doubt;) and all contracts, bonds, &c. contrary to the meaning of the act, shall be null and void, and the master of such ship entering into such contract shall forfeit 100l.

oath of L. Lacy master of the ship 'Suffolk' now lying at anchor in the harbour of Savannalamar in the said parish and bound thence to the port of London in the kingdom of Great Britain that he cannot engage seamen to carry his said ship home at the rate allowed by law. These are therefore to license and permit the said L. Lacy to procure men on such terms as he can to navigate his said ship now loaded and ready to depart with the convoy for Britain. Witness my hand, &c. &c." Under this licence the Defendant engaged the present Plaintiff, agreeing to give him forty-five guineas at that time, (which was paid,) and 9l. per month during the voyage, with half a pint of rum per day, and coffee night and morning. On the part of the Defendant it was objected, that the Plaintiff could not recover upon the above agreement, inasmuch as the sum agreed for was above the rate of double monthly wages, and the contract having been made under a general licence to the captain to give according to his discretion, instead of a licence regulating the precise sum, was therefore void. His Lordship being of opinion that it was the intention of the legislature, with a view to prevent exorbitant wages being given, to deprive both the master and the mariner in such cases of the power of exercising their discretion, and to place the regulation of the price of wages in the hands of the chief officer of the port, who ought therefore to specify in the licence the rate of wages allowed by him, nonsuited the Plaintiff, with liberty to move the Court for a verdict in his favour on the contract as proved.

Cockell, Serjt. now moved for a rule nisi to set aside this nonsuit, and contended that the licence was sufficient within the meaning of the act, the chief magistrate having, under the existing circumstances, felt it impossible to fix the rate of wages himself.

[59] But the Court were clearly of opinion both on the policy and letter of the act, that the nonsuit was right, and that if it were otherwise every chief magistrate in the ports of the West India islands would have it in his power to annul the act.

Cockell took nothing by his motion.

KIDD v. RAWLINSON. Jan. 27th, 1800.

The goods of A. being taken in execution and put up to sale, B. became the purchaser and took a bill of sale of the sheriff, but permitted A. to continue in possession; A. then executed another bill of sale of the same goods to C. a creditor, under which the latter took possession; whereupon A. brought an action against C. for the goods. Held, that the first bill of sale was valid, and that A. was therefore entitled to recover (a).

This was an action for money had and received.

An execution having issued against the goods of one Aburn who kept a public house, his furniture was taken and put up to sale by the Sheriff of Surry; the Plaintiff, who was Aburn's brother-in-law, but not a creditor, became the purchaser, and a bill of sale was made out to him, dated 13th of November 1798; Aburn was by him permitted to continue in possession of the goods in order that he might be able to carry on his business, but being soon after taken in execution and committed to prison, he executed a bill of sale of them, dated 11th of March 1799, to the Defendant, to whom he was indebted in the sum of 16l. 5s.; the Defendant having taken possession under this last bill of sale, received a notice from the Plaintiff not to dispose of the goods, stating his prior title; on the 14th of March the landlord of the premises authorised the Defendant to distrain to the amount of 12l. 10s. for rent due from Aburn for two quarters, which the Defendant accordingly paid, and on the 26th of the same month sold the goods for 26l. 14s. 6d. The expences of the bill of sale to the Defendant, of keeping possession, and of the auction added to the rent advanced by the Defendant, amounted to 26l. 4s. 8d.; leaving a balance of 9s. 8d.; this being deducted from the debt due from Aburn to the Defendant, the latter still remained a creditor of the former for 15l. 15s. 4d. The cause being tried before Lord Eldon, Ch. J. at the Westminster sittings after last Michaelmas Term, his Lordship put it to the jury to say, Whether

(a) S. C. 3 Esp. Rep. 52, and see *Wordall v. Smith*, 1 Campb. 332. *Guthrie v. Wood*, 1 Stark. Ni. Pri. 367. *Mair v. Glennie*, 4 M. & S. 240. *Steward v. Lombe*, 1 B. & B. 506, 509. *Benton v. Thornhill*, 7 Taunt. 149. *Woodlman v. Baldock*, 8 Taunt. 676. *Jezeph v. Ingram*, 8 Taunt. 838.

the Plaintiff had purchased the goods with a view to defeat any execution by any of the creditors of Aburn? And the jury being of opinion that the purchase was not made with that view, gave him a verdict for 14l. 4s. 6d.

Marshall, Serjt. now moved for a rule nisi to set aside this verdict and enter a nonsuit: he contended that the bill of sale to [60] the Plaintiff not having been accomplished and followed by possession, was fraudulent and void, and cited *Edwards v. Harben*, 2 Term Rep. 587, and *Bamford v. Baron* in a note to that case.

LORD ELDON, Ch. J. This action was brought to recover the produce of the sale made by the Defendant after deducting the amount of the rent paid to the landlord. It is to be observed that the Plaintiff was not a creditor of Aburn, and did not buy the goods as the means of satisfying any debt of his own; nor indeed could he, for the Sheriff was to receive the money produced by the sale: nor was the purchase made with a view to defeat creditors, but out of mere kindness to Aburn to whom the Plaintiff was related. If, under these circumstances, the possession of Aburn be sufficient to make the bill of sale fraudulent, the Plaintiff must suffer the legal consequences of his benevolent disposition. But it appears to me that this does not fall within the principle of *Twyne's case* (3 Co. 80), and the other cases on this subject, where the parties stood in the relation of debtor and creditor, and where their object was to defeat the other creditors. This seems to me a new case; for here the goods were purchased at a public sale by a person who had never acquired the character of a creditor, and were then lent to the original owner for a temporary and honest purpose. If Kidd had lent money to Aburn to buy these goods, and had then taken a conveyance of them, or a security for his debt thus arising out of the mere act of lending the money; leaving Aburn in possession of the goods would not have been a fraudulent act. This appears from Mr. J. Buller's *Law of Nisi Prius*, p. 258, who after stating a case of conveyance which was holden to be fraudulent because the donor continued in possession, adds, "but yet the donor continuing in possession is not in all cases a mark of fraud; as where a donee lends his donor money to buy goods, and at the same time takes a bill of sale of them for securing the money." It will be difficult to distinguish the transaction in question from this case. Indeed a public buying of the Sheriff seems to be more favourable to the Plaintiff. It appeared to me at the trial that Kidd might be considered as the donee of these goods lending money to Aburn to purchase them through the medium of the Sheriff, and taking a bill of sale as a security for the money. I desired the jury to say what they considered to be the object of the bill of sale; and they were of opinion that it was the intention of the parties that the bill of sale should be a security for the money advanced to the Sheriff.

HEATH, J. I see no reason for setting aside this verdict. The [61] case is clearly distinguishable from *Twyne's case*, there being great notoriety in the whole of this transaction. Now it is to be observed, that Lord Coke in *Twyne's case* recommends that gifts in satisfaction of a debt by one who is indebted to others also, should be made in a public manner before the neighbours and not in private; for secrecy is a mark of fraud. Here there was no fraud or secrecy, and therefore I think the consequences would be mischievous if this Plaintiff's title were defeated.

ROOKE, J. I am of the same opinion.

Marshall took nothing by his motion.

ENGLISH v. DARLEY. Jan. 27th, 1800.

[Applied, *Goring v. Edwards*, 1829, 6 Bing. 99.]

If the indorsee of a bill having sued the acceptor to judgment, and taken out execution, receive of him a sum of money in part payment, and take his security for the remainder, with the exception of a nominal sum only; he is thereby precluded from afterwards suing the indorser (a).

Assumpsit by the indorsee of a bill of exchange against the indorser.

Lord Eldon, Ch. J. before whom the cause was tried at the Westminster sittings after last Michaelmas Term, nonsuited the Plaintiff under the following circumstances:

(a) Vide *Clark v. Delvin*, 3 B. & P. 363. *Withall v. Masterman*, 2 Campb. 179. *Lorton v. Peat*, 2 Campb. 185. *Gould v. Robson*, 8 East, 576. *Claridge v. Dalton*,

Payment of the bill being refused when due, the Plaintiff commenced actions against the present Defendant and the acceptor, and having sued the latter to judgment, took out execution thereon; but although the acceptor had sufficient to answer the execution, the Plaintiff at his instance received 100*l.* in part payment of the bill, and took his bond and warrant of attorney as a security for the payment of the remainder by instalments, together with interest and costs, excepting only a nominal sum, with a view to enable him, the Plaintiff, to support actions against the other parties to the bill.

Shepherd and Lens, Serjts. now moved for a new trial, and contended that the holder of a bill of exchange after due notice given of non-payment is entitled to sue all or any of the parties whose names are on the bill; and that although he receive from any one of them what may amount to a satisfaction as against him, yet that the others will not be discharged until the whole amount of the bill be paid; as in *Macdonald v. Bovington*, 4 Term Rep. 825, where the holder of a bill having sued the acceptor and charged him in execution, he was allowed to sue the drawer on the acceptor being discharged by an insolvent act; and in *Hayling v. Mulhall*, 2 Bl. 1235, where it was laid down that the holder after having discharged one of the indorsers, whom he had taken in execution, [62] by a letter of licence, might sue a prior indorser. They insisted that each of the parties to the bill was in the nature of a co-surety, and therefore nothing short of actual payment by one of them could be considered as a satisfaction in an action against any of the others, and cited *Dyke v. Mercer*, 2 Show. 394.

LORD ELDON, Ch. J. It is very clear that the holder of a bill may at his election sue any or all the parties to it, and that if they all become bankrupt, he may prove against the estates of all, unless he receive part of the debt from any one. And although the debt be reduced from time to time by dividends, no part of the proof shall be expunged under any of the commissions till 20*s.* in the pound have been received. As long as the holder is passive, all his remedies remain; and if any of the parties be discharged by the act of law, as by an insolvent debtor's act, that operation of law shall not prejudice the holder. With respect to *Hayling v. Mulhall*, it may be observed that the marginal abstract of that case is incorrect; for it appears from the report that the person first sued was a subsequent indorser: had the Plaintiff first sued a prior indorser and discharged him from execution, it would have afforded a sufficient objection to an action against a subsequent indorser. If a holder enter into an agreement with a prior indorser in the morning not to sue him for a certain period of time, and then oblige a subsequent indorser in the evening to pay the debt, the latter must immediately resort to the very person for payment to whom the holder has pledged his faith that he shall not be sued. In the case *Ex parte Smith (a)* Lord Thurlow, after consulting with all the Judges, was of opinion, that the holder of a bill by entering into a composition with the acceptor discharged the indorser, and accordingly ordered the proof against the estate of the latter to be expunged, proceeding on the ground of the acceptors' liability being varied by the act of the holder. We all remember the case where Mr. Richard Burke being co-surety for an annuity, the grantee gave time to the principal, and yet argued that Mr. Burke was not relieved thereby, though the principal was; but it was answered that the grantee could make no demand upon the co-surety, because he must by so doing enforce a payment from the principal contrary to the agreement. Here the Plaintiff having taken a new security from the acceptor, has discharged the Defendant.

HEATH and ROOKE, Js. were of the same opinion.

Shepherd and Lens took nothing by their motion.

[63] WILLIAMSON v. BUTTERFIELD AND ANOTHER, Executors of J. Braley.

Jan. 29th, 1800.

A. being possessed of a lease for years, covenanted in an indenture for making a family provision, that if he should die during the continuance of the Term of the lease, his executors or administrators should assign the residue to B.; A. after-

4 M. & S. 226, 232. *Fentum v. Pocock*, 5 Taunt. 192. *Moore v. Bowmaker*, 7 Taunt. 97. *Rowe v. Young*, 2 B. & B. 165, 244. *Bedford v. Drakin*, 2 B. & A. 210. *Badnall v. Samuel*, 3 Price, 521, 530. *Perfect v. Musgrave*, 6 Price, 111.

(a) Co. B. L. 168, 172. Ed. 4. *Walwyn and others v. St. Quintin*, vol. i. p. 652.

wards purchased the reversion in fee and died; Held, that A. did not by the terms of the covenant intend to preclude himself from purchasing the fee, and therefore his executors were not liable upon that covenant.

Covenant. The declaration stated, that J. Braley in his lifetime was possessed of a certain lease of certain marsh lands and tenements, of which at the time of making the after-mentioned indenture there were eight years then to come and unexpired; that an indenture was entered into between C. Williamson (the Plaintiff) of the first part, the said J. Braley of the second part, and one J. Morgan of the third part, which after reciting that C. Williamson and J. Braley were desirous of making some provision for the support of Mary Williamson, the wife of James Williamson, who had left her and gone abroad (she being the sister of the said J. Braley and sister in law of the said C. Williamson,) and also for the maintenance and education of her children by the said James Williamson, and therefore that C. Williamson had offered and agreed to allow 30*l.* per annum during his life, and to leave at his death 600*l.* for the same purpose, and the interest of which should be applied in lieu of the 30*l.* per annum, and that J. Braley had also agreed to allow 20*l.* per annum during his life in case C. Williamson the younger should continue to live with him or be kept at school, and found and provided by him with board and other necessities, but if he should cease to live with him and quit him with his consent, then J. Braley agreed to allow 35*l.* per annum; And reciting that C. Williamson and John Braley for carrying into execution their intentions, and securing payment of the said sums, bound themselves to J. Morgan in 1200*l.* with conditions to perform all the covenants thereafter mentioned; witnessed, That C. Williamson covenanted with J. Morgan to perform his part of the abovementioned agreements, and that J. Morgan should receive the said sums allowed by C. Williamson as aforesaid, upon the trusts declared concerning the same (which were adapted to carry into effect the agreement above-mentioned; and that J. Braley also covenanted with J. Morgan to perform his part of the above-mentioned agreement in the same manner; And lastly, that it was agreed by all the parties that in case Mary Williamson should misbehave herself to the disapprobation of C. Williamson and J. Braley it should be lawful for J. Morgan, his executors or administrators, on the same being signified to him by C. Williamson and J. Braley, [64] to apply the above sums for the maintenance of the children only, in such manner as C. Williamson and J. Braley should direct. That after further reciting "that it had been agreed by and between the said J. Braley and C. Williamson, that in case he the said J. Braley should happen to die during the continuance of the term of the lease, under which the said J. Braley then held the marshes in the parish of Laindon, in the county of Essex, called Bishop's Lands, that his executors or administrators should immediately thereupon deliver the possession thereof, and assign the residue of such term unto the said C. Williamson, his executors, administrators and assigns, and that from thenceforth, he the said C. Williamson should pay to the said John Morgan, his executors or administrators, the further yearly sum of 30*l.* during the continuance of the said term upon the trusts therein-before mentioned, the said J. Braley did thereby covenant and agree to and with the said C. Williamson, that in case of his said dying as aforesaid, his executors or administrators should immediately, and he the said C. Braley did thereby direct them to deliver immediate possession to the said C. Williamson of the said marshes, and to assign to him, his executors, administrators, and assigns, the lease under which he held the same for the residue then to come of the term thereby granted; and the said C. Williamson in consideration thereof did thereby covenant, promise and agree to pay or cause to be paid unto the said J. Morgan the further yearly sum of 30*l.* of like lawful money of Great Britain during the continuance of the said term of the said lease, to, for, and upon the several trusts, intents, and purposes therein before mentioned. And it was thereby mutually agreed between the said J. Braley and C. Williamson, that if the said C. Williamson should in the lifetime of the said J. Braley purchase the said land, that the said J. Braley should continue tenant thereof during his life at the same rent he then held the same." The declaration then averred the death of J. Braley, and the appointment of the Defendants as his executors, the performance by C. Williamson of his part of the covenants, and a demand made by him upon the Defendants to deliver up immediate possession of, and assign to him the lease under which they were held, and a refusal by them so to do.

Plea, that J. Braley after the making of the indenture in the declaration mentioned,

and during the continuance of the said term, purchased the reversion in fee. "Whereby the said lease in the said declaration mentioned, then and there became void, and the [65] said term thereby granted, and in the said declaration mentioned, then and there became, and was and still is merged, surrendered, and extinct in law. And the Defendants as executors aforesaid, by reason thereof, could not upon the death of the said J. Braley deliver immediate possession, nor have they as such executors at any time since been able or capable of delivering possession, nor can they now deliver possession of the said marshes and tenements in the said declaration mentioned, or assign the residue of the said term by the said lease granted unto the said Plaintiff, his executors, administrators, or assigns, according to the form and effect of the said indenture in the said declaration mentioned, and of the covenant of the said J. Braley deceased, in that behalf made as aforesaid. And this," &c.

To this there was a general demurrer and joinder therein.

When this case first came before the Court, no part of the indenture now set out in the declaration, except the covenant of J. Braley that his executors should assign, appeared on the record. The declaration then contained a second breach, which stated that J. Braley in his life-time purchased the whole estate, whereby his executors were unable to assign any residue to the Plaintiff. To this breach the Defendant had demurred.

In support of which demurrer, Shepherd, Serjt. in last Michaelmas term contended, that the clear meaning of the covenant was, that if the covenantor should happen to die possessed of the term, his executors should assign to the Plaintiff; but that as the covenantor had purchased the reversion in fee in his life-time, he did not die possessed of the term, and therefore his executors were excused; and observed, that the words, "in case of his said dying as aforesaid," must be construed, in case of his dying as mentioned in the former part of the deed. He cited *Walter v. Montague*, 2 Roll. Rep. 332.

Sellon, Serjt. contrâ, insisted, that where a man creates a charge upon himself by his own contract, nothing can relieve him from it, much less an act of his own. He cited *Sir A. Mayne's case*, 5 Co. 20, Cro. Eliz. 479, *S. C. Paladine v. Jane*, Aleyn, 26. *Earl of Chesterfield v. Duke of Bolton*, Com. 627. *Bullock v. Dommitt*, 6 Term Rep. 650. *Brecknock Company v. Pritchard*, 6 Term Rep. 750. *Doe d. Mitchenson v. Carter*, 8 Term Rep. 300.

The Court thinking the whole deed material to the construction of the covenant in question, ordered the parties to amend.

Accordingly, the deed being set forth in the declaration, and [66] the second breach and demurrer thereto being struck out, the case now came on to be argued on the demurrer to the plea.

Sellon in support of that demurrer. This is a conditional covenant, that the executors of the covenantor shall do a certain act in case he die during the continuance of the term of the lease; and for the Defendants it is contended that he did not die during the continuance of that term. The word "term" may be taken in two senses, either as a limitation of time for which the estate is to continue, or as the estate itself. Sheph. Touch. c. 14, p. 267, Ed. 1651. The former, however, is the more usual acceptance of the word, and the only one to be found in most of the law dictionaries. In this case the words that precede and follow it shew that it was used in the common sense. Had the expressions been "during the term," or "during the lease," they might have been considered as describing the estate, but the words "during the continuance of the term of the lease," can bear no other sense than during the continuance of the time which the lease has to run. The object of the covenant was to make a provision for Mary Williamson; and C. Williamson, in consideration of having this term assigned to him by J. Braley's executors, undertook to allow her a certain sum after J. Braley's death as long as the term lasted. Now, if J. Braley had it in his power to defeat the covenant, he had it in his power thereby to deprive Mary Williamson of the provision intended for her. A stipulation is inserted in the deed in the case of C. Williamson purchasing the fee of these premises, that J. Braley shall continue to hold them as tenant, but no stipulation is made in case of its being purchased by J. Braley; it is therefore to be inferred that the parties did not intend that J. Braley should be at liberty to purchase the fee. If on the other hand it be urged that the Plaintiff should have provided for this event by a covenant, it may be

observed, that J. Braley was the covenantor, and that all omissions must be taken most strongly against him. (He was then proceeding to argue that it was not in the power of J. Braley to defeat the covenant by his own act, but the Court interfered, and stopped Shepherd, who was on the other side.)

LORD ELDON, Ch. J. The second point to which my Brother Sellon was proceeding, assumes the meaning of this covenant to be, that if J. Braley should die within the number of years unexpired at the time when the covenant was made, his [67] executors should assign the residue to C. Williamson. On this head an important question might arise, Whether, considering the purchase as the act of J. Braley, he could defeat the covenant so understood? I should have no difficulty in saying that he could not, because it would be incompetent to him to say that he did not mean C. Williamson to have the benefit of so many years as should be unexpired at his death. The Court can only collect the meaning of the parties from what is expressed upon the deed, and the undertaking of the covenantor must be made good according to the terms of the covenant. If the import of the instrument be, that on the supposition of the term existing under the lease at the time of his death, then if he so die during the term so existing under that lease, it shall be assigned to C. Williamson, whatever may have been the meaning of the parties, the Court must not indulge in conjecture, but must put that construction on the covenant which is warranted by the terms of the deed. It does seem to me, however, that the terms of the instrument have done justice to the intent of the parties. J. Braley meant, that if he died possessed of the term under the lease, C. Williamson should take the residue of that term; but I find nothing in the deed which calls upon the Court to say that J. Braley, who was giving a benefit to the children might not put an end to the term, and provide for the children in any other way that he pleased. The circumstance of C. Williamson having entered into a covenant in case of his purchasing the reversion, affords strong ground to infer that Braley did not mean to bind himself to any thing in case it should be purchased by him. And are we to imply between parties covenanting with each other, that their covenants were intended to extend to a case not expressed in terms, merely because it is not so expressed? It is observable that Braley covenants that in case he should die during the continuance of the term, his executors and administrators, who would be the persons representing him in respect of his interest in this term, should assign the residue to Williamson; saying nothing of the heir upon whom the interest would devolve in case he should purchase the fee. The covenant further states, that the executors and administrators "shall deliver immediate possession to the said C. Williamson of the said marshes, and assign to him, his heirs, &c. the lease under which he (Braley) held the same, for the residue then to come of the term thereby granted." This supposes a term and interest subsisting which may be availably assigned. J. Braley having [68] a certain interest in the marshes, and it being competent to him to purchase the whole fee, C. Williamson covenanted to make certain additional provisions for M. Williamson and her children, in case the term should be assigned to him, and as long as it should last. He therefore has no reasonable cause of complaint, since his obligation only arises from the time of the term being assigned to him. In fact, J. Braley seems to have been anxious to secure to himself the tenancy of the premises at all events, but to have avoided saying that he would not purchase a larger interest. If the parties to a deed will not express their intentions, the Court cannot by construction insert a provision, however well satisfied they may be that the parties ought to have provided for any particular event.

HEATH, J. I am of the same opinion. In construing covenants the Court cannot extend them beyond their natural import. It has been said that the object of the covenant was to provide for M. Williamson and her children, and that unless the construction contended for by the Plaintiff be adopted the covenant will be ineffectual. But it appears to me to have been matter of mutual accommodation. It was agreed, that if C. Williamson should purchase the fee, the lease should be continued to J. Braley during his life, and that if J. Braley should die during the continuance of the lease, the residue should be assigned to C. Williamson. But it does not appear that he intended to preclude himself from purchasing the reversion: and it would be strange to draw a conclusion to that effect from the omission of any covenant respecting it. Then it is argued that it was not competent to him to defeat his covenant by his own act. But if a man convey a defeasible interest, there is no reason why he should not defeat that interest. Thus, if a rector of a parish grant an annuity charge-

able on his living, and enter into no covenant, if he surrender his living the next day, the grantee will be defeated. That case seems to me similar to the present.

ROOKE, J. I am of the same opinion.

Judgment for the Defendants.

[69] MARTIN v. KENNEDY. BANNING v. PERRY. Feb. 1st, 1800.

[Referred to, *Brunsdon v. Humphrey*, 1884, 14 Q. B. D. 147.]

If A. and B., having recovered in separate actions for libels against different parties engaged in the management and publication of the same newspaper, commence fresh actions against the same parties, each suing that party against whom the other has recovered, the Court will not interfere in a summary way to set aside the latter proceedings.

The Defendant, Kennedy, being the printer, and Perry the proprietor of a newspaper called *The Morning Chronicle*, the present Plaintiffs brought actions against them and Lambert the publisher for two libellous advertisements: Martin first sued Perry, the proprietor, and Banning sued Kennedy, the printer: in both these actions judgment was suffered by default; and writs of inquiry being executed, 40s. were recovered in the former, and 5l. in the latter. Each of the Plaintiffs then sued Lambert the publisher, and judgment having been suffered by default in these actions also, and writs of inquiry executed, a farthing only was given in each case. After this the present actions were commenced, Martin suing Kennedy, the printer, and Banning suing Perry, the proprietor. The same attorney was employed by the Plaintiffs in all the actions.

Bayley, Serjt., on a former day moved for a rule calling on the Plaintiff to shew cause why the proceedings in these two last actions should not be set aside with costs, and cited *Bird v. Randall*, 3 Burr. 1345, and 1 Bl. 387, S. C.

The Court granted the rule nisi, but expressed great doubts respecting the success of the application.

Shepherd, Serjt., now shewed cause. If the Plaintiffs in these actions have received that which amounts to a satisfaction in law, the Defendants may put that fact upon the record as a defence: so if two actions be brought for the same cause, a Defendant may plead in abatement of one that the other is pending; and if the second be brought after judgment obtained in the first, that judgment may be pleaded in bar. But neither of the above cases affords any ground for an application to stay proceedings in a summary way. The Court never interferes in that manner unless it be to prevent an abuse of its process. Thus, where trespass has been committed by two, and the Plaintiff having already brought an action against one, commences another action against both, the Court will interfere: not on the ground of satisfaction having been received by the Plaintiff, but because one of the Defendants has already been sued.

Bayley in support of the rule. The Plaintiffs having recovered a complete satisfaction for the act of publication of which they now complain, the Court may interfere without [70] driving the Defendants to plead it. That the act of publication now complained of is the same act for which the Plaintiffs have already sued, appears both upon the declarations and upon the affidavits in answer to the rule. In the latter the Plaintiffs insist that they have not recovered an adequate satisfaction; not that any new or distinct act of publication has taken place. In *Bird v. Randall*, which was an action on the case for seducing a servant out of the Plaintiff's service, the Plaintiff having previously recovered from the servant the penalty in which he had bound himself by articles, the Court held that the action could not be supported; and Lord Mansfield in the conclusion of his judgment said: "My Brother Deunison suggests to me that the Court would upon the application of the present Defendant, by way of motion, have stayed the Plaintiff's proceeding further against him, upon the Defendant's shewing them that the Plaintiff had actually received the money recovered by him in his former action against the servant." In Com. Dig. tit. Action (K. 4), a distinction is taken between damages certain and uncertain, and it is there said that in the latter case a recovery and execution against one of several is a bar to an action against any of the others; as in trover against I. S. for the same goods for

which the Plaintiff had already sued another to judgment and execution. *Broome v. Woolton*, Yelv. 67, Cro. Jac. 73, S. C. (a); and the same in trespass, *Lendall v. Pinfold*, 1 Leon. 19. *Anon.* 3 Leon. 122. Litt. pl. 376 (b); and in *Cooke v. Jennor*, Hob. 66, it was laid down, that if several Defendants in trespass be sued in several actions, though the Plaintiff make choice of the best damage, yet when the Plaintiff hath taken one satisfaction he can take no more; and if he require two, an *audita querelâ* will lie. Now, wherever a party is entitled to an *audita querelâ*, the Court will relieve in a summary way.

LORD ELDON, Ch. J. Though every attempt to shorten litigation is entitled to the favour of the Court, yet before we stop a party in a regular course of proceeding, we ought to be certain that we shall not deprive him of that justice which the law authorizes him to seek. There are certainly many cases in which it is held that a party is not entitled to maintain different actions for the same cause. But the present application in fact amounts to this: the Defendant, instead of putting that upon the record which may or may not be a good defence, applies to the Court [71] by affidavit to compel the Plaintiff to disclose the evidence upon which he means to go to trial. In actions of trespass for taking away posts, or destroying grass in a field, where several persons are concerned, the amount of the injury sustained is ascertained by the very nature of the act; and when a compensation in damages has been once received, the Court may very reasonably prevent the Plaintiff from seeking the same compensation a second time. In *Bird v. Randall* no summary application was either made or granted. The test laid down in *Kitchen v. Campbell*, 3 Wills. 308, 2 Bl. 831, S. C. by which it may be ascertained where a recovery in one action is a bar to another, is this, viz. where the same evidence will support both the actions. At any rate the present case differs materially from all which have been cited, because the injury done is an injury to character. Now character will be affected according to the extent of the circulation of the libel; and the injury may be very different according to the manner in which it is committed: the damage sustained will be much varied, whether the libel be published in a coffee-house at York among persons with whom it is peculiarly the interest of the Plaintiff to stand well in point of character, or in some other place where it is of less importance. So the person who disperses the libel as a mere agent and the principal himself ought to suffer in very different degrees, because the former is comparatively innocent. We must be very sure of our ground before we stop a party in this stage of the proceedings; since we must do it at the peril of being right, as we thereby prevent him from producing any evidence to shew that the causes of action were essentially different, and deprive him of his writ of error.

HEATH, J. I am of the same opinion. It is clear that if a satisfaction has been recovered, the plaintiff may avail himself of that circumstance in some way or other. He may plead it or give it in evidence; or if the satisfaction has been obtained after trial, perhaps the Court might interfere in a summary way, and not put the party to his *audita querelâ*. But it was never known that because a recovery has been had, the Court will stop the proceedings in limine. Suppose a defendant to have taken the plaintiff's receipt, and the latter to declare for goods sold and delivered; the Court could not interfere to stay proceedings, for that would be trying the question in a summary way. I only understand Mr. Justice Dennison to have said in *Bird v. Randall*, that if the party has no other remedy the Court will do him justice.

[72] ROOKE, J. There is no doubt that the Court in many cases will relieve on motion, where different actions are brought for the same cause, instead of putting the party to plead. But this case is of a peculiar sort, and not like trespass, where the precise injury is ascertained by the act itself. The damage arising from a libel depends much upon the mode of its publication. The cases cited, therefore, do not apply.

Rule discharged with Costs.

(a) Vide etiam *Morton's Case*, Cro. Eliz. 3.

(b) Vide etiam *Sir Humphrey Ferrers and Others v. Archer*, Cro. Eliz. 667.

DAVIS AND OTHERS v. DAVENPORT. Feb. 4th, 1800.

The Court will not discharge a defendant out of custody on the ground of the affidavit of delivery of the declaration not having been filed within 20 days of the delivery, if it be by way of detainer.

On a former day Runnington, Serjt. moved to discharge the Defendant in this action out of the custody of the warden of the Fleet on entering a common appearance. The ground of the application was, that the affidavit of the delivery of the declaration was not filed in due time, according to the rule of E. 5 Will. & Mar. Reg. 2; the declaration itself having been delivered by way of detainer on the 3d of January as of Michaelmas Term, and the affidavit of the delivery not having been filed until the 24th of that month, whereas by the rule it is required to be filed within twenty days of the delivery.

The Court finding, upon inquiry from the officers, that in practice the rule was not held to extend to the case of a declaration delivered by way of detainer, refused a rule nisi.

On this day Runnington mentioned it again, and cited Impey's Prac. C. B. 689, and 694, ed. 4, and referred to the case of *Pagar v. Hadgely* in the former page:

But the Court abiding by the opinion of the officers, he took nothing by his motion.

THYATT v. YOUNG. Feb. 4th, 1800.

The Court will not allow non assumpsit and alien enemy to be pleaded together (a).

Best, Serjt. shewed cause against a rule nisi obtained on a former day for pleading the several matters of non assumpsit and alien enemy; and relied on *Feron v. Ladd*, 2 Bl. 1326, and *Angerstein v. Vaughan*, ante, vol. i. p. 222, in notis.

Heywood, Serjt. contra, urged that as the Defendant might give in evidence under the general issue that the Plaintiff was alien enemy, there could be no objection to allowing him to put it on record together with non assumpsit; and compared the plea of alien enemy to the pleas of infancy and coverture.

But the Court refused to allow the application.

Per Curiam. Rule discharged.

[73] PARKER v. BAYLIS AND WIFE. Feb. 4th, 1800.

A. declared against B. and his wife administratrix of C. deceased: for that whereas C. died intestate, possessed of South Sea Stock which she held in trust for A. and upon which certain dividends were due, in consideration that A. at his own expence would procure administration to be granted to the wife of B. as next of kin to C. and would furnish evidence to enable B. and his wife to receive the dividends; B. and his wife as such administratrix promised to pay over to A. the amount of the dividends when received. Held, that the consideration stated was insufficient to support the promise. Held also, that as the dividends never made part of the intestate's estate, the action against B. and his wife as administratrix could not be maintained.

"William Baylis and Mary his wife, which said Mary is the administratrix with the will annexed of all and singular the goods and chattels, rights and credits which were of Eliz. Stattard deceased at the time of her death which remain unpaid and unsatisfied, were attached to answer unto John Parker, &c. For that whereas before and at the time of the making of the promise and undertaking of the said William and Mary his wife hereinafter next mentioned, the said John was beneficially interested in and entitled to a certain large quantity (that is to say) 533l. 6s. 8d. of a certain stock or fund commonly called the 3 per cent. South Sea Annuities, then standing and being in the books of the South Sea Company in the name of the aforesaid Elizabeth Stattard deceased, to which said Elizabeth Stattard deceased the said Mary the wife of the said

(a) Vide *M'Connell v. Hector*, post, 549. *Shombeek v. De la Cour*, 10 East, 327.

William was the next of kin then surviving; on which said stock or fund certain dividends were then and there due in arrear and unpaid, to which said dividends the said John was also then and there entitled; and whereas in order to obtain payment of the said dividends it became and was necessary, according to the practice of the said South Sea Company, that application for such payment of the dividends which were so in arrear should be made by and on the behalf of the executors or administrators of the said Elizabeth Stattard deceased, in whose name the said stock or funds then stood in the books of the said South Sea Company, of all which premises the said William and Mary his wife had due notice; and thereupon heretofore, to wit, on, &c. in consideration that the said John, at the special instance and request of them the said William and Mary his wife, had procured administration to be granted to the said Mary the wife of the said William as the surviving residuary legatee of the said Elizabeth Stattard deceased, with the will annexed of the unadministered goods of the said Elizabeth Stattard, for the purpose of obtaining by their means and medium payment of the said dividends so in arrear as aforesaid, unto and to the use of him the said John, and had agreed to bear, pay, and discharge all the expences of obtaining such administration as aforesaid, they the said William and Mary his wife so being such administratrix as aforesaid, undertook and then and there faithfully promised the said John that as soon as the payment of the dividends then due and in arrear as aforesaid should be obtained by them, that they the said William and Mary his wife, administratrix as afore-[74]-said, would pay the amount of the said dividends to him the said John when they the said William and Mary his wife, administratrix as aforesaid, should be thereto afterwards requested. And the said John avers that he the said John having at his own proper costs and charges so obtained and procured such administration to be granted to the said Mary the wife of the said William for the purpose of obtaining by the means and medium of him the said William and Mary his wife, as such administratrix, payment of the said dividends so in arrear as aforesaid to be made to and to the use of him the said John, and the said Mary, the wife of the said William, by and with the consent, privity, and authority of the said William, having accepted and taken upon herself the burthen of such administration for the purpose aforesaid, they the said William and Mary his wife, as such administratrix as aforesaid, afterwards and after such administration was so obtained and procured for and granted to the said Mary the wife of the said William aforesaid, to wit, on, &c. at &c. obtained, procured, and received payment of the said dividends then due and in arrear on the said stock or fund as aforesaid, to a great and considerable amount, to wit, to the amount of 500l. of lawful money of Great Britain; yet the said William and Mary his wife, administratrix as aforesaid, not regarding, &c. have not as yet paid the amount of the said dividends or any part thereof to him the said John, although so to do he the said William and Mary his wife, so being such administratrix as aforesaid, were requested by him the said John afterwards, to wit, on, &c. and often afterwards, to wit, at, &c. but have refused, &c. contrary to the form and effect of the said promise and undertaking of them the said William and Mary his wife, administratrix as aforesaid, and in breach and violation thereof, to wit, at," &c.

The 2d count, after stating that there was a certain quantity of South Sea Stock to which the Plaintiff was entitled, and that he at the request of Baylis and his wife had at his own expence procured administration to be granted to the wife of Baylis for the purpose of obtaining payment of the dividends by their means, averred, that "in consideration of the premises last aforesaid, and that the said John would furnish and supply them with evidence to entitle them to payment of the dividends so due in arrear as last aforesaid for the purpose last aforesaid, they the said William and Mary, as administratrix as aforesaid, undertook," &c. as before. The 3d count was on a promise by "the said William and Mary administratrix as aforesaid," for money had and received "by the said [75] Mary, administratrix as aforesaid." And the 4th was on an account stated by the husband and wife administratrix, and the promise was alleged to have been made by both.

To the three first counts there was a special demurrer, assigning for causes "that the said John hath in and by the said three first counts of the said declaration declared against the said Mary as administratrix with the will annexed of all and singular the goods and chattels, rights and credits which were of Elizabeth Stattard deceased at the time of her death remaining unpaid and unsettled, for certain supposed causes of action arising after the death of the said Elizabeth Stattard, and with which the said

Mary is not chargeable as administratrix as aforesaid; and also for that no sufficient consideration is laid or alleged for the supposed promises and undertakings in the said first and second counts of the said declaration mentioned; and also for that it is not stated or alleged, nor does it appear in or by the said third count of the said declaration that the money therein mentioned to have been had and received by the said Mary as administratrix as aforesaid, to and for the use of the said John, was had and received by her the said Mary on her own account, or as administratrix as aforesaid in right of the said Elizabeth Stattard, nor whether the same was had and received by the said Mary before or after her intermarriage with the said William; and also for that the said three first counts of the said declaration are in other respects uncertain, insufficient and informal." On the last count the Defendant tendered issue.

Joinder in demurrer and issue.

Shepherd, Serjt., in support of the demurrer. The Plaintiff has charged the husband and wife jointly on a promise made by the wife as administratrix after the death of the intestate. Now in such a case the wife cannot be considered as liable quâ administratrix, since a right of action can only arise against her in that capacity from the liability of the deceased, on the non-performance of his contracts. Thus if A. covenant that his executors shall within a certain time after his death pay money, or do some act, and they omit to do so, an action lies against the executors as such, not because they have broken the contract, but because the testator has not secured the performance of his undertaking. Their failure after the testator's death gives the right of action against them in the capacity in which they are placed, but the failure of the testator is the cause of that right of action. This appears from another instance; where A. covenants for himself [76] and his executors that B. shall do an act within six months after A.'s death, no action lies against B. for not doing the act, but it lies against the executors of A. because B.'s failure is not the foundation or gist of the action, which arises from the non-performance of A.'s contract. Executors as such are not liable beyond the assets, unless they bind themselves by a personal contract. The ground of such a contract indeed, is their being in the situation of executors: but the judgment against them will be de bonis propriis, not de bonis testatoris; and in such case plene administravit cannot be pleaded. If then the Defendants here cannot plead plene administravit, and the judgment against them must be de bonis propriis, it is clear that the action is brought on the personal contract of Mary Baylis, and not against her quâ administratrix. All the cases shew that where an action is brought against an executor on promises made by him after the death of the testator, he is charged in his own right. *Trewinian v. Howell*, Cro. Eliz. 91. *Wheeler v. Collier*, Cro. Eliz. 406. *Davis v. Wright*, 1 Vent. 120. *Scott v. Stevens*, 1 Sid. 89. *Atkins v. Hill*, Cowp. 284, and *Hawkes v. Saunders*, Cowp. 289. But if it appear that the present action is brought on the personal contract of Mary Baylis, then it is clear that no action can be maintained against husband and wife, on a promise of the wife after marriage. Indeed the husband is never liable on a contract made by the wife during coverture, but where that contract is considered as having been entered into by her as his agent. And this is the reason of his being charged for necessities purchased by her. *Manby v. Scott*, 1 Lev. 4, and Bac. Abr. Baron and Feme, H. where the opinion of Hale, Ch. Baron, on that case is stated at length. With respect to the third count, the Plaintiff has declared against Mary Baylis in her own right, having merely styled her "administratrix as aforesaid," but not alleged that she was indebted or promised "as administratrix as aforesaid." If therefore the other counts are against her in her capacity of administratrix, this is a misjoinder of action. Indeed, money had and received can only be maintained against her in her personal character, *Rose v. Bowler*, 1 H. Bl. 108. If therefore there can be judgment de bonis testatoris on the other counts, still on this count the judgment must be de bonis propriis.

Vaughan, Serjt. contra. It is a rule that the husband must be joined in all cases where the cause of action would survive against the wife. Although the Plaintiff might perhaps in this case have declared against the husband as upon a personal contract, yet he [77] was at liberty to pursue his remedy against the wife as administratrix, and to make her a co-defendant. The only objection in *Hawkes v. Saunders* was, that the Defendant was charged personally, and it seems to have been admitted that if the action had been brought against him in his representative capacity, it might have been maintained. Lord Mansfield there says: "An executor who has received assets is under every kind of obligation to pay a legacy; he receives the money as a trust or

deposit to the use of the legatee." So here the wife having in the character of administratrix received a sum of money which belonged to the Plaintiff, she is under every kind of obligation to pay it over. The contract in this case had its inception in the life-time of the intestate, though it was not complete till after her death, and in that respect is not unlike the case of a covenant by the testator and a breach by the executor. The ground of action in *Rann v. Hughes* (a)¹, 7 Bro. Parl. Cas. 550, was a promise by the administratrix to pay the debt of her intestate; and it may be collected from that case that if the judgment had been de bonis testatoris it would have been good, but that a judgment de bonis propriis was not warranted by such a promise. Admitting the third count to be bad, the Plaintiff is entitled to judgment on the two former counts: and even if it amount to a misjoinder of action, the Court will give the Plaintiff leave to amend by striking out the last count, as in *Jennings v. Newman*, 4 Term Rep. 347; or the same thing may be done by entering a nolle prosequi; for it has lately been held that a nolle prosequi may be entered after demurrer joined. *Milliken v. Fox* (ante, vol. 1, p. 157).

LORD ELDON, Ch. J. The facts of this case are, that the Plaintiff being entitled to a certain sum of 3 per cent. South Sea Annuities standing in the name of Elizabeth Stattend, and also to the dividends which had accrued during her life, was desirous of obtaining possession of them through the medium of an administration. The consideration for the promise stated in the declaration is, that the Plaintiff undertook to procure administration to Mary Baylis as next of kin, at his own expence, and also to procure evidence by which she should be enabled to receive the dividends. But this affords no consideration for the promise. Though Mary Baylis was next of kin, it does not appear that she was to derive any peculiar benefit from taking out administration, and if the Plaintiff was desirous of placing some person between himself and the South Sea Company, it is very obvious that he ought [78] to pay all the expences attending that transaction. Whatever dividends had been received by the intestate in her life-time were part of the general funds; and with respect to them the Plaintiff is entitled to demand payment out of the assets either as a specialty or simple contract creditor, according as he may be possessed of security or not. But the present action seeks a judgment de bonis intestati, on the receipt of a sum of money by the Defendants after the death of the intestate. The question is, whether Mary Baylis who appears on this record rather in the character of trustee than in any other character (for the stock is not assets), has so much relation to the intestate that her personal act of receiving this money, though as a trustee shall give a general remedy to the cestuy que trust against all the assets of the intestate in common with the simple contract and specialty creditors? Not doubting that the Plaintiff has abundance of remedies, I am of opinion that he is not entitled to charge the assets of the intestate with a demand founded on the receipt of that which never was a part of the intestate's estate.

HEATH, J. It seems admitted, that judgment must be given de bonis intestati in this case in the first instance. But there has been no default on the part of the intestate. The receipt of dividends after the death of the intestate is the cause of action; and the promise of Mary Baylis is in consequence of that receipt. This promise will not bind her husband. And as the money never was assets for payment of debts, non-payment in this case cannot bind the estate of the deceased.

ROOKE, J. I am of the same opinion.

Judgment for the Defendant.

BISHOP v. YOUNG. Feb. 4th, 1800.

Debt lies by the payee against the maker of a promissory note expressed to be for value received (a)².

Debt on a promissory note. The first count of the declaration was; "For that whereas the Defendant on &c. at &c. made his certain note in writing commonly called a promissory note with his own proper hand thereunto subscribed bearing date the same day and year aforesaid; and then and there delivered the said note to the

(a)¹ See the case with the opinion of the Judges at length, 7 T. R. 350, n. (a).

(a)² Vide *Larton v. Peat*, 2 Campb. 185. *Brill v. Neele*, 3 B. & A. 208. *Priddy v. Hembrey*, 1 B. & C. 674. *Stratton v. Hill*, 3 Price, 253.

Plaintiff, by which said note the Defendant one month after date promised to pay to the Plaintiff or order \$1. value received in goods by him the Defendant, by reason whereof and by force of the statute in that case made and provided the Defendant became liable to pay to the Plaintiff the said sum of money in [79] the said note mentioned, whereby an action hath accrued," &c. There were other counts in debt for money lent, money had and received, and an account stated, and the common conclusion.

To the first count there was a special demurrer, but as the cause assigned was afterwards removed by an amendment, the case was now argued as upon a general demurrer.

Marshall, Serjt. in support of the demurrer. The question is, whether debt will lie by the payee of a promissory note against the drawer? The court will not incline to encourage the practice of bringing debt upon simple contract, since that practice subjects the Defendant to serious inconvenience. In case he suffer judgment by default he is liable to execution for whatever sum the Plaintiff may chuse to lay in the declaration; and he has no other mode of preventing that execution than by pleading and going down to trial. The question on this demurrer was expressly decided in *Welch v. Craig*, 8 Mod. 373; 1 Str. 680, S. C. where the Court were clearly of opinion that no action of debt would lie on a promissory note.

Bayley, Serjt. *contrà*. It is a general principle that where a man enters into a contract on a sufficient consideration for the payment of a sum of money, the party with whom the contract was made may maintain an action of debt thereon. On this principle it is, that actions on simple contract or on specialty equally proceed. Lord Chief Baron Comyns introduces his title of Debt on Contract by saying "Debt lies upon every express contract to pay a sum certain." Com. Dig. tit. Debt (A. 8). And if debt cannot be maintained by the payee of a promissory note against the maker, it certainly is the only case of an express contract where it cannot. To found the action of debt there must indeed be a sufficient consideration. In some cases the consideration must be averred, in others it is implied from the instrument itself. In simple contract, generally speaking, it must be averred, and in that respect there is no distinction between debt and assumpsit; whether the averment be necessary or not, depends upon the nature of the contract, not upon the form of action. Where the contract is founded on specialty the consideration is implied; therefore in covenant for payment of a sum certain, or in debt on bond, the consideration need not be averred. There are certain privileges peculiar to a bill of exchange: 1st, although a chose in action it may be assigned, and the assignee may maintain an action thereon; 2dly, though a simple contract, the consideration is implied from the nature of the instru- [80]-ment. Even in assumpsit therefore on a bill of exchange the consideration is never stated. It appears from the cases of *Clerke v. Martin*, 2 Ld. Raym. 757, and *Potter v. Pearson*, 2 Ld. Raym. 759, which were before the statute 3 & 4 Ann. c. 9, that the only objection then made to declaring upon a promissory note was, that they did not imply a consideration though bills of exchange did. Then came the statute of Anne; the effect of which was to put promissory notes upon the same footing with bills of exchange. The case of *Rumball v. Ball*, 10 Mod. 38, came before the Court soon after the passing of that statute. That was debt upon a promissory note, no objection was taken to the form of the action, and the Plaintiff was allowed to recover. And in 1 Mod. Entr. 312, pl. 13 (a), it is said, "In an action of debt on a promissory note, the Defendant demurred to the declaration, and the question was, whether an action of debt would lie? it was said, that it would not lie against the indorser, but that it would lie against the drawer." With respect to the case of *Welch v. Craig*, it is not expressly stated in either of the reports, against which of the parties to the note the action was brought. But it may be observed, that the counsel in support of the demurrer insisted on this distinction, that debt would not lie against the indorser, though it would against the drawer; which shews that the action in that case was not brought against the maker, and affords ground

(a) In the same page, however, pl. 14, it is observed, that the words of the statute of 3 Anne are, that the party "shall recover damages, &c. which shews that an action of debt will not lie, because damages are never recovered in debt."—And in pl. 15, it is said "an action of debt was never known to be brought on a bill of exchange or note," though it is admitted in the same placitum that *indebitatus assumpsit* will lie on a note, for in such case the Plaintiff may recover in damages.

to infer the prevailing opinion of the time, that if it had been brought against him it might have been supported. The undertaking of the maker differs substantially from that of the indorser; since the former undertakes to pay absolutely, whereas the latter only undertakes to pay upon the default of the maker. Between the payee and the maker, there is a privity of contract: and the ground on which it was held in *Anon.* Hard. 485, that debt would not lie against the acceptor of a bill of exchange, was, that his contract was collateral; admitting that it would lie against the drawer. The case of *Kulder v. Price*, 1 H. Bl. 547, was debt on a promissory note payable by instalments, and the declaration was demurred to by Mr. Justice Lawrence, then at the bar, because it appeared that the last instalment was not due. But neither at the bar or on the bench was it ob-[81]-jected that debt was not the proper form of action, though that objection, had it been thought maintainable, would have afforded an obvious and easy answer to the Plaintiff's demand. A precedent of a declaration in debt against the maker of a promissory note is to be found in *Morgan's Vade Mecum*, 458. The practice of dispensing with a writ of inquiry in actions of assumpsit, both on bills and notes, shews that no objection can be raised to this form of action on the ground of the Defendant being deprived of the benefit of a writ of inquiry where judgment has gone by default.

Cur. adv. vult.

On this day the opinion of the Court was delivered by

LORD ELDON, Ch. J. The question in this case is, Whether an action of debt will lie on such a promissory note as is stated in this declaration, and between such parties as the Plaintiff and Defendant in this suit? The Defendant, by the tenor of that note, one month after date promised to pay to the Plaintiff, or order, 8l. value received in goods by him the Defendant; and it is averred that the note so made was delivered to the Plaintiff, being first signed by the Defendant. This is a note, therefore, with a consideration apparent upon the face of it, and the action of debt is brought by the payee of that note against the person who made and signed it; not by the indorsee against the maker or the indorser. It was insisted for the Defendant, that under these circumstances the action of debt would not lie, and several cases were cited in support of that proposition. The case particularly relied upon was *Welch v. Craig* reported in 1 Str. 680, and in 8 Mod. 373. In the former report it is laid down generally, that before the statute no action lay upon the note as a note, nor did an action of indebitatus assumpsit lie upon a bill of exchange. I say, that it is there laid down generally; for it is not stated between what parties to the bill the action is supposed to arise. The report then proceeds, "the only remedy given upon the note by the statute is the same that was before on an inland bill of exchange." The inference therefore is, that debt would not lie on an inland bill of exchange. From this case, as reported, we are not able to collect who the person was that brought the action, whether the payee or the indorsee, nor against whom the action was brought, whether the maker or the indorser. The doctrine is laid down without any circumstances enabling us to make a proper application of the case, and the conclusion which results from the reasoning [82] there used is, that an action of debt will not lie on a promissory note between any parties, whether there be an apparent consideration or not. But it is impossible to read the report of the same case in 8 Mod. without perceiving that we should be in great danger of applying the case too generally if we were to hold it as clear law, that without any exception an indebitatus assumpsit will not lie on a foreign bill, an inland bill, or a promissory note. In 8 Mod. it was argued by the counsel, that debt would not lie against the indorser, but that it would lie against the drawer. We shall see presently whether there is any ground in the principles of the action of debt for that distinction. In that very argument the reason given why a general indebitatus assumpsit will not lie on a promissory note, is, for want of a consideration. The Court are said to have been "clearly of opinion that no action of debt would lie on a promissory note declaring thereon," and they use these expressions, "by the custom of merchants no remedy was given on foreign bills of exchange, but by action on the case; the statute 9 & 10 W. 3, c. 17, has given the same remedy to inland bills, and the 3 & 4 Anne to promissory notes; an indebitatus assumpsit will not lie on a bill of exchange." According to this report the Plaintiff had leave to discontinue; it is therefore impossible for us to obtain a sight of the record and satisfy ourselves, whether the action was brought by the payee against the maker, or by any other person standing

in any other relation, or whether there was any apparent consideration on the face of the note. But it is observable on the two reports taken together, that the reason for holding that debt would not lie, was founded on the analogy of promissory notes to inland and foreign bills of exchange. If, therefore, it be true that an action of debt brought by the payee of an inland or foreign bill of exchange against the drawer of such bill, will lie, it will remain to be considered whether the analogy will not require us to hold in the case of a promissory note having an apparent consideration, that an action of debt will lie if brought by the payee of such note against the maker. The case in *Hardres* seems to open the principles on which this case must be decided. The effect of that case and of *Pearson v. Garret*, Skin. 398, are very accurately expressed in Com. Dig. tit. Debt (B). Lord Chief Baron Comyns after having said that debt lies upon every express contract to pay a sum certain (tit. Debt (A. 8)), and also, that it lies, though there be only an implied contract (ibid. (A. 9)), [83] thus states the principles of these cases: "So debt does not lie upon a bill of exchange against the acceptor; for the acceptance binds him by the custom of merchants, but does not raise a duty, R. Hard 485. So it does not lie upon a note to pay, without consideration; though alleged that it binds by custom, R. Skinn. 398." The case in *Hardres* was debt against the acceptor of a bill; and the Court in declaring their opinion, that the action will not lie, say: "The acceptance does not create a duty, no more than a promise made by a stranger to pay &c. if the creditor will forbear his debt. And he that drew the bill continues debtor notwithstanding the acceptance, which makes the acceptor liable to pay it." As the reasoning, therefore, stated in this case against the liability of the acceptor in an action of debt, is this, namely, that his situation is analogous to that of a person who takes upon himself an obligation to pay that which is not his debt, but the debt of another, it is clear, that the Court considered the drawer himself as owing the debt or duty, though no debt or duty were raised against the acceptor. Looking at the effect of a bill of exchange, it seems very reasonable to hold, that although the acceptor be primarily liable, yet that he is not liable for his own debt, but for that of another. The drawer holds the debt; and if the drawee refuse to accept, an action may be immediately brought against the drawer (a). If the drawer does accept, the transaction amounts to no more than an undertaking on his part to pay the debt of the drawer, and on the part of the holder to resort to the acceptor, to be paid out of the effects of the drawer in his hands before he resorts to the drawer himself. With respect to promissory notes the books say, that when they are indorsed by the payee, they resemble bills of exchange. But this is rather inaccurate with reference to the case before us. For though the payee, by making himself an indorser, assumes the character of drawer, and the maker assumes that of an acceptor to certain purposes, yet with respect to the question, Who owes the debt? where there is an apparent consideration, the person who owes the debt is still the maker of the note, as well as the drawer of the bill of exchange. Here, therefore, Lord Coke's maxim may very properly be applied *nullum simile est idem*. Agreeable to this is *Hard's case*, Salk. 23, where it is said that *indebitatus assumpsit* will not lie against the acceptor of a bill of exchange, for his acceptance is but a collateral engagement, but that it will lie against the drawer, for he is really a debtor by the [84] receipt of the money. So also in *Holges v. Steward*, Skinn. 346, it is allowed by the Court that debt will lie against the drawer of a bill of exchange for value received; and the reason given is, "but this is for the apparent consideration." Now, in point of fact, has not this principle been applied to promissory notes where there has been an apparent consideration? In *Rumball v. Ball* the Plaintiff was allowed to recover in debt on a note which from its tenor was clearly a promissory note within the statute. Indeed, if it be true that an action of debt will lie against the drawer of a bill of exchange in favour of the payee, it seems to me to be the necessary effect of the statute of Anne, which puts notes on the same footing with bills of exchange, that debt may be maintained by the payee of a promissory note against the maker. That statute makes a distinction between the remedies which it gives to the payees and the indorsees; it enacts, that the payee may maintain an action upon the note in the same manner as he might do upon any inland bill of

(a) *Macarty v. Brown*, 2 Str. 949, P. 269. *Milford v. Mayor*, Doug. 54. 3 Wils. 17, S. C. *Bright v. Parrier*, Bull. N. *Stedman v. Gooch*, Esp. N. P. Cas. 5.

exchange against the person who signed the same, and that the indorsee may maintain his action either against the person who signs such note or against any of the persons who indorse the same, in like manner as in cases of inland bills of exchange. If, therefore, he to whom a bill of exchange for value expressed is made payable, may bring an action of debt against the person who signed it, it follows from the very words of the statute, that he to whom a promissory note, having an apparent consideration, is made payable, may have the same remedy of debt against the person who signed such note. I take no further notice of the case of *Rudder v. Price*, than to observe, that though it was argued for the Defendant by a person of great abilities, it did not occur either to him or to the Court, to observe that, whether the instalments on the note were due or not, still the form of the action was misconceived.

Under these circumstances, the Court is of opinion, that in this particular case the action of debt may be maintained. We do not say how the case would stand if the action were brought by any other person than he to whom the note was originally given, or against any other person than him by whom it was signed and made, or if the note itself did not express a consideration upon the face of it.

Per Curiam. Judgment for the Plaintiff.

[85] LAING v. KAINE, ONE, &C. Feb. 5th, 1800.

If A. agree to acknowledge an old warrant of attorney given by him "so as to enable B. to enter up judgment thereon," judgment may be entered up under a judge's order, without an affidavit of the subscribing witness (a).

A rule nisi having been obtained for setting aside a judgment entered upon a warrant of attorney under a Judge's order, upon the ground of the order having been obtained without any affidavit of the subscribing witness to the warrant of attorney; Shepherd, Serjt. now shewed cause, and relied on an affidavit by the Plaintiff's attorney, which stated that the warrant of attorney was given to secure a sum of money payable by instalments; that the deponent being under a difficulty to procure the subscribing witness at the time when one of the instalments became due, applied to the Defendant himself, and after stating his difficulty, proposed that the Defendant should acknowledge the warrant of attorney "so as to enable the deponent, if it should become necessary, to enter up judgment thereon," he giving the Defendant time to pay the instalments then due; that the Defendant agreed to this proposal, and that the instalment not being paid within the time, judgment was entered up.

Williams, Serjt., in support of the rule, cited *Abbot and Another v. Plumbe*, Doug. 216, and insisted that the Defendant's acknowledgment would not avail (b), though he allowed, that where a Defendant agrees to admit an instrument, the evidence of the subscribing witness may be dispensed with.

LORD ELDON, Ch. J. and HEATH, J. were of opinion, that upon a fair construction of the affidavit it appeared that the Defendant did not simply acknowledge the instrument, but agreed that the Plaintiff should act upon it as if the witness himself had been produced.

ROOKE, J. seemed to entertain some doubts upon the subject.

Rule discharged.

[86] THE KEEPERS AND GOVERNORS OF THE POSSESSIONS, &C. OF HARROW SCHOOL v. ALDERTON. Feb. 5th, 1800.

[Principle applied, *Doherty v. Allman*, 1878, 3 App. Cas. 725. Referred to, *Meux v. Copley*, [1891] 2 Ch. 263.]

In an action of waste on the statute of Gloucester against tenant for years, for converting three closes of meadow into garden ground, if the jury give only one farthing

(a) And see *Park v. Mears*, 3 Esp. Rep. 171, post, 217. *Call v. Dunning*, 5 Esp. Rep. 16. *Cunliffe v. Sefton*, 2 East, 183.

(b) Recognized per Lawrence, J. *Barnes v. Trompowsky*, 7 T. R. 267.

damages for each close, the Court will give the Defendant leave to enter up judgment for himself (a)¹.

This was an action of waste on the statute of Gloucester, for ploughing up three closes of meadow-land, and converting the same into garden-ground, and building thereupon, to the damage of the Plaintiffs of 500l. Plea, Not guilty (b).

The cause was tried before Heath, J., at the Westminster sittings after last Trinity Term, when the jury found a verdict for the Plaintiff with three farthings damages, being one farthing for each close.

In the Michaelmas Term following, Cockell, Serjt., obtained a Rule, calling on the Plaintiff to shew cause why the judgment should not be entered up for the Defendant, on account of the smallness of the damages recovered, on the principle that *de minimis non curat lex*; and cited in support of the application Bro. Abr. tit. Waste, pl. 123. Co. Lit. 54 a. 2 Inst. 306. Cro. Car. 414, 452. Finch's Law, lib. 1, cap. 3, s. 34, adopted 3 Black. Com. 228. Vin. Abr. tit. Waste N. and Buller's N. P. 120.

Shepherd, Serjt., now shewed cause. There are two species of waste: that which consists in the abuse of the thing in which the waste is committed, and the consequent deterioration of its value, and that which changes the nature of the thing itself. In waste of the first kind, if the damage be very small, it may be right that no action should lie, because the deterioration is the offence of the waste. But where the waste consists in the alteration of the property, that alteration is the essence of the waste. If then the amount of pecuniary damage be the criterion of this kind of waste also, the distinction will no longer exist; for it will then be the deterioration of value, and not the alteration of the property which will constitute the waste. It is clear that "if the tenant convert arable land into wood, or *è converso*, or meadow into arable, it is waste; for it changeth not only the course of his husbandry, but the evidence of his property." Co. Lit. 53 b. though it be for the advantage of the lessor, Dyer, 35 b. Hob. 234. 2 Leon. 174, per Periam, J. and Owen, 67. All the cases in which the rule contended for has prevailed, have been cases of deterioration of property; and though the Court will not allow the judgment to be entered for [87] the Plaintiff where the damages in such a case are small, yet though the damages be small in this case, where the nature of the property itself has been changed, they will not deprive the Plaintiffs of a judgment by which they are entitled to recover the land (a)². The observation of Bracton, lib. 4, c. 18, s. 12, fol. 316 b. that *vastum erit injuriosum nisi vastum ita modicum fuerit, propter quod non sit inquisitio facienda*, seems to be confined to cases of deterioration; for he is there only speaking of the tenant, who, in taking estovers, *si mensuram excedat utendo et capiendo ultra rationabile estoverum suum, utitur quasi in alieno*. It is also to be observed, that where waste is found to have been committed in several places, the Plaintiff is entitled to recover the thing wasted, notwithstanding the smallness of the damages, 14 H. 4, 11 b. Bro. Abr. tit. Waste, pl. 70.

LORD ELDON, Ch. J. I confess, that when this application was first made, I was not aware, that under the circumstances of the case the Defendant was entitled to demand judgment: but my Brother Heath has satisfied me that the application is

(a)¹ Vide *Pindar v. Wadsworth*, 2 East, 154. *Redfern v. Smith*, 1 Bing. 382.

(b) For precedents of pleadings in this action, see Co. Ent. tit. Waste, and Rastall, Ent. same title.

(a)² By the statute of Gloucester, 6 Ed. 1, c. 5, if tenant for life or years do waste, he shall forfeit the place wasted, and treble damages; if a guardian, he shall forfeit his wardship, and shall render damages to the heir if the wardship forfeited be not sufficient to satisfy the damages. In Hil. 34 Ed. 3, an infant having brought waste against his guardian, damages were found to the value of twenty-one pence; and it was contended, that for the smallness of the value it should not be adjudged waste. The Court upon great consideration awarded "that the Plaintiff should recover the wardship, &c. without damages, because the wardship was worth more than the damages of the place wasted." Fitz. Abr. Waste, pl. 146. It does not, however, necessarily follow from this case, that where small damages are found against tenant for life or years, the Plaintiff shall recover the place wasted, without damages; and indeed it was laid down so early as Pasch. 8 Ed. 2, that in such case the Court can never award one without the other, Fitz. Abr. Waste, pl. 111.

supported by the current of authorities. I do not indeed see precisely on what ground those decisions have proceeded; though I can easily conceive many cases in which it may be extremely unconscientious for a Plaintiff to take advantage of his judgment, where such small damages have been recovered as in this case. As, if the owner of land suffer his tenant to lay out money upon the premises, and then bring an action of waste to recover possession when the land may have been improved to ten times the original value. The cases do not appear to authorize the distinction contended for by my Brother Shepherd. Whether the waste committed be by alteration of the property, or by deterioration, still the jury, in estimating the damages, take into consideration the injury which the Plaintiff has sustained; and in this case the jury have estimated the damage which these Plaintiffs have sustained, by the alteration of their [88] property, at three farthings only. The Courts of Common Law seem to have entertained a sort of equitable jurisdiction in cases of this kind.

HEATH J. This doctrine prevailed as early as the time of Bracton, who wrote before the statute of Gloucester. With respect to the distinction taken, there is no reason why pecuniary damages should not be assessed for the alteration of property as well as for the deterioration. Thus, if a tenant convert a furzebrake in which game have bred into arable or pasture, by which its real value would be improved, but its value to the landlord depreciated, it would be the business of the jury to assess damages to the landlord thereon.

ROOKE, J. I am of the same opinion.

Rule absolute.

EX PARTE EVAN EVANS. Feb. 5th, 1800.

If by abuse of the process of one of the Courts at Westminster a sheriff's officer extort a promissory note from a suitor, and then declare upon that note in another of the Courts at Westminster, the latter Court cannot interfere summarily to punish the officer under 32 Geo. 2, c. 28, s. 11.

This was an application under the Lord's act, 32 Geo. 2, c. 28, s. 11 (a), for an order to punish two sheriff's officers for extortion, and to stay their proceedings in an action against the petitioner, with costs. By the affidavit on which the application was founded, it appeared that the petitioner having sued process of quo minus out of the Court of Exchequer, applied to one of these officers to arrest a person in Oxfordshire, and proposed to give him ten guineas if he should succeed in making the arrest, but nothing in case he should fail; that the other officer, who was the principal, refused this proposal, but insisted on, and had his regular fee of one guinea; that the two officers then effected the arrest, and having so done, demanded the ten guineas which had been offered in the manner above mentioned, and obliged the petitioner to give them his note for that sum; that on this note the petitioner was sued in the Mayor's Court at Oxford, but the proceedings there were afterwards stayed, on the petitioner giving the officers a new note [89] for the above sum, and that on this last note an action was commenced in this court.

Williams, Serjt., moved this on the ground of its being an abuse of the process of this court, and within the provisions of 32 Geo. 2, c. 28, s. 11.

Sellon, Serjt., shewed cause against the rule nisi, and insisted that the Court had no authority to interfere in the way desired, inasmuch as, if an abuse of any process had taken place, it was an abuse of the process of the Court of Exchequer.

(a) By that section, "for the more speedily punishing gaolers, bailiffs, and others, employed in the execution of process, for extortion and other abuses in their respective offices and places," upon the petition of any person arrested by any process, complaining of exaction or extortion by any gaoler, &c. "unto any of his Majesty's Courts of Record at Westminster from whence the process issued by which any person who shall so petition was arrested, or under whose power or jurisdiction any such gaol, prison, or place is," such Court is authorized "to hear and determine the same in a summary way, and to make such order thereupon for redressing the abuses which shall by any such petition be complained of, and for punishing such officer or person complained against, and for making reparation to the party or parties injured, as they shall think just, together with the full costs of every such complaint."

LORD ELDON, Ch. J., on this day said, We have looked into the act of parliament, and are satisfied that we have no jurisdiction in this case. The summary power of interference is given to the Court from whence the process issues; we therefore can take no notice of this application.

Per Curiam. Rule discharged.

ILES AND OTHERS v. BOXALL. Feb. 5th, 1800.

A bond taken by the commissioners, appointed under an inclosure act to indemnify themselves against the expences of a suit brought to try the right to an allotment made by them, and in which they are, according to the directions of the act made, Defendants, is not void; though there be a fund provided out of which such expences may in some cases be satisfied; at least if the commissioners doubt whether the case in question be one of those cases.

Debt on bond.

On oyer craved by the Defendant it appeared from the recital of the condition that by an act of parliament of the 37 of Geo. 3, for dividing, allotting, and enclosing the open and common fields, &c. in the parish of Croydon in Surry, the Plaintiffs, who were appointed commissioners, were directed "to make an allotment of land to the person or persons entitled to the rectorial tithes of commons and wastes within the said parish in lieu of such tithes;" that it was also provided by the said act that those whose claims should not be allowed by the commissioners, and any three or more whose claims should be allowed by the commissioners, but who should object to the allowance of the claims of other persons, might proceed to trial of his or their claims at the assizes for the county in a feigned cause to be carried on between the persons claiming and any one of the commissioners disallowing their claims, or the persons objecting to the allowance of such claims; that the Defendant claimed to be entitled to the rectorial tithes of the said commons and wastes, and his claim was allowed; that other persons having also claimed to be entitled to certain proportions of the same tithes, and having objected to the determination of the commissioners respecting the Defendant's claim, resolved to proceed to trial, and delivered issues accordingly, that "although the said Plaintiffs were [90] enabled by the said act to reimburse themselves the costs of actions brought against them as therein is expressed, yet as they considered the question respecting the said tithes not to be of that public nature which would authorize them to defend the actions concerning the same at the public charge," they required the Defendant to indemnify them from all expences attending the same, and which he agreed to do, and for that purpose entered into the bond; the condition of which was to indemnify the Plaintiffs from those expences.

The Defendant pleaded; 1st, non est factum; 2dly, the act of parliament authorizing the commissioners to set out an allotment by way of compensation to the owners of rectorial tithes in the first place, and then to divide the rest of the lands among the persons entitled thereto, the material clause of which, after directing that the claims of the different persons concerned in the division and allotment, in case of the determination of the commissioners being disputed, should be settled in manner before stated in the recital of the condition, provided, that in order to raise a sufficient sum of money to defray the charges and expences of obtaining and passing the act, and of carrying it into execution "and of defending any action or actions which might be brought against the said commissioners or any of them, and all other the charges and expences arising and accruing in the carrying the said act into execution," it should be lawful for the commissioners "to make sale by auction of such part or parts of the said commons, marshes, heaths, wastes, and commonable woods, lands, and grounds, as they should deem sufficient for the purposes aforesaid." The plea then went on to state that the Defendant, in pursuance of the said act, did deliver to the commissioner a claim in writing to the rectorial tithes of all the commons, &c. within the said parish of Croydon, which was allowed by them; that certain other persons afterwards claimed to be entitled to certain proportions of the same tithes, which claims were disallowed by the commissioners; that thereupon afterwards and before the making of the said writing obligatory three several feigned actions were brought against one of the commissioners, and which said actions at the time of making the said writing obligatory were respectively depending in the Court of King's Bench, and the several

Plaintiffs respectively intended to proceed to the trial of their respective claims at the next assizes for the county of Surry, of all which said several premises the Plaintiffs, so being such commissioners as aforesaid, had notice. "And [91] thereupon afterwards whilst the said actions were so depending as aforesaid, and before the trial thereof, to wit, on, &c. at, &c. the said Plaintiffs, under colour of their office as such commissioners did unlawfully and unjustly exact and require of and from the said Defendant the said writing obligatory in the said declaration mentioned, with the said condition thereunder written. And the said J. F. (the commissioner made defendant in the said suit) did then and there refuse to proceed in the defence of the said actions unless the Defendant would make and enter into such writing obligatory as aforesaid; and thereupon the said Defendant, in order that the said J. F. might proceed in the defence of the said actions, did then and there make and enter into the said writing obligatory in the said declaration mentioned with the said condition thereunder written: which said writing obligatory for the cause aforesaid was and is wholly void in law. And this he is ready to verify. Wherefore he prays judgment if he ought to be charged with the said debt by virtue of the said writing obligatory, with this, that the Defendant will also verify that the means provided by the said act were and are sufficient to enable the said commissioners to defray the costs of defending the said actions, and all other the costs charges and expences arising and accruing in carrying the said act into execution, &c."

The Plaintiffs in their replication tendered issue on the first plea, and demurred generally to the second. The Defendant joined in issue and demurrer.

Best, Serjt., in support of the demurrer, observed that the question was, Whether the commissioners were justified in taking this indemnity bond? He was proceeding to argue that the only ground on which the plea could be maintained was, that the bond had been obtained by duress; but that duress in law is such a restraint as deprives a man of the power of acting for himself, not such a restraint as merely affects his interest (a)¹, and if it was to be contended that the bond was obtained by fraud, that the Defendant must seek relief in a Court of Equity. He was then stopped by the Court.

Palmer, Serjt. contra. It is a principle of law that no public officer can carve out to himself an advantage in his official capacity. *Empson v. Bathurst*, Hut. 52 (a)². That case does not proceed on the principle of duress, but that the bond taken by the sheriff being extorsive was void at common law. Now a person acting under a judicial authority, delegated to him by act of parliament, is under as great an obligation to do his duty as an officer who derives his authority from the common law. The commissioners have no option, but must join the issue when tendered to them, and defend it when joined. If it were not so, many of the claimants who are poor and whose rights are small, might be deprived of them altogether in consequence of the expence attending the litigation. The commissioners have no more right to demand a bond before they join issue than an under-sheriff has to demand his fees before he executes process; which he cannot do. *Hescott's case*, 1 Salk. 330.

LORD ELDON, Ch. J. The commissioners have a right to say, "we are doubtful whether under the provisions of this act we can in this particular case be re-imbursed the expences of the suit out of the fund provided by the act: either compel us to defend the issue by obtaining a mandamus from the Court of King's Bench, or give a bond to indemnify us against the expences which we may incur." If the Defendant pays the expences of the suit according to the condition of his bond, he will then be entitled to stand in the place of the commissioners and may compel them to re-imburse him by a sale of land, if they would have been warranted in so re-imbursing themselves. If they would not have been warranted in so re-imbursing themselves, the Defendant is the proper person to pay the expences of the suit. I cannot but entertain a doubt upon this act. The property which was the subject of the act consisted of lands and

(a)¹ Vide 2 Inst. 483, and 1 Bl. Com. 130, 131, but Lord Chief Baron Comyns, in his Digest, tit. Officer (H.), in treating of exaction by an officer, cites 3 Inst. 149, to shew that any bond exacted from the subject to the King or other person, to do that which by law he is bound to do to the King, is void, and then adds "and the defendant shall plead duress;" this latter position, however, is not supported by 3 Inst. 149, to which he refers generally for the whole sentence.

(a)² Winch. Rep. 20, 50. Winch. Entr. 334, S. C. also cited Poph. 176.

tithes. The commissioners are directed to set out certain allotments in lieu of tithes, and then to divide the rest among the land owners. When they have satisfied all the demands of the tithe-owners, by setting out for them their due proportion of land, it appears to me that any question arising among the tithe-owners, as to their respective rights to the land given in lieu of tithes, must be litigated at their own expence. The act seems to sever the consideration of the tithes and of the land. Can it be contended, that if several claim to be entitled to the tithes, and the land owners admit the lands to be subject to tithes, that the latter are to pay the expences of a [93] litigation among the former, in which they have no interest? It may as well be said, that if a dispute should arise among the land-owners they would be entitled to have the expences of such dispute defrayed out of the allotments in lieu of tithes.

Per Curiam. Judgment for the Plaintiffs.

(In the Exchequer Chamber.)

H. BEARD AND ARABELLA his Wife v. WEBB AND ANOTHER; in Error.
Feb. 5th, 1800.

A feme covert sole trader in the city of London, is not liable to be sued as such in the Courts at Westminster: And even in the city courts the husband should be joined for conformity (a).

The record in this case, after stating in the usual form the appointment of attornies by the Plaintiffs below (the Defendants in error), and also by Arabella Beard the sole Defendant below (and one of the Plaintiffs in error), proceeded to set out a declaration by bill in the King's Bench against the latter for goods sold and delivered, money paid, lent, had and received, and on an account stated. To this the pleas were; 1st, Non assumpsit; 2dly, that the Defendant was covert of one H. Beard; 3dly, a set-off. The replication took issue on the first plea, and answered to the second, "that although true it is that she the said Arabella before and at the time of the making of the said several promises and undertakings in the said declaration mentioned, and each of them, was, and yet is the wife of, and married to the said H. Beard, as the said Arabella hath in her said plea, secondly, above pleaded in bar, alleged; yet for replication in this behalf the Plaintiffs say that the city of London is an ancient city, within which said city there is and from time whereof, &c. there hath been a custom used and approved of; that is to say, that where a feme-covert of a husband useth any craft in the said city on her sole account whereof her husband meddleth nothing, such a woman shall be charged as feme-sole, concerning every thing that touched her craft; and that the said Arabella before, and at the time of the making of the said several promises and undertakings of the said Arabella in the said declaration mentioned, used the craft of an upholsterer in the said city, on her sole account, whereof the said H. Beard during all the time aforesaid meddled nothing within the said city of London, to wit, at, &c. and that the said goods, &c. were sold and delivered by the said Plaintiffs to her the said Arabella, the wife of the said H. Beard, as using the craft aforesaid, within the said city, on her sole account as aforesaid." There were similar averments respecting the money [94] paid, lent, had and received, and account stated. On the plea of set-off issue was tendered. The rejoinder, after protesting that there was no such custom as that mentioned in the replication, tendered issue on the Plaintiffs' averment that she carried on the trade of an upholsterer on her sole account, and joined issue on the set-off. The rebutter was a joinder in the issue tendered by the rejoinder. Upon the trial of these issues the jury found, as to the first, that the said Arabella did undertake, &c. As to the second, that she did "use the craft of an upholsterer in the city of London within mentioned, according to the custom of the said city, on her sole account, whereof her husband the within-named H. Beard meddled nothing;" and as to the third, that the Defendant had no set-off. On this finding judgment was entered up for the Plaintiffs in the King's Bench.

Arabella Beard (the Defendant below), together with her husband H. Beard, having brought a writ of error in this court assigned for errors, that the Plaintiffs below "declared against her the said Arabella as a feme-sole in the court of our said

(a) Vide *Durant v. Tilley*, 7 Price, 577.

Lord the King before the King himself, whereas by the law of the land no such action could or can be supported against the said Arabella in the said court; and also that the said Arabella appeared in the said suit and pleaded by T. W. her attorney, whereas by the law of the land the said Arabella could not during her coverture make an attorney in the said court without the said H. Beard her said husband; and also that the said H. Beard should have been joined in, and made a party to, the said suit." Joinder in error.

Wigley for the Plaintiffs in error. It is a settled principle that a feme-covert sole trader cannot be sued upon the custom of the city of London any where but in the city courts, because that is a custom regulating the proceedings of those courts. Upon this *Stanton's case*, Moor, 135, and *Bohun*, Privil. Lond. p. 83, are express; and in the first of these books Fenner cited 1 Ed. 4, in support of this doctrine. At the end of the report in Moor there is another case respecting a custom of the city of London, where Fleetwood, Serjt. and Recorder of London, on moving for a procedendo, said, that the "Common Pleas could not do right upon the said custom," and therefore it was granted him. So in *Langham v. la Femme de John Bewett*, Cro. Car. 68, a return to a habeas corpus cum causâ to remove a cause from the city court being that the wife was sued as a feme-sole merchant, Hutton, Harvey, and Croke, Js. were of opinion "that it was such an action and cause wherewith this court (C. B.) ought not to meddle, nor take conuzance, nor can give the party re-[95] hef although he hath good cause of suit; for in London they are judges of their own customs, and by intentment will proceed in their courts there according to their customs and not otherwise, and therefore we ought not to take away their privileges, nor remove the action out of that court where we cannot give remedy in this." The same law is laid down by Lord Mansfield and Yates, J. in *Lavie v. Philips*, 3 Bur. 1776, 1 Bl. 570, S. C. and agrees with *Offley v. Johnston*, 2 Leon. 166. This was again acted upon in *Pope v. Vaux and Wife*, 2 Bl. 1060. The most modern recognition of this law is to be found in *Cawlell v. Shaw*, 4 Term Rep. 361, and in the case of *Reade v. Frances Jewson*, there cited by Buller, J. The case of *Moreton v. Packman et Uxor*, 2 Keb. 583. 1 Mod. 26, S. C. shews, that though the custom be admitted upon the record, yet the courts at Westminster cannot try whether the trade be within the custom or not. In the present case therefore the jury have found that which is not a subject of inquiry in the court in which they found it. It is also observable, that in all the cases cited it is said that the husband ought to be joined for conformity; and Dyer, 271 b. is mentioned by Aston, J. 4 Term Rep. 364, as a singular instance of the wife being suffered to appear alone to prevent her being waved, the husband being banished (a)¹. This being a case where the wife is liable to execution, and where the husband may therefore be deprived of her fellowship, the latter has acted right in joining in this writ of error. *Hayward v. Williams*, Sty. 254, 280. *Earl of Bedford's case*, 7 Co. 8, and Hob. 225 (b).

Wood for the Defendants in error. This case differs from those cited, inasmuch as the custom being here stated on the record and admitted, the Court is not called upon to take judicial notice of it. Indeed, the only case in which the custom appeared upon the record is *Stanton's case*; and there it was held that the action might be maintained in the courts above. It is true, that if a party would proceed by foreign attachment, he can [96] only avail himself of that remedy in the city courts (a)². But

(a)¹ There are two cases on this subject in Dyer, 271 b. one in the text and one in the margin, neither of which, however, exactly corresponds with the description supposed to be given by Aston, J. in 4 Term Rep. 364. The former was debt on bond against husband and wife; in which process was continued until the husband was outlawed and the wife waved; the wife being then brought in by process, shewed the Queen's pardon, and the Court held that she should be discharged from the imprisonment, but that the pardon could not be allowed, since the wife alone could not sue a scire facias to compel the Plaintiff to declare; and the pardon had a condition, ita quod ipsa staret recta in curiâ, which she could not do without her husband. In the latter case process in debt against husband and wife having been continued to the exigent, the husband appeared, but would not suffer his wife to appear, and it was ruled that the wife might make an attorney to prevent her being waved.

(b) Vide etiam 18 E1. 4, and *Edwards v. Simpson*, 4 Roll. Abr. 748, pl. 18.

(a)² To this effect see *Turhill's case*, 1 Sautl. 67, Gibb. Hist. C. B. p. 209, ed. 2. And this doctrine has lately been recognized in *Rudge v. Hardecstie*, 8 Term Rep. 417,

the custom stated in this case is very strong in its nature, and is, as was said of the custom of apprenticeship in *Stanton's case*, pleadable everywhere. The words of the custom are, that she shall be "charged as a feme sole in every thing touching her craft;" the meaning of which is, that she shall be charged not in the city of London only, but all the kingdom over. Great mischief might ensue if this were otherwise: for a feme-covert sole trader, after having incurred a debt in London, might quit that city and so defraud her creditors. In 1 Ed. 4, 6, Billing having asserted that by the custom a feme might be sued in the superior courts without joining her baron, Littleton cited a case to the contrary; but it is added, that in the case cited the custom of London was not alleged; et ideo, quære? [Chambre, Baron: In 1 Ed. 4, 6, Danby, J. observes, that when an action is brought on a custom, which custom lies in the connuance and allowance of a particular jurisdiction, the action on the custom is not maintainable in the superior court.] Most of the cases cited for the Plaintiffs in error were on motion for procedendo; in which cases the custom could not have appeared upon the record: for in declarations in the city court the custom is never averred; but the judges there take notice of the custom judicially, as the judges of the courts at Westminster do of the common law. In *Royston v. Ivory*, 3 Keb. 302 (b) a procedendo was awarded on the suit of a feme-covert sole merchant; and the Court of King's Bench there said they must be ascertained of their jurisdiction, but if the custom be alleged in the declaration it is sufficient. The meaning of this seems to be, that if the custom appear to the Court above, that Court will entertain the cause, and that if the custom had been alleged in that case a procedendo would not have been granted. Neither in *Cudell v. Shaw* or in *Read v. Jewson* was any custom alleged. With respect to the second objection, that the husband ought to have been joined, it may be asked, how the action can be brought against the husband and wife, if the latter only is to be liable? If [97] the judgment were against both, the execution might go against both.

Cur. adv. vult.

LORD ELDON, Ch. J., (after stating the record) now delivered the judgment of the Court.—Supposing the jury were competent in this case to enter into the question of the custom at all, still they have not carried that custom farther in point of precision as to how, and where, and in what manner the feme-sole trader is to be charged, than it was alleged in the replication. It stands therefore before us upon the original allegation as made by the Plaintiffs below. On this record the Court of King's Bench gave judgment in favour of the Plaintiffs below; and in deference to the opinion of that Court (entertaining a contrary opinion myself), I could have wished to have known the grounds upon which it proceeded before we ordered a reversal. The writ of error assigns for causes; 1st, That Arabella Beard has been sued in the court above as a feme-sole; 2dly, That she had no power to make an attorney in the court where she was sued without her husband; and 3dly, That her husband ought to have been joined in the action for conformity. After considering the authorities upon this subject, it is the opinion of this Court that the judgment of the Court of King's Bench cannot be supported. We are of opinion that this action on the custom will not lie against a feme covert in the courts of Westminster-hall, though the custom may in some instances be pleaded in bar there. And we think that it would be giving a greater degree of effect to the custom than belongs to it, to hold that a feme-covert may make an attorney in Westminster-hall; and we also think that she cannot be sued as a feme-covert sole trader without joining her husband at least for conformity. Many cases were cited in argument; but on giving my best attention to the distinctions made in favour of the Plaintiffs below, I was not able to perceive that any other propositions were attempted to be supported for them than that as the custom appears

though some authorities, Dyer, 287 a. and *Lodge's case*, 2 Leon. 156, were there alluded to as being the other way.

(b) In *Bohun Privil. Lond.* p. 188, and in *Cudell v. Shaw*, 4 Term Rep. 362, arguendo the custom is said to have been alleged in the declaration. The report in Keble is very confused, but the result of it seems to be, that the custom was alleged in the declaration below, but was not returned upon the writ by which the action was removed; that the Court doubted whether they could award a procedendo without such return, since it did not appear whether the Court below had jurisdiction; but that finding the custom alleged in the declaration they did award it.

upon this record, therefore this action may be maintained against the wife in the superior court, and that there is no occasion to make the husband a party to the suit, as no judgment can be obtained against him. Now, in the first place, it makes no difference whether the custom appear upon the record or not; and, 2dly, I do not admit that it does appear; for if the place where the wife is to be charged be part of the custom, that circumstance not being stated upon the record the custom does not appear; and therefore, supposing [98] the other objections to be of no avail, it appears to me that the Plaintiffs for that reason could not have any judgment. It is clear, I think, that if the custom had appeared on the record such as it really is, it would have put an end to the action altogether. The customs in the city of London are of different kinds; some are available every where, and others, of which this is one, are spoken of in the books in terms which are not very intelligible, unless explained by the cases on the subject. These latter customs are called executory customs, the exposition of which expression is, customs united to the courts of the city of London. They are pleadable in London and not elsewhere, except so far as they may be made use of in the superior courts by way of bar. The following are customs of this species: an infant shall not wage his law on a covenant for tabling; no person shall wage his law where an alderman has signed the contract as a witness; pledges may be sued without deed; and debt will lie against executors in simple contract. In addition to these is the custom in question, viz. that a feme covert sole merchant may sue and be sued with reference to her transactions in London. But I do not admit that she can be sued there without joining her husband to a certain extent in the proceedings. The case of an infant binding himself apprentice by covenant under the custom of the city of London, is allowed to be pleadable every where and to stand upon the same footing as the customs of Gavelkind and Borough-English. If, then, it can be made out that the custom in question is united to the courts of the city of London, it follows of course that this action cannot be supported upon it in the superior courts. That it is united to the city courts, and that no action can be maintained upon it here, is clear from authorities. Even if an action could be maintained here, it could only be maintained in the same manner as in the city courts; and the authorities prove that no action could be maintained in the city courts unless the husband be made a party to the suit for conformity: nor can the wife make an attorney to conduct her defence either in the city courts or in Westminster-hall. The first authority to be cited respecting customs united to the city courts is *Osley and Johnson's case*, 2 Leon. 166. There one of two sureties having been sued to execution in the city court brought an action against his co-surety in the same court for contribution according to the custom, the cause was removed into the King's Bench, and afterwards a procedendo was prayed "and because upon this matter no action lieth by the [99] course of the common law but only by custom in such cities the cause was remanded; for otherwise the Plaintiff should be without remedy." From these words it is clear that the Court did not proceed upon the ground of the custom not appearing upon the record. It is manifest also from subsequent authorities that the proposition which the Court meant to lay down was, that whether the custom be stated on the declaration or not, an action will not lie upon the custom in Westminster-hall. In *Chamberlain and Thorpe's case*, 1 Leon. 130 (Cro. Eliz. 186, S. C.), which was debt in the King's Bench on a recognizance acknowledged before the Mayor of London, according to custom, at the conclusion, Ray says, "A more strange custom than this hath been allowed of here before, scil. that a feme-covert shall sue an action alone without her husband, for she is a sole merchant;" but this proposition seems to be overstated; for Gawdy, whose opinion, from what we know of him, is entitled to great respect, says, "A feme-covert may have an action within the city, but not here." I think it will be difficult to contend that the right to sue and the liability to be sued do not stand upon the same footing. Next comes *Stanton's case*, Moor, 135. That was covenant on an indenture of apprenticeship; the Defendant pleaded infancy, and the Plaintiff replied the custom of London which enables an infant to bind himself "apprentice by indenture with covenants, and that he shall be bound by the covenants as if he were of full age at the time of the indenture;" Fenner, for the Defendant, demurred, and one cause of demurrer was, "that such custom is solely in London, and not at the common law, and therefore it is pleadable in London and not here;" and for this he vouched 1 Ed. 4, where it was held that a feme-covert sole merchant is to be sued in London and not elsewhere, and he enumerated several other customs

pleadable only in the city courts. Walmsley for the Plaintiff did not deny the truth of the proposition, but took a diversity between the nature of the customs referred to and the one in question, viz. that the former were things executory and united to the courts in London, but that the latter was become chose fort and allowable in law, and so pleadable in every place within the realm. Now if the Court proceeded on that diversity, it will be impossible for the Plaintiffs here to argue that, because the indenture of apprenticeship bound the infant in Westminster-hall that a feme-covert shall therefore be bound there also, since the very authority on which the argument is founded proceeds on the distinction between those customs. At the end of the above [100] case it is said that Fleetwood, Serjeant and Recorder, moved for and obtained a procedendo in an action on the custom for contribution (which had been removed from the city court into the Common Pleas); "for," says he, "the Common Pleas cannot do right upon the said custom;" the meaning of which clearly is, that an action grounded on a custom united to the courts in London does not lie in the courts in Westminster hall, and I think that an authority for concluding that no declaration on that species of custom can be good in the courts above. Let us now look to the 1 Ed. 4, 5 b. referred to in *Stanton's case*. It was a writ of debt for tabling in London, and Littleton for the Defendant offered to wage his law; and on its being objected that it was for tabling in London, and that the Defendant by custom could not wage his law, Littleton urged that customs and usages which take effect in the court where the custom or usage is, and there begin to be of force, are only allowable in the court where they are used. This seems to be a good exposition of the expression employed in *Stanton's case*, of customs executory and united to the courts in London. Billing contended that the custom was allowable in the courts above, and said that a feme-covert sole merchant by the custom of London shall have an action without her husband, and an action shall be maintained against her alone without naming her husband, and that such custom is allowable here. But Danby, J., denies this proposition, and says that all good customs are pleadable in bar here, as if there be a recovery in London upon the custom, we allow the plea and the custom; but when the Plaintiff brings his action upon a custom which lies in the cognizance and allowance of a special judge, such action is not maintainable here. In *Snelling v. Norton*, Cro. Eliz. 409, it was held a good plea to debt on bond brought against an administrator, that by the custom of London if one citizen contract to pay money to another, and he who contracts die, his executor shall be chargeable as upon obligation, and that the Defendant's intestate had so contracted, and that the Defendant as administrator had been sued on such custom, and having paid what had been recovered against him, had no further assets. The Court gave as the reason for their opinion, that the custom had been executed against the Defendant. This is in perfect conformity to what was laid down by Danby: for a custom is executory which is united to a court, and it is executed when it has been acted upon by the court to which it is united. In *Luch's case*, 16 Jac. Hob. 247 (a) [101] the Court of K. B. said, "We in this court cannot examine the truth of the custom." The next case in point of time is *Langham v. le Femme de John Blewett*, Cro. Car. 67, Hetl. 9, and Littl. 31. It was a habeas corpus cum causâ to remove a feme-covert sued in London into the Common Pleas. Upon the return the custom of the city was stated: and though Richardson, Ch. J., who had taken bail de bene esse, on it being affirmed that she merchandized only for her husband, and was therefore out of the custom, and Yelverton, J., thought that she ought to be discharged: yet Hutton, Harvey, and Croke, Justices, thought that "forasmuch as the writ had returned that she was sued in London as a feme-sole merchant according to the custom of London, it was such an action and cause wherewith this Court ought not to meddle nor take consuance, nor can give the party relief although he hath good cause of action: for in London they are judges of their own customs, and by intendment will proceed in their courts there according to their customs, and not otherwise: and therefore we ought not to take away their privileges, nor remove the action out of their court where we cannot give remedy in this." They also added, that "it is reason to accept bail where an action cannot be grounded on that contract in this court." And the cause was remanded. At the conclusion of the case is cited

(a) The same case is inserted verbatim in Het. 132, as of Hil. 4 Car. C. B. under the title of *Lashe's case*.

Geppings v. Harding, M. 26 H. 6, Rot. 344: the circumstances of that case are not stated, nor is it to be found in the year-book. Probably, however, it was an action of trespass for taking the Plaintiff's goods: the Defendant set up a delivery by the Plaintiff's wife as a sole merchant by way of defence, and issue was taken on this point, whether she were a sole merchant or not. And where the custom comes collaterally in question, there is no doubt that the courts both of law and equity will find the means of ascertaining what the custom is. Then came *Moriton v. Packman et Uxor*, 2 Keble 583, and 1 Mod. 26, where a procedendo being prayed because the husband was not joined in an action for ale sold, the Court said, they could not try whether selling ale be within the custom, "nor will any action lie here against her alone, nor will this Court take notice of those private customs." Now although this was a case of procedendo, yet the proposition that the action would not lie here against the wife alone, is laid down as generally as terms can express it, and includes the supposition of the custom being stated on the record. In *Royston v. Ivory*, 3 Keb. 302, a procedendo having been prayed in the case of a feme-covert, [102] without the custom having been returned, the Court doubted whether they could remand the cause. With respect to their own jurisdiction, they had no doubt, but they said that they must be ascertained of the jurisdiction of the Court below: however, the custom being alleged on the declaration, they held that sufficient, and awarded the procedendo. It is to be observed that the custom in this case was alleged in the declaration, and yet the cause was sent back to be tried in the city courts. So also in *Soan and Mace*, Comb. 42, Holt, in moving for a procedendo in an action against a feme-sole merchant in London, alleged that by the custom of London it must be tried there; and upon this observation, which is all that is material in the case, his motion was granted. The last of the older cases to which I shall refer is *Mrs. Pool's case*, 11 Mod. 253; where it was observed by the Court that as a feme-covert sole-merchant "may be sued sole, so may she sue sole for debts owing to her within the city." But it is to be remarked that when we meet with the expressions of suing and being sued sole in the older books, they mean nothing more than this, that she may be sued in the manner in which a woman may be sued who is answerable without her husband: it does not therefore follow that the husband is not to be joined for conformity. I have not found any other authority on the subject till we come to the more modern decision of *Larrie and another, assignees of Jane Cox, v. Phillips and others, assignees of John Cox*, 3 Burr. 1776, and that is a material case. John Cox having become bankrupt, his assignees seized the goods of his wife Jane Cox, who had carried on trade after her marriage, as a sole merchant in London, and had also become bankrupt. The question was, Whether her separate effects could be applied towards the satisfaction of the debts of the husband in prejudice of her separate creditors? The question was not, Whether the wife could be sued in Westminster Hall without her husband? but it became necessary to examine the custom collaterally, in order to determine the right to the goods in question. The custom is there stated from the liber albus; which alleges, that if the husband and wife shall be impleaded, in such case the wife shall plead as a feme sole. The custom therefore supposes the husband to be joined in the action, and I understand that in practice the husband is joined as to all acts before the plea, and particularly in naming the attorney. The question was argued by the late Lord Chief Justice Eyre, then Recorder of London, who seems to have had no conception [103] that an action could be maintained in the city courts unless the husband were joined for conformity. Mr. Dunning, who argued on the other side, put the right of suing and the liability to be sued as a sole merchant upon the same footing, and stated them both to be confined to the city courts. Lord Mansfield says, "The feme-sole trader in London, under this custom, must indeed bring her action in London, but such custom would be allowed in any other court in a defence by the husband." This is a clear exposition of the language used by Walmsly in *Stanton's case*, and by Danby in the year-book, that customs united to the city courts are executory and pleadable there only, but that such customs, if acted upon in those courts, may be pleaded in the superior courts as matter of defence. Wilmut, J., says, "These customs, though local, are to be considered as allowable under the general law of the land when they come in question in other courts, though the action must be brought in the local court." And Yates, J., says, "That an action on the custom can only be brought in the mayor's court of London, but the custom may be pleaded in bar in a superior court by way of defence, and in such cases the superior court will take notice of the

custom." The language here used with respect to the custom being put on record by way of a defence, will not support the proposition, that when the custom is made the ground of action, it may be allowed in the superior courts, because put upon the record: for it is impossible to suppose that these great and learned persons would have stated the manner of putting the custom on record by way of defence, and at the same time have treated it as incapable of being made the ground of action. Indeed, Mr. Justice Blackstone, in his report of the same case, p. 574, states Lord Mansfield to have said, "Any action that is brought against the wife by her creditors must be in the city courts; but the custom being a good one, use may be made of it in any court in the kingdom." And the words of Mr. Justice Yates, according to the same report, are still stronger, and shew with what diligence he had looked through the older cases, without a knowledge of which they are not altogether intelligible. His words are, "Custom of London may be pleaded in bar: while the custom is executory it can only be alleged in the mayor's court: when executed, it may be pleaded in any other court." And it appears that the Court there considered the custom as executed, in the circumstance of the assignees of the wife having possessed themselves of her property, and that the custom was therefore examinable in the supe-[104]-rior courts in a case where it came collaterally before them. The next case to be considered is *Read v. Francis Jewson*, as stated by Mr. Justice Buller, in 4 Term Rep. 362. That was a motion to set aside a judgment entered upon a warrant of attorney given by the Defendant a sole trader under the custom of London, at the same time with a bond in which she was described milliner, citizen, and sole trader. In the judgment it was stated that she was a feme-covert sole trader, and that the money mentioned in the bond was advanced to her touching her craft. The objections to the judgment were, that it was not entered pursuant to the authority, that the husband ought to have been impleaded jointly with the wife, though execution must be against the wife only; and that the action was not maintainable in the King's Bench, but ought to have been brought in the court of the city of London: the Court thought that the husband alone could be prejudiced by the judgment, and had a right to bring a writ of error to reverse it, but if he acquiesced they were inclined to think that the judgment ought to stand. However, they ordered the case to stand over in order to hear what the husband had to say: and when the matter came on again the husband appeared, and declared that he consented to the motion. Lord Mansfield then observed that it was an application to set aside a judgment entered up without authority. He observed also, that no instance had been shewn in which a feme-covert sole trader could execute a bond; and though she is liable to simple contract debts, she cannot give a bond. And he went further and said, "A married woman cannot be made Defendant without her husband." Whatever may have been determined in subsequent cases, we have here the authority of Lord Mansfield himself for this proposition, that in an action on the custom of the city of London a married woman cannot be made Defendant without her husband." Lord Mansfield also says, "She cannot give a warrant of attorney to confess judgment; and if she cannot, how can she make an attorney in Westminster-hall?" Mr. Justice Aston added, "By the better authority it seems that the action ought to be brought in the city courts, and the husband ought to be joined. It is a principle of the common law that a woman shall never be put to answer without her husband." And he concluded with saying, that the warrant of attorney "was an absolute nullity." The case of *Pope v. Vaux*, 2 Bl. 1060, may be cited to shew that it was considered to be a matter of course to remand an action upon the custom removed from the city court [105] into the Court at Westminster. Lord Ch. J. De Grey in the case of *Hutchett v. Baddeley*, 2 Bl. 1081, says, "The general law is, that a feme-covert can neither sue nor be sued alone; and, amongst the exceptions to that rule, takes notice of local customs, as in the city of London, where a feme-covert being a sole trader may be sued; but there the husband must be joined in the action at the outset for conformity." The first case in which the question, whether a feme-covert, having a separate maintenance, could be sued without her husband, seems to have distinctly arisen, is *Lean v. Schultz*, 2 Bl. 1195. The case, indeed, was decided on the form of the record rather than on the real merits of the question; but there are some passages which are very material. The Court say, "The whole is totally vicious, as the husband is not party to the record: and there is no instance in the books of an action being sustained against the wife, the husband being living, at home, and under

no civil disability." Whether this proposition be maintainable as the law stands at the present day, or whether deeds of separate maintenance (if that can be called a deed which is executed by a married woman,) have introduced an exception to it, I do not pretend to determine. But the very next passage in that judgment is, "even by the custom of London, though the wife and her effects are alone liable to execution if she be a sole trader, yet the husband must be a co-defendant. And though a wife may acquire a separate character by the civil death of her husband, as by exile, profession, or abjuration; yet by a voluntary separation she does not acquire such a character as may be called a civil widowhood, nor is taken notice of by the law as such." Then came the case of *Ringstead v. Lady Lanesborough* (Cooke, B. L. 26, ed. 4): notwithstanding the difficulties stated by Mr. Justice Blackstone at the end of *Hatchett v. Baddeley*, as resulting from the doctrine of allowing a feme-covert to be sued alone, and notwithstanding what was said in *Lean v. Schultz*, yet in *Ringstead v. Lady Lanesborough* those two cases were considered as having decided nothing in a case of a married woman having a separate maintenance by deed. If that case be law, it is perhaps the only instance in which the husband and wife may not plead non est factum to a deed executed by the latter. But admitting that case to be good law, yet it does not follow that in the particular case before the Court a feme-sole trader can be sued without her husband in Westminster-hall, unless it can be made out that the custom of the city does not require the husband [106] to be joined in the city courts, or unless it can be shewn that she stands on the same footing in Westminster-hall as if she had executed a deed of separation. That such was not the opinion of Lord Mansfield appears from his own words in *Ringstead v. Lady Lanesborough*, which I state from a note of that case with which I have been favoured by my brother Buller. "This case," he says, "is not analogous to the case of a feme-sole trader in London. There the husband has not given up the right to the society of his wife, or to her property in trade." Then I find the authority of Lord Mansfield for saying, that if that had been the case of a feme sole trader, the husband must have been joined. I have also been favoured with a note of *Barwell v. Brooks*, from the same learned Judge. In that case, and as I think for the first time, we find a proposition stated which was made use of in the course of the argument for the Plaintiffs in this case, namely, that it is absurd to join a party in the action against whom there can be no judgment. This is the only scintilla of a principle which I have been able to find any where to support the proposition that the husband ought not to have been made a party to this suit. If this objection be valid, it applies strongly to this case; for certainly there can be no judgment against the husband here. But the question is, Whether upon the authority of this single dictum we are to overturn the series of determinations which I have traced from the 1 Edw. 4 to the present day. Soon after this *Corbett v. Poelnitz*, 1 Term Rep. 5, was decided. These three cases certainly tend to establish this point, that a married woman having a separate maintenance by deed, may make an attorney in the courts of Westminster-hall as if her husband was professed, exiled, or had abjured the realm, or as if she had never been married. Without saying one word more on these cases, which are likely soon to come under discussion before all the Judges; (a)—without presuming to say how the difficulties enumerated by Mr. Justice Blackstone in *Hatchett v. Baddeley*, and the additional difficulties stated by the Master of the Rolls in *Hyde v. Price*, 3 Vez. jun., are to be surmounted, or how these cases are to be reconciled with the judgment of the Court in *Lean v. Schultz*, or with the policy of the law of this country, respecting the relations which it forms in private families, constituting together [107]—that great family called the public;—without inquiring how far in these cases the Courts of Common Law have given a remedy against a married woman beyond what the Courts of Equity would afford;—without examining how it is to be argued that a feme-covert can execute a deed of separation, when, in order to execute any deed, she ought to be a feme-sole;—without inquiring how we are to maintain that her contracts are good, because she is in a state of separation, her existence in that state originating in a deed

(a) At this time the case of *Marshall v. Mary Rutton*, in which judgment has since been given in K. B. (see 8 Term Rep. 545), was pending before the twelve Judges. The decision in that case establishes, that a feme-covert living apart from her husband, and having a separate maintenance secured to her by deed, cannot contract or be sued as a feme-sole.

or contract executed and entered into before she is separated;—without saying what answer we are to give to the Ecclesiastical Courts, if, upon a suit of restitution of conjugal rights, they should hold that it is not in the power of the parties themselves to dissolve by voluntary separation this obligation to discharge the duties arising out of that particular contract which was formed in the presence of God;—without inquiring whether if those Courts should refuse to admit, as a cause of separation, any circumstances upon which they would not decree a separation, the Courts of Common Law would grant a prohibition to prevent their proceeding in a suit for restitution of conjugal rights;—without examining how far the case of *Rex v. Mead*, 1 Burr. 542, which establishes, that a man having agreed to live separate from his wife, shall not by force compel her to return to him, has or can have established that a deed of separation executed by a feme-covert binds her as her deed, and as effectually as if she was single, and ought to be enforced by courts of justice through all its consequences;—without examining at present what is the true principle to be deduced from these and all the subsequent cases capable of being applied to the contracts of married women having executed deeds of separation and having certain and ample or reasonable maintenances, or having uncertain or insufficient provisions, having property, or not having property by the gift of the husband, having annual allowances undiminished or altogether anticipated by reasonable or unreasonable expense;—without examining how these and all the subsequent cases can possibly be reconciled, and how far we can apply that principle, whatever it may be when once ascertained, only to the contracts of such married women, or to their other acts also of whatever nature, or how it is to be applied to their property;—without saying more on these cases, it is enough for me to take notice that Lord Loughborough in *Compton v. Collinson*, 1 H. Bl. 350, has expressed himself of opinion that the cases alluded to are not to be considered as completely settled, and that the same learned Lord in a subsequent case of *Legard v. Johnson*, [108] 3 Ves. jun., 358, declared that he had infinite difficulty in conceiving it possible to decree performance of a deed of separate maintenance;—it is enough for me to observe that in *Hyde v. Price*, 3 Ves. jun. 444, as laborious and diligent a judge as ever sat in Westminster-hall, the present Master of the Rolls (after adverting to the cases of *Corbett v. Poelnitz*, *Hatchett v. Baldeley*, and *Lean v. Schultz*, and observing, that Mr. Justice Blackstone, in his last edition of his Commentaries, continued to state his text conformably to the opinion delivered by him in the Court of Common Pleas, and after referring to *Cudell v. Shaw* and *Read v. Jewson*, to obviate the conclusion that it is so fully established as the editor of the last edition of the Commentaries supposes, that a feme-covert with a separate maintenance by deed is to all intents and purposes a feme-sole,) says thus much, “In every one of the cases that have occurred it has been uniformly understood, that the act of the wife, or of the husband and wife jointly, cannot either by custom or contract, or otherwise, make her a feme-sole so as to be subject to the process of the law as such, and to be sued as femes-sole are sued. The same doctrine as that of *Corbett v. Poelnitz* came before the Court of King’s Bench in *Gilchrist v. Brown*, 4 Term Rep. 766, and *Ellah v. Leigh*, 5 Term Rep. 679. The Court evaded the question how far *Corbett v. Poelnitz* was to be acquiesced in to his full extent: but Lord Kenyon shews that he entertained a doubt upon the subject: which is all I wish to have understood; that it may not be considered as quite acquiesced in.” I conclude, therefore, that these cases are not settled; and even if they were settled, still if the custom of London be that the husband must be joined with the wife to the extent of making the attorney who is to defend her, these decisions will decide nothing as to the case of a feme-sole merchant in London sued without her husband in Westminster-hall. This brings me to the case of *Cudell v. Shaw*, which is the last I shall have occasion to mention, and which was subsequent in point of time to *Corbett v. Poelnitz*, and the other two cases on which I have observed. That case proves that a feme-covert sole trader in London cannot sue without her husband in the courts at Westminster. And if this be so, I think the converse necessarily follows, that she is not liable to be sued there without him. In this view of the case it becomes unnecessary to advert to what has been intimated upon the count upon an account stated. With respect to the argument of inconvenience, which has been urged, it is sufficient to say, that if the law has decided that a feme-sole trader in London cannot be sued [109] elsewhere than in the city courts, those who deal with her must take their remedy as the law has given it to them. Whatever may be the effect of the prevailing fashions of the times, I do not

think that the argument of inconvenience, arising out of those fashions, can at any time be relied upon against a current of decisions: and I am ready to say, that if the policy of the law has withheld from married women certain powers and faculties, the courts of law must continue to treat them as deprived of those powers and faculties, until the legislature directs those courts to do otherwise. Much of what has been said ought perhaps to be considered as affecting my judgment only: upon the whole, however, we are all of opinion that the judgment of the King's Bench in this case must be reversed.

Per Curiam. Judgment reversed.

STEVENSON v. DANVERS. Feb. 8th, 1800.

A. B. having been arrested, on a *capias* sued out against him by the name of B. C.; a bail-bond was given, by which A. B. arrested by the name of B. C. became bound, conditioned for the appearance of A. B. arrested by the name of B. C. The affidavit to hold to bail named the Defendant properly A. B. The Court amended the *capias* and return, and rejected an application by the bail to set aside the bail bond; but without prejudice to the sheriff(a).

The Defendant in this case was arrested on a writ sued out against him by the name of the Honourable George Augustus Richard Danvers, and a bail bond was entered into by which the Honourable Augustus Richard Butler Danvers, arrested by the name of George Augustus Richard Danvers, together with his bail, became bound to the sheriff of Middlesex in the sum of 8000*l.* conditioned for the appearance of the said Augustus Richard Butler Danvers, arrested by the name of George Augustus Richard Danvers. The real name of the Defendant was Augustus Richard Butler Danvers, and in that name the affidavit to hold to bail was made.

On account of this variance in the process, a rule nisi was obtained on a former day to discharge him, on entering a common appearance, and at the same time the Plaintiff in the action obtained a rule nisi to amend the writ.

In support of the former rule, Shepherd, Serjt., contended, that the writ must be founded on the affidavit to hold to bail, for that as by the 5 Geo. 2, c. 27, no person can be holden to bail for any sum under 10*l.* without an affidavit, in this case either the writ or the affidavit must be held to be good for nothing, and the Court must either supply a new affidavit or a new writ. He urged that if the amendment were allowed it would operate to the injury [110] of the bail, who might have been willing to enter into the bail bond having a knowledge that the writ was defective, but would not have done so otherwise. He added that in this case there was nothing to amend by as the affidavit to hold to bail does not appear upon record.

Bayley, Serjt., *contrà*, cited *Browne v. Hammond*, Barnes, 10. *Hunt v. Kendrick*, 2 Bl. 836. *Newham v. Law*, 5 Term Rep. 577. *Bourchier v. Wittle*, 1 H. Bl. 291, and *Carr v. Shaw*, 7 Term Rep. 299.

The Court thinking that as the affidavit to hold to bail was right there could be no question arising upon the statute which requires the affidavit to hold to bail, and that the writ might be amended thereby, discharged the rule for entering a common appearance, and made the rule for the amendment absolute, without prejudice to any application which the bail might make on their own behalf.

Afterwards Shepherd, on the part of the bail, obtained a rule to shew cause why the bail bond should not be cancelled; and Bayley at the same time obtained a rule to shew cause why the sheriff should not amend his return in order to make it conformable with the amended writ.

When these rules came on to be discussed, Shepherd was called upon by the Court to begin. Unless the arrest was warranted by the process at the time when it was made, it must be bad altogether: and giving a bail bond can be no waiver of any defect in that process. The distinction is between an irregularity and a defect in the process; the former of which may be waved, but the latter not. *Goodwin v. Parry*, 4 Term Rep. 577, and *Hussey v. Wilson*, 5 Term Rep. 254. Indeed in every case of an application to cancel the bail bond for an irregularity in the proceedings, the argument would

(a) Vide *Atkinson v. Newton*, post. 336. *Smith v. Innes*, 4 M. & S. 360. *Wilks v. Lorck*, 2 Taunt. 399.

apply that the irregularity has been waived by the act of giving a bail bond. In fact waver is doing something after an irregularity committed, where the irregularity might have been corrected before such act done. Analogous to the rule in the cases cited, is that which has been adopted in the case of supplemental affidavits, which are always refused where the original affidavit is defective, and only allowed where they are ambiguous, *Green v. Redshaw* (ante, vol. i. 228). The engagement of the bail is, that the Defendant shall appear if he has been properly arrested (b).

[111] Bayley was stopped by the Court.

Best, Serjt., on the part of the sheriff observed, that by the statute of 23 H. 6, c. 9, the bail bond and the process must correspond; that in the present case the bail bond did correspond with the process as originally issued, but that in consequence of the amendment which had taken place, a variance had been created between the writ and the bail bond, which would prevent the sheriff from bringing an action on the latter.

Upon this the Court discharged the rule for cancelling the bail bond, and made absolute the rule for amending the return, but ordered that it should be inserted as a term in the latter rule, that no proceedings should be had against the sheriff without special notice being first given to the Court.

AUDLEY v. DUFF. Feb. 10th, 1800.

Policy on the "Ceres" "at and from Oporto to Lynn, with liberty to touch at any ports on the coast of Portugal to join convoy particularly at Lisbon; at 12 guineas per cent. to return 6l. if she sail with convoy from the Coast of Portugal and arrive." The "Ceres" sailed from Oporto with a sloop and cutter appointed to protect the trade of that place to Lisbon, from whence it was to proceed with the Lisbon trade under a larger convoy for England. In the way from Oporto to Lisbon the fleet was dispersed by a storm, and the "Ceres" judging for the best, run for England and arrived. Held that the assured was entitled to a return of premium.

This was an action for return of premium. The policy was on the ship "Ceres" "at and from Oporto to Lynn, with liberty to touch at one port before Lynn, to deliver wines, and to proceed and sail to and touch and stay at any ports or places whatsoever on the coast of Portugal to join convoy particularly at Lisbon;" with this clause on which the present question arose, "at the premium of twelve guineas per cent. to return 6l. if the 'Ceres' sail with convoy from the coast of Portugal and arrive" (a).

The cause was tried before Lord Eldon, Ch. J., at the Guildhall Sittings after Michaelmas term, when the following circumstances appeared in evidence.—Lord St. Vincent having the command on the Lisbon station, and finding himself unable to afford separate convoys for England to all the ports upon the coast of Portugal, directed the "Speedy" cutter and "King's-fisher" to go to Oporto and convoy the trade of that place from thence to Lisbon, where they were to lie in the Bay Doyras, without entering the port of [112] Lisbon, so as to become chargeable with the Lisbon duties. From that place the "Romulus," "Argo," and "Alliance" were ordered to convoy the whole trade on their way to England; and off the Scilly Isles the "Romulus" was to leave them, and protect the ships bound for Ireland to their place of destination. The Oporto fleet in proceeding to Lisbon being dispersed, lost the convoy, and the "Ceres" then judging for the best, run for England and arrived. At the time when the captains of the Oporto trade left that port, they conceived that they were to proceed direct for England, and did not learn the contrary until they received their sailing instructions. It was within the knowledge

(b) In *Gardiner v. Dudley*, 2 Show. 51, it is said that "the bail bond to the sheriff is to make the Defendant appear according to the writ and not according to the condition of the bond."

(a) At the time the rule nisi was obtained in this cause, a like motion was made in a case of *Everard v. Hollingworth*, the circumstances of which were precisely similar with this, except that in the clause for return of premium the words used were "depart with convoy from Portugal" instead of "sail with convoy from the coast of Portugal." The two cases were now argued together, but it was admitted by the bar and the bench that the two expressions were the same in effect, and that the same construction must prevail in both cases.

of all parties when the policy was under-written, that the coast of Portugal was much infested with privateers. The counsel for the Defendant contended that the "Ceres" never left the coast of Portugal with convoy. The Lord Chief Justice directed the jury, that as the Oporto trade had put themselves under the convoy of the "Speedy" cutter and "King's-fisher" which formed one part of the aggregate convoy for England, they had thereby deprived themselves of all power of acting for themselves, and had therefore taken their departure from the coast of Portugal with convoy. He observed that the liberty given to the "Ceres" by the policy to touch at other ports on the coast of Portugal, did not vary the inference with respect to her being under convoy for England from the moment that she received sailing instructions. A verdict was found for the Plaintiff, with liberty to the Defendant to move for a nonsuit.

Accordingly a rule nisi having been obtained for that purpose on a former day ;

Shepherd and Bayley, Serjts. now shewed cause. It appears from the cases that a ship is held to have sailed on her voyage when she has quitted her port of loading. *Bond v. Nutt*, Cowp. 601, and *Thellusson v. Fergusson*, Doug. 361. And if she sail with a convoy appointed by Government, however that convoy be constituted, it is a fulfilment of a warranty to sail with convoy. *Smith v. Redshaw*, Park. Insur. 349, and *De Garay v. Claggett*, *ibid.*(a). These authorities shew that the "Ceres" did depart from Oporto with convoy for England. All connection with the coast of Portugal was at an end as soon as she had taken her departure from Oporto; and though she was proceeding to the Bay Doyras in pursuance of her sailing orders at the time when the fleet was dispersed, she was [113] not the less upon her voyage to England. Had she been ordered by her convoy to pursue any other course, she must have obeyed, and though the course prescribed might have been very much out of her way, yet she would not have been guilty of a deviation. The clause for return of premium on which this question arises must receive one of three constructions; 1st, if the ship sail with convoy from that port on the coast of Portugal from which the Oporto convoy shall sail; 2dly, if she sail with convoy from any port on the coast of Portugal; and 3dly, if she sail with convoy from the last port on the coast of Portugal, at which the convoy shall touch. If either of the two former constructions be correct, the Plaintiffs are entitled to recover; and it is hardly to be supposed that the underwriters when the policy was effected contemplated the third, since it was well known to them that the coast of Portugal was infested with privateers, and it was not therefore their interest to allow the "Ceres" to go from Oporto to Lisbon without convoy, in order to gain the return of premium by departing from thence with convoy.

Vaughan and Lens, Serjts., in support of the rule. It may be admitted that when the "Ceres" sailed from Oporto with the "Speedy" cutter and "King's Fisher," she sailed with convoy on the voyage insured. The question is, whether the sailing from Oporto was a sailing from the coast of Portugal? That was a condition precedent, and unless strictly complied with the Plaintiff cannot recover. The underwriters appear to have had two risks in contemplation; 1st, while the ship was on the coast of Portugal, touching and staying at the ports there, until she had taken her final departure from thence; 2dly, from such final departure till her arrival in England: and it was in consideration of being relieved from a part of the latter risk that the premium was to be returned. Now though it may be allowed that in a general sense the convoy from Oporto was a convoy for England, yet it may be also considered in a more limited sense, as a convoy along the coast of Portugal: and it is very clear that the underwriters did not mean the proviso for a return of premium to attach until the "Ceres" had taken her departure from the coast with convoy across the Atlantic. A policy of insurance is an instrument in which matters are expressed with peculiar conciseness. The Court therefore will be inclined to give effect to every word employed: but in this case the words "from the coast of Portugal" must be struck out unless they be construed to mean "from the district of Portugal."

[114] LORD ELDON, Ch. J. After all the consideration which I have been able to bestow upon this subject, I remain of the same opinion which I entertained at the trial, and therefore think that the case was properly decided by the jury. The case

(a) Vid. et. *D'Eguino v. Bewiske*, 2 H. Bl. 551. Park. Insur. 349 a. and *Hibbert v. Pigow*, *ib.* 339.

is neither more nor less than this. From the disposition of the enemy's force it happened that we had many merchant ships collected in the various ports of Portugal. Lord St. Vincent as commander upon that station, was to provide a convoy for them in such a manner as he should think best. With respect to many of those ships, it could hardly be ascertained, at the time when the policies were underwritten, in what ports they were; though indeed it was understood that the "Ceres" was at Oporto. The uncertainty therefore under which the parties laboured, respecting the manner in which the convoy would be formed, and the place from which it would depart, created the necessity of employing the expressions which have been introduced into this policy. The assured agreed that on the ship being insured from the port in which she then was to Lynn, the underwriter should have 12 guineas per cent.; but that in case the voyage was undertaken with convoy, there should be a return of 6l. per cent. It being unknown from what port on the coast of Portugal the convoy would sail, the clause for the return of premium was to be adapted to the circumstances of the case. The departure with convoy might be from Oporto, or it might be from some other place; it became necessary therefore to introduce some expression which extended to something more than a mere departure from Oporto. Had the insurance been from Portugal, the introduction of the words, "from the coast of Portugal," might have furnished an argument in the Plaintiff's favour. But the insurance being from Oporto which is a port on the coast of Portugal, it may be inferred that the assured intended to claim a return of premium, not only if the ship departed from Oporto with convoy, but if she departed with convoy from any port on the coast of Portugal, not excluding Oporto. With respect to the liberty given by the policy to touch and stay at any ports on the coast of Portugal, I think it quite clear that when the ship departed from Oporto with convoy, that liberty was at an end. It must be understood that such liberty was given to the "Ceres" when not under convoy; for then only would she be in a situation to exercise it. Having in this case departed from Oporto with convoy, the policy must be considered as if the above mentioned liberty had never been conceded. The only fair interpretation of the agreement is, that the [115] assured should have the benefit of the policy, though she sailed from Oporto without convoy, but that if the "Ceres" sailed from Oporto, which is on the coast of Portugal, with convoy, then there should be a return of premium.

HEATH, J. This question is new in specie because it has arisen on a transaction which never happened before. It had been usual for ships to go from Oporto to Lisbon to meet with convoy. But in the present instance it was thought proper, on account of the number of privateers, to send the "Speedy" cutter and "King's Fisher" to collect the trade. There are however established principles on which this case must be decided. It has always been understood that provisions for a departure with convoy have relation to the custom of trade and the orders of government, and ought therefore to receive a liberal construction. There are many instances in Park's Insurance where ships having been warranted to depart with convoy from the port of London, but the convoy having been appointed to sail from the Downs, or from Spithead, reference has been had to the orders of Government, and the warranties have been held to be fulfilled by joining convoy at those places (a). It was contended that we should in effect strike out some of the words of the policy if we decided in favour of the Plaintiff: but that argument, if just, would apply to those cases to which I have alluded where ships have been warranted to depart with convoy from the port of London. The question is, what was to be the terminus a quo? as to which I think the cases cited are directly in point. I am clearly of opinion that the event has happened on which the contract for a return of premium was to attach, and if any doubt could be entertained upon the words, they must be construed most favourably for the assured. The underwriters engaged to return the premium, and *verba fortius accipiuntur contra proferentem*.

ROOKE, J. Since this rule was first moved for I have entertained some doubts upon the subject, but am now satisfied that the verdict is right. The premium was given on a war risk: the "Ceres" therefore was at liberty either to touch and stay at any of the ports of Portugal, with a view to obtain convoy, or to sail direct for England without convoy; but if she obtained convoy then a part of the premium was to be

(a) *Vid. Lethulier's case*, 2 Salk. 443, and *Gordon v. Morley*, 2 Str. 1265, and *Park Insur.* 344.

returned. Now in this case there was a convoy appointed by relays to protect the trade to England; and [116] the captain of the "Ceres" having sailed with that convoy with a bonâ fide intention to proceed for England, the proviso for a return of premium has been complied with. Had the ship been warranted to depart with convoy, she would have been under the necessity of leaving Oporto with the "Speedy" cutter and the "King's Fisher;" and her so doing would have amounted to a fulfilment of the warranty. It is true that the policy is made by the broker of the assured; but the undertaking to return the premium is the undertaking of the underwriters, and must therefore be construed most strongly against them.

Rule discharged.

WHITE v. WILSON. Feb. 11th, 1800.

Declaration by a sailor for wages and the average price of a negro slave earned "during a certain voyage from the port of London to the coast of Africa, and from thence to the West Indies:" at the trial it appeared from the articles that the voyage was, "from the port of London, upon an intended voyage to the coast of Africa for slaves, from thence to the West Indies or America, and afterwards to London in Great Britain, or to her delivering port in Europe," and that no mention was made in the articles of the average price of a negro-slave: Held that the variance between the description of the voyage in the declaration and the articles was fatal, though the captain put an end to the voyage in the West Indies, and discharged the crew there, and though the description of the voyage in the declaration was under a scilicet; held also that the contract for the average price of a negro slave in addition to the wages was void, not being included in the articles according to the 2 Geo. 2, c. 36 (a).

Assumpsit. The 1st count of the declaration stated "that heretofore, to wit, on, &c. at, &c. in consideration that the Plaintiff on the retainer and at the special instance and request of the Defendant, would enter himself and serve as chief mate of and on board a certain ship called the "Swallow," whereof the defendant was master, during a certain voyage, to wit a certain voyage from the port of London to the coast of Africa, and from thence to the West Indies which the said ship was then about to make, during which said voyage certain negro slaves were intended to be purchased on the coast of Africa, and to be carried and conveyed from thence in the said ship to the West Indies, and there, to wit, in the West Indies aforesaid, to be sold, he the Defendant, undertook and promised the Plaintiff to pay him at and after the rate of 6l. by the month, for each and every month during the said voyage, and also so much money as should be the average price, at and for which one of the said negro slaves, so to be purchased, carried, conveyed, and sold as aforesaid, should be sold in the West Indies aforesaid:" it then averred that the Plaintiff did enter himself as chief mate, and that the ship sailed from London, on her said intended voyage, "and in the course thereof proceeded to Africa aforesaid, and from thence to the West Indies aforesaid, and there, to wit, at the West Indies aforesaid, afterwards, to wit, on, &c. completed and ended the said voyage, the same having continued a long space of time, to wit, the space of eleven months;" [117] that the Plaintiff served as chief mate during the said voyage; that divers negro slaves were purchased on the coast of Africa, and carried to the West Indies, and there sold, and that the average price for which they were sold was 53l.; that by reason of these premises the Plaintiff became liable to pay 66l. in respect of the monthly wages, and 53l. as the average price of a negro slave. The 2d count stated the Defendant to have promised "that over and above certain sums of money, at and after a certain rate by the month then and there agreed to be paid by the Defendant to the Plaintiff, in respect of his said service during the said last-mentioned voyage, he the said Defendant would pay to the said Plaintiff, so much money as should be the average price, at and for which one of such negro slaves to be purchased, carried, conveyed, and sold as last aforesaid, should be sold in the West Indies aforesaid;" in all other respects it resembled the 1st count. There were also counts in indebitatus assumpsit for wages, work and labour, money paid, had and received and on an account stated. Plea, non assumpsit.

(a) And see *Penny v. Porter*, 2 East, 2. *Miles v. Sheward*, 8 East, 7.

At the trial before Lord Eldon, Ch. J., at the Guildhall sittings after last Hilary term, it appeared on the production of the ship's articles, that they were intitled "Articles of Agreement between the master, officers, mariners, seamen and seafaring men of the ship 'Swallow,' bound from the port of London, upon an intended voyage to the coast of Africa for slaves, from thence to the West Indies or America, and afterwards to London in Great Britain or to her delivering port in Europe;" and that the rate of wages inserted in them, agreed with that claimed in the 1st count, but no mention was therein made of any sum of money to be paid to the Plaintiff, as the average price of a negro slave. It was then proved that the chief mate on board ships employed in the slave trade, usually receives in addition to his wages the average price of one or two negro slaves according to his contract, provided he does not misbehave himself, and that in this case the Defendant had agreed to allow the Plaintiff the average price of one negro slave beyond his wages. It was also in evidence that the captain on his arrival in the West Indies, broke up the voyage and discharged the crew. Two objections were made to the Plaintiff's recovery; 1st, that as the 2 Geo. 2, c. 36, had provided that all agreements for wages between captains and their crews should be made in writing, the contract for the average price of a negro slave, could not be superadded to the articles; 2dly, that there was a material variance between the descriptions of the voyage [118] in the declaration and the evidence. A verdict was found for the Plaintiff, with liberty to the Defendant to move for a nonsuit.

A rule nisi for that purpose having been obtained;

Lens and Bayley, Serjts., now shewed cause; and observed that the articles produced at the trial which bore date the day after that on which the 37 Geo. 3, c. 90, imposing a new stamp, took effect, had only the old stamp; they contended therefore that as by the 2 Geo. 2, c. 36, s. 8, it is provided, that the articles shall be produced by the master, and that the seaman shall not fail in his suit for want of such articles being produced, the fair construction of that clause was, that the articles should be produced in such a state as to be good evidence, but that not having the proper stamp in this case, they must be considered as not having been produced at all, and consequently the objection of variance between the declaration and the articles did not arise. [But the Court said, that if the Plaintiff were permitted to go into parol evidence wherever the articles produced were on an improper stamp or otherwise defective, it would amount to a repeal of those legislative provisions which direct that such agreements shall be in writing and in a certain form.] They then contended, 1st, that the 2 Geo. 2, c. 36, applies only to contracts for wages in the strict sense of the word, and not to any collateral perquisites agreed upon between the parties, which need not be specified in the articles; 2dly, with respect to the variance, that the contract in question was originally in the alternative, and might terminate in the West Indies, and therefore the voyage which was the true consideration of the Plaintiff's demand, and so understood between the parties, was correctly set out; or at any rate being only introduced in that part of the declaration, which states the inducement for making the contract, and under a scilicet, it might be rejected as an immaterial averment (a); for as it would have been sufficient to have alleged generally "a certain voyage," and then to have proved that voyage from whence the earnings accrued, the declaration might be read so as to avoid the variance by leaving out the description of the voyage. They observed that in *Bristow v. Wright*, Doug. 665, the variance which was there held fatal, was not under a scilicet, and referred to the several cases of *Savage v. Smith*, 2 Bl. 1101. *Frith v. Gray* cited in the note to *Dreury v. Twiss*, 4 Term Rep. 561, and [119] *Peppin v. Solomons*, 5 Term Rep. 496, to shew that an averment need not be proved where the declaration can be deemed perfect without it.

Shepherd and Vaughan, Serjts., contrâ, after citing *Webster v. De Tastet*, 7 Term Rep. 157, where three privilege slaves agreed to be given in addition to wages, were held to be wages, and therefore not insurable, were stopped by the Court.

LORD ELDON, Ch. J. I was rather of opinion at the trial that this voyage was capable of being represented merely as a voyage from London to Africa, and from thence to the West Indies: and that although the voyage described in the articles

(a) If an averment be material, putting it under a scilicet will never make it immaterial. *Pope v. Foster*, 4 Term Rep. 590. *Grimwood v. Barritt*, 6 Term Rep. 460. *Johnson v. Pickett*, E. 25 Geo. 3, B. R. cited per Lawrence, J. 6 Term Rep. 463.

was a voyage from the port of London to Africa, from thence to the West Indies or America, and afterwards to London in Great Britain or to her delivering port in Europe, yet that the latter part of the description was not binding in a case in which there was no delivering port in Europe, the captain having broken up the voyage in the West Indies, according to the option which seemed to have been vested in him. I doubted whether it was not a contract in the alternative; and if so, whether it was not sufficient to describe that voyage which had really taken place (a). I am now, however, inclined strongly to a contrary opinion, and think that the declaration should have specified the agreement as it was stated in the articles. The contract in the alternative should have appeared upon the record, and the fact of the voyage having terminated in the West Indies should have been averred. And this will be found to be the more necessary, if we attend to the policy of the various acts of parliament which have provided different forms of articles for different voyages. With respect to the additional perquisite of the average price of a negro slave, it is impossible to consider it in any other light than that in which it was considered in *Webster v. De Tastet*, namely, as wages. If the le-[120]-gisature have decided that all agreements for wages shall be in writing, and the practice be not to put in writing contracts for the price of one, two or more slaves, that practice, if allowed to prevail, may be made the means of evading the provisions of the act.

HEATH, J. I am of the same opinion. It is not sufficient for the Plaintiff to state in his declaration "a certain voyage," as the consideration of his wages; but he must specify what that voyage was.

ROOKE, J. Of the same opinion.

Rule absolute.

GOODTITLE, EX DEM. WANKLEN, v. BADTITLE. Feb. 11th, 1800.

Affidavit of service in ejectment made by a person who saw the declaration served and heard it explained to the tenant in possession, is sufficient to entitle the Plaintiff to judgment against the casual ejector.

Williams, Serjt., moved for judgment against the casual ejector, and mentioned that the affidavit of service was not made by the person who served the declaration, but by a person who swore that he saw the tenant in possession served, and heard the person who served him with it acquaint him with the true intent and meaning of the declaration and notice.

The Court held this affidavit sufficient.

W. MAINWARING, G. B. MAINWARING, AND T. CHATTERIS v. NEWMAN.
Feb. 12th, 1800.

[Discussed, *Boyce v. Edbrooke*, [1903] 1 Ch. 842. Referred to,
Ellis v. Kerr, [1910] 1 Ch. 537.]

Assumpsit by A. B. and C. against D. as one of the indorsers of a promissory note drawn by E. in favour of C. D. and (himself) E. then in partnership and by them

(a) See *Layton v. Pearce*, Doug. 15, where it was decided in the case of an alternative contract, that the party who had not the option, could not state it as an absolute contract. Lord Mansfield, indeed, there laid down that if the option had been in the party pleading, it had been otherwise. On the authority of this dictum it was contended, in *Churchill v. Wilkins*, 1 Term Rep. 447, that a contract in the alternative, where the option is in the party pleading, may be stated as an absolute contract; and this seems to have been admitted by Buller, J.; for his reasoning went to shew that the contract in that case which was "to deliver tallow at 4s. per stone, and so much more as the Plaintiff paid to any other," was not a contract in the alternative, but merely a contract depending on a contingency, and therefore not within the above rule applicable to alternative contracts. However, in the subsequent case of *Tate v. Wellings*, 3 Term Rep. 531, the Court held, that the Defendant could not plead a contract which was in the alternative, as an absolute contract, though the option was in himself. See also *Perry v. Porter*, 2 East, 2 S. P. and *Shiphan v. Saunders*, 2 East, 4, in notis S. P.

indorsed to A. B. and C.; plea in bar that C. one of the Plaintiffs, is liable as an indorser, together with D., and held good on special demurrer (*a*).

The declaration in this case stated "that one James Brander, on &c. at &c. made his certain note in writing commonly called a promissory note, his own proper handwriting being thereunto subscribed bearing date the same day and year aforesaid and then and there delivered the said note so subscribed to the said William Newman and one James Brander and one Thomas Chatteris carrying on trade together in partnership under the name style and firm of Newman Brander and Chatteris by which said note the said James Brander two months after date promised to pay to the order of the said William Newman James Brander and Thomas Chatteris by the names and description of Messrs. Newman Brander and Chatteris 2800l. value in account. And the said William Newman James Brander and Thomas Chatteris to whose order the payment of the said sum of money in the said note contained was [121] thereby appointed to be made afterwards and before the payment of the said sum of money in the said note contained or any part thereof and before the time thereby appointed for such payment to wit on &c. at &c. indorsed the said note the handwriting of one of them on their joint and partnership account and in their joint and partnership name style and firm of Newman Brander and Chatteris being thereunto subscribed and by that indorsement appointed the contents of the said note to be paid to the said William Mainwaring George Boulton Mainwaring and Thomas Chatteris, and then and there delivered the said note so indorsed to the said William Mainwaring George Boulton Mainwaring and Thomas Chatteris of which said indorsement so made upon the said note as aforesaid the said James Brander afterwards to wit on &c. at &c. had notice. And the said William Mainwaring George Boulton Mainwaring and Thomas Chatteris aver that afterwards and when the said note became due and payable (to wit) on &c. at &c. they the said William Mainwaring George Boulton Mainwaring and Thomas Chatteris shewed and presented the said note so indorsed as aforesaid to the said James Brander for his payment of the said sum of money therein contained and then and there required him to pay the same. But the said James Brander did not then or at any time whatsoever pay the said sum of money in the said note mentioned or any part thereof but then and there wholly refused so to do of all which premises the said William Newman James Brander and Thomas Chatteris afterwards to wit on &c. at &c. had notice. By reason of all which premises and by force of the statute in that case made and provided the said William Newman became liable to pay the said William Mainwaring George Boulton Mainwaring and Thomas Chatteris the said sum of money in the said note mentioned and being so liable the said William Newman in consideration thereof afterwards to wit on &c. at &c. undertook and to the said William Mainwaring George Boulton Mainwaring and Thomas Chatteris then and there faithfully promised to pay to them the said sum of money in the said note mentioned when he the said William Newman should be thereunto afterwards requested." There were also counts in indebitatus assumpsit for money had and received, money paid, and money lent, and on an account stated, in each of which William Newman was stated to be indebted to William Mainwaring, George Boulton Mainwaring, and Thomas Chatteris, and in consideration thereof, to have promised to pay to them 7000l. These counts were followed by the common [122] breach that William Newman had not paid to the said William Mainwaring, George Boulton Mainwaring, and Thomas Chatteris, or either of them, &c.

Pleas. 1st, Non assumpsit. 2dly, "That the said Thomas Chatteris, one of the said payees and indorsers of the said promissory note in the first count of the said declaration mentioned, is one and the same person with the said Thomas Chatteris one of the said Plaintiffs, and not other or different, and that the said several promises and undertakings in the said declaration mentioned were, and each of them was, made by the said William Newman together with the said Thomas Chatteris, jointly, and not by him the said William Newman separately from and without the said Thomas Chatteris, to wit, &c. And this, &c. Wherefore, &c."

To this second plea there was a special demurrer assigning for causes "that the said William Newman hath not in or by that plea traversed or denied the making by

him the said William Newman of the said promises or undertakings in the said declaration mentioned, nor hath he thereby confessed and sufficiently avoided the same. And also for that the said William Newman hath thereby attempted to plead in bar of the actions of the said William Mainwaring, George Boulton Mainwaring, and Thomas Chatteris, matters which ought to have been pleaded, if at all, in abatement of the original writ of the said William Mainwaring, George Boulton Mainwaring, and Thomas Chatteris, and not in bar of the said action. And also for that the same plea doth not mention but wholly omits the said James Brander the other payee and indorser in the first count of the said declaration mentioned of the said promissory note therein mentioned. And also for that the matters contained in the same plea are wholly immaterial and contain no answers to the said declaration of the said William Mainwaring, George Boulton Mainwaring, and Thomas Chatteris, and that the same is in other respects evasive, argumentative, and informal."

Lens, Serjt., in support of the demurrer. The subject of the Defendant's plea is, not that the same person is Plaintiff and Defendant, but that one of the Plaintiffs being also one of the payees might have been made a Defendant. Of this the Defendant might have taken advantage by plea in abatement, but having omitted to do so, the Court will not now take notice that this matter, which is the proper subject of a plea in abatement, appears on the record. *Deering v. Moor*, Cro. Eliz. 554. *Cabell v. Vaughan*, 1 Saund. 291. *Addison v. Overend*, 6 Term Rep. 766. The [123] course which the Defendant should have pursued is this; he should first have pleaded in abatement, that T. Chatteris, one of the payees, was not joined as a Defendant, and then upon his being made a Co-defendant, he should have pleaded in bar that the same person was made a Plaintiff and a Defendant. If it be insisted that this could not have been pleaded in abatement because a better writ could not have been given, it may be observed, that it is not an invariable rule that a better writ must be given in such a case. *Symonds v. Parmenter*, 2 Str. 1269 (a)¹. In this case, however, a better writ might have been given, since by such a writ as has been suggested all the payees would have been made Defendants in the suit. Though perhaps it may appear on the face of the first count that the same person who is one of the Plaintiffs ought to have been made a Defendant, yet this observation does not apply to the three last counts, where the contract is alleged to have been made with Newman only. It is true, that the plea, which is pleaded to the whole declaration, avers that the several promises were made by Newman coupled with others; but that is only the subject of a plea in abatement to the three last counts, upon the face of which it does not appear that T. Chatteris may be both Plaintiff and Defendant: the plea, therefore, being pleaded to the whole declaration is bad. Besides, the promises being jointly made by Newman, one James Brander, and Thomas Chatteris, the Defendant's plea, which states them to have been made by Newman and Chatteris only, is on that account also incorrect.

Heywood, Serjt., contra. As it was impossible for the Defendant in this case to give a better writ to the Plaintiff, he could not plead in abatement; and as it was necessary to introduce upon the record the fact of the promises being made jointly by the Defendant and one of the Plaintiffs, the Defendant was compelled to adopt the special plea in question. Had this matter appeared distinctly on the face of the declaration, the Defendant might have demurred, since the objection destroys the Plaintiff's right of action. No distinction can now be taken on the form of the different counts, because the plea has averred that all the promises were made by Newman and T. Chatteris jointly. With respect to *Addison v. Overend*, it might be sufficient to observe that it was a case of tort, and therefore not applicable to the case now before the Court. It appears to me, however, that the decision in *Addison v. Overend* proceeded on a mistake. The objection appeared on the face of [124] the declaration; now, if that which is the subject of a plea in abatement appear on the face of the declaration, why call for a plea in abatement? the only object of which is to introduce on the record that which will give the Plaintiff a better writ. The cases prove, that where a Plaintiff by his own shewing cannot maintain the action on his writ, the Court will abate the writ ex officio (a)². The argument of the Court

(a)¹ Vide etiam Vin. Abr. tit. Abatement, (E. b.) Com. Dig. tit. Abatement, (I. 2).

(a)² Vide 1 Roll. 176. Hob. 199, 280 and 281, and the cases collected in Vin. Ab. tit. Abatement, (K. b.)

in *Addison v. Overend* was, that if the substance of a plea in abatement appear on a special verdict it shall not abate the writ, and therefore that it should not where it appears on the declaration; but it may be observed¹, that if such a fact appear on a special verdict, it appears there improperly, since it ought never to have been received in evidence. The expression in *Deering v. Moor* is, "the finding it by the jury is not material" (b). The substance of the plea is not that the Plaintiffs have sued one on a joint contract, but that one of the Plaintiffs ought also to have been made a co-defendant; and the objection is, that the promise on which the Plaintiffs have sued is such a promise as cannot be enforced against the Defendant. This very point was decided in *Moffatt and Others v. Van Millingen*, E. 27 G. 3, B. R. (c). With respect to the last objection to the plea, that one James Brander was also liable, it may be answered, that the name of Newman alone appears in the three last counts, and that the only other name introduced by the plea is [125] that of Chatteris; and although the name of J. Brander appear on the first count as one of the payees, non constat that he is not dead (a).

Cur. adv. vult.

LORD ELDON, Ch. J., on a subsequent day said; The present opinion of the Court is, that the Defendant must have judgment. Indeed it appears to me that the subject of the present plea could not have been pleaded in abatement; because a plea in abatement ought to give a better writ, not to shew that the Plaintiff can have no action at all. Certainly the case is of great importance, and it has not been without some hesitation that I have been able to come to a decision upon it. The facts of the case are these; a man of the name of Brander makes a promissory note to three

(b) Vid. etiam *Harman v. Whichlow*, Lach. 152, where this distinction was taken by Sir W. Jones, and agreed by the Court. So in *Whelpdale's case*, 5 Co. 119. *Stead v. Moon*, Cro. Jac. 152, and *Holdwich et Ux. v. Chase*, All. 42, the Court refused to abate the writ where matter pleadable in abatement appeared on special verdict. But in *Horner v. Moor*, cited 5 Bur. 2614, where such matter appeared on the declaration, and in *The King v. Young*, cited 6 Term Rep. 769, where it appeared on scire facias the Court did abate the writ though it was not pleaded.

(c) *Moffatt and Others v. Van Millingen*, East, 27 G. 2, B. R. Indebitatus assumpsit by the Plaintiffs as executors. The plea averred that the promises if any were made by the Defendants, together with two others, and the Plaintiff Moffatt, and concluded with praying that the declaration might be quashed. To this there was a special demurrer, assigning for cause that the Defendant had concluded by praying that the declaration might be quashed, and had pleaded in abatement of the declaration, whereas he should have pleaded in abatement of the bill, &c. On this demurrer the Plaintiffs had judgment of respondeas ouster; whereupon the Defendants now pleaded in bar, "that the several promises and undertakings in the said declaration mentioned, if any such were or was made, were and each and every of them was made by them, the Defendants, together with the said William Moffatt, one of the Plaintiffs in this cause, jointly, and not by them the said Defendants separately from and without the said William Moffatt, to wit, at, &c. And this, &c. Wherefore, &c." To this plea the Plaintiffs demurred.

Wood, for the Plaintiffs, contended that this matter could only be pleaded in abatement; that Moffatt was in auter droit as executor and trustee; and that the debt was not extinguished in equity by his being executor to the person entitled.

BULLER, J. (without hearing Gibbs for the Defendant). The promise was made jointly with one of the Plaintiffs. How can he sue himself in a Court of Law? It is impossible to say that a man can sue himself.

Judgment for the Defendant.

And see *Lloyd v. Williams*, 2 M. & S. 484. *Bosanquet v. Wray*, 6 Taunt. 597. *De Tastet v. Shaw*, 1 B. & A. 664.

(a) See as to this point *Cabell v. Vaughan*, and the notes subjoined thereto in Williams's Saunders, vol. i. p. 291.—It may also be observed, that as James Brander was not one of the Plaintiffs, his liability to be made a co-defendant was only the subject of a plea in abatement, (see Williams's Saunders ubi supra,) and consequently to have introduced his name into the plea in bar, would have been incorrect.

persons, namely to Newman, to himself Brander, and to Thomas Chatteris. This note is indorsed to William Mainwaring, George Boulton Mainwaring, and Thomas Chatteris, who are clearly the persons appearing on this record as Plaintiffs. The effect of a judgment for the Defendant will be, that if a man make a note to himself and others carrying on business under a particular firm, and that partnership be dissolved, the promissory note can neither be put in suit as such, nor enforced as an equitable agreement, because on a promissory note stamp. Considering therefore the quantity of circulating paper in this country standing under the same circumstances with the note in question, the consequences of such a decision may be highly injurious. However the case of *Moffatt v. Van Millingen* cited by my brother Heywood is unanswerable.

The case stood over till this day, when the Court observed, that if any inconvenience should result from a judgment in favour of the Defendant it was for the Legislature to interfere, but that the Defendant was entitled to judgment.

Judgment for the Defendant.

[126] BAILEY v. HANTLER. Feb. 12th, 1800.

Defendant being arrested on a writ returnable the last return of Mich. Term, put in bail on the last day of that term, who justified on the first day of Hil. Term; a declaration was delivered on the third day of Hil. Term, and in the same Term judgment was signed for want of a plea. Held regular, the Defendant not being entitled to an imparlance (a).

The Defendant being arrested in Michaelmas Term on a writ returnable the last return of that term, put in bail on the last day of that Term, who justified on the first day of Hilary Term; a declaration was delivered on the 25th of January, indorsed to plead in four days, otherwise judgment, and in the evening of that day a rule to plead was given: on the 28th of January a plea was demanded, and on the 31st of the same month judgment was signed for want of a plea.

On a former day Shepherd, Serjt. obtained a rule Nisi for setting aside this judgment and all subsequent proceedings thereon, with costs; on the ground of the Defendant's being entitled to an imparlance, and therefore not obliged to plead, the declaration not having been delivered until after the Essoign-day of Hilary Term. On this day he contended, that the Plaintiff should have delivered his declaration *de bene esse* before the Essoign-day, in order to deprive the Defendant of an imparlance over this term, and cited a case to this effect from 1 Crompt. Pr. 126, Ed. 3, 26th January, 1764.

Bayley, Serjt. *contra* insisted that the Plaintiff was never obliged to declare *de bene esse*, and that he could not declare in chief until the bail were perfected, which was not till after the Essoign-day.

The Court after referring to the officers said, that although a Plaintiff be entitled to declare *de bene esse* if he please before the Defendant is in court, yet that he is not compellable to do so, and that the judgment was therefore regular.

Rule discharged (b).

Mr. Justice Buller was absent during the whole of this Term from indisposition.

In this Term William Draper Best, of the Middle Temple, Esquire, was called to the honourable degree of Serjeant at Law, and gave rings with this motto, "*Libertas in legibus.*"

End of Hilary Term.

(a) Vide *Thompson v. Jordan*, post, 137.

(b) Vid. 1 Sellon Pract. 268, ed. 2, *Rook v. The Earl of Leicester*, 2 Term Rep. 16, and *Rolleston v. Scott*, 5 Term Rep. 372.

[127] CASES ARGUED AND DETERMINED IN THE COURTS OF COMMON PLEAS AND EXCHEQUER CHAMBER, AND IN THE HOUSE OF LORDS; IN EASTER TERM, IN THE FORTIETH YEAR OF THE REIGN OF GEORGE III.

THE KING v. SMITH. 1800.

In an indictment on the 15 Geo. 2, c. 28, s. 3, it is not necessary to aver that the Defendant is a common utterer of false money.

The Defendant was indicted at the Summer assizes for Kent 1799, on the 15 Geo. 2, c. 28, s. 3.

The indictment stated, that the Defendant on, &c. "with force and arms at &c. one piece of false and counterfeit money made and counterfeited to the likeness and similitude of a piece of good lawful and current money and silver coin of this realm called a half-crown, as and for a piece of good lawful and current money and silver coin of this realm called a half-crown then and there unlawfully unjustly and deceitfully did utter to one J. F. he the said Defendant at the time when he so uttered the said piece of false and counterfeit money then and there well knowing the same to be false and counterfeit, and also that he the said Defendant at the time when he so uttered the said piece of false and counterfeit money as aforesaid to wit [128] on &c. at &c. had about him the said Defendant in the custody and possession of him the said Defendant one other piece of false and counterfeit money made and counterfeited to the likeness and similitude of a piece of good lawful and current money and silver coin of this realm called a half crown he the said Defendant then and there well knowing the said last mentioned piece of false and counterfeit money to be false and counterfeit. In contempt, &c. against the form of the statute" &c.(a).

The Defendant was tried and found guilty before Buller, J., who reserved the following question for the opinion of the Judges, viz. Whether the indictment should have concluded with an averment that the Defendant was a common utterer of false money?

The case was argued before the Judges (absent Buller J.) in the Exchequer Chamber

Gurney, for the prisoner, contended, that when the law gives any particular name to an offence, that offence ought not to be described in an indictment by any circumlocution; as in murder where all the circumstances which constitute the crime, if stated in the indictment, will not dispense with the allegation that the party is guilty of murder; that the same rule obtained with respect to perjury, and that as the statute had in this instance declared that a person under certain circumstances should be deemed a common utterer of false money, the indictment ought to have charged him with being so, in the very words of the statute.

Fielding, on the part of the prosecution, argued, that the conclusion of law necessarily resulted from the facts set forth; that the Legislature after stating the circumstances which constitute the crime, had declared, that a person offending against this provision of the act, should be "deemed and taken to be a common utterer," which words are equivalent to the expression "adjudged a common utterer;" that this case therefore was not like those where [129] a technical name having been given by the Legislature to the offence itself, that name must be employed in describing such offence.

(a) Which enacts, "that if any person whatsoever shall utter or tender in payment any false or counterfeit money knowing the same to be false or counterfeit to any person or persons and shall either the same day or within the space of ten days then next utter or tender in payment any more or other false or counterfeit money knowing the same to be false or counterfeit to the same person or persons or to any other person or persons or shall at the time of such uttering or tendering have about him or her in his or her custody one or more piece or pieces of counterfeit money besides what was so uttered or tendered then such person so uttering or tendering the same shall be deemed and taken to be a common utterer of false money and being thereof convicted shall suffer a year's imprisonment, and shall find sureties for his or her good behaviour for two years more to be computed from the end of the said year."

At the ensuing Spring assizes for Kent, Heath, J., delivered the opinion of the Judges that the indictment was well enough.

GIBSON v. CHATERS. May 5th, 1800.

[Discussed, *Clissold v. Cratchley*, [1910] 2 K. B. 250.]

In an action for maliciously holding to bail, it is not sufficient to prove that the writ was sued out after payment of the debt, if the circumstances afford no inference of malice; but in such case evidence of actual malice must be given (a)¹.

This was an action on the case for maliciously and without any just or probable cause arresting the Plaintiff and holding him to bail.

At the trial before Lord Eldon, Ch. J., at the Guildhall sittings after last Hilary term, it appeared that the Plaintiff and the Defendant were both resident at North Shields in Northumberland, the former being the master, and the latter the owner of a ship; that some matters in difference between them having been submitted to arbitration, the Plaintiff was awarded to pay the sum of 19l. 14s. on the 31st of November 1797, but in consequence of his being absent from home at that time, and not returning till March 1799, did not pay the sum awarded; that in December 1798 the Defendant being in London made an affidavit of debt to hold the Plaintiff to bail, and that a writ issued thereupon; that on the Plaintiff's return to North Shields in March 1799, he hearing of the Defendant's intention to arrest him, paid the debt to the Defendant's agent at North Shields, and took a receipt for the amount; that on the 4th of May following, the Plaintiff having arrived in the river Thames from North Shields, was arrested and holden to bail by the Defendant's attorney, on an alias writ taken out at that time, but grounded on the affidavit made by the Defendant in December 1798. His Lordship being of opinion that it was necessary to prove express malice, and that no evidence of malice had been given, nonsuited the Plaintiff.

Best, Serjt., now moved for a rule nisi to set aside this nonsuit, and have a new trial; contending that the case was distinguishable from that of *Scheibel v. Fairbain*, ante, vol. i. p. 388; the writ on which the Plaintiff in that case was arrested having been sued out previous to the time when the debt was paid, whereas the writ in the present instance was actually taken out after the debt had been discharged and the receipt given; that the ground of complaint in *Scheibel v. Fairbain* was a mere nonfeasance in [130] the Defendant who had omitted to countermand a writ previously sued out, and was so treated by the Court, but that this was a malfeasance and came expressly within the rule laid down in *Waterer v. Freeman*, Hob. 267, that a man is liable to an action if he sue against his release, or after the debt duly paid. He observed, that the rule with respect to proving malice in actions for malicious prosecutions, did not hold in the case of actions for holding to bail in a mere civil suit, since the rule in the former instance proceeded on the danger of discouraging prosecutions for public offences.

But the Court were of opinion that the facts of this case precluded any inference of malice, and that the Plaintiff therefore to entitle himself to recover, ought to have given evidence of actual malice.

Best took nothing by his motion.

SHIRLEY v. SANKEY AND OTHERS, Executors of Collingwood. May 8th, 1800.

An action will not lie on a promissory note given in payment of a wager on the amount of the hop-duties (a)².

This was an action on a promissory note for 167l. 10s. dated the 12th July 1793.

The cause was tried before Hotham, B., at the last Spring assizes for Kent, when it was proved that in August 1792 the Plaintiff and the Defendant's testator laid a wager on the amount of the hop-duties for that year; that the event proving favour-

(a)¹ Vide *Wetherden v. Embden*, 1 Campb. 295, 299. *Page v. Wiple*, 3 East, 314. *Sinclair v. Eldred*, 4 Taunt. 7.

(a)² Vide *Tappenden v. Randall*, post, 467. *Gilbert v. Sykes*, 16 East, 150.

able to the Plaintiff, the Defendants' testator gave him the promissory note in question for the amount of the wager.

At the trial it was objected, that since it was established by the case of *Atherfold v. Beard*, 2 Term Rep. 610, that wagers on the amount of the hop-duties, or of any other branch of the public revenue, were illegal, and no action could be maintained upon them, therefore the present Plaintiff could not maintain an action on this note, the consideration of which was a wager upon the amount of the hop-duties.

The learned judge, being of that opinion, nonsuited the Plaintiff.

Bayley, Serjt., on a former day moved to set aside that nonsuit, and contended that this case was distinguishable from *Atherfold v. Beard*; first because the note was not given until the growth of the hops was complete, consequently it was not possible for either party to affect the amount of the duties with a view to his own interest; secondly, that as the question re-[131]specting the amount of the duties was admitted by the note to be in favour of the Plaintiff, no discussion of that question need now take place, and therefore no inconvenience could arise to the public. He urged that this note stood on a different footing from notes given on smuggling or other illegal transactions of that kind, since the wager which was the consideration of it, was neither illegal or immoral in itself, though the Court had refused to enforce it on account of public inconvenience.

The Court said, they would look into the case of *Atherfold v. Beard* before they granted a rule nisi, and on this day,

LORD ELDON, Ch. J., said, We can discover no difference between this case and that of *Atherfold v. Beard*. There also the discussion respecting the amount of the hop-duties was shut out; for the Plaintiff gave in evidence the admission of the Defendant that he had lost his wager, and upon that evidence obtained a verdict (a)¹. What difference then is there between the two cases?

Bayley, Serjt., took nothing by his motion.

M. TATTERSALL Administratrix of W. Tattersall v. GROOTE. May 12th, 1800.

[Explained and distinguished, *Belfield v. Bourne*, [1894] 1 Ch. 521.]

If A. and B. in consideration of a sum of money paid by one to the other enter into partnership and covenant in case of a dissolution of the partnership to submit all matters relating thereto to arbitration, the arbitrators are not thereby authorized to determine whether any part of the sum of money which was the consideration of the partnership should be refunded (a)².—Semb. that no action can be maintained for refusing to nominate an arbitrator in pursuance of a covenant to refer matters to arbitration.

Covenant. The declaration stated, that by an indenture dated the 2d of January 1797, between G. W. Groote, the Defendant, and W. Tattersall, the Plaintiff's intestate, reciting that in consideration of 420l. paid to G. W. Groote by W. Tattersall, G. W. Groote agreed to accept W. Tattersall as a partner in his business of an

(a)¹ In that case which came on by motion in arrest of judgment, Grose J. observed, that the objection to the wager appeared upon the face of the record; where the Defendant's admission as to the amount of the duties could not appear. And in *Good v. Elliot*, 3 Term Rep. 700, Buller, J., remarked that the case of *Atherfold v. Beard* established that if an action lead to improper inquiries, it may be stopped in limine; and that the case could not have been decided on any other ground, because the confession of the Defendant excluded any actual discussion concerning the public revenue. The principal case however being an action on a promissory note, nothing appeared upon record which could lead to improper inquiries; no evidence respecting the amount of the duties was necessary to substantiate the Plaintiff's case; and it seems doubtful, whether the Defendant could have been permitted to enter into such evidence, after having acknowledged the loss of the wager by giving the note in question. At all events, it does not seem necessarily to follow that the Plaintiff ought to fail in his suit because the Defendant under some possible circumstances might have a defence depending upon evidence improper to be admitted.

(a)² And see *Cooke v. Lucas*, 2 East, 395.

apothecary, it was witnessed that in consideration [132] of the premises they became partners in the business aforesaid, subject to the provisoes and agreements in the indenture contained; that it was "covenanted by and between the said G. W. Groote and W. Tattersall, and G. W. Groote and W. Tattersall deceased, and each of them for himself his executors and administrators did covenant promise and agree to and with the other of them his executors and administrators that if at any time during that co-partnership or at or after any determination thereof any variance dispute doubt or question should arise happen or be moved between the said parties or either of them their executors or administrators in for about or touching the said joint concern or copartnership or any covenant agreement clause matter or thing therein contained or in the construction thereof, or in anywise relating thereto, then every such variance dispute doubt or question should be referred to and be resolved and determined by two indifferent persons to be elected and chosen by the said partners, that is to say, one by each of them within twenty days next after such variance dispute doubt or question should arise happen or be moved," with power to the arbitrators to elect an umpire in case of dispute; and that each of them covenanted to abide by the determination of the arbitrators "without any further dispute or trouble whatsoever." The declaration then averred, that on the 11th of December 1798, the co-partnership was dissolved by consent, and that after such dissolution W. Tattersall conceiving himself entitled to a return of the 420l. the consideration of the co-partnership, all disputes touching the same were referred to the award of two indifferent persons elected for the purpose by the said W. Tattersall and G. W. Groote, but that W. Tattersall died before any award was made; that since his death the Plaintiff Margaret Tattersall conceiving herself to be entitled to the said 420l. as administratrix, in order to put an end to the dispute, did within 20 days proceed to name to the said G. W. Groote an indifferent person as an arbitrator on her part, and requested the said G. W. Groote to name one on his part. The breach was, that G. W. Groote refused to nominate an arbitrator, whereby the Plaintiff was prevented from recovering by means of the said arbitration the said 420l. paid as the consideration of the said copartnership, and which was dissolved without any benefit accruing thereby, either to the said W. Tattersall in his life-time, or to the Plaintiff as his administratrix since his death.

The Defendant prayed oyer of the indenture, by which it appeared, that G. W. Groote apothecary to Her Royal Highness the Duchess of York, and W. Tattersall man-midwife and apothecary, entered into partnership for so long a time as they should mutually agree, the latter paying to the former 420l.; that they entered into the several covenants usually contained in articles of partnership; that G. W. Groote then covenanted with W. Tattersall not to interfere with or endeavour to turn to his own advantage that part of the practice established during the co-partnership which respected midwifery, but that W. Tattersall, his executors, administrators and assigns, should be at liberty after the dissolution of the partnership to carry on that part of the business or dispose of it to their own advantage; then followed the covenant as set out in the declaration, for referring all matters in dispute to arbitrators, and abiding by their award.

The Defendant then demurred generally to the declaration; and the Plaintiff joined in demurrer.

Lens, Serjt., in support of the demurrer. 1st, This action is novel in its kind, and cannot be maintained. The covenant on which it is founded is not so far binding as to oust the jurisdiction of the courts of common law; for it cannot be pleaded in bar to an action in those courts. *Thompson v. Charnock*, 8 Term Rep. 139. Now if it were so far binding as to subject a party to damages for not submitting to arbitration, the same consequence would ensue as if the party were allowed to plead it in bar. It is true that in *Halfhide v. Fenning*, 2 Brown Chan. Cas. 336, an agreement to refer all matters in difference was allowed to be pleaded to a bill filed for a partnership account, but in that case it was also agreed that they would not sue either at law or in equity: and even this determination is much shaken by the subsequent case of *Mitchell v. Harris*, 2 Vez. jun. 129. Such an action as the present, if it could be supported, would be altogether fruitless; since it would be impossible for the jury to ascertain the damage sustained by refusing to submit to an arbitration, when it cannot appear what the result of such an arbitration would be. 2dly, This case is not within the covenant, which directs that all matters relating to the co-partnership

shall be referred to arbitration, whereas the subject of the present dispute is the original consideration of entering into the co-partnership. 3dly, By the terms of the covenant one arbitrator is to be named by each of the partners; but the Plaintiff who is executrix to one of the partners has no authority to nominate, and consequently cannot sue the Defendant for omitting to nominate on his part.

[134] Shepherd, Serjt., *contra*. 1st, It is clear that an agreement to refer matters in dispute to arbitration is not illegal. Such agreements are recognised and enforced by the 9 & 10 of Will. 3, c. 15. But where a man covenants to do any thing which by law he may do, he is liable to an action for non-performance of his covenant. Many things may be the subject of an action of covenant, though the result of the decision would require a further investigation. Thus if a man covenant to account, an action may be maintained on his refusal to do so; yet a subsequent action would be necessary to recover the balance of the account. Whatever difficulty may be found in ascertaining the damage, the only question now is, Whether the action be not maintainable? 2d, Nothing can be larger than the expressions of this covenant. The terms upon which the partnership should be dissolved is clearly within the meaning of them. It is possible that the propriety of restoring the 420l. or a proportionable part of it, might be the foundation of a suit in equity; as if some fraud had been practised in the formation of the partnership. If therefore this question could be the foundation of a suit in equity, it was clearly a proper subject for arbitration. 3dly, The Court will so construe the covenant as to give effect to the intention of the parties. The words of the covenant respect any difference which shall be moved between the said parties or either of them, their executors or administrators; it would therefore be absurd to confine the agreement to nominate arbitrators to the partners themselves.

LORD ELDON, Ch. J. (after stating the case). These articles purport to be an agreement between two gentlemen conversant in the different branches of the medical profession; and one of them has thereby decided for himself, that it was worth his while to give 420l. to the other on the establishment of a joint concern. It was competent to him to decide on the prudence of such a measure, taking into consideration the probability of the connection being of long continuance or not. It is very evident from the covenant which provides that the practice of midwifery shall belong wholly to Mr. Tattersall, after the dissolution of the partnership, that he might derive a sufficient inducement for entering into it from the hope of being soon able to establish his character in that branch, and then to dissolve the partnership and set up for himself. He declined entering into articles for a definite period of time; we may therefore lay out of the case the whole doctrine of equity respecting agreements between masters and apprentices, where part of the consideration has been restored to the [135] latter on the ground of its having been paid with a view to some continued benefit which has been interrupted by some unexpected event. The case has been argued on these grounds. I shall first consider the second, and on that point I am clearly of opinion that the case is not within the articles. See how it stands. In consideration of 420l. to be paid by Mr. Tattersall, the parties agree to enter into the articles. The covenant to refer matters to arbitration in point of consideration, is sustained by the payment of 420l. and yet by virtue of that very covenant it is now made a matter of dispute whether the 420l. ought to have been paid or not. Courts of equity will interfere in cases where fraud has been practised, and order the consideration to be returned; but then they treat the articles as a nullity in consequence of the fraud; whereas here the parties apply to a court of law to enforce a covenant in the articles, because they are binding. Large as the words are, I do not think that they authorise a demand of an arbitration on the point, whether the consideration of the articles should have been paid or not. With respect to the third point, I do not feel that we are bound to struggle to make sense of the terms which the parties have used. It can hardly be doubted that the parties meant to extend the power of nomination to their executors and administrators: but the words are "partners and each of them." Now there is no sufficient reason in this case for extending those words beyond their obvious sense. On these two last grounds therefore I am clearly of opinion that judgment must be given for the Defendant.

With respect to the first point, if it were necessary to give an opinion I should wish to take time to consider of it. This is quite clear, that there is no instance of such an action as the present having ever been brought in a court of law, and it is

equally clear that though courts of equity will decree the specific performance of reasonable covenants where substantial damages cannot be obtained in a court of law, yet no man, I apprehend, ever heard of a suit in equity to compel the specific performance of a covenant to refer disputes to arbitration. In *Wellington v. Mackintosh*, 2 Atk. 569, Lord Hardwicke overruled a plea of covenant to refer matters in difference which was pleaded to a bill for a discovery. Lord Kenyon, indeed, in *Halfhide v. Fenning*, supported such a plea; but then the words there were, "before they brought any suit." I think I do not misconstrue the case of *Mitchell v. Harris*, by [136] stating that the opinion of Lord Loughborough did not agree with the doctrine laid down in *Halfhide v. Fenning*. In the discussion of *Mitchell v. Harris*, the counsel were asked by the Lord Chancellor if an action like the present had ever been known in a court of law, and it was admitted that no instance was to be found. It would be difficult to direct a jury upon what rule to proceed in assessing damages in such an action; for non constat that the Plaintiff would have succeeded in the arbitration. The covenant, therefore, seems nugatory, or if not so, yet it cannot be enforced as tending to exclude the jurisdiction of the courts.

HEATH, J. I am of the same opinion. If it were necessary to decide the case upon the first ground, I should wish to consider it more fully. It appears to me, however, that the covenant is tantamount to a covenant to forbear suing. Indeed it does not appear upon these pleadings that the Plaintiff is entitled to the £20l. whereas he was bound to make out a title to recover it. Thus in an action for not accounting, the Plaintiff must shew that the Defendant has received a certain sum of money; otherwise no legal difference appears between them. In the same manner an action can never lie for not going before an arbitrator unless it appear that there is a fair subject of arbitration. By the words of the covenant in the present case, the power of nominating arbitrators is confined to the partners themselves.

ROOKE, J. On the first objection the inclination of my opinion is, that the covenant is futile: but it is not necessary to decide that point. On the two last grounds I am of opinion that judgment should be given for the Defendant.

Judgment for the Defendant.

[137] MURPHY v. CADELL. May 13th, 1800.

The Court will not stay proceedings in an action, on the ground of a bill depending in chancery for the same cause.

This was an application to stay proceedings in an action in this Court, on the ground of the Plaintiff having filed a bill in Chancery against the Defendant for a discovery and an account respecting the very matters for which he was pursuing his remedy here.

Cockell, Serjt., shewed cause against the rule, and cited *Jones v. Clay*, ante, vol. i. p. 191, where the Court refused to compel a party to elect whether he would proceed by indictment or action for the same cause.

Shepherd, Serjt., argued in support of the rule.

But the Court were of opinion they could not interfere, observing, that possibly the Defendant might be in contempt in Chancery for having put in an insufficient answer.

Rule discharged without costs.

PAYNE v. WHALEY. May 13th, 1800.

Allowance of a writ of error may be served before the Plaintiff is entitled to sign final judgment.

Best, Serjt., having obtained a rule nisi for setting aside a fieri facias in this case and all proceedings thereon, as being subsequent to the allowance of a writ of error;

Bayley, Serjt., shewed cause and contended that the allowance of the writ of error was irregular, inasmuch as it was served before the Plaintiff was entitled to sign a final judgment.

But the Court held the allowance regular (a)¹.
Rule absolute.

THOMPSON v. JORDAN. May 14th, 1800.

If the writ by which a replevin is removed be returnable on the first return of the term, and the Plaintiff do not declare within four days before the end of that term, the Defendant is entitled to an imparlance; though he has not appeared within the term.

This was a rule obtained by Lens, Serjt., calling on the Plaintiff to shew cause why the interlocutory judgment, and all subsequent proceedings thereon, should not be set aside for irregularity, with costs.

The Defendant having distrained upon the Plaintiff for rent, the latter replevied the goods, and on the 16th of December, 1799, removed the action of replevin into this Court by a writ [138] of *accedas ad curiam* (a)², returnable on the first return of Hilary term (Jan. 20), 1800. Previous to the return of this writ it was shewn to the Defendant's attorney who undertook to appear; but on the 22d of January no appearance having been entered, the Plaintiff ruled the Defendant to appear in four days, and on the 4th of February the Plaintiff's attorney gave notice to the Defendant's attorney that the writ of *accedas ad curiam* had been returned and filed, and demanded that an appearance should be entered, adding, that unless an appearance were entered a *distringas* would issue. On the 8th of February no appearance having been entered, the Plaintiff sued out a *distringas* returnable on the last return of Hilary term (Feb. 12). On the 14th of February, being two days after the expiration of Hilary term, the Defendant entered an appearance, and on the same day a declaration was delivered, and a rule to avow served on the Defendant; which rule not having been complied with, interlocutory judgment was signed. The objection to the regularity of the judgment was, that as the writ of *accedas ad curiam* was returnable on the first return of Hilary term, and the declaration was not delivered until two days after the end of that term, the Defendant was entitled to an imparlance.

Best, Serjt., now shewed cause, and admitted, that as the Plaintiff instead of enforcing the undertaking of the Plaintiff's attorney had proceeded by *distringas*, the case must be considered as if no such undertaking had been made; but he contended, that as the Plaintiff had been prevented from declaring within four days before the end of Hilary term by the Defendant neglecting to appear, the latter was not entitled to an imparlance. He cited *Rooke v. The Earl of Leicester*, 2 T. R. 16, & 1 Sellen, Prac. 268.

[139] But the Court (after consulting the officers) were of opinion, that the exception (a)³ contended for did not apply to the action of replevin; and that the Defendant therefore was entitled to an imparlance.

Rule absolute without costs.

(a)¹ Vid. *Gravall v. Stimpson*, vol. i. p. 479, for what is said on this subject by Eyre Ch. J.

(a)² This writ is only a species of *recordari facias loquelam*, and is employed when "a replevy is sued by plaintiff in the court of any other lord than in the county court before the sheriff." By this writ the sheriff is directed to go to the court of the lord, and there record the plaint; whereas the common *recordari facias loquelam* directs him to record that plaint which is in his own court. F. N. B. 70, B. Where the replevin is by writ out of Chancery, either in the county court or in the court of a lord of a Hundred, &c. it must be removed by *Pone*. F. N. B. 69, M. 70, A. *Et sciendum est quod Recordare vel Pone pro defendente semper debet fieri cum causâ, sive loquela sit in curia regis sive alterius. Et si loquela sit in curia Wapentachii Hundredi, &c. alterius magnatis, semper inferenda est causa, sive fuerit pro petente sive pro defendente. Si autem loquela fuerit in aliqua curiâ regis non fiat pro petente cum causâ, sed pro defendente: sic Reg. Orig. 85 b. Vide etiam 2 Inst. 339.* There is also an *accedas ad curiam* where false judgment has been given in a Hundred court, court baron, &c. F. N. B. 18 A. B. And if justice be delayed in the little writ of right, the demandant shall have a writ *quod vicecomes accedat in propria persona sua ad curiam, &c. ad videndum quod plena justitia exhibeatur, &c.* Reg. Orig. 9 b.

(a)³ Vid. *Bayley v. Huntler*, ante, p. 126, and the cases there referred to.

(IN THE EXCHEQUER CHAMBER.)

LORD PETRE v. LORD AUCKLAND AND LORD GOWER, Postmaster-General ;
in Error. May 14th, 1800.

A Roman Catholic peer is not entitled to frank.

This was an action of indebitatus assumpsit for money had and received ; and was tried before Lord Kenyon at the Guildhall sittings after last Michaelmas term, when his Lordship having directed the jury to find a verdict for the Defendants, a bill of exceptions was tendered. A verdict having been found for the Defendants, and judgment given in the King's Bench accordingly, a writ of error was brought, and the common errors assigned. From the bill of exceptions, when sealed and annexed to the record, the case appeared to be in substance as follows:—That Lord Petre before and at the time of the receipt of the sum of seven-pence hereinafter mentioned, was a peer of Great Britain, by hereditary descent from his ancestor John Petre, who was created by letters patent of the 21st July 1603, Baron Petre of Writtle in the county of Essex, to hold to him and his heirs male ; that the ancestors of Lord Petre enjoying the said honour and dignity, have always been summoned to parliament in right of the said dignity ; and that Lord Petre long before the demand and receipt of the said sum of sevenpence hereinafter mentioned, viz. on the 30th of May 1796 (he being then of the age of 21 years and upwards,) was duly summoned to the present parliament in right of his said dignity ; that Lord Auckland and Lord Gower before and at the time of the demand and receipt of the sum of sevenpence hereinafter mentioned were his Majesty's postmaster-generals, and as such, on, &c. at, &c. (being during the sitting of the present parliament,) demanded, charged, and received of and from Lord Petre the sum of sevenpence for the postage of a single letter, sent and conveyed by the post from Bristol to London, being a distance exceeding 100 miles, and less than 150 miles, and which letter [140] was directed to Lord Petre at his house in London, being the place of his usual residence, the same being the only letter sent and conveyed to Lord Petre by the post on that day ; that from the passing of the 30 Car. 2, st. 2, made to prevent papists from sitting in parliament, the privilege of sending and receiving letters free from postage has been enjoyed by all peers not professing the Roman Catholic religion who have been summoned to parliament, although they have not taken or offered to take their respective seats in the House of Lords ; that Lord Petre is and was at the time, when, &c. a Roman Catholic, and never appeared in parliament in pursuance of his summons, or voted, or made his proxy in the House of Peers, or sat there during any debate, or offered to do so ; and that he has never subscribed or repeated the declaration mentioned in the 30 Car. 20, st. 2, but that he has taken, made, and subscribed the declaration and oath mentioned in the 31 Geo. 3, c. 32, made to relieve papists from certain penalties ; that since the passing of the 30 Car. 2, st. 2, the sending and receiving letters free from postage has not been enjoyed by any peer professing the Roman Catholic religion, although actually summoned to parliament ; that the said privilege has never been enjoyed by any peeress being such in her own right, or by marriage, or by any peer under 21, nor have they ever been summoned to parliament ; that since the union of England and Scotland, no peer enjoying his dignity only by reason of his own possession before the union, or by hereditary descent, and who has not been one of the sixteen peers, has enjoyed the said privilege ; that the said privilege was, before the 4 Geo. 3, c. 24, enjoyed by such peers as did in fact enjoy the same under certain warrants from time to time issued under the King's sign manual, in which warrants they were exempted from postage by the name and description of the members of both houses of parliament ; that in some of these warrants the exemption was expressed to be during the sitting of parliament only, in others which were issued immediately before the 4 Geo. 3, c. 24, the exemption was expressed to be granted to the members of both houses of parliament during every sessions of parliament, and for forty days before, and forty days after every sessions ; that on the 16th of April 1735, the commons of Great Britain resolved that the privilege of franking letters by the knights, citizens, and burgesses, chosen to represent the commons in parliament, began by erecting a post-office within this kingdom by act of parliament, and that all

letters not exceeding two ounces, [141] signed by the proper hand of or directed to any member of that House, during the sitting of every session of parliament, and forty days before and forty days after, every summons and prorogation ought to be carried and delivered freely and safely from all parts of Great Britain and Ireland without any charge of postage.

Jervis for the Plaintiff in error. The question in this case depends upon the construction of 4 Geo. 3, c. 24, by which it is enacted, that no letter shall be exempt from postage except such as are therein excepted; the exception applicable to this point is, "all letters and packets not exceeding the weight of two ounces, sent from and to any places within the kingdoms of Great Britain or Ireland during the sitting of any session of parliament, or within forty days before or forty days after any summons or prorogation of the same, which shall be signed on the outside thereof by any member of either of the two houses of parliament of Great Britain, and whereof the whole subscription shall be of the hand writing of such member, or which shall be directed to any member of either house of parliament of Great Britain, or at any of the places of his usual residence, or at the place where he shall actually be at the time of the delivery thereof, or at the house of parliament, or at the lobby of the house of parliament of which he is a member." The subsequent statutes regulating the number and weight of letters do not vary the effect of the above clause upon the present case. From the bill of exceptions it appears that the Plaintiff is a member of one of the houses of parliament. It is stated that he is a peer of the realm by descent, and he is not only entitled *ex debito justiciæ* to his writ of summons, 4 Inst. 1, but has actually received it for the present parliament. Neither the 30 Car. 2, stat. 2, nor 31 Geo. 3, c. 32, contain any thing to negative a Roman Catholic peer being a member of the house of lords. Indeed the inference from the former of those acts is directly the reverse, for it provides that "no person that now is or hereafter shall be a peer of this realm, or member of the House of Peers, shall vote, &c. until he shall have taken certain oaths, and subscribed a certain declaration; the act, therefore, seems to consider that a person may be a member of the House of Peers, previous to his having taken the oath. If then the Plaintiff be a member of the House of Peers, he is entitled to the exemption under 4 Geo. 3, c. 24. That exemption is not confined to the peers in any particular predicament, since no mention is made of any religious persuasions, but the description is general. No [142] analogy can be drawn from peeresses or peers under age, or Scotch peers not of the sixteen, because they are not entitled to sit at all, not receiving a writ of summons. But the Plaintiff has an unquestionable right to go into the house and take his seat and vote at any moment during the session, provided he take the oaths; and is thereby precisely in the same situation as any other peer, who having received his writ of summons, is prevented by illness or any other occasional disability from taking his seat. It is further to be observed, that as the exemption commences forty days previous to the sitting of parliament, it is impossible to ascertain whether the persons who claim the exemption mean to take the oaths or not. The right to the exemption, therefore, cannot depend upon their taking the oaths.

Abbott for the Defendants. If it could be assumed that every peer is a member of parliament, no further argument would be necessary on the part of the Plaintiff. On that point the whole question turns; and though the Plaintiff be at liberty to become a member of parliament whenever he may think proper, yet he was not so at the time when the letter stated in the bill of exceptions was sent. The Legislature seems to have made a distinction between privilege of peers and privilege of parliament. Had it been intended that every peer should be equally entitled to the right of franking, the expressions of the act would have been, "any peer of the realm, and any member of the Lower House of Parliament;" whereas the words of the act are, "any member of either house of parliament of Great Britain." The same expressions are used in the 24 Geo. 3, sess. 2, c. 37, & 35 Geo. 3, c. 53, s. 1, 2, 3, and are taken from the royal warrants which were in use previous to the 4 Geo. 3, c. 24. Besides, the act seems to consider the privilege as granted in consequence of the legislative functions of the person to whom it is given; since it directs in s. 5 that the votes and proceedings of parliament shall be free of postage; and the first section clearly contemplates the person entitled to the privilege as attending upon his duty in parliament, which speaks of letters directed to him "at the house of parliament, or the lobby of the house of parliament of which he is a member." And the subsequent statute

(35 Geo. 3, c. 53), which has limited the number of letters which are to pass free of postage, appears also to have had in view the number of letters which any member of [143] parliament could be supposed to send or receive in his official capacity. In farther confirmation of the distinction between privilege of peerage and privilege of parliament, it may be remarked, that peeresses, though entitled to freedom from civil arrest, and to a trial by the peers of the realm, are not entitled to the privilege of franking. It is also observable, that in the act of union, 5 Ann. c. 8, Art. 23, "all privileges of parliament" are secured to the sixteen peers of Scotland, which are enjoyed by the peers of England, and that to the other peers of Scotland are secured "all privileges of peers," as fully as they are enjoyed by the peers of England, "except the right and privilege of sitting in the House of Lords and the privileges depending thereon." A member of the House of Commons, disabled by the 30 Car. 2, stat. 2, is no longer a member, and therefore it is provided that his place shall be filled up; this provision cannot indeed apply to peers who are not elected: but by a parity of reasoning, when they are disabled they are no longer members of the house. Usage, if it may be taken into consideration at all, stands directly in opposition to the Plaintiff's claim. Upon the whole therefore, the writ of summons seems only to confer an inchoate right to become a member of parliament, for it is absurd to contend that any one can be deemed a member of an assembly, which he cannot enter during a debate, and in which he can neither sit or vote without incurring penalties.

The Court took time to consider of their opinion, which was on this day delivered by

LORD ELDON, Ch. J. The question is, Whether, under the circumstances of this case, Lord Petre was entitled to receive the letter in question free of postage? If he was entitled to receive it free of postage, it appears from the record that the money in demand was paid by mistake, and Lord Petre will be entitled to recover it in this action. Since the passing of the 4 Geo. 3, c. 24, which has converted what was before a privilege into what may now be called a legal right, that is a right under an act of parliament, no doubt can be entertained of the Plaintiff's right to sue in this form of action; though previous to the passing of that act, when the exemption was allowed under warrants from time to time issued by the crown, operating as grants of part of the duties vested by parliament in the crown for its own use, some doubts might have been entertained upon the subject, the money [144] having been paid over to his Majesty's use. We are now to decide the question on the true construction of the 4 Geo. 3, the title of which is, "An Act for preventing frauds and abuses in relation to the sending and receiving of letters and packets free from the duty of postage." The preamble of that act states, that "under colour of the privilege of sending and receiving post letters by members of parliament free from the duty of postage many great and notorious frauds have been and still are frequently practised, as well in derogation of the honour of parliament as to the detriment of the public revenue, divers persons having presumed to counterfeit the hand, and otherwise fraudulently to make use of the names of members of parliament upon letters and packets to be sent by the post in order to avoid the payment of the duty of postage." In construing these words we should be extremely at a loss to find what exposition should be put upon them, unless we were informed by the record of the true meaning of the expression, "privilege of sending post-letters by members of parliament free from the duty of postage." It is not an expression which necessarily implies that the privilege was enjoyed by all members of parliament, nor does it shew what were the origin, nature, restrictions, limitations, or extensions in practice or usage of that privilege. In this Court therefore, not understanding privilege of parliament, we are obliged to look at the record to enable us to understand the act. The record contains what out of this place we know to be the substance of the parliamentary history of this privilege. It is not stated however by whom this privilege was enjoyed between the years 1660 and 1678; and it is not our province to infer from what is stated to have been the usage subsequent to the year 1678, what was the usage between 1660 and that year. But the record has stated that from the year 1678 the privilege has been enjoyed by all peers not professing the Roman Catholic religion, and that it has not been enjoyed by any peer professing that religion. In 1660, when parliament (a) adopted the scheme for erecting a post-office, which had been first introduced during the usurpation

(a) Vid. 12 Car. 2, c. 35, Ruffhead's Statutes, Appendix, p. 175.

by the act of 1656 (*b*)¹ the duty of postage was imposed generally on all his Majesty's subjects. We know historically, though we cannot take judicial notice of it, that a clause was proposed in the commons to exempt "the [145] knights, citizens, and burgesses chosen and continuing to be members of the parliament of England and sitting the parliament from the duty of postage" (*a*)¹. We know also that the proposition was entertained with considerable doubt; that it was treated by some as a mendicant clause, and that the speaker was very unwilling to put the question upon it (*b*)². However it passed the House of Commons (*c*). But as it contained no provision for the members of the House of Lords, and as that house could make no addition to a money bill, the clause was there omitted (*d*). The omission occasioned some difficulty in the House of Commons with respect to the passing of the bill; to facilitate which, His Majesty's ministers gave assurances to the members of the House of Commons that their letters should pass free. Accordingly, on the 14th of May, 1661, a warrant was issued by King Charles the Second, which is to be found in the Commons Journals, vol. 22, p. 463 (*e*) to this effect: "Charles R. The king being informed by his principal secretaries of state that the members of parliament seemed unwilling to pay for the postage of their letters during the sitting of parliament, His Majesty was thereupon graciously pleased to give directions to the farmers of his post-office that all single letters, but not packets, sent by the post-office to or from any member of either house of parliament go free without payment of any thing for the post thereof." What effect was actually given to the exemption directed by this warrant between the years 1661 and 1678 we have no means of knowing from this record; but the record states, that from the year 1678 no peer professing the Roman Catholic religion, whether considered as a member of parliament, or as a mere peer contradistinguished from a member of parliament, ever did enjoy the privilege. On the [146] 19th of February, 1734, the copy of a warrant allowing letters to pass free of postage, dated the 18th of October 1727, and directed to the postmaster-general, was presented to the house (*a*)², pursuant to an order of the house (*b*)³; by which it appears that the form of the warrant at that time varied from what it was in 1661. After reciting that the revenue had been greatly prejudiced by the free carriage of letters which ought to have been paid for according to the acts of parliament in that behalf, it directs the postmaster-general not to permit any person to send or receive free any letters which ought to be paid for by the said act, except, among other exceptions, "the members of both our houses of parliament during every session of parliament, and for forty days before and forty days after every session, so as the said letters or packets to be franked by virtue of this our authority for the members of parliament of either house do not exceed the weight of two ounces." It concludes, "and we do also will and require you to make our pleasure known to the members of our said houses of parliament, that for preventing the above abuses which, as we have been informed, have been frequently practised with divers persons who not being members of either of the said houses of parliament have yet presumed to indorse on their letters the names of such as were, as also to

(*b*)¹ See Scobell's acts, p. 511, Anno 1656, c. 30.

(*a*)¹ December 16th, 1660, Comm. Journ. vol. 8, p. 212.

(*b*)² Vide Parliamentary Hist. vol. 23, p. 56.

(*c*) The bill was agreed to by the Commons and sent to the Lords for their concurrence, December 20th, 1660, Comm. Journ. vol. 8, p. 217, 218.

(*d*) The bill came to the Lords on the 21st December 1660, and was on the same day twice read, and referred to a committee on the bill for poll money. Lords' Journ. vol. 2, p. 220. On the evening of the same day the committee reported it fit to pass with "some few amendments," which having been twice read, and agreed to, the bill with the amendments was read a third time and passed. Lords' Journ. vol. 2, p. 222. On the 22d of December, 1660, the Commons received the bill with a message from the Lords, desiring their concurrence in the alterations; and on the same day "the amendments to the bill taking away the proviso about letters to members of parliament" were read and agreed to; and the bill sent back to the Lords. Comm. Journ. vol. 8, p. 223.

(*e*) Where the substance of the above facts is stated in the report of a committee appointed by the house in 1736 to consider the subject.

(*a*)² See Comm. Journ. vol. 22, p. 385.

(*b*)³ 17th February 1734, Comm. Journ. vol. 22, p. 382.

direct their letters to members of parliament when at the same time such letters do not really belong to or concern the members to whom the same are directed, we do expect that the members of both houses do constantly indorse their own names on their own letters with their own hand-writing, and that they do not suffer any letters whatsoever other than such as concern themselves to pass under their frank cover or direction, to the diminution and prejudice of our said revenue. And for so doing this shall be your warrant" (c)¹. This warrant, which restrained the generality of the exemption by requiring that the letters which were to go free of postage should have a particular address and be confined to a certain weight, appears to have been entertained by the House of Commons as a matter, the propriety of which was to be inquired into. If the privilege under the old warrants were general, the house seemed to think that it ought not to be limited without their consent. Accordingly a committee was appointed on the 26th of February 1734 to take the copy of [147] the warrant into consideration (a); and in April 1735 various resolutions were passed concurring in the measures for preventing frauds suggested in the warrant (b). Among these resolutions was that stated at the end of the special verdict. Since these resolutions and this warrant which concerned the members of both houses of parliament, no peer professing the Roman Catholic religion, as we are informed by the record, has de facto enjoyed the privilege. In the year 1764 previous to the passing of the 4 Geo. 3, the House of Commons again took the matter into their consideration (c)² as a matter of privilege, and entered into several resolutions, the first of which relates to the practice of counterfeiting the hands of members of the house; and they suggest several wholesome regulations for preventing the abuses which had prevailed. They then send a message to the Lords, not desiring their concurrence as in cases of legal regulation, but for the purpose only of communicating their resolutions: the subject is entered into by the House of Lords, and resolutions are there passed (d), the first of which is in ipsissimis terminis the same with that entered into by the Commons; and states that the practice of counterfeiting the hands of "members of this house" is become frequent. The resolutions of both houses being framed, the act of 4 Geo. 3 is brought in, after which the house proceeds in its communications by message (e) desiring the concurrence of the Lords. The preamble of that act, which has been already stated, uses the expression "members of parliament," the very expression of the royal warrant, and describes the fraud to be provided against to be, the practice of counterfeiting their hands. The [148] fraud therefore was one which could not be practised upon those who, according to the exercise of the privilege then prevailing, had not been in the habit of franking letters to any person whatsoever. The question in this case cannot accurately be said to depend upon usage, otherwise than as that usage was the subject of the act of parliament. I agree that if the expression "members of parliament" in the enacting clause of the statute, must be understood to include all members of parliament, or all peers who stand in the

(c)¹ Comm. Journ. vol. 22, p. 393.

(a) It is to be remarked that on the 9th of September 1715 (Comm. Journ. vol. 18, p. 303), the House of Commons, on complaint made of great abuses in the privilege of franking, came to resolutions regulating the exercise of that privilege in a manner similar in many respects to that afterwards adopted; and that on the 23d March 1716-17, a warrant was issued by the crown, couched almost verbatim in the same terms as that which issued in the first year of the reign of George the Second, viz. 18th October 1727, and which the House of Commons thought it necessary to take into their consideration in 1734. A copy of the warrant of the 23d March 1716-17, is printed in the Appendix to a report of this Case published by Mr. Dillon.

(b) Comm. Journ. vol. 22, p. 464, 465, 472, 476.

(c)² Committee appointed March 1st 1764. Comm. Journ. v. 29, p. 893. Report and resolutions of the committee 28th March, p. 997, 998. Resolutions agreed to and orders made upon the members regulating the exercise of the privilege and a message sent to Lords communicating the same 28th March, p. 1002.

(d) March 29th, 1764. Lords' Journ. v. 30, p. 531-534. Communicated to the Commons on the same day. Comm. Journ. v. 29, p. 1010. Ordered that a bill be brought in, same day, p. 1011.

(e) Bill passed in the Commons and message to the Lords desiring their concurrence, April 11th, 1764, Comm. Journ. v. 29, p. 1047.

predicament in which the record states Lord Petre to be, we should not be authorized to give judgment for the Defendant. But the true question seems to be, whether the act must not be taken to be an act regulating the privilege, as that privilege was exercised at the time when the act passed. If the privilege were a privilege of such members of the House of Peers (taking all peers to be members of parliament) as did not profess the Roman Catholic religion, the question is, whether the act must not be taken to be an act regulating the privilege of peers not professing that religion; or whether we are to understand that notwithstanding the act was passed to restrain the right of franking, yet that its operation was intended to be such as to enlarge that privilege and confer it upon those who had it not before? Understanding from this record what was the privilege of members of parliament at the time when the act passed, we are all of opinion that the act must be taken to regulate the privilege with respect to those by whom it was enjoyed at that time, and not to enlarge the number of those who were to exercise it in future. When I say members of parliament, I wish not to be understood as giving any opinion whether Lord Petre be or be not entitled to be considered a member of parliament. There is a great difference between privilege of peerage and privilege of parliament. But I think the case of Lord Petre in the present instance stands on the same ground as if a writ of summons had been delivered improvidently to a protestant peer during his minority. The minority in such case would operate an incapacity against his sitting in parliament, and I do not know how we are to account for the facts in this record, unless we consider the Roman Catholic peers since 1678, as under a disability similar in effect to that which arises from the minority of a protestant peer. If a minor peer were to receive a writ of summons and demand to have his letters free of postage, the postmaster-general would only have to [149] prove the fact of the minority in order to establish that such a peer was not entitled to the privilege of parliament; though clearly entitled to privilege of peerage. In the case of a Roman Catholic peer having received a writ of summons, as he could not take the oaths directed by 30 Car. 2, he could no more be a peer of parliament than a protestant peer during his minority. And I take it that the privilege now in dispute must have been withheld from the one on the same ground as from the other, viz. that the privilege is connected with the capacity of doing business in parliament. How far the privilege has been abused, will not affect the justness of the reasoning upon principle. But in all the acts which have given the liberty of franking and receiving letters free from postage to public officers, it is expressly given in respect of the business of the offices in which they are employed. I do not assent to the argument, that because Lord Petre is entitled to privilege of peerage, therefore he is intitled to privilege of parliament. It is not necessary for us to decide whether his Lordship be a member of parliament or not; but if it were necessary, I will not pretend to say but that there are many acts of parliament containing expressions such as "Lords of Parliament," and "Lords of the House of Parliament," which would apply to any peer before he has taken his seat. But, as it seems to me, the true ground upon which the construction of the 4 of Geo. 3 is to be put is this; that the right of members of parliament under the act, is the same with the privilege allowed by the houses of parliament to be exercised by their members previous to the passing of the act; that this privilege (which is not stated in the act to be the privilege of all members of Parliament,) was then enjoyed by peers (members of parliament if you choose so to call them,) not professing the Roman Catholic religion; that the enacting clause of the statute when it speaks of members of parliament means such members of parliament as are mentioned in the preamble, that is, members of parliament who independently of the act, were entitled to the privilege which the act intended to regulate; that the object of the act was, that such members should continue to exercise their privilege subject to certain regulations; and the object of the act being to regulate and restrain the privilege where it was, it could not be intended to give the privilege where it was not. Being informed by the record what the meaning of "privilege of sending and receiving post-letters by members of parliament free from the duty of postage," was at the time when the 4 Geo. 3 was pass-[150]-ed; we are all of opinion that the enacting clause can only extend to those who being members of parliament had the privilege independent of the act.

Per Curiam. Judgment affirmed.

FAULKNER AND OTHERS v. WISE. May 15th, 1800.

It is not a sufficient ground for rejecting a person as bail that he is described to be "of A. in the county of B., gaol-keeper."

One of the bail in this case (who were to justify by affidavit) having been described as "of Banbury in the county of Oxford, gaol-keeper," was opposed on that account by Runnington, Serjt., who observed that the Court had refused to allow persons in that situation to become bail.

But the Court thinking that the rule did not extend to this case, inasmuch as it did not appear that the bail was the county gaol-keeper, but might only be a corporation gaol-keeper, and as such have nothing to do with the process of the Court (a)¹, permitted him to justify.

AMES v. HILL. May 17th, 1800.

[Followed, *Reardon v. Swaby*, 1803, 4 East, 188.]

A mere cognovit need not be stamped; but if it contain any terms of agreement it does require a stamp. An agreement to confess judgment for 30l. to secure 5l. and costs is not an agreement for payment of more than 20l. within 23 Geo. 3, c. 58, s. 4, and therefore need not be stamped (a)².

The Defendant in this case having given a cognovit to the Plaintiff on unstamped paper, whereby he agreed to confess that the Plaintiff had sustained damage in the action to the amount of 30l., on which no judgment was to be entered unless the Defendant made default in payment of the sum of 5l. by instalments, together with costs to be taxed; the Plaintiff for default of payment entered up judgment thereon.

[151] To set aside this judgment, Shepherd, Serjt., on a former day obtained a rule nisi, on the ground of the cognovit not being on a stamp; contending, that it was an agreement for the payment of a sum above 20l. and therefore within the provisions of the stamp act.

Against this rule Marshall, Serjt., shewed cause, and insisted that a cognovit need not be stamped; and that if this were deemed an agreement, it was an agreement to pay less than 20l. therefore not liable to the stamp duty (23 Geo. 3, c. 58, s. 4), observing that the duty on bonds does not extend to the penalty but only the sum secured (*ibid.* s. 1).

The Court took time to consider of the point, and on this day,

LORD ELDON, Ch. J., said: We are of opinion that a cognovit requires no stamp; and also that if a paper be a mere authority to enter a cognovit, such mere authority requires no stamp: but that if there be any thing of agreement beyond the mere authority, a stamp then becomes necessary. A cognovit is a mere acknowledgment of an account, and there is no mutuality; but if any terms be added, it then becomes such an agreement as falls within the provisions of the act. In this case we think the paper in question amounted to an agreement; but that within the meaning of the act, it was an agreement for less than 20l.

Per Curiam. Rule discharged.

(a)¹ The rule of Hil. 6 Geo. 2, s. 7, C. B. after stating that great inconvenience had arisen "by reason that sheriff's officers, bailiffs, and other persons concerned in the execution of process" become bail; orders, that "no sheriff's officer, bailiff, or other person concerned in the execution of process shall be permitted or suffered to become bail in any action or suit depending in this Court." Accordingly in *Bolland v. Pritchard*, 2 Bl. 799, a person merely employed to summon juries was rejected as being a sheriff's officer within the letter of the first part of the rule; and in *Hawkins v. Magnall*, Doug. 466, the keeper of the Poultry compter was also rejected, on the ground as it should seem of his being within the latter words of the rule, viz. "other persons concerned in the execution of process."

(a)² See *Reardon v. Swaby*, 4 East, 188. *Cawthorne v. Holben*, 1 N. R. 279.

PILKINGTON v. GREEN AND ANOTHER. May 18th, 1800.

A warrant was directed to an officer of excise by the commissioners, commanding him to apprehend a person convicted in several penalties and take him to prison to keep him there until the amount of the penalties was paid; the officer having arrested the party discharged him upon a promissory note for the amount of the penalties payable at a future day, and the commissioners afterwards approved of his conduct. Held, that the discharge was a good consideration for the note, and that an action might be maintained thereon (a).

This was an action by the Plaintiff, as indorsee, against the Defendants as makers of a promissory note for 50l. payable nine months after date.

The cause was tried before Lord Eldon, Ch. J., at the Westminster sittings in this term, when a verdict was found for the Plaintiff with liberty to the Defendant to move to have a verdict entered in his favour. The case in substance was this. The Defendant Green having been convicted by the commissioners of excise in penalties to the amount of 150l. was taken into custody on a warrant directed to the excise officer at Oswestry, "to take and arrest the body of the said J. Green if found, &c. and forth-[152]-with to carry the same to the gaol or prison of and for the county or place where you shall so take and arrest the same, and the same together with a duplicate of this warrant, there to deliver into the custody of the said gaoler or keeper of the said gaol or prison until he shall satisfy and pay the said sum of 150l." Green being unable to pay the money, the officer agreed to take three notes for 50l. each at nine months, one of which was the note in question; and thereupon discharged him out of custody, and gave him a receipt for the notes. The conduct of the officer upon this occasion was afterwards fully sanctioned by the commissioners.

Best, Serjt., on the part of the Defendants, now contended that there was no consideration for the note, and that if there were any consideration it was against law; and argued that the officer, whose authority was merely ministerial, could not discharge Green on his giving these notes payable at a future day, but was bound to execute the warrant according to its tenor, by taking him to gaol, and keeping him there until he paid the money; that the officer's discharge under these circumstances was of no effect, and that Green was liable to be taken again; that this was like the case of a person taken in execution under a ca. sa. where the sheriff has no power to discharge his prisoner but must keep him in *salvâ custodiâ*, *Love's case*, Salk. 28; and that if the discharge which was the consideration of the note were void at the time when the note was given, the subsequent approbation of the commissioners would not make it good.

Cockell and Shepherd, Serjts., contrâ, were proceeding to shew cause in the first instance, but

The Court strongly inclined to support the verdict, and took till the next day to consider; when

LORD ELDON, Ch. J., said: We have looked into the case cited from Salkeld; and are of opinion that under the circumstances of this case, the note, having been accepted by those who were interested in it, has a sufficient consideration to support it.

Per Curiam. Postea to the Plaintiff.

[153] DE SYMONDS v. SHEDDEN. May 19th, 1800.

Declaration on a policy on ship and goods at and from London to Embden, "beginning the said adventure on the said goods, &c. from the loading thereof on board the said ship;" in the policy there was a memorandum whereby the said insurance was declared to be on 15 hogsheads of tobacco marked "B. S. No. 51 and 65." Special demurrer. 1st, because the goods were not averred to have been put on board at London: 2dly, because the goods were not alleged to have been marked or numbered as in the memorandum, but only thus: "15 hogsheads the goods, &c. in the said policy mentioned;" 3dly, because the Plaintiff was stated to have been interested

(a) Vide *Sugars v. Brinkworth*, 4 Campb. 46. *Brett v. Close*, 16 East, 293, 298.

until and at the time of the loss, without shewing that he was interested at the time of the policy being made: 4thly, because no venue was laid to the allegation of loss on the high seas. Semb. that the declaration was bad (a).

Assumpsit on a policy of insurance on a ship and goods at and from London to Embden, "beginning the adventure on the said goods and merchandizes from the loading thereof on board the said ship." At the end of the policy there was a memorandum "whereby the said insurance was declared to be on 15 hogsheads of tobacco, marked B. S. No. 51 and 65, valued at 550l."

The first count of the declaration, after setting out the policy and averring the promise, stated, "that before the making of the said writing or policy of insurance divers, to wit, 15 hogsheads of tobacco the goods, wares, and merchandizes in the said policy mentioned" of great value, to wit, of the value of 800l. were loaded and put on board the said ship, and continued on board the said ship from thence until and at the time of the loss hereinafter next mentioned, and that the Plaintiff until and at the time of the loss and damage hereinafter mentioned, was interested in the said premises in the said writing or policy of assurance mentioned to a large value, to wit, to the value of all the monies so insured by them thereon, and that the said insurance so made by him was so made for and on his account and for his own use and benefit, to wit, at London aforesaid in the parish and ward aforesaid. And the said Plaintiff further saith, that afterwards, to wit, on, &c. the said ship with the said goods and merchandizes so loaden on board her as aforesaid, departed and set sail on her said intended voyage towards Embden aforesaid, and that afterwards and during her said voyage, to wit, on, &c. after her departure from London aforesaid and before her arrival at Embden aforesaid, on the high seas, by and through the mere dangers of the seas, &c. was greatly damaged, &c. and the said goods and merchandizes thereby then and there in the said voyage were wetted, damaged, and wholly spoiled, and rendered of no use or value to him the said Plaintiff.

To this there was a special demurrer, assigning the following causes; "For that it is not alleged nor does it appear in or by the said first count of the said declaration that any goods or merchandize were loaden on board of the said ship in that count mentioned, at London in the said writing or policy of [154] insurance mentioned, or that the said goods and merchandize which are in that count alleged to have been on board of the said ship at the time of the loss in that count mentioned were loaden on board of the said ship at London aforesaid, or at what time or at what place the said goods and merchandize were loaden on board the said ship, whereas the beginning of the adventure of the Defendant upon the goods and merchandize mentioned in the said writing or policy of assurance in the said first count of the said declaration mentioned is by the said writing or policy of insurance declared to be from the loading thereof on board the said ship, and the said Defendant is not according to the meaning and effect of the said writing or policy of insurance in the said first count mentioned liable for losses sustained by or upon any goods or merchandize which were not loaden on board the said ship at London aforesaid, and also for that it is not alleged nor does it appear in or by the said first count of the said declaration that the said hogsheads of tobacco therein alleged to have been loaden on board the said ship were marked or numbered in the manner in the said writing or policy of insurance mentioned, whereas the said Defendant is not according to the meaning and effect of the said writing or policy of insurance liable for losses sustained by or upon any goods except 15 hogsheads of tobacco marked and numbered in the manner in the said writing or policy of insurance in that behalf mentioned. And also for that it is not alleged nor does it appear in or by the said first count of the said declaration that the said Plaintiff, or that any or what other person had at the beginning of the said adventure any interest or concern in the said goods therein alleged to have been loaden on board of the said ship, or at what time the said Plaintiff began to have any interest or concern therein; and also for that it is not alleged nor does it appear in or by the said first count of the said declaration where or at what place the said goods therein mentioned were wholly spoiled and rendered of no use or value to the said Plaintiff, but the said goods are therein and thereby alleged to have been wholly spoiled and to have been rendered of no use or value without any place or venue being in that behalf men-

tioned; and also for that the said first count of the said declaration is in various other respects insufficient, informal, and defective."

Joinder in demurrer.

Heywood, Serjt., in support of the demurrer. 1st, It should have been averred that the goods were put on board the ship at [155] London: for if they were put on board at any other place, the policy has not been complied with. *Hodgson v. Richardson*, 1 Bl. 463. That was the case of an insurance at and from Genoa, the cargo having been taken in at Leghorn, and the ship having lain above five months at Genoa waiting for convoy, which circumstance, though known to the insured, was not communicated to the underwriter. The words of Mr. Justice Wilmut are very strong: "The fact disclosed by this policy is not true, that Genoa is the loading port, for so it must be understood; and in such cases I will not speculate on the materiality or immateriality of the fact." The policy in this case being at and from London, the subsequent words, "beginning the adventure on the said goods and merchandize from the loading thereof on board the said ship," are necessarily confined to a loading at London. It is impossible to argue that the words "to wit at London aforesaid in the parish and ward aforesaid" can be so applied to the averment of loading as to describe the place where that loading was made; since they do not occur until after the intervention of several independent and distinct averments. Nor will the Court read the declaration with an endeavour to support it, for the rule has been established ever since the time of Plowden that the intendment is against the party averring. 2dly, It was necessary to shew that the goods were marked and numbered in the manner stated in the policy, since the undertaking of the underwriters does not extend to any goods not so marked and numbered. 3dly, It ought to appear that the assured was interested in the goods not only at the time of the loss, but also at the time of making the insurance: for otherwise the policy is void. *Sadlers' Company v. Badcock*, 1 Wils. 10. *Hibbert v. Carter*, 1 T. R. 745. *Perchard v. Whitmore*, Guildhall sittings after Michaelmas term 1786, before Buller, J.(a). 4thly, There are two material [156] facts in this declaration; one the promise to pay in case of a loss, and the other that a loss took place. To the latter of these no venue is assigned. And though it be true that the allegation of the promise having been made in an English county, will draw to it the cognizance of the other fact which took place out of England, provided a venue in England be alleged, yet it is necessary to allege a venue, as in the case of a bond made abroad.

Bayley, Serjt., contrà. 1st, It sufficiently appears that the goods were put on board at London. The several allegations of the loading the goods, the value of the goods, the interest of the Plaintiff, and that the insurance was made on his account, are all parts of one sentence; and the words, "to wit, at London aforesaid in the parish and ward aforesaid," with which that sentence concludes, apply to the whole, and may be considered as inserted at the end of every branch. The averment is not the less certain because it comes under a "to wit," and if the "to wit" be omitted,

(a) *Perchard v. Whitmore*, Guildhall sittings, after Mich. Term, 1786.

Action on a policy of insurance on goods on board the ship "L'Aurore" at and from Cette to Guernsey. In the declaration it was averred that Peter Maingy and Nicholas Maingy, until and at the time of the loss were interested in the goods and merchandizes in the said policy mentioned to a great value, to wit, &c. and that the said insurance was so made for the said P. M. and N. M. and for their account. In the course of the cause the Plaintiff called Mr. Le Mesurier, who was objected to as an interested witness. He admitted that having no interest in the goods insured when the policy was effected, he had since become a partner with P. M. and N. M. and had taken a share of all the stock, and among other things of the goods insured. Upon this Mr. Le Mesurier was rejected. But Cowper for the Defendant pressed that the Plaintiff might be nonsuited, insisting, that as Mr. Le Mesurier was interested in the goods insured, the averment in the declaration was not proved.

BULLER, J., said, he thought the Plaintiff ought not to be nonsuited upon that point, for that Mr. Le Mesurier was not interested at the time of making the policy to which the averment of interest related, and the Plaintiff brought the action for those who were interested at the time.

Many other points were contested in the cause, and a verdict was found for the Defendant.

the loadings, which is the first member of the sentence, is alleged to have taken place at London. Besides, it is not material that it should appear upon record that the goods were put on board at the place mentioned in the policy. The meaning of the expression in the policy is, that the risk shall begin from the time of the goods being laden on board the ship at the place mentioned in the policy; but whether the goods be first laden on board the ship before or after her arrival at that place the policy will be equally complied with. It may be material, indeed, in many cases to represent to the underwriters at what place they were actually put on board. And the case of *Hodgson v. Richardson* was decided entirely on the want of a proper representation. 2dly, It is sufficient to observe, that the declaration avers that 15 hogsheads of tobacco, "the goods mentioned in the policy," were put on board. 3dly, It is not necessary that the party insuring should have an interest at the time of the policy being effected, for perhaps he may insure on the knowledge of goods about to be consigned to him, and a reasonable expectation has always been held the subject of an insurance. If it were otherwise, policies on "goods shipped or to be shipped" could not be supported. [157] 4thly, It appears that the loss was on the high seas, and it is a general rule that the venue where the cause is laid draws to it the trial of all facts arising abroad. In 6 Co. 47 b. a case upon a policy of insurance is mentioned which is precisely in point. To the same effect are *Lutw. 699. Ilderton v. Ilderton*, 2 H. Bl. 161, and *Neale v. De Garay*, 7 T. R. 243.

The Court inclined to think the declaration bad, but took time to consider of their opinion.

And on a subsequent day gave leave to the Plaintiff to amend without costs.

STANWAY QUI TAM v. PERRY Sheriff of Essex. May 24th, 1800.

In a penal action a *capias ad respondendum* issued within a year after the offence committed, but never was served on the Defendant or returned; after the expiration of the year, but in the same term, a *capias per continuance* issued and was duly served and returned; the declaration was of the term in which both writs issued. Held that the first writ not having been returned could not be connected with the second so as to support the action (a).

This action was brought to recover the penalty imposed by the 29 Eliz. c. 4, on sheriffs for extortion.

At the trial before Lord Eldon, Ch. J., at the sittings after Hilary term, the Plaintiff, in order to shew that the action was commenced within a year, gave in evidence two writs, the one a *capias ad respondendum* issued on the 8th of November 1799, and the other a *capias per continuance* issued on the 13th of the same month; the former of these writs issued within a year after the offence committed, but the latter did not: the Defendant was served with the latter writ only. The declaration was of Michaelmas term. A verdict was found for the Plaintiff. After the verdict was given, it was discovered and objected by the Defendant's counsel, that the first writ had never been returned, and could not therefore be connected with the second. On an affidavit of this fact a rule was obtained calling on the Plaintiff to shew cause why the verdict should not be set aside and a nonsuit be entered.

Shepherd, Serjt., now shewed cause, and contended, that as the declaration in this case was of the same term with that in which the first writ issued, namely, Michaelmas term 1799, it was not necessary that it should have been returned in order to support the action; for although in *Harris v. Woolford*, 6 T. R. 617, it was held necessary that the first of two writs issued in that case should appear to have been returned in order to save the statute of limitations, yet it was to be observed that there the declaration was not delivered within a year after the first writ issued; whereas in *Parsons v. King*, 7 T. R. 6, the Court held, that if the Plaintiff declare any time within a year after a writ issued in time to save [158] his action, it need not be shewn that such writ was returned. He said that this case, therefore, might be considered as if the second writ had never issued at all.

Bayley, Serjt., contra, relied on *Harris v. Woolford*; and observed, that in *Parsons*

(a) Vide *Sturmy v. Sheriff of Middlesex*, 11 East, 25, 31. *Weston v. Fournier*, 14 East, 492. *Thistlewood v. Cracroft*, 6 Taunt. 141.

v. *King*, as one writ only had issued and the Plaintiff had declared within a year, it must be understood that he had declared on that writ; whereas in the present case, as the Defendant had been served with the second writ only, it was evident that he could only have appeared to the second writ, and that the Plaintiff must be taken to have declared upon that writ only. He added, that this very point had been decided in this court in a case of *Field qui tam v. Currol*, M. 32 Geo. 3, before Eyre, Ch. J., who nonsuited the Plaintiff on a similar objection.

The Court agreed that the distinction between the cases cited proceeded on the circumstance of two writs having issued in the former and one only in the latter; and held, that if two writs be issued, one within a year after the offence committed and the other not, it is necessary that the first writ should be returned in order to connect it with the second, and thereby make the action appear to have been commenced in due time.

The objection, however, not having been taken till after the verdict had been given, the Court refused to enter a nonsuit, but made the rule absolute for a new trial.

PRICE v. MESSENGER AND ANOTHER. May 24th, 1800.

[Observations adopted, *Atkins v. Kilby*, 1840, 11 Ad. & E. 784. Distinguished, *Hoye v. Bush*, 1840, 1 Man. & G. 786.]

If an officer seize goods in obedience to the warrant of a magistrate, whether that warrant be legal or not, he cannot be sued without a previous demand of a copy and perusal of the warrant according to 24 Geo. 2, c. 44. If the warrant be to seize "stolen goods," and the officer seize goods which turn out not to have been stolen, he is still within the protection of 24 Geo. 2, c. 44 (a).

Trespass for seizing and taking a quantity of moist sugar and a quantity of tea and nails of the Plaintiff, and for assaulting and imprisoning his person, and for carrying the Plaintiff, together with the above goods, before a justice of the peace, under colour and pretext that part of the said goods, to wit, the sugar had been before then feloniously stolen from some ship in the Thames, and had been found concealed in certain premises of the Plaintiff in which he carried on his trade and business of a grocer. There was a second count for assaulting and imprisoning the Plaintiff generally, and a third for seizing and taking away his goods.

[159] The Defendants pleaded not guilty as to all but taking away the tea and nails, as to which they suffered judgment by default.

This cause came on before Lord Eldon, Ch. J., as well to try the issue joined, as to assess damages upon the judgment by default at the Westminster sittings after last Hilary term. The evidence was in substance as follows: The Plaintiff was a grocer living on the Surry side of Westminster bridge, and the Defendants two constables of one of the police offices in Westminster. On the 2d of April 1799 an information was exhibited against the Plaintiff at the police-office, upon which the following warrant was granted. "Surry and Middlesex to wit. To all constables and other His Majesty's officers of the peace whom these may concern. Whereas complaint upon oath hath been this day made unto me one of His Majesty's justices of the peace for the said counties by Henry Nash that there was lately stolen from some ship or vessel lying in the river Thames a quantity of sugar and that there is just cause to suspect that the said stolen goods are knowingly concealed or deposited in the shop warehouses outhouses yard or premises belonging to and occupied by Price and Co. situate the second house in Coad's Row on the Surry side of Westminster bridge nearly opposite to Astley's theatre, these are therefore to require you forthwith to make diligent search in the day time in the said premises for the said stolen goods and if you find the same or any part thereof that then you secure the said goods, and bring the person or persons in whose custody you find the same before me or some other of His Majesty's justices of the peace to be examined and dealt with according to law. Given under my hand and seal the 2d day of April, 1799, P. Colquhoun." On the same day on which the

(a) S. C. 3 Esp. Rep. 96, and see *Cooper v. Booth*, 3 Esp. Rep. 135, 148. *Milton v. Green*, 5 East, 233. *Smith v. Wiltshire*, 2 B. & B. 619. *Bell v. Oakley*, 2 M. & S. 259.

warrant issued the Defendants went to the Plaintiff's house, and finding some sugar of a particular quality selling under prime cost, and a bag of nails and two parcels of tea of which no satisfactory account was given, sent to the office requesting instructions for their conduct respecting the tea and nails which were not mentioned in the warrant; upon which they were ordered by the magistrate to bring the sugar, tea, and nails to the office. This they accordingly did, and at the same time carried the Plaintiff before the magistrate, who discharged him for that day, but desired him to attend the next morning. The Plaintiff having attended the next morning, and no sufficient evidence having been produced against him, he was discharged altogether, and his property was afterwards restored. It was proved that the Defendants had conducted themselves with great civility towards the Plaintiff. Lord Eldon directed the jury that the war-[160]-rant was no justification as to anything but the assault, imprisonment, and taking the sugar, and that the verbal orders of the magistrate under which the Defendants seized the tea and nails would not avail them. For the Plaintiff, however, it was insisted that even the assault, imprisonment, and taking the sugar under the circumstances of the case, were not justified by the warrant: on the other hand, it was contended that they were justified by the warrant which was granted by virtue of the bum-boat act (*a*); and that at all events a copy of the warrant should have been demanded, pursuant to 24 Geo. 2, c. 44. His Lordship having desired the jury to distinguish the damages incurred by the seizure of the tea and nails, from those incurred by the assault, imprisonment and seizure of the sugar, a verdict was found of 30*l.* for the former, and 70*l.* for the latter.

A rule having been moved for, calling on the Plaintiff to shew cause why this verdict should not be set aside, it was granted as to the 70*l.* the Court intimating an opinion that as to the 30*l.* the verdict could not be disturbed.

Shepherd and Best, Serjts., now shewed cause. The main objection to the Plaintiff's recovery is, that no demand was made of a copy of the warrant under which the Defendants acted, pursuant to 24 G. 2, c. 44. But no officer can avail himself of that objection, unless he shew that he has acted in obedience to the warrant of a magistrate, per Lord Mansfield, *Dawson or Lawson v. Clarke*, cited 3 Bur. 1767; whereas in this case the Defendants exceeded the authority delegated to them by the magistrate. Where the warrant itself authorises others to act in a matter not within the jurisdiction of the magistrate, he is personally responsible; but where an officer exceeds his authority, the magistrate who gave that authority is not liable for such excess. Here the warrant was to seize stolen sugar, and the officers were bound at their peril to seize stolen sugar or none at all. In the case of *Boote v. Cooper*, cited 1 T. R. 535 (*b*), where the warrant was to enter and search for concealed goods, it was rightly held that the officer was justified in entering and searching, though no con-[161]-cealed goods were found, that being no excess of authority; but in *Entick v. Carrington*, 2 Wils. 286, De Grey, Ch. J., seems to have considered that an officer who, under a warrant to search for stolen goods, should seize the goods of the owner of the house, would not be within the protection of the 24 Geo. 2, c. 44. Supposing the warrant itself to be legal, still the Defendants have not executed it according to its true spirit; for they were not to decide wantonly that any sugar found in the Plaintiff's house was stolen sugar, but to exercise a sound discretion. Now the sugar seized by the Defendants appears to have been exposed in a situation in which no man would place goods subject to seizure. Though the warrant speaks of sugar deposited or concealed, yet the word "deposited," when applied to stolen goods, must mean deposited for the purpose of concealment; especially as it is connected with the word "concealed."

(*a*) 2 Geo. 3, c. 28, s. 7, which enacts, that it shall be lawful for any justice of the peace, upon information on oath, that there is cause to suspect that any merchandizes &c. (suspected to have been stolen or unlawfully come by, or taken from some ship or vessel in the river Thames) are concealed in any dwelling-house, warehouse, &c. by warrant under his hand and seal, to cause every such dwelling-house, &c. to be searched in the day time; and if any such merchandizes, &c. shall be found therein, to cause the same to be deposited in some place of safety, and also to cause the person in whose house, &c. the same shall be found, to be brought before him; and if such person shall not give a satisfactory account how he came by the same, he shall be adjudged guilty of a misdemeanor.

(*b*) Reported 3 Esp. Cas. 135, by the name of *Cooper v. Booth*, in error in K. B.

Cockell, and Bayley, Serjts. contra. If the officers acted in obedience to the warrant, it is altogether immaterial whether the warrant were legal or illegal; for if legal the officers and the magistrate are both justified; if illegal the magistrate alone is responsible. It would be highly dangerous to allow the officer to exercise his judgment whether the warrant directed to him by the magistrate were good or not; it is his duty to obey. The warrant in this case only asserted that there was stolen sugar in the Plaintiff's house, and ordered the officers to seize it; now it was impossible for them to ascertain whether the sugar they found was stolen or not, or how much of it was in that predicament.

LORD ELDON, Ch. J. The ground upon which I have formed my opinion in this case may be stated in a very few words. The public interest requires that officers who really act in obedience to the warrant of a magistrate should be protected. In such cases, therefore, the law has provided that the remedy of the party grieved shall be confined to the magistrate, as well where he has granted a warrant without having jurisdiction, as where the warrant which he has granted is improper. The statute provides that no action shall be brought against an officer for any thing done in obedience to any warrant of any justice of the peace, unless a demand hath been made of a copy and perusal of the warrant; and in that case, after compliance with such demand, any action shall be brought against such officer for any such cause as aforesaid, without making the justice a Defendant, a verdict shall be given for the Defendant, "notwithstanding any defect of jurisdiction in such justice;" and if such action be brought jointly against such justice, and [162] also against such officer, on proof of such warrant, the jury shall find for the officer "notwithstanding any such defect of jurisdiction as aforesaid." The act therefore takes it for granted, that an officer may be said to act in obedience to the warrant of a justice of the peace, though such justice had no jurisdiction, and though the warrant be an absolute nullity. For it is as much a defect of jurisdiction, if the justice grant an improper warrant in a case over which he has jurisdiction, as if he had no jurisdiction over the case at all. The only question therefore is, Whether the act of the officer were done in obedience to any warrant of any justice of the peace? And considering the nature of the protection intended to be given to officers by this act, I think it reasonable to say that the Defendants in this case acted in obedience to the warrant within the meaning of the legislature. If this be so, it is sufficient for the Defendant to say that no demand of a perusal and copy of the warrant was made, whether that warrant on production would have afforded a defence or not. It was not agreed by the Plaintiff's counsel whether the warrant itself were legal or illegal. Now suppose it to have been legal: the officer acted with as much precision in the execution of the warrant, as the justice in granting it. If the information given to the latter was insufficient to enable him to describe the goods with certainty, the former was unable to ascertain with certainty what goods he was directed to seize. Then suppose the warrant to have been illegal, it was not competent to the Defendant to judge of its legality. If he executed it in the only way in which it was capable of being executed, namely, by making it attach on all goods which fell within the description contained in it, he acted in obedience to it, and having done so, he is entitled to avail himself of the protection of the act. Whether the warrant would have afforded a defence to the justice or not I shall give no opinion.

HEATH, J. The only question is, whether the constable acted in obedience to the warrant? Whether the warrant were legal or not, we are not called upon to decide. When this Defendant seized the teas he was not acting in obedience to the warrant; but when he seized the sugars he was. The warrant, after stating that certain sugars had been stolen, and that there was reason to suspect that the same were concealed or deposited in the Plaintiff's house, directs the Defendant to seize them. Under these circumstances, he could not act otherwise than he has done.

ROOKE, J. The Defendant appears to me to have acted in obedience to his warrant, and therefore to come within the pro-[163]-tection of the statute. If the warrant were illegal the Plaintiff might have proceeded against the justice: but as he has chosen to abandon that remedy and to proceed against the constable, he is only entitled to a verdict for such damages as arose from that seizure which was not made in obedience to the warrant.

Verdict to be entered for the Plaintiff for 30l. only.

DICKER v. ADAMS, Executor. May 26th, 1800.

If issue be joined upon one of three pleas, and judgment be entered by default upon the two others, the Plaintiff cannot execute a writ of inquiry on those pleas on which he has judgment, but must award jury process tam ad triandum quam ad inquirendum.

Indebitatus assumpsit. The Defendant pleaded first non assumpsit; secondly, non assumpsit infra sex annos; and thirdly, a set-off. On the first plea issue was joined; and to the two last there was a demurrer. No joinder in demurrer having been put in, the Plaintiff signed judgment. After this a writ of enquiry of damages on the two counts upon which judgment had gone by default was executed.

A rule nisi was obtained upon a former day to set aside this writ of inquiry, and all proceedings thereon, for irregularity; because, as issue was joined on non assumpsit, the Plaintiff should have entered the issue and awarded jury process as well to try the issue joined as to inquire of the damages on the interlocutory judgment.

Shepherd, Serjt., now shewed cause against the rule, and Lens, Serjt., in support of it, cited Tidd's Pract. K. B. 795, ed. 2 (p. 591, ed. 1).

The Court were clearly of opinion that as an issue was joined upon the record, the Plaintiff ought not to have executed a writ of inquiry on the two pleas on which judgment had gone by default.

Rule absolute.

PARIENTE, Assignee, &c. v. CASTLE, ONE, &c. May 26th, 1800.

The Court will not discharge a prisoner out of execution, because there is no judgment against him docketed and entered upon the rolls of the Court.

This was an application to discharge the Defendant out of the custody of the warden of the Fleet as to the execution in this case because there was no judgment docketed and entered on the rolls of the Court whereon to found the writ of execution.

Bayley, Serjt., in support of the rule.

Shepherd, Serjt., contra.

The Court rejected the application, saying it was unprecedented.

Rule discharged.

[164] ANDERSON v. PITCHER & UX. May 26th, 1800.

A warranty to depart with convoy is not complied with, unless sailing instructions be obtained before the ship leaves the place of rendezvous, if by due diligence of the master they can be then obtained (a).

This was an action for money had and received to the use of the Plaintiff by the Defendant's wife, before her intermarriage with the Defendant.

This cause was tried before Lord Eldon, Ch. J., and a special jury at the Guildhall sittings after Hilary term, when the following case appeared in evidence:—On the 31st of October, 1795, the Plaintiff underwrote a policy of insurance on the "Golden Grove," at five guineas per cent., "at and from London to all or any of the West India islands, Jamaica and St. Domingo excepted, with leave to go to the place of rendezvous to join convoy, and warranted to sail from thence with convoy for the voyage." The ship having been lost soon after she sailed from Portsmouth, the Plaintiff paid 284l. 5s. under the policy. To recover back that sum the present action was brought, the Plaintiff being of opinion that the "Golden Grove" never received her sailing instructions, and therefore had not fulfilled the warranty to depart with convoy. It now appeared that the "Golden Grove" arrived at Spithead about nine o'clock in the morning of the 15th November 1795; that she came round under the care of the first mate, the captain himself being on shore at Portsmouth; that on the day preceding (the 14th) sailing instructions were delivered at Portsmouth to all such ships as applied regularly for them, and that the captain of the "Golden Grove" previous to her arrival made enquiry concerning sailing instructions, but found that they could not be obtained

(a) S. C. 3 Esp. Rep. 124. And see *D'Aguilar v. Tobin*, Holt, Ni. Pri. 185.

until the ship was actually in sight; that on the 15th of November, by day-light, Admiral Sir H. C. Christian, the commander of the convoy got under weigh, but had not entirely quitted the roadstead until about four o'clock in the evening; that when he got under sail he left the "Trident" frigate to bring up such vessels as did not weigh anchor with him, that about one o'clock the same day the captain of the "Golden Grove" repaired on board, and got under weigh, at which time the "Trident" had also got under weigh, and both the admiral's ship and the "Trident" had then proceeded so far, that it was clear the "Golden Grove" could not overtake the former soon enough for the captain to go on board that night, and it was even doubtful whether he could overtake the latter; that on the next day, between 10 and 12 o'clock in the forenoon, the captain [165] of the "Golden Grove," being then only a quarter of a mile from the admiral's ship, went on board her, and obtained sailing instructions; that soon afterwards the "Golden Grove" was lost, having been, from the time of her departure to that of the loss, under the protection of the convoy. Lord Eldon directed the jury, that although under some circumstances sailing instructions might be dispensed with, yet that this did not appear to be a case of that kind; that the "Golden Grove" did not appear to him to have departed from the place of rendezvous with convoy, since she had either not arrived time enough to obtain sailing instructions, or if she had arrived time enough, her captain had not used the necessary endeavours to obtain them before he sailed. The jury found a verdict for the Plaintiff.

Early in this term a rule nisi for a new trial was obtained, in support of which, affidavits of the Defendant's attorney, and of several naval men, to the following effect, were filed:—That the point upon which the verdict had proceeded was a matter of surprise upon the Defendant, it having been understood that the cause would be tried on the single question, Whether sailing instructions had ever been obtained? that it is the constant practice for commanders of convoys to give sailing instructions to vessels which sail under their protection, after leaving the place of rendezvous, and that such vessels are always understood to depart with convoy; that sailing instructions are never given to the captain of any vessel until the vessel is in sight; that when the Admiralty directs the commander of a ship of war at Spithead to take under convoy a fleet bound to the westward, he is generally instructed to put to sea thirty hours after the wind has been fair, with a view to give time to the ships in the Downs to come round to Spithead; and, that as such ships frequently do not arrive until the convoy is under weigh, and are often prevented, by blowing weather, from getting their sailing instructions at the place of rendezvous, it is usual for their captains to obtain them the first time the convoy is brought to at sea.

Shepherd, Serjt., in the course of the term shewed cause; and after observing, that as the facts of this case had been before the Court upon a former occasion in *Webb v. Thompson* (ante, vol. i. p. 5), they would not interfere, unless they entertained very great doubts upon the question; contended, that the "Golden Grove" was not within any of the exceptions to the general rule, which [166] required sailing instructions in order to the fulfilment of a warranty to depart with convoy; and that consequently, as she had not obtained them before her departure from the place of rendezvous, she had not fulfilled the warranty in this policy; that in this case the commander of the convoy was ready to have given sailing instructions, had they been applied for; and that, if such a latitude as was contended for was to be allowed, it must hereafter be deemed sufficient if ships obtain their sailing instructions the day before their arrival at the port of discharge.

Best, Serjt., in support of the rule. Although the "Golden Grove" had not obtained sailing instructions on the 15th, when she departed from Spithead, yet she received them early enough on the next morning to constitute a departure with convoy within the spirit of the warranty. The words of the warranty do not require that sailing instructions should be obtained, and therefore a greater latitude may be allowed than in a construction of the very letter of the warranty. Usage of trade has been constantly admitted in the construction of warranties to depart with convoy; thus, if a ship depart from the port of London and join convoy at Portsmouth or the Downs, it is a sufficient compliance with the warranty to depart with convoy (vide ante, p. 115). Usage therefore may be admitted in the present case, to shew that sailing instructions are not necessary till the ship has actually put to sea. No case has been cited to shew that they are necessary at the time of breaking ground; if they be obtained as soon as they become necessary for the protection of the ship, it is sufficient;

and, as the commander of the convoy in this case gave sailing instructions to other ships at the same time that he gave them to the "Golden Grove," it appears that he considered it sufficient for their protection to deliver them at that time. It may be contended that the case of *Victoria v. Clerve*, 2 Str. 1250, Park's Insur. 348, is distinguishable from this; for there it was impossible to get sailing instructions. But *Feodon v. Wilmet*, Park's Insur. 341, note a. is in point, for there sailing instructions were not applied for till after the convoy was under sail. No neglect is imputable to the captain in this case; he applied for his sailing instructions before the "Golden Grove" arrived, but was refused them; she actually did arrive on the morning of the 15th, before the convoy had left the place of rendezvous; but, as the convoy was then under sail, it may have been dangerous for him to put out a boat. [167] On the morning of the 16th the sailing instructions were obtained without any inconvenience having arisen from the want of them, the ship having remained the whole time under the protection of the guns of the convoy.

Cur. adv. vult.

The opinion of the Court was now delivered by

LORD ELDON, Ch. J. This action is brought to recover back 284l. 5s., paid by the Plaintiff as under-writer of a policy on the ship "Golden Grove," to the Defendant, the assured in that policy, under the supposition that the loss which happened was within the terms of his undertaking. He now says, that on a better examination of all the circumstances attending that loss, he finds he was not liable, as he had erroneously supposed, and therefore, that the money which he paid to the Defendant under a mistake may be recovered back by him. This is a case in which the convoy appointed by Government was ready to give sailing instructions at the place of rendezvous, to all such vessels as were ready to receive them. And it appears to me, that if the captain of the "Golden Grove" had been on board his ship at nine o'clock in the morning, when she arrived, he might have obtained sailing instructions from the frigate before he left the place of rendezvous. In point of fact, however, the admiral was under weigh before the "Golden Grove" arrived, and the frigate was under weigh before the captain was on board. It is clear also, that the captain of the "Golden Grove" could not have gone on board the admiral that night, and it was very doubtful whether he could have gone on board the frigate. The question for the Court to decide is, Whether a new trial should be granted, the jury having determined that, under all the circumstances of the case, the warranty was not complied with? Considering that the case came to trial chiefly on the question, Whether or not any sailing instructions were ever obtained by the "Golden Grove?" and that the Defendant was somewhat surprised by the point raised at the trial, respecting the time at which the sailing instructions were obtained, I should wish a new trial to be granted, if I could see any proposition of law to be stated to a jury in the Defendant's favour. But it seems to me, as well from the affidavits as the evidence, that the Defendant would not be entitled to retain a verdict if he should obtain one. The policy contained this warranty: That the ship should be at liberty to go to the place of rendezvous to join convoy, and that she should sail [168] from thence with convoy for the voyage. It is now too late to say that this warranty is not to be expounded with due regard to the usage of trade. Perhaps it is to be lamented, that in policies of insurance, parties should not be left to express their own meaning by the terms of the instrument. This seems to have been the opinion of that great judge Lord Hold (a). It is true, indeed, that Lord Mansfield, who may be considered the establisher, if not the author, of a great part of this law, expressed himself thus: "Wherever you render additional words necessary, and multiply them, you also multiply doubts and criticisms" (b). Whether, however, it be not true, that as much subtlety is raised by the application of usage to the construction of a contract, as by the introduction of additional words, might, if the matter were res integra, be reasonably questioned. If, therefore, the question before us be still undetermined, the inclination of my mind will be to adhere to the letter of the contract: and I feel the more disposed to do so, since it appears most clearly, from the affidavits which have been produced, that no man of the highest experience in the navy can ascertain, by any reference to usage, what other interpretation ought to be adopted. The first question is, What is the meaning of the words, "departing with convoy?" Do they mean departing with sailing instruc-

(a) *Lethalier's case*, 2 Salk. 443.

(b) In *Lilly v. Ewer*, Dougl. 74.

tions in all cases? or, Do they mean departing with sailing instructions in a case circumstanced like this? It is clear that sailing instructions are not necessary in all cases: but the decisions authorize me in saying, that in general cases they are required; and if that be so, I do not find any thing in the circumstances of this case which can bring it within any of the exceptions to the general rule. In *Hibbert v. Pigon* (Park's Insur. 339), Lord Mansfield laid it down generally, that sailing instructions are essential to convoy. Mr. Justice Willes, indeed, entertained doubts upon the subject; and Mr. Justice Buller declined giving any opinion upon that point. In that case, however, it was not necessary to decide whether sailing instructions were essential or not; for though captain Mann had neglected no means of obtaining sailing instructions from the "Glorieux," yet it did not appear, upon the first trial, that the "Glorieux" was a convoy appointed by Government, and therefore the Court was obliged to hold that the warranty was not fulfilled. It is true that it was determined in [169] *Victoria v. Cleve*, where the convoy was appointed by Government, that sailing instructions may be dispensed with where no default appears on the part of the master. It being once decided that a convoy within the terms of the policy means a convoy appointed by Government, it seems to follow of necessity that the ship must depart with sailing instructions, if by the due diligence of the master they can be obtained. The value of a convoy appointed by Government in a great measure arises from its taking the ships under control as well as under protection. But that control does not commence until sailing instructions have been obtained; nor can it be enforced otherwise than by their means. Indeed, the reason of that rule which requires that the convoy should be appointed by Government, shews the necessity of having sailing instructions; since without them the ship does not stand in that relation or under those circumstances in which she can take the full benefit of the Government convoy. If the fleet be dispersed by a storm, how is she to learn the place of rendezvous? If it be attacked by the enemy, how is she to obey signals? In short, what communication can the protected have with the protecting force. It has been contended, that if she be under the protection of the guns it is sufficient. But will it be contended that, provided she be under the protection of the guns at her departure, though sailing instructions be never obtained during the voyage, or not till the last day of the voyage, the warranty is complied with? Either sailing instructions are not necessary, or, if they be necessary, they must be so at some given period, and can only be dispensed with in some particular cases. Then can any other period be assigned but the beginning of the voyage? Some of these affidavits say, that if the ship has obtained her sailing instructions at any time before she is lost, it is sufficient; but that she must obtain them before she is lost. Are we then to depart from the terms of the contract between the underwriter and the assured, in order to let in a construction which is at variance with the reason on which that contract is founded? Let us consider the exceptions to the general rule which have been admitted. Respecting *Victoria v. Cleve* there can be no difficulty, since the very ground of the decision in that case was, that there was no default in the master, and that no activity of his could have procured sailing instructions, he having come out of the port of Fleckery in obedience to the signal of the convoy then off that port, and having been prevented from receiving sailing [170] instructions before the loss of the ship, by the roughness of the weather. In *Webb v. Thompson*, Mr. Justice Buller, with the assent of the Court, stated, with reference to a case arising out of the loss which happened to this very ship, that, generally speaking, unless sailing instructions were obtained, the warranty is not complied with; and the Court did not, at that time, see any circumstance by which this case could be taken out of the general rule. The late Lord Chief Justice of this court, in his note book, makes this observation in the case of *Webb v. Thompson*:—"It seems to me that the single question is, whether the ship departed with convoy? In fact she sailed with the fleet. Admiral Christian distinguished accurately between ships under protection of the fleet and ships under convoy. All friends are protected while they are within reach of protection; but ships under convoy are according to him, ships under control who can be spoken to in a language which they understand. They control them—would fire at them, if they misbehave. The fact settled that it would raise the premium, would decide. It may make a difference in the premium, whether the ship be under protection without control, or under protection and control. It is necessary to inquire, therefore, whether she got sailing instructions (which is the mode of putting herself under convoy), and when? It may seem a hard case to take

advantage of a ship, but the nature of the contract is an answer. It is a contract founded in the consideration of premium estimated by the risk." Taking into consideration the way in which the premium in these cases is estimated, can we say that the underwriters have had the full benefit of the undertaking of the assured to depart with convoy, when in fact it was a mere matter of chance whether the "Golden Grove" would, under the circumstances of her actual departure, ever be able to procure sailing orders or not? The present case may indeed be decided without affecting the case of any other ship which sailed with that convoy; since, if the captain of the "Golden Grove" had gone on board the frigate at nine o'clock in the morning of the 15th, he might have obtained sailing instructions, and that he did not do so was his neglect. In the case of *Feedon v. Wilmot*, sailing instructions were not obtained; but it appears that they were applied for and refused while the convoy was in the Downs, the place of rendezvous. The ship, therefore, departed with convoy from the place of rendezvous, in the strictest sense of the word. Indeed, the Court is bound to hold, that where sailing instructions are, under such cir-[171]cumstances, refused by the commander of the convoy, they are so refused for the benefit of the trade which is to be protected by the convoy. It is very usual to refuse to give them till the fleet is out at sea; and we know that La Motte who was hanged for giving intelligence to the enemy, got possession of the sailing instructions in consequence of their having been given before the departure of the fleets. It is clear, therefore, that a ship is not bound to obtain sailing instructions in the place of rendezvous at all events; but if they can be obtained by due diligence, she is bound to obtain them, because it then appears that the convoy appointed by Government decides, that under all the circumstances of the case, the place of rendezvous is the place where they ought to be obtained. The principle of law which says that a convoy means a convoy acting under the orders of Government, must operate in favour of those who, without any neglect of their own, are not able to obtain sailing instructions, because they must obey the orders of that convoy which is supposed most capable, under all the circumstances, of judging for the best. In a late case, Lord Kenyon intimated a strong opinion that sailing instructions were essential where they could be had (a). Having now stated the exceptions to the general rule, it does not strike me that the present case comes within any of them. (His lordship then went through the affidavits.) It appears to me the constant usage for the commanders of convoys to give sailing instructions to all ships which depart under their protection, whenever applied for. But the question in this case is, Whether the warranty, that the "Golden Grove" shall depart with convoy from the place of rendezvous, has been fulfilled? It may be the duty of a commander to give instructions at all times; but that will not vary the contract by which the assured undertakes that the ship shall be ready to receive them at the place of rendezvous. It is stated, in one of the affidavits, to be the practice for the Admiralty to give orders to the commanders of convoys at Spithead, to get under weigh 30 hours after the wind has been fair, in order to give time for the ships in the Downs to come round; and that in case of blowing weather it may not be in the power of the ships which come from the Downs to obtain sailing instructions previous to the convoy having set sail. But if such a case should occur, it will remain to be considered whether it may not be said that the ship departed with convoy as far as the cir-[172]cumstances of the case and due diligence on the part of the master, would admit. With respect to the case of a convoy being ordered to call off the several ports upon the coast, in order to enable such ships as may be willing to join; it is exactly the case of *Victoria v. Cleve*, where the ship being ordered by the convoy to leave the port without sailing instructions, was excused on the ground of obedience to the orders of the convoy. In this case the ship did come round time enough to have received her instructions at the place of rendezvous, had the captain used due diligence in applying for them. Not being able, therefore to represent to myself any principle of law, which could be stated to a jury as a foundation for a verdict in favour of the defendant, I think that the case must be decided on the general rule, which ought not to be infringed on account of any particular hardship which the Defendant may sustain.

Per Curiam. Postea to the Plaintiff.

(IN THE HOUSE OF LORDS.)

KNIGHT v. HALSEY; in Error. 1800.

Hops are, by law, titheable after they are picked from the bind. And no usage can vary this rule. No evidence is sufficient to support a real composition, unless it have some reference to a deed of composition (a).

This was an action on the case brought by the Plaintiff in error in the King's Bench against the Defendant in error, as farmer of and entitled to the tithe of hops within the parish of Farnham in the county of Surry, for not taking away the tithe of hops from a certain close in that parish, whereof the Plaintiff was occupier.

The declaration consisted of two counts. The first stated generally the Plaintiff's occupancy of the close in question, and the Defendant's right to the tithes, and that the latter neglected to take them away after they were duly set out. The second varied from the first, by averring that the tithe was set out "according to the usage and manner of tithing of hops in and throughout the said parish lawfully used."

The cause was tried before Hotham, Baron, and a special jury at the Surry spring assizes, when a verdict was found for the Defendant, under the direction of the learned Judge. To this direction a bill of exceptions was tendered, stating that at the trial the [173] counsel for the Plaintiff in error gave in evidence:—"That the Plaintiff in error, on the 1st of August 1795, was occupier of the close in question, whereon hops were then growing, and that the Defendant in error was the farmer of and entitled to the tithe of such hops; that within the parish and rectory of Farnham aforesaid, for above 60 years before the 12th of July, in the fourth year of the reign of the late King James the Second, when the tithes of hops were not compounded for, the manner of setting out tithes of hops within the said parish was as follows; that is to say, the occupiers, owners, and proprietors of lands within the said parish planted with hops have used to set out every tenth row, whenever hops have been planted in equal rows, and where the same have not been planted in equal rows every tenth hill of the said hops so growing in the said lands, and thereby to separate and divide the tenth part from the other nine parts of the said hops, and there to leave the same standing with the binds uncut, for the use of the impropiator of the said rectory, or his lessee or farmer for the time being to come upon the said lands, and in a convenient time there to cut the said binds of the said tithe-hops so set out as aforesaid, and to pick the said tithe-hops and carry away the same; That from the time when the occupiers used to set out their tithe in manner aforesaid, till the year 1795, when the Defendant became farmer thereof (being a period of 100 years), the tithe of hops was compounded for throughout the parish at the rate of 20s. by the acre; That the Defendant is entitled to tithe of hops of the close in question, being field land; That in the said year 1795 the said hops so then growing in the said close were planted in unequal rows; That on the 17th day of August 1795 the Plaintiff gave the Defendant a notice that he was about to set out the tithe in kind: That in consequence of a notice from the Defendant that he would take his tithe in kind, the tithe thereof was set out accordingly in the said close called Round Close, by every tenth hill, leaving the binds uncut, and the tithe marked with a hole dug in the ground, and was fairly set out, and all the hills not bearing hops passed over and not counted; That on the 2d day of September following the Plaintiff gave the Defendant notice in writing that the tithe in question was so set out; That on the 20th day of October following the Plaintiff gave a notice in writing to the Defendant to take away the said tithe so set out as aforesaid; That the Defendant did not take the same away, but left the tithe so set out [174] standing with the binds uncut, encumbering the Plaintiff's lands for the space of time in the said declaration mentioned; That tithe of hops may be fairly set out by the tenth hill; That such setting out is the most convenient mode and least liable to fraud and the general manner of manuring hop grounds is to spread the manure over the whole ground, for many hills will be weak and many will die, and it is impossible to foresee which; That hops will sometimes intermingle on poles on the same hill, but seldom between one hill and another, and where they happen to do so they are easily separated, and without any mischief or injury thereto; That the manner of picking

(a) Vide *Smyth v. Sambrook*, 1 M. & S. 70.

hops in the parish of Farnham is not to pick them into measures of a bushel each, but they are picked in the first instance into three sorts, called the bright, the middling, and the brown, of different qualities and values, which three sorts grow upon the same bind; viz. the bright are the finest and best, the middling the next best, and the brown of inferior quality: the difference in value between the bright and the brown is in the proportion of 7l. 10s. for the bright, and 3l. 3s. for the brown per hundred weight; the hops are thus divided into three sorts in the first picking from the binds into three different bags or baskets at the same time, each containing upon an average eight or ten bushels, and their respective contents are denoted by small round black specks or streaks made on the sides thereof, at different distances; but the bags or baskets are not all of the same measure; That the pickers pick in families, as it is called; viz. in parties, in unequal numbers; some of which families pick much quicker than others, but all cease picking at the same time, either on account of the approaching rain, which would soon spoil the hops when picked, or at meal times; That the average price of picking to be paid by the planter is two-pence per bushel to each family of pickers, separately and distinct from the others; That hops, in the parish of Farnham, are never measured, the pickers being paid according to the quantity denoted by the specks or streaks aforesaid: but when the bags are full, or at the respective times of giving over work, the hops that are picked are immediately turned over from the bags into a surplice or sheet, and carried from the ground to the oast to be dried; that it would be extremely prejudicial to measure them after picking, because it would render it inconvenient to pick them into three sorts, as aforesaid, and in such case it would employ the pickers an hour and an half extra, the flower of the hops [175] would be bruised, and the bright hops turned to brown, to the great injury of the planter as well as the tithe owner himself; whereas by setting out the tithe by the bill, with binds uncut, in the manner above mentioned, the tithe owner, as well as the planter, may pick his hops into three sorts, as aforesaid, at his own convenient time, and enjoy all the other conveniences above enumerated, as well as be enabled to take a tithe of the binds, together with the hops at the time of picking. It also appeared upon the reading of the answer of the Plaintiff in error to a bill filed against him by the Defendant in error in the court of Chancery, that the Plaintiff in error had admitted, that he believed it might be true that the introduction and first cultivation of hops in the said parish of Farnham and elsewhere in this kingdom, were with reference to what is termed the legal time of memory, modern, and within the time of memory."

Judgment having been given in the King's Bench for the Defendant, in pursuance of the verdict (a), the Plaintiff brought his writ of error, and having annexed the bill of exceptions to the record, and assigned the common errors, submitted that the judgment below was erroneous, and that a venire facias de novo should be awarded, for the following among other Reasons:

1. Although the common law does in general prescribe that there should be an uniform mode of setting out tithe, where no particular mode of setting out is established by custom, yet the custom of a particular place may authorize or require a different mode from that in general prescribed by the common law, if such custom be in itself reasonable. And it has never yet been decided, that the mode of setting out tithe of hops by the tenth measure, as contended for by the Defendant in error, is the only legal mode of setting out such tithe, nor is the particular mode contended for by the Plaintiff in error unreasonable.

2. It has been determined, that the tenth land of grain may be set out standing for the tithe of grain, *Stebbs v. Goodluck*, Moor, 913; and in *Hild v. Ellis*, Hob. 250, it is stated, as coming from the Court, that in many places they set out the tenth acre of wood standing, and so of grass.

3. The evidence in the former cause of *Chitty v. Reeves* (b), [176] and in the litigation between the present parties, is uniform to shew, that in the parish of Farnham the

(a) This verdict was found upon a second trial; a verdict had before been given for the Plaintiff, and the Court of King's Bench thinking that verdict contrary to law, awarded a new trial. For the arguments of Counsel and opinion of the Court upon that occasion, see 7 T. R. 86.

(b) Upon the former trial copies of the proceedings in this cause, together with the decree of the Court of Exchequer thereon, were read. For the substance of the proceedings and decree, see 7 T. R. 87.

tithe of hops, when set out, was set out by the tenth row, if equal, or else the tenth hill. How long that custom or usage had actually prevailed, it is not now possible to make out; but if it was not an immemorial custom (which is not so devoid of foundation as has been generally supposed), it might at least have had its commencement at a time when it was competent to the rector and vicar, with the consent of the patron and ordinary, to make a binding agreement that the tithe should be set out in the way it has been. It was on supposition of some agreement so made, accompanied with the usage, that the court of Exchequer, in the suit instituted some time since by the vicar, claiming the tithe of hops planted in fields, adjudged the tithe of hops to belong to the rector, though the vicar took those in the rest of the parish.

4. The evidence adduced by the Plaintiff in error proves two essential things: first, That the tithe of hops may be set out fairly by the tenth row or hill; and, secondly, that the obliging the occupiers of lands in Farnham (where hops are, in the picking of them, managed in a peculiar manner,) to set out the tithe of the hops by measure would be difficult, attended with additional expense and great delay, and very injurious to the hops themselves, and materially affect their prices when sold.

5. The prior cases of *Gee v. Perch* (Vin. Abr. Dismes. Y, pl. 3, in margin. See also 7 T. R. 90, in notis), *Bliss v. Chandler* (see Vin. Abr. and 7 T. R. ubi suprà, also Burn. Eccles. Law, Tithes, sect. 7), and *Walton v. Tyers* (Burn. Eccles. Law, ubi suprà, and 5 Brown. P. C. 99), were totally different from the present; and the defences were in them all so unfounded, and the manner in which the Defendants themselves had before set out their tithes was such, that the Court could not do otherwise than decree an account of the tithes as having been subtracted; and no one of the cases made it necessary for the Court to declare, that, by law, hops were to be picked before the tithes were set out.

J. MANSFIELD.

WILLIAM ADAM.

The Defendant in error submitted, that the directions of the Judge were right and according to law, and that the verdict and judgment ought to be affirmed for the following amongst other Reasons:

[177] 1. That the common law rule for setting out the tithe of hops, in many instances, hath been determined, and more recently after the most solemn argument, hath been adjudged, and is now clearly settled, that the tithe shall be set out by measure, after the hops are picked from the bind or stem; for that hops are not titheable until after they are picked, at which time, but not before, the tenth part is severable from the other nine parts.

2. To the validity both of a *modus decimandi* being a compensation which must have originated prior to the time of legal memory, and also of a composition real being a compensation which may have originated since that æra, but not after the restraining statutes passed in the reign of Queen Elizabeth, a consideration or quid pro quo is indispensably necessary. A compensation, be it either ancient or modern, whereby part of the thing is given in lieu of the whole, or whereby a thing is given in a less perfect state than the law enjoins it to be given, unless something be added to make it equal to the value of the real tithe, carries internal evidence to destroy itself, and is considered as being rank, and therefore void. The compensation here contended for by the Plaintiff in error, whether commencing in ancient or modern times, whereby nothing more than the tenth part of the hops before picking is to be given, without adding any thing to make it equal to the greatly advanced value of the real tithe, which the law enjoins, shall be set out after picking, or for the considerable costs the occupier incurs in bringing the article into the more perfect state, and to the benefit of which the tithe-owner is by law entitled clear of all expense, must be *felo de se*, and as being rank is void.

3. A custom must be presumed to be as old as the time of legal memory; and, when that presumption is refuted by any circumstance that shews it could not have existed during the whole of that period, the custom is destroyed. No mode of tithing hops can have existed from the time of legal memory, because the cultivation of hops within the kingdom is of a date long subsequent to it, and of this all the courts of Westminster Hall have taken judicial notice, and in consequence have uniformly decided against all customs that ever have been attempted to be set up relative to the tithing of hops.

4. The mode of tithing contended for by the Plaintiff in error cannot be supported

as a local custom peculiar to the parish of Farnham; because, besides the evidence which the records of the judgments of courts of law furnish against its antiquity generally [178] throughout the kingdom, it is stated on the bill of exceptions that the introduction and first cultivation of hops within the parish and rectory of Farnham is with reference to the time of legal memory, modern, and within the time of memory.

5. Notwithstanding the evidence adduced by the Plaintiff in error, these facts cannot be denied—that the hops on different hills, as well as in different rows, are so unequal both in quantity and quality, that the tenth of either of them bears no proportion to the tenth of the whole produce; that tithing by the hill or row is liable to great frauds; that taking the tithe by either of these modes would in all cases be very inconvenient and in many quite impracticable; whilst, on the other hand, the fairness, convenience and justice of setting out the tithe by measure, after picking, in experience have been so fully proved, as to render this mode of tithing part of the common law of the land.

6. A custom to set out the tithe by the tenth row, if equal, or by the tenth hill, if unequal, ought not to have been permitted to be proved in this cause; because the Plaintiff in error has not, in his declaration, stated, that there was any such custom, or that he had set out his tithes, which are the subject of his complaint, according to any such custom, and therefore the existence of such custom could have no relation to the matter in issue between the parties.

JOHN SCOTT.

WM. GARROW.

This case was argued on February the 25th and 27th, by Mansfield and Adam for the Plaintiffs in error, and by the Attorney General (Sir John Mitford) and Hall for the Defendant in error. After the argument, the question put to the Judges was: Whether upon the matter set forth in the bill of exceptions, the direction to be given to the Jury ought to have been, to find for the Plaintiff or for the Defendant?

The Judges desired time to consider of their opinions; and on two subsequent days delivered them seriatim, there being a difference upon the Bench. Rooke, J., was of opinion, that the direction ought to have been in favour of the Plaintiff; and Chambre, Baron, Le Blanc, J., Lawrence, J., Thompson, B., Grose, J., Heath, J., and Macdonald, Ch. B., held that it was rightly given in favour of the Defendant.

ROOKE, J.—The question proposed by Your Lordships is, Whether, upon the matters set forth in the bill of exceptions, [179] the direction to be given to the Jury ought to have been, to find for the Plaintiff or for the Defendant?

According to my view of this case, the answer to this question must depend on the opinion the Jury would have formed as to the facts here stated—If the Jury were satisfied that the facts stated in the bill of exceptions were sufficiently proved, my opinion is, that they ought to have found a verdict for the Plaintiff.

Though I am so unfortunate as to differ from the Lord Chief Baron and all my brethren on this question, yet I flatter myself that we do not materially differ as to first principles, but rather as to the application of them. I agree that, where no practice has prevailed to the contrary, the general law of tithing hops is by the measure; that a strict legal custom must be immemorial; that according to the doctrine laid down in our books, hops are of modern cultivation, as an article of husbandry, and cannot be the subject of a strict legal custom. But, I think,

1st, That the general law of tithing hops has been established with a cautious regard to the usage of such particular parishes wherein a reasonable and convenient usage has obtained.

2dly, That such restriction on the general law is not illegal, nor contrary to the principles of tithe-law.

3dly, That the usage set up by this parish of Farnham may be supported without violating any legal principle.

1. As to the general law of tithing hops.

The wild hop is probably an indigenous plant: but though indigenous, yet if it first became an article of cultivation within time of legal memory, it seems agreed, that no customary usage as to tithing it can be supported against the general rule of law. In the case of *Crouch v. Riden* (as reported in 1 Sid. 443) the Court deny that there can be a modus, by way of prescription, to pay so much for tithe-hops, and say, they will take notice that hops are not so ancient, but were used in beer only of late

times, notwithstanding the records cited by Lord Coke to the contrary. In justice to Lord Coke's memory it should be observed, that the passage alluded to in Lord Coke's work is misrepresented by the reporter. Lord Coke cites 12 Ed. 4, c. 8, as to those who had purchased licences patent to be correctors of ale, beer, wine, &c.; and has this note in the margin of the 4 Inst. 262. "Nota, By this appeareth that beer is not of such late time as some suppose. See also Rot. Parl. 4 H. 4, No. 53. Beer and ale mentioned to be then in Calice. Beer is a Saxon word, Bier; and [180] "Beer is within the word *Cervisia* in the ancient statutes. For it is but as the putting a new button to an old coat, viz. hops to malt and water, to make it continue the longer." According to this passage, the putting hops to beer was considered by Lord Coke as of modern practice in his time: whereas the reporter represents him as saying the contrary. The same case (*Crouch v. Ridsden*) is reported 1 Ventr. 61, and the reporter makes the Court say, "there could be no such composition time out of mind; hops not being known in England till Queen Elizabeth's time; for then they were first brought out of Holland; though beer is mentioned in a stat. of H. 4." This account of the introduction of hops is certainly inaccurate, for we find, that hops were known before 1562; for they had attracted the notice and encouragement of the legislature at that time, as appears by 5 & 6 Ed. 6, c. 5.

We have then the authority of Lord Coke, that the use of hops in beer is of modern introduction: and supported by the authority of this passage in 4 Inst., and of these very inaccurate reports of the case of *Crouch v. Ridsden*, the modern authorities uniformly consider it as settled, that hops were first cultivated within time of legal memory, and that they cannot be the subject of immemorial custom. Yet I cannot but observe, that as the hop is probably indigenous, and as (if the reporters are correct) the Court were certainly not aware how long the hop had been an article of cultivation, the judicial notice which they took of its modern introduction seems to have a slight foundation. To ascertain satisfactorily the law as to tithing hops, it may not be amiss to state, in historical order, the several cases which are reported on this subject. The earliest case we have in our books, respecting hops, is cited in Hutton, 78, it was 3 Jac. 1, between *Potman, Knt., and another*. The question was as to the nature of the tithe, and adjudged to be a great tithe: but as for hops in gardens and orchards, they were adjudged to the vicar as *minutæ decimæ*. In Hil. 14 Jac. 1, B. R. (1616), it was said by Hitcham, Serjt., and agreed by Mountacute (who was then Ch. Justice), that a man may set forth a tenth part of hops for tithes, before they are dried, 1 R. Abr. 644, tit. Dismes (Y), pl. 3, between *Barham and Goose*. From this dictum of Serjt. Hitcham, as to setting forth the tithe before they are dried, it seems pretty clear, that the setting forth the tithe by measure was practised in some countries at that time; though we know not how generally. But, on the other hand, if the law of tithing hops by the tenth measure after picking was the general rule from the time they were first cultivated, it seems [181] difficult to say by what analogy the tithe of the mere flower of the hops was ever considered as a great tithe.

Hops were an article of general cultivation before the reign of Car. 1; for in the case of *Uvedale v. Tindall*, Hutton, 77, 1 Car. 1, the Court say, "In some countries a great part of the land within the parish is sown with hemp or hops." In 1629, 4 Car. 1, Trin. B. C. *Alfrey v. Mills*, the Court held that where there was a modus for a garden, hops growing in a garden were within the modus, provided that they did not grow in any addition to the garden. From these cases we may safely infer that hops were an article of general cultivation so early as 4 Car. 1, and that there had been several litigations as to the nature of the tithe, whether great or small, and as to the claiming of a modus decimandi. In the case of *Legard v. Elcock* (1666), Pasch. 18 Car. 2, B. R. on a question as to the mode of setting forth tithe of corn the Court say (according to the report of 2 Keble, 36), that the custom of England is, to set forth in sheaves, but each county hath several ways, as of hops, which by Keeling (then Ch. J. of B. R.) is a small tithe, and payable by the pole. What Lord Ch. J. Keeling is here reported to have said as to the nature of the tithe, is now considered as law; for notwithstanding the case cited in Hutton, 78, hops are now held to be a small tithe: according to the report of the same case, 1 Sid. 283, under the name of *Ledger v. Langley*, Twysden, J., said, that it has been questioned, and is not now known how the tithe of hops shall be set out, scil. by the tenth pole or by measure. And in the case of *Crouch v. Ridsden*, Hil. 21 & 22 Car. 2, B. R. (1670), 1 Sid. 443, the reporter adds, note per Twysden, J. (who lived in Kent); It is a question at this day how hops

should be tithed, Whether by the hill, or by the pole, or by the bushel? I have been the more particular in deducing the cases thus in chronological order, because I think it must appear clearly from them, that from the first cultivation of hops, which was before A.D. 1551, till after 1670, a period of above 120 years, though hops had for a long course of time been an article of general cultivation, no certain mode of setting forth the tithe of them had been established; consequently, we may presume that different modes prevailed in different parishes, and perhaps in different parts of the same parish, and some particular modes might have prevailed in particular places for a very long course of time, even from the first cultivation of the hop. The tithe owner received his tenth and had a right to his tithe in kind; no *modus decimandi* was allow-[182]-ed; but as to the *modus exponendi* or mode of setting it forth, various practices prevailed. This distinction between the *modus decimandi* and the *modus exponendi*, was taken by Lindley, who was counsel against the prohibition in the case of *Ledger v. Langley*, and seems to me to be a sound distinction. In *Hob. 107*, *Wilson v. The Bishop of Carlisle*, 13 Jac. on a question, Whether a custom was good to tithe wool truly without view of the parson? Lord Hobart holds it bad, and says, "The law provides that you have your right, and therefore that your means be such as is likely to produce it." Here is a distinction between the right and the means whereby that right may be obtained; i.e. between the right to the tenth and the means whereby that tenth may be ascertained and set forth. And the doctrine laid down by the Court in the case of *Hyle v. Ellis* is to the same effect; that tithe naturally is but the tenth of the revenue of my ground, not of my labour and industry, where it may be divided. If, therefore, a mode could be devised by which the tithe owner may receive the tenth of the produce of the hop grounds, and the same may be conveniently set forth, I feel no absolute necessity for requiring the farmer to set it forth by measure. The *modus exponendi* may vary, provided the tenth is received in kind.

The law of tithing hops being thus unsettled till so late a period, let us see when the law was settled, and what law was settled on the subject. From the dictum of Hitcham, Serjt., 1616, till the case of *Chitty v. Reeve*, 1687, I am not aware of any decision or even of any dictum in our books, which ascertains or even suggests how the manner of setting forth this tithe is settled. That case states how the law was settled, and is cited by Mr. Ward in the case of *Bake v. Sprackling*, Seacc. 1717 (Bunbury, 20), as having settled the law on the subject; viz. that tithes of hops are not to be paid till after they are picked and before they are dried, every tenth measure. Bunbury, in a note says, that the tithing of hops was settled in the case of *Bliss v. Chandler*, 1720; but in this he is inaccurate; for in reading the decree in *Chitty v. Reeve*, no one can doubt that the general law was there ascertained, and that subsequent cases have only served to confirm the law there settled, without impeaching any thing there laid down; nor has that case ever been impeached till the present difficulty was started. It seems, therefore, of great importance to the decision of the present question, to examine accurately what was the law laid down by the Court of Exchequer in that case. The Court were fully [183] apprised of the terms of this custom, of the mischiefs of cutting the binds, and not tithing by measure after picking, and that by the law of the land, tithe hops ought to be paid in kind; viz. the tenth part of the whole after picking: yet the Court declares in favour of the usage, and makes a decree to the following effect: "It fully appearing to the Court that the custom usage or practice of paying tithe hops in the parish of Farnham for above 60 years past hath been that the impropiator hath had the tenth row when equal, or else the tenth hill, that the same hath been left standing with the hop binds uncut, that the impropiator hath always had convenient time to come and cut the binds, and to pick the hops on the ground; the Court was of opinion and declared the said custom, usage and practice to be reasonable and fitting to be observed, and the Court declared that in case there was not any such usage, the tithe of hops ought to be paid in kind, viz. the tenth part of the whole after picking." Thus in the very first case in which we have any account that the law of tithing hops is settled, we have also an account of an usage allowed to stand against it. Words cannot express more plainly that according to the opinion of the Court of Exchequer, an usage or practice if convenient and fitting to be observed, ought to be established against the common law right which was now declared to be, by the tenth of the whole after picking. It was objected in the argument that this usage was set up by the executor of a lessee for a short term, who could not bind the

right of his landlord; but let the usage be set up by whom it might, it was disputed by the occupier; and if the Court had thought that no usage could stand against the general law of tithing hops as it was then held to have been settled, they were bound to have declared against the usage.

When the law was settled, we do not precisely know, but this case declared that it was settled, and how it was settled. With respect to the *modus exponendi* thus established, I cannot but make this observation, that it seems to have been adopted on a principle of convenience only; for it certainly is not a regular legitimate mode of tithing; it gives the tithe owner the flower of the hop only, and it withholds from him the stalk; though according to the course of husbandry as to hops, the bind is first severed, and then the hop is picked. By a sort of compromise for convenience sake, it takes from him the stalk, to which he has a sort of legitimate right from the moment of severance, and gives him the benefit of the planter's labour and expense in picking, to which, according [184] to the principle laid down in *Hob. 250*, he has no right at all.

I am aware that, since the hop has been decided to be a small tithe, attempts have been made to put it, by analogy, on the same footing as the tithe of fruit. The bind is likened to the branch of a fruit tree; and it is said, that the parson is only entitled to the fruit, and that as the farmer may not pluck off a bough and give it to the parson and bid him gather the fruit, so neither ought the farmer to cut the bind and leave the parson to pluck the hop.—This may be similitude; for there are some faint traits of resemblance, but it certainly is not analogy; because it is defective as to the main circumstance, the common course of husbandry.

The constant course of husbandry is to sever the bind; but by no course of husbandry is it usual to cut the branches off the fruit trees. Should a farmer cut his binds and refuse to pick his hops, I think it probable that our courts of law would hold this to be so far a severance as to entitle the tithe-owner to something, if he thought it worth his while to claim it; or should it happen that, by any course of husbandry, the binds were severed on one day and not picked till the next, and should the tithe-owner die in the intermediate time, I think it probable our courts would consider this as a severance, and give the tithe to the executor, because the severance is according to the course of husbandry. In short, I consider this *modus exponendi* as peculiar, as not reconcilable by analogy to any prior mode of setting forth, as founded solely on the peculiar nature of the subject-matter, and as settled on a principle of convenience only; and if the Court of Exchequer, proceeding upon this principle, has also held, that where a convenient usage has long prevailed in a particular parish, it shall be established against the general principle of convenience, where no usage is set up: I do not feel myself warranted, or disposed to say, that the Court has done wrong. I consider the Court of Exchequer as proceeding with great and laudable caution in settling this point of law, aware of the great length of time during which the law had been unsettled, and aware of the possibility that particular practices might have prevailed in particular parishes, which were reasonable and fitting to be observed; and having one instance of that kind before them they declare that such usage ought to be observed, but that where there is no such usage the general rule must prevail. Since the case of *Chitty v. Reeve*, this point has never come directly in question till the present case. Several cases have been litigated as to the tithe of hops; in none of which the doctrine laid down [185] in *Chitty v. Reeve* has been denied; but in some of which it has been affirmed. In the two cases of *Gee v. Perch*, 1698 and 1704, 1 Wood, 386, 439 (a), the Court declares, that hops ought to be picked and gathered from the bind before they are tithed. This had been already settled in the case of *Chitty v. Reeve*, and was no new doctrine; the custom set up in the first of these cases, in 1698, was that 10s. an acre should be paid for the tithe of hops; such a custom was void according to the principles laid down in *Crouch v. Risden*, 1 Sid. 443; but this custom respected a *modus* in discharging of tithe, not the manner of setting it forth. The case of *Bliss v. Chandler*, 1720, 2 Wood, 148, respected the manner of setting forth the tithe of hops: but the Defendant set up no custom; he had paid tithe of early hops by the bushel, after they were picked, and the remainder by stripping the binds from every tenth pole or hill, and leaving them on the ground for the Plaintiff to pick. The Court say, tithe must be paid by every tenth bushel of

the whole after they are picked. Here the Defendant had set forth his tithe in two different ways, but alleged no custom in support of either; the Court, therefore, did not decide any point as to custom, but declared the general law. The next case that is reported on this subject is the case of *Sneyd v. Unwin*, January 1740, 2 Wood, 403. The rector of Heddingham Sible in Essex, claimed the tithe of hop, by receiving, on the hop grounds where the same arise, the tenth measure or weight after they are plucked from the stalk, and before they are dried and packed. The Defendant set up an ancient usage, whereby the rectors are obliged to accept their tithe hops by the tenth pole or hill, after the vines are severed from the ground and stripped off the poles; and that the said rectors were, and the Plaintiff was obliged, to pick all his tithe hops. Here was an ancient usage set up less favourable to the rector than the usage set up in the case at bar; because it was to sever the binds from the ground and to strip them off the poles; yet the Court did not pronounce against it a priori, and say, it was technically impossible that any usage could be supported against the established right. The Court was very deliberate in its proceedings. It heard the counsel, it read the proofs, it read the several decrees in *Chitty v. Reeve*, in the two cases of *Gee v. Perch*, and in the case of *Bliss v. Chandler*, and with this full information before them, it directed an issue to be tried by a special jury, Whether, by the usage in the parish of Heddingham Sible, hops are to be tithed before they are picked from the stalk? This case has great weight with me: the [186] Court had the case of *Chitty v. Reeve* before them, as well as the other cases; they were well apprised of the general law, and yet they directed this issue. Must not a plain man infer from hence, that, according to the opinion of that court, an usage to tithe hops before they are picked from the stalk might, under some circumstances, be supported against the general rule?

It is observable that the Court did not direct an issue on the particular custom set up by the Defendant, but a more general issue on usage at large. Had they not thought that, according to the case of *Chitty v. Reeve*, usage might stand against the general rule, they surely would not have directed such an issue. And if any usage whatever could be supported against the law then generally established, then this case is an additional authority to shew that the technical objection made to the usage now set up, ought not to prevail. On the trial of this issue the jury found a verdict against the usage. In the year 1752 the rector filed his bill against the son of the former Defendant Unwin; the Defendant answered to the same effect, as to the custom of tithing hops as his father had done in the former cause; the Court declared that the method of tithing hops insisted on by the Defendant, is not the legal method of tithing hops; but that they ought to be picked and gathered from the binds or stalks before they are titheable, 2 Wood, 478. There can be no doubt that this decree was right; the question as to usage had been tried, and the jury had found against it, and there being no usage the method set up by the Defendant was not the legal method. The next and last case in point on the subject is, the case of *Walton v. Tyers*, in Seace. February 1753, and ultimately decided in this house (a). This case is relied on as having finally settled the point as to the mode of tithing hops. I do not understand this case to have settled any point which was not well known before. From the case of *Chitty v. Reeve* the decisions had been uniform, that the tithe of hops is to be set out after they are picked, and before they are dried, unless in parishes where there had been an usage to the contrary: on the point of usage there were two cases which seemed very strongly to allow its validity; and on this point the case of *Walton v. Tyers* decides nothing. According to the account of this case, in 2 Wood, 484, the Defendant, in his answer, disputed the general rule of law, and insisted, that the tithe-hops ought not, by law to be set out after they are picked from the bind or stem, and he denied that there was any custom, in either of the parishes, [187] for setting out the tithe of hops. So that, though the Court decides nothing on the question of custom, it seems as if those who advised the parties in their pleadings thought that custom or usage might be material in the case.

On these authorities, and for these reasons, I am of opinion, that according to the law established for tithing hops, the general rule that hops are to be tithed by measure after they are picked, and before they are dried, has not been established so peremptorily and strictly as to destroy or to disturb such reasonable and convenient

(a) Vid. 5 Bro. P. C. 99. 3 Burn's Ecc. Law. 450.

usages as have prevailed uninterrupted and for a long course of time, in particular places; but has been established with due caution and circumspection, and subject to such usages.

My second proposition is, that the law settled as above stated, with a restriction as to local usages, is not contrary to the principles of tithe-law. And so far is it from being contrary to these principles, that it is in strict analogy with them. The manner of setting out the tithe of every titheable article has been, for the most part, long known and settled; yet there are many articles which local usage regulates the mode of setting forth. In Hob. 250, *Hide v. Ellis*, 16 Jac. it is said, "In divers places they fell out the tenth acre of wood standing, so of grass." This shews at least the opinion of the Court, that the *modus exponendi* may be regulated by the custom of the place. In 2 Keble, 36, P. 18 Car. 2, *Legard v. Elcocke*, the Court are reported to have said, on a question of tithe-corn, "The custom of England is, to set forth in sheaves; but each country hath several ways, as of hops." In *Holberch v. Whadcocke*, P. 13 Car. 2, Scacc. Hardr. 184, it is said, agistment tithes for barren cattle are due *de communi jure*, according to the value of the land, after the rate of 2s. in the pound; for that they cannot be otherwise valued, or accounted for, because the profits of the land for which they are paid are perceived by the mouths of beasts: but, by custom or prescription, they may be paid in other manner, as, by the acre, or for all manner of cattle barren, and for the plough and pail. So in *Hicks v. Woodson*, M. 6 W. & M. B. R. as reported in Skinner, 560, Holt, Ch. J., says, Tithes for barren cattle are due *de communi jure*, and 2s. in the pound is the usual tithe of common right, but that there are divers customary manners of tithing for them.

In addition to these authorities, the law as to tithing milk is a complete proof that the custom of the place may regulate the mode of setting forth tithe. The common law right has [188] been finally settled by very modern cases; but it has been settled with a due regard to all the local customs which have prevailed in different parishes. The case of *Stebbs v. Goodluck*, Moor, 913, 1 Leon. 99, P. 30, Eliz. B. R. appears to me very material to this point. The custom there set up was, that the parson shall have for his tithe the tenth land sown with any manner of corn, and he shall begin his reckoning always at the first land which is next the church. The parson shewed, that the Defendant, by fraud and covin, sowed every tenth land, which belonged to the parson, very ill, and with small quantity of corn, and did not dung or manure it as he did the other nine parts, by reason whereof the other nine yielded each eight cocks, and the tenth yielded but three cocks. The parson libelled in the Spiritual Court, and confessed the custom; but for abusing the custom prayed the tithe in kind: the Defendant prayed a prohibition, and the parson afterwards a consultation. And the opinion of Wray, Ch. J., was, that the custom was against common reason, and so void, but if it be a good custom then the parson shall have his action on the case. This is the report in 1 Leon. The case is also reported in Moor, 913, who says, that a prohibition was awarded, notwithstanding the covin, for the fraud may be remedied in an action on the case at common law. Whether a consultation was afterwards granted does not appear from either report; but, it is said, in argument, by counsel, 2 P. Wms. 569 (*Chapman v. Monson*, Hil. 1729), on what authority I know not, that a consultation was granted on Wray, Ch. J.'s opinion. This case furnishes observations very applicable to the case at bar.

1st, Wray, Ch. J., declared his opinion immediately on the argument, that the custom, though confessed and set up, as in the case of *Chitty v. Reeve*, by the parson, was against reason, and so void. He did not (as the Court of Exchequer are supposed to have done in the case of *Chitty v. Reeve*) suffer a custom to be set up under the sanction of the Court, which he thought to be void: but he declared his opinion directly; and I am disposed to think with equal favour of the Court of Exchequer in 1687, that had they thought no usage could prevail against the general right, they would have declared so, notwithstanding the usage was confessed and set up by the impropiator. 2dly, supposing Wray, Ch. J.'s opinion to have been the opinion of the whole Court, it does not affirm that a custom to tithe the tenth part of corn growing upon the land is bad; but it affirms this, [189] and this only, that a custom to tithe the tenth land of corn beginning at one certain land, is void; because it is open to the fraud of manuring and sowing the parson's land worse than the others. And according to this distinction the law is laid down in Watson's Clergyman's Law, c. 49, page 549, "If the custom of the place be to measure forth to the parson the tenth part of the

corn standing, this manner of tithing is, I conceive, to be observed, and the parson must sit down by it." Mr. Bohun, in his *Law of Tithes*, chap. 2, says the same, and adds, it seems to me, such a custom or prescription may have a reasonable foundation on this supposal, that the field where those lands or ridges lay, was originally a common waste field belonging to the township; and that, on agreement of the parishioners to turn it into arable, they consented to allot the tenth land or ridge by them sown to the parson, but he to reap it. If there be any weight in this observation by Mr. Bohun, it applies very strongly to the case now before the house; for *pari ratione* it might be agreed in this parish of Farnham, that the parishioners should turn their lands into hop-grounds, and consent to allot the tenth row or hill to the parson, and he to sever and pick the hops, and to have convenient time for this purpose. It seems not settled at this day what shall be sufficient evidence to warrant a jury to find such an agreement; but if a jury may presume a grant or agreement from usage only, then they may presume that in this parish. An agreement may have been made before the restraining stat. of 13 Eliz. c. 10, and by consent of the proper parties, namely, the parson, patron, and ordinary. For we know that hops were an article of husbandry before the 5th and 6th of E. 6 (35 years before); and Hob. 297, says, that a grant of a parson, patron, and ordinary, is good without any recompense. There is a report 2 Leon. 70, of an *Anonymous case*, Hil. 24 Eliz. B. C. which certainly countenances this doctrine of tithing by the tenth land. "By the civil law the parson ought to have his tithe by the tenth ridge, and in a great field there was corn upon the arable, and grass upon the head-lands, and in a suit for tithe-bay and rakings of the corn, the Defendant did prescribe to pay the tenth shook of corn for all the corn, bay, and rakings of the corn: and in the end all the justices agreed, that by the civil law the tenth ridge is due for tithe-corn; therefore, for the reaping, binding, and shocking, it is a reasonable prescription, that the party shall have the bay on the head-lands in [190] recompense of the said other things; and the bay upon the head-lands is but of little value." Upon the whole, this case of *Stebbs v. Goodluck*, sifted and commented upon as it has been by our text-writers, is, to my understanding, a very considerable authority to prove, not only that local custom may regulate the mode of setting forth tithe, but also, that according to professional tradition, tithe may be set forth while standing, and before it is severed; though it is true, as was observed by Mr. Attorney General, that there is no adjudged case in which it is declared that tithe may or may not be so set forth. The answer given to all these cases is, that they respect articles which have been in use time out of memory, and which, therefore, may be the subject of a legal custom. This answer is merely technical: for we all know, that in point of fact, the evidence of usage seldom goes back so far as two centuries; but if it goes back for a considerable length of time, and the article which it respects has been of immemorial cultivation, a presumption attaches that the usage has been immemorial. In the case of hops, no such presumption can attach, because the hop is of modern cultivation. But it seems to me that Courts of law are at liberty to decide by analogy, in this as in other cases which arise on new subjects: and if they observe that local usage has been respected as to the mode of setting forth those tithes which may be the subject of custom, they may also respect it when they declare a new system of law on a subject introduced within time of legal memory. This, I think, our predecessors have done on the subject of hops; they have said that local usage, if convenient, and of long continuance, shall be respected; and that where there has been no such usage, the tithe shall be set out by the measure, after picking.

It appears to me to be fallacious to state the present question to be—Whether modern usage can be set up against the established law of England? If that were the question, I should answer without hesitation, that it could not; but I consider the question at present to be—Whether the Courts of law have not, when they first settled the general practice as to tithing hops, settled it with a due deference to particular local usages: and whether they might not legally do so? They were aware that the usage, though not immemorial, might be coeval with the cultivation of the article; that in particular places fit and convenient usages might have prevailed; that the general rule declared by them was anomalous, illegitimate, and support-[191]-able upon principles of convenience only; and, therefore, they would not set it up rigorously and strictly, to disturb the peace of parishes, and to destroy all established usage; but they laid down their rule subject to such a reasonable usage as had obtained in particular places. Now if convenient usage is first established, and the law is settled

afterwards upon a principle of convenience, why may not the courts settle the law subject to such usage? Are we to be told that the law is drawn from the eternal and immutable principles of reason and justice; and that, though it was settled as to some particular point only yesterday, it must necessarily have relation back to the first constitution of things, and destroy every usage to the contrary? This doctrine, rigidly pursued, would destroy all local custom; for the custom being in derogation of the law, ought then to have been abolished when the law was settled. But the Courts have declared that both being beyond time of memory, custom, if reasonable, may stand against the common law, though it is in derogation of those immutable principles on which the common law is founded. I see no reason why our Courts may not follow a similar rule by analogy, and where they know, or have reason to believe, that convenient local usages have prevailed for above a century before the law was settled; why they may not lay down this rule with a due regard to the preservation of those usages. If they have done so (and I think they have in the present instance), I incline to support the decisions.

I do not hold myself bound to say, that my predecessors were in an error in 1687 and 1740, and that though morally right they were technically wrong, or to set parishes on a new course of tithing, and, for aught I know, on a new course of husbandry as to picking their hops, when I have evidence before me that they have proceeded in a particular course peaceably and quietly for near two hundred years, under a sanction of a decree of the Court of Exchequer. The rule of *Stare decisis* is as justly applicable to private parties as it is to general principles, where the decision can be reasonably ascertained and supported. And on the present question, I find no principle and no decision, ancient or modern, which calls on me to declare, that the decrees of 1687 and 1740 were against law.

My 3d proposition is—That the usage set up in this case may be supported without violating any legal principle. If the [192] opinion is well founded, that the general law of setting forth the tithe of hops has been settled with the exception as to convenient and established local usages, and that it is no violation of legal principles to have settled it so; the only doubt on this proposition will be, Whether there is any thing illegal in the usage here specially set up? Where the subject-matter is capable of custom, and where usage can be ascertained, Courts of law have been even astute to support it.

The case of *Scory v. Baber*, P. 34 Eliz. Cro. Eliz. 276, was a prohibition against the proprietor of the church of South Kirkby, who sued for tithes of hay. It was surmised that time out of mind the owners of these lands had found straw for the body of the church, in discharge of all tithes of hay; Coke moved that this is no discharge; for the parson was not chargeable with it, nor had any benefit by it: and of that opinion was the whole Court: but if he had alleged that he gave the straw to the parson, and he bestowed it in the body of the church, or that the parson had a seat in the body of the church, it had been otherwise. In short, any compensation, however small, may be sufficient to support a discharge from payment of tithe in kind; and the smaller the compensation (if it is pecuniary) the greater is the probability of its antiquity. It was said in the argument that there should be some mutuality between the parties; some benefit to the one and some charge to the other: the compensation need not be equal, but something should be given, however small. This rule holds as to a *modus* in discharge of tithes in kind; but I do not find that it holds as to the *modus exponendi*. Tithes may, according to the authorities and cases above referred to, be set forth according to the custom of the country, without a particular compensation for not setting them out according to the general rule of law. The usage set up in the present case is stated at length in the bill of exceptions. Divers objections have been suggested to it at the bar: 1st, That it gives no recompense, not even the binds. I answer, 1st, That no recompense is necessary in a usage merely, as to the setting forth of tithe. 2d. That as the custom is here stated, I think the binds left for the parson to cut do pass to him: the farmer does not state that they were to be left for him; I think he may choose whether he will carry them away. And as to the binds being a recompense, it is well known that experiments have been lately made to turn them into a pulp which may make paper; though they have not yet succeeded.

[193] The second objection is, That there is no severance. I answer, that there is a severance by the farmer of his share, so as to ascertain when the tithe is due; the

severance of the tithe in kind is merely for the benefit of the tithe owner, and if he chooses to renounce this benefit for his own convenience, he may lawfully do it.

The third objection is, That it will not give a complete tithe; for, suppose there should be only nine hills, the parson would be entitled to nothing. I answer, That I do not find the usage so stated. I should rather suppose, that if there were only nine hills, the usage would not attach: but the supposition of only nine hills is rather a matter of fancy than a case likely to happen; and perhaps it may be fair to answer, that such a small circumstance as this is beneath the regard of the law in a question of parochial usage. *De minimis non curat lex.*

The 4th objection is, That it is open to fraud; that the farmer may manure some hills better than others; that in setting out his tithe he may begin to reckon from some particular hill so as to throw all the unproductive hills into the parson's tithe. I answer, 1st, That this is not like the case of the custom condemned by Wray, Ch. Jus., where the farmer was necessarily to begin at a particular ground, and might consequently neglect to manure every tenth ground, and know for a certainty that it would be the lot of the tithe-owner: here the farmer has no customary right to begin at a particular hill; he is to begin, as in a corn or hay field, at such hill, or sheaf, or hay-cock, as may enable him to set forth the tithe fairly and equally; he must set it forth openly, so that it may be viewed and objected to by the tithe-owner or his agent; and if it be not fairly set forth, the tithe-owner has various remedies to enforce his right. But further: the supposition that the farmer can manure and prepare his hop-ground in such a manner as to enable him to count the tenth hill or row so unfairly as to make all the blasted or blighted, or unproductive parcels fall to the parson's share, is much too refined, and is directly contrary to the facts stated in the bill of exceptions. "Many hills may be weak and many die, and it is impossible to foresee which." The bill of exceptions also states, that the tithe of hops may be fairly set out by the tenth hill, and that such setting out is the most convenient mode, and least liable to fraud. There is also the opinion of the Court of Exchequer, in 1687, that the custom, usage, and practice is reasonable and fitting to be observed. Under these circumstances I do not feel myself warranted to pronounce that this [194] usage which had prevailed, and in which all parties had acquiesced for above sixty years before 1687, and which has surely influenced all parties in the compositions they have made for above a century past, is in itself illegal, and could not be supported if it respected a subject of immemorial existence. I do not presume to impeach the wisdom or policy of the general law laid down as to tithing hops. It is probably the most politic and convenient that could be adopted; and the present litigation shews that (in the opinion of the tithe-owner of this parish at least) it is more profitable for the church than the usage which the parishioners of Farnham now set up. But I think it is anomalous and founded on the principle of convenience and policy only: and I think too, that it is not wholly void of inconvenience, nor likely to be unproductive of disputes, where there is no composition. For the farmer is not bound to provide measures or vessels to hold the tithe after it is ascertained; consequently the tithe-owner must have agents attending in every ground, and in various parts of extensive grounds, while the hops are picking, who must be ready to receive the tithe immediately as it is set forth. Such rights on each side may give rise to great dispute, where the tithe is taken in kind, and the parties cannot agree on a composition. The usage here set up may have inconveniences also; but they are not of such a nature as to satisfy me that the Court of Exchequer did wrong when in 1687 they declared the usage to be reasonable and fitting to be observed; the conveniences and inconveniences of the usage may be thus stated: The loss to the tithe-owner is—the benefit and expense of picking the tithe. On the other hand—he takes his own reasonable time to pick; he saves the expense and difficulty of procuring a number of agents to attend in various places; he picks and sorts as he pleases; he has the stalks if ever they should prove valuable. The farmer too has some disadvantage:—his ground may be encumbered; his hop-poles are used and exposed for a reasonable time beyond his own harvest.

Upon the whole I am of opinion, That the law of tithing hops has been settled not generally, but with an exception as to reasonable and ancient usage respecting the mode of setting it forth; that the Courts might so settle the law, and allow such exception, without violating any sound principle of the law of England; and that this usage, set up by the Plaintiff in error in the bill of exceptions (if the jury had been

of opinion that the facts there stated were sufficiently proved), is not contrary to any principle of tithe-law.

[195] Some apology may not be improper for having occasioned so much trouble to the House and to the Judges, for thus differing in opinion from those whose judgment I feel myself both disposed and bound to respect. The best apology I can make is, to say, that as it is my opinion, I am bound by my oath to avow it, and by my duty to the public to state the grounds on which I have formed it; and it is a great satisfaction to me to know that, if I am in error, this House will take care that my error shall work no injury to the parties nor to the established law of the country.

The course of argument pursued by the learned judges who thought the direction right, was to the following effect:

The consideration of this question resolves itself into three heads:—First, What is the general rule of law with respect to setting out the tithe of hops, independent of particular usage or practice in particular places? If that rule should be found essentially to vary from the course which has been pursued in the parish of Farnham, and to which the Plaintiff has conformed: then, secondly, Whether the usage stated in the bill of exceptions, however convenient and applicable to any modern improved method of cultivating and preparing the hop for market, can overturn the general rule, or be supported upon any legal principles? and, thirdly, Whether sufficient matter was given in evidence, whereon to ground a sound presumption of a real composition having taken place with respect to this article of annual increase?

That this article became a subject of cultivation long posterior to the time of legal memory is a fact noticed in a variety of cases agitated more than a century ago. It seems true, indeed, that the Courts of justice were not called upon to declare the particular mode in which hops were titheable until a considerable time after their introduction into this country; though, when the point did arise, there appears to have been little difficulty in deciding it. All titheable matters, when newly introduced, are classed among others to which they bear an obvious resemblance; and are accordingly deemed a great or small tithe, and are required to be severed and set out in a similar manner with those articles which they resemble. Such has been the case with woad, saffron, tobacco, and other such titheable matters; such would have been the case with madder, had not the legislature established a temporary composition, which expired in 1786; such has also been the case with all artificial grasses. The right of the parson to his tithe in kind accrues [196] on the act of severance; his right to take the tithe accrues when the titheable matter, after severance, is in the earliest stage of the course of husbandry applicable to it, in which the tenth part may be visibly distinguished from the other nine. What shall be deemed a severance must depend upon the nature of the matter to be severed. But no other mode of severance in the case of titheable matters of annual increase has been judicially recognized, except that of severance from the soil, and severance from the parent stem. The same principle that requires fruit and seeds to be set out, after they are gathered or collected, by measure or weight, must require hops to be tithed in the same manner, after being picked or gathered from the plant. The flower of the hop is the sole object of the cultivation of that plant, and it not only is, but necessarily must, to preserve its quality and value, be picked and gathered upon the spot. It seems difficult to distinguish the case of hops from pease plucked by the hand for the use of man, as the phrase is, from the bind of the plant, or from beech mast, and acorns pulled from the trees. Hops are, in truth, the fruit of the plant as much as the pod of pease. Upon principle, therefore, the mode of severing and setting out the tithe of hops contended for by the Plaintiff in error, is not that which the law requires. Although there was a time when it was doubtful what the common law principle of severing and setting out this tithe was, the point is now settled even in the last resort. The first case is in 1 Roll. Abr. 644, tit. Dismes (Y), pl. 3, 14 Jac. 1, where it is said, "A man may set out his tithe of hops before they are dried." The stage of husbandry immediately preceding the drying is the picking; consequently, it was not then doubted that they must be severed by picking before they are set out. In 1672, in the case of *Crouch v. Ridsen*, 1 Sid. 443, Twysden, J., said, that it was uncertain whether they ought to be tithed by the hill, the pole, or the bushel. This proves nothing affirmatively on the subject, but only that he did not consider the subject as having received any determination which ascertained the general rule of law upon the point. About twenty years after this observation of Twysden's, the question came under consideration in the case of

Chitty v. Reeves, viz. in the year 1687. The Court there pronounced the rule of the common law, by declaring, that in case there had not been such usage as was proved in that case, the tithe of hops ought to be paid in kind, which they explained to be the tenth part of the whole after picking. The expression of paying it in [197] kind, is somewhat singular, and most strongly imports that any other mode would be a sort of substitution for the tithe itself. In 1698, in the case of *Gee v. Perch*, the custom alleged of paying ten shillings an acre, was declared by the Court to be a bad custom; and in the absence of any good custom an account was decreed of a tenth part of the value of the hops, when the same were pulled from the bind or stem; and the true reason is there added, "at which time the tenth part is severable from the nine parts, and the tithe by law payable." In a subsequent suit in 1794, by the administratrix of *Gee*, the Plaintiff in the former action, against the same Defendant, 1 Wood, 436, the same doctrine is laid down by the Court; and this case is the stronger to shew the necessity of picking the hops, because the Defendant did not insist on setting out the tithe by the tenth row or hill, but had cut down ten hills together, and set out the tenth of the whole quantity, both hop and bind, thereby giving the tithe-owner his full proportion. Again, in 1720, *Bliss v. Chandler*, the Court declared that hops are not titheable until they are picked; and that the tithe thereof ought to be paid in kind by the bushel, namely, every tenth bushel of the whole, after picking. The same rule prevailed in the two several cases of *Sneyd v. Unwin*, in 1740 and 1752. Lastly, in *Walton v. Tyers*, decided in the House of Lords, in 1753, 5 Brown, Parl. Cas. 99, where the Defendant insisted on setting out every tenth hill, and cutting the bind; and on the other hand the Plaintiff demanded every tenth bushel, when picked; it was declared, that the mode insisted on by the Defendant was improper; and further, it was affirmatively pronounced, that the tithe ought to be set out after the hops are picked from the bind or stem. From this series of authorities, which is not impeached by any thing to be found in the books, or by any thing to be drawn from the nature of the case, it seems completely settled, that the severance of the tithe of hops must be by separating the fruit from the stem.

Seeing then what is the general rule as to severing the hops and setting out the tithe thereof, we may proceed to inquire, Whether any such usage as that which has been set up by the Plaintiff in error can be supported consistently with the rules of law? The usage stated in the bill of exceptions amounts to this, that the occupier shall, at his discretion, leave for the rector the tenth part of the hops, not severed, as we have seen that the common law principle requires; but in a stage of the husbandry of this article, [198] short of that in which he is entitled by law to receive it, and that without compensation. This is precisely the same thing in principle as if it were contended that the rector, by custom, should receive a less quantity in that stage of husbandry, when it is by law to be set out, than he is entitled to; for, abridging the quantity of the tithe, and calling upon the rector to incur expense, when he is not by law obliged so to do, come to the same end, since both equally reduce his profit. The question then is, Whether the usage contended for be good and available in law? Now there are three distinct things, besides the rules and principles of the common law, that control the right of tithes; viz. custom, modus and real composition. These three rest on different foundations, the confounding of which has introduced much of the perplexity and difficulty which have arisen in this cause. Custom, in respect of prædial tithes, chiefly regards the manner of setting them out. It must be immemorial; it requires no equivalent; it is to be presumed coeval with the original payment of tithes, or endowment of the parish church, provided it be not subject to fraud; for it never can be presumed that the lord of the manor, at the time of endowing the parish, meant to stipulate for such a mode of setting out the tithes as would defeat his own endowment. Hence come the different modes of tithing the same article in different parishes. In some places the modes of husbandry, in others, the fervor and zeal of Christians in the early ages, gave an advantage to the parson. When the lords of manors consecrated their tithes to any church, as they might have done before the second council of Lateran, probably they expressed, in the consecration, in what manner the tithe should be paid. *Cujus est dare, ejus est disponere*. See Selden's History of Tithes. The payment of tithes was at first voluntary, and of imperfect obligation. Afterwards, indeed, it was enforced by papal bulls, and by decrees of councils: but the canonists in all ages admitted that the custom of tithing was to be observed in every parish. Linwood's Provinciale De Decimis (fo. 196). Modus and real

composition differ from each other in nothing more than in their origin. Modus must have existed from time immemorial; composition real must have been made before the disabling statute of the 13 Eliz. But both modus and real composition must be subsequent to the original endowment of the church, inasmuch as [199] they control it, and are founded on the consent of the parson, patron, and ordinary. Now the usage of tithing hops insisted on by the Plaintiff in error, cannot be referred either to a custom, or to a modus, because the cultivation of hops was introduced within the time of legal memory. Whether the plant be indigenous or not, we are informed by many cases which occurred at a great distance of time from the present day, that its cultivation for use is modern; and indeed, the evidence in the present case states, that in the parish of Farnham, and elsewhere in the kingdom, hops are "with reference to time of legal memory, modern and within time of memory;" and it was almost conceded at the bar, that as a custom which must be immemorial, reasonable, and certain, the usage contended for could not be supported, although it appears to have obtained a considerable time prior to the last hundred years, during which the parish has been under composition. In *Crouch v. Risden*, 1 Sid. 443, the Court refused to grant a prohibition upon the suggestion of a modus for hops, declaring that they would take judicial notice that hops were not of sufficient antiquity to become the particular subject of a modus, though hops, as well as other matters of novel introduction, might be included in a modus for small tithes in general. This case arose a considerable time before that of *Chitty v. Reeve*, which was decided in 1687; and after the case of *Chitty v. Reeve*, the same point was again determined in 1698; for in the case of *Gee v. Perch*, the defendant having set up a modus of 10s. an acre for hops, the Court declared the custom void in law; and, according to a short report of the same case, from a manuscript of Lord Ch. B. Dodd, in *Rayner on Tithes*, p. 87, the second resolution is, "that no modus can be for hops, being a late thing." So Lord Ch. B. Comyns, in his judgment, in *Wallis v. Payne*, Com. 638, considers it as settled, that hemp, line, saffron, hops, and tobacco, are new things, and as such to be ranked with matters of a like nature, as small tithes. But it was contended, that the mode of setting out the tithe of a matter newly introduced with a reference to the time of legal memory, and which mode was possibly coeval with the introduction itself, might be good, as being reasonable, and that this was actually so by usage in other cases. To this it may be answered, that a custom of tithing, like every other custom, must be conformable to what is required by the common law; and that reasonableness or fitness will not alone dispense with other ingredients which necessarily enter into the definition of a custom. It would be repugnant to every principle of law, to [200] hold that an obligation created by the general law of the land could be avoided within particular limits, by the immediate effect of a contrary practice of sixty or seventy years in that district; or, according to the argument at the bar, that there shall be a rule of law which is only to take place when there has been no practice to the contrary. Immemorial reasonable usage may, indeed, locally supersede the common law, and introduce a different rule; but the common law cannot be different at Farnham from what it is in Kent or in Essex, or in other places. It must be the same in all places, otherwise there is no rule of the common law at all.

In support of the usage stated in the bill of exceptions, the case of *Chitty v. Reeve* was cited; the proceedings and decree in which cause are to be found in 1 Wood, 251. This case deserves particular examination. It arose in this very parish of Farnham; the opinion of the Court was given upon nearly the same statement of the practice of sixty years before the statute of Jac. 2, that is to be found in this bill of exceptions; and if that opinion were well founded in point of law, it would dispose of the question in the plaintiff's favour. A bill was filed by the administratrix of the lessee of the tithes, for an account of the tithe of hops, suggesting that the custom in Farnham was to set them out in the manner contended for by the present Plaintiff. The Defendant, the occupier, admitted that they ought to be set out by the tenth hill, but insisted that the growth of every tenth hill ought to be left upon the hill with the binds cut, and stripped from the pole, to be taken away by the tithe-owner to be picked elsewhere. Upon the evidence given in the cause it appeared to the Court, that the practice insisted upon by the Defendant would, for the reasons given, be destructive to the tithe; but that to set out the tenth row, where the rows were equal, and where not, the tenth hill, and to leave it standing, with the binds uncut,

for the tithe, and for the impropiator to have a convenient time to come and cut the bind, and pick the hops upon the ground, had been observed for above sixty years. This custom, usage, and practice, the Court declared to be reasonable and fitting to be observed; at the same time pronouncing the common law obligation, of setting out the tithes in kind, to be as before mentioned. One is at no loss to find out the reason why the defence was overruled; but it is not so easy to discover the ground upon which the Court could declare, that the custom, usage, and practice, alleged by the Plaintiff, was reasonable [201] and fitting to be observed; at least, if by that language they meant to say (as seems to have been the case, though the decree is only for an account,) that it was obligatory upon the tithe-owner, though it was contrary to the general rule of law which they themselves in the same breath declared. How they applied this custom, usage, and practice, as they call it, the decree gives us no information. They may have decided upon the effect of an usage of sixty years *proprio vigore*, and independent of the consideration how far it might be evidence of something further; they may have considered it as evidence of a legal, immemorial custom; or they may have considered it as evidence of a composition real. At any rate, the attention of the Court was not drawn to the general point, Whether either of the customs, set up by the parties, could have any foundation in law; the antiquity of either custom did not come in question, but only their comparative reasonableness, and on that alone the Court determined. The authority of that case, therefore, does not weigh much in the present, where the point as to the validity of any custom upon this subject is directly made. The other case mainly relied upon to shew, that a practice of long standing, although not properly a custom, may be considered as having the same effect, in the case of hops, is that of *Sneyd v. Unwin*, in 1740. There the Plaintiff insisted that the tithe should be set out in the manner now contended for by the Defendant in error. The Defendant relied on an ancient usage of tithing by the tenth pole or hill, after the binds are severed from the ground. The Court directed an issue, to try "Whether the usage was for hops to be tithed before they are picked from the stalk?" From this, it has been contended, that the Court must have been of opinion that such an usage might be good, but it is much too strong a conclusion to suppose a court of equity pledged to any settled opinion on a matter which, by directing an issue, it confesses may be more effectually investigated at law both as to the legal principles applicable to the usage proved, and as to the fact of usage itself. That a court of equity should pause, and call for information upon those heads for its own satisfaction, before it proceeds to a decree, cannot, in fair reasoning, furnish such an inference; and perhaps the Court might be less scrupulous, having the decree of *Chitty v. Reeve* before them, where their predecessors had been governed by an usage. In *Sneyd v. Unwin*, the verdict was against the custom. Whether that arose from the party upon whom the affirmative lay failing in his proof of the usage having [202] long subsisted, or from the direction of the Judge upon the effect of the usage supposing it proved to be of long standing, we have no means of knowing with certainty; but it is reasonable to suppose that the same usage would not have been set up twelve years afterwards, namely, in 1752, unless strong evidence had been given of it in the first cause; and the declaration of the Court in the second cause seems to countenance an opinion, that the invalidity of the usage in point of law might have been the ground of determination, since the court declared that the method insisted on "was not the legal method of tithing hops, but that they ought to be picked or gathered before the same are titheable," and decreed an account accordingly. The only just inference which can be drawn from that case is, that the court of equity did not think proper, any more than another court of equity in the present case, to determine upon a matter of custom, without the assistance of an investigation of the facts *vivâ voce*, and of the law which should result therefrom.

The usage insisted on by the Plaintiff in error appears also to be defective in reasonableness; for it is stated in the bill of exceptions, that the occupier is to leave the tenth row if equally planted, or the tenth hill if unequally planted. This mode of tithing, therefore, is more open to fraud than that prescribed by the common law, since the planter has it in his power to determine which shall be the tenth row or hill, and accommodate his cultivation accordingly, and as many hills are weak and many die, and he can begin to set out from what part he pleases, it would require very little contrivance so to set them out, that the hills allotted to the parson should

be those which are weak and blighted. This is not merely an opening, but an invitation to fraud. Authorities however have been resorted to to shew that such a mode of setting out tithes has been considered as reasonable, and may be good by custom; and for this purpose the case of *Stebbs v. Goodluck*, Moor, 913, 1 Leon, 99, has been relied on. According to the report in Moor, the parson, as he alleged, was to have every tenth land for tithe of corn, beginning with the land next the church; and the occupiers knowing which of the lands would be the parson's, neglected to till, sow, and manure them as they did their own; for which fraud, the parson sued for tithe in kind, that is, every tenth sheaf, in the Spiritual Court: but the Court of King's Bench granted a prohibition, because the parson's remedy for the fraud was at common law. According to this report, it does not ap-[203]pear that the validity of the custom was at all taken into consideration, but only that the parson, having sued in the spiritual Court, and having stated a fraud as the only ground on which his suit there was founded, was told that his remedy was at common law, and therefore a prohibition was granted. But in the report of the same case, in Leonard, the reporter states that the opinion of Wray, Ch. J., was, that the custom was against common reason, and void; but that if it were a good custom, then that the parson should have his action on the case at common law. Nothing more seems fairly to be collected from the two reports, than that the Court decided that at all events the fact of fraud should not be tried in the Spiritual Court, the Chief Justice expressing his opinion as to the custom, from which no one is stated to have dissented. The dictum of Lord Hobart in *Hyde v. Ellis*, Hob. 250, is the only other authority cited to the same effect. The point immediately in judgment in that case was, Whether carrying the first crop of hay into the advanced state of tedding, and putting it into wind-rows, might be a compensation for exempting the second crop from payment of tithe? and it was determined, as it has often been since, that it might. By way of assimilation to the case then at bar, the report states his Lordship to have said, that at divers places they set out the tenth acre of wood standing, and so of grass. It must be observed, that the law of tithes was not so well ascertained in the time of Lord Hobart as it is at present, and many opinions then fluctuated upon matters which have since been settled. With respect to wood, indeed, if it were titheable only by custom, as it was at that time supposed to be, the tithe-owner could only have taken it in the way that custom gave it to him. But the proposition as applied to grass, or any subject titheable by the general law, is not warranted by any decisions ancient or modern, but is contrary to the course of them all. There must in all cases, and without any exception, be a severance from the freehold, so that what was part of the inheritance may become a chattel and vested in the parson. If this were not the case, the Spiritual Court would be ousted of its jurisdiction, for it can hold no plea of what relates to the freehold. In all the books, indeed, tithes are called lay chattels; but till severed they are not so; they still remain parcel of the freehold, so that severance is essentially necessary. That a particular piece of wood-land, or meadow-land, separately and immemorably enjoyed by the par-[204]-son, may be a compensation for tithe of wood and hay, is undoubted; but no authority, except the dictum above mentioned, is to be found, to shew that the leaving a tenth of any titheable matter unsevered can be good by custom. The case of *Stedman v. Lye*, M. 11 W. 3, 1 Lord Raym. 504, is strongly in point. In a suit for tithe of hops a modus was set up, that if the parson send his servant, &c. to pull aliquam partem lupulorum, he should have the tithe of them, &c. But it was agreed by the Court to be "an ill custom, because it drives the parson to more pains than the law requires to entitle him to that which by law he ought to have in the same manner without such pains."

The observation of Mr. Justice Twisden, in *Crouch v. Ridsen*, seems to have a contrary tendency to that which was contended for by the Plaintiff in error. When he observes that the legal manner of setting out the tithe of hops, whether by the hill, the pole, or the bushel, had not been settled; he must be understood to say, that in point of fact the tithe had been set out in these several ways in different parishes, but which of them was the legal way had not been then determined. Had he conceived that the practice which had long obtained in each particular parish, could constitute the legal mode in such parishes respectively, it is probable that he would have so said; but it seems plain that he conceived some general rule, founded on principle, and applicable to all places, remained to be ascertained: that general rule has since been ascertained in the case of *Walton v. Tyers*.

The ground, however, upon which the Plaintiff in error principally relied, was that of a real composition, which it was argued might have taken place antecedent to the 13 Eliz. : but it is very doubtful whether the manner in which, or the time when, the tithe itself shall be set out in kind, can be the subject matter of a real composition but only of the discharge of tithe.

In the Codex (a)¹ it is said, that a composition real is, "where the incumbent together with the patron and ordinary make agreement by deed executed under their hands and seals that certain lands shall be discharged from the payment of tithes in specie in consideration of a recompense to the incumbent either in money or in lands to him and his successors for ever or in some other thing for their benefit and advantage." So Sir Simon [205] Degge observes: "That which we call a real composition is, where the present incumbent of any church, together with the patron and ordinary, do agree under their hands and seals, or by fine in the King's Court, that such lands shall be freed and discharged of payment of all manner of tithe for ever, paying some annual payment, or doing some other thing, to the ease, profit, and advantage of the parson or vicar to whom the tithes did belong" (a)². Indeed there are two requisites to constitute a real composition, namely, that the tithe shall be discharged, and that a compensation shall be given. Are these requisites to be found in this usage? That the tithes are not discharged must be admitted. Where then is the compensation? It was said that the parson was to have the binds; but the pleadings do not give them to the parson, and if they did, they are of no worth or value. It is obvious that in this case the parson is to give up the benefit of having the hops picked for him, and to do it for himself at a great expense, and in an inconvenient manner. For this he receives nothing: for according to the evidence, he is only to have the privilege of coming upon the land, of cutting the binds and picking the hops, and then carrying away the hops when picked. To this agreement, it was argued, the parson might have been induced to accede in order to tempt the occupiers of lands to plant hops, and to give encouragement to a very expensive cultivation. As to the inducement, if this were to be admitted as a compensation, it would equally well establish a custom of tithing corn by setting out the tenth land, or apples by setting out the tenth tree; because, by a parity of reasoning, it might be presumed that the parson held out this favourable mode of tithing such articles in order to tempt the farmers and occupiers of lands to employ their woodlands or pasture in such culture as might produce more beneficial tithe to himself. In short, it would make good a composition or modus to receive one fifteenth instead of one tenth of corn; for undoubtedly in all cases, the less that is taken for the tithe of any article, the more the occupier is encouraged to cultivate that article; and if this alone were to be admitted as a sufficient consideration, the objection of want of consideration would not lie in any case.

If therefore, on the presumption that the tithe had been originally so granted, or on any other supposition this method of [206] setting out the tithe of hops might, by immemorial usage, be supported, still the argument will not apply to the present case, wherein no immemorial usage can have existed; and if the tithe-owner at the first introduction of hops had a right to his tithe by measure, the objection remains unanswered, that the composition cannot be good, because he parts with that right without receiving any compensation.

Supposing, however, that this can be the subject-matter of a real composition, it will be right to examine the nature of the evidence upon which the composition is attempted to be supported. In fact, the evidence is not applicable to a composition real. It consists wholly of usage, and is that sort of evidence which is applicable to a modus, but has no reference to a particular deed of composition. Usage is in general a ground for presuming deeds, even against the crown: yet in the particular instance of composition for tithes, it is settled that where the deed cannot be produced, some evidence must be given referring to the deed, or shewing that it did exist, independent of mere usage. And the reason why this has been so held, is stated to be, that if it were otherwise the church would be defrauded, and every bad modus turned into a good composition. *Heathcote v. Mainwaring*, 3 Bro. Chan. Cas. 217. Indeed it may be collected from the Year Book 34 H. 6, 36, that the ancient law was, that an annuity founded on a real composition, in discharge of tithes, could only be claimed by pro-

(a)¹ Gibson's Codex, tit. 30, c. 5, p. 705, in notis, ed. 1713.

(a)² The Parson's Counsellor, Part 2, c. 20.

ducing the deed of composition, or by alleging an immemorial prescription. The presuming a deed from long usage is certainly a novel invention of the Judges for the furtherance of justice and the sake of peace, where there has been a long exercise of an adverse right. For instance, it cannot be supposed that any man would suffer his neighbour to obstruct the light of his windows, and render his house uncomfortable, or to use a way with carts and carriages over his meadows for twenty years respectively, unless some agreement had been made between the parties to that effect, of which the usage is evidence. But with respect to a compensation for tithes the same reason does not obtain, because temporary agreements are made and continued for the convenience of parties during a succession of incumbents. There is no exercise of an adverse right, which is generally deemed necessary to raise the presumption. The best evidence of an agreement for a real composition having actually taken place is the deed itself, but that can rarely be expected. In the case of [207] *Sawbridge v. Benton*, Austr. 375, instruments were given in evidence which strongly denoted that such an agreement must have taken place as they related, with a reasonable degree of probability, more particularly to such a transaction than to any other; wherefore the real composition was supported. Indeed, it appears to have been invariably holden that some evidence must be adduced to shew that such an agreement, though lost, did once exist. Such was the opinion of the Court of Exchequer in the cases of *Robinson v. Appleton*, 4 Wood, 10; and *Hawes v. Swaine*, 4 Wood, 313; and such was the opinion of Lord Hardwicke in *Rotherham v. Fanshawe*, 3 Ark. 628. In the present case there is wanting that which is indispensably necessary where a real composition is to be presumed, namely, mutual loss and gain on the respective parts of the parson and occupier. Where the occupier has long retained that which by law he ought not to retain, and yields to the parson that which by law he is not bound to yield; this mutuality of loss and gain acquiesced in for a great length of time, is strong corroborating evidence of such an agreement having been executed by the necessary parties: but where this mutuality is not to be found, the presumption must be that no agreement took place, whereby the parson consented, with the permission of the patron and ordinary, to forego his legal rights without any retribution. The bare fact, therefore, of the parson having been in the perception of less than what is due to him, or of that which is due in a less beneficial manner, is not of itself a ground for presuming a real composition; and this was the opinion of Rolfe, as appears in the case of *The Earl of Hertford v. Leech*, 8 Car. 1 (a), where in stating what he conceives were the reasons of the Court for holding that certain lands were not discharged of tithes, he gives this as one, "that it shall not be intended that any real composition or consideration was given for the discharge of tithe without shewing that specially." Such has been considered to be the law ever since.

From this course of reasoning it follows that the tithe of hops, by the principles of the common law, is payable from the true time of the severance of this titheable matter, namely, from the picking; that no custom or modus can apply to this any more than to many articles of modern introduction; that no long practice, even though concomitant with the introduction of the ar-[208]-ticle itself, can have the effect of a custom or modus; and vary the legal principle by which the tithe is to be set out; that as a real composition, the mode of tithing contended for cannot be supported, since it does not fall within its definition; that if it did, there is in this case no evidence whatever of the existence of a deed of composition; that the usage contended for would furnish to the farmer a temptation almost irresistible to cheat the parson, and would subject the property of the church to imminent peril, and therefore that upon the matter set out in the bill of exceptions, the direction was rightly given to the jury to find for the Defendant.

After hearing the opinion of the Judges, the House, upon the motion of the Lord Chancellor, resolved that the judgment of the Court of King's Bench should be affirmed.

Mr. J. Buller was prevented by illness from attending in Court during any part of this term, and early in the ensuing vacation died at his house in Bedford Square.

The end of Easter Term.

(a) Vid. 2 Danv. Ab. 612, tit. Dimes (I.), pl. 2, Vin. Abr. tit. Dimes (I. a), pl. 2.

[209] CASES ARGUED AND DETERMINED IN THE COURTS OF COMMON PLEAS AND EXCHEQUER CHAMBER, AND IN THE HOUSE OF LORDS; IN TRINITY TERM, IN THE FORTIETH YEAR OF THE REIGN OF GEORGE III.

(The following case was decided in last Easter Term, but its publication was unavoidably delayed till the present period.)

LONG v. DUFF. IDEM v. BOLTON. May 26th, 1800.

A foreign built ship, British owned, is not required to be registered: and may therefore sail without convoy, being within the exception of the convoy act 38 Geo. 3, c. 76, s. 6. If a policy of insurance be effected on such a ship, it is not incumbent on the assured to communicate to the underwriter, at the time of making the policy, the circumstance of her being foreign built (a).

These were two actions on policies of insurance on the ship "Lucy," at and from Padstow in Cornwall to Leghorn.

The causes were tried before Lord Eldon, Ch. J. at the Guildhall sittings after Michaelmas term 1799, and verdicts were found for the Plaintiffs in both actions, under the following circumstances: The "Lucy" was a Spanish built ship purchased at Hamburg by the Plaintiff, a British subject; she was not registered, but had paid the alien duties. Previous to setting sail upon the voyage insured, the captain of the "Lucy" applied to the Admiralty for a licence to proceed without convoy to Leghorn and Naples, but only obtained a licence for Naples; notwithstanding which he proceeded on the voyage to [210] Leghorn without convoy, and was captured off that place by a French privateer. The only difference between the two cases was, that in the former it was represented to the underwriters at the time of effecting the policy that the "Lucy" was a foreign built ship and not registered; but in the latter it was not.

On the part of the Defendant it was objected in both actions, that as the licence obtained did not extend to the voyage insured, the "Lucy," though a foreign-built ship British owned, was within the provisions of the 38 Geo. 3, c. 76, which makes void all policies upon ships sailing without convoy; and in the second, that supposing her not to be within the provisions of the convoy act, that circumstance ought to have been communicated to the underwriters.

On these grounds a rule nisi was obtained in Hilary term, calling on the Plaintiffs to shew cause why new trials should not be had, and nonsuits be entered; and the cases were afterwards argued by Shepherd and Williams, Serjts. for the Plaintiffs, and Lens and Bayley, Serjts. for the Defendants.

Cur. adv. vult.

On this day the opinion of the Court was delivered by

LORD ELDON, Ch. J. There was nothing to distinguish the case of *Long v. Duff* from *Long v. Bolton*, except this single circumstance, viz. that in the latter it was not disclosed to the underwriters that the ship in question was of such a peculiar description, as not to fall within the provisions of the convoy act. With respect to which, we are all of opinion that it was properly left to the Jury to determine whether according to usage it was the duty of the assured to give this information, or of the underwriter to satisfy himself upon that point. The Jury have decided that it was the business of the underwriter to obtain this information for himself.

With respect to the general point, the question is, Whether a vessel in the situation of the "Lucy," departing without convoy, (not having obtained a proper licence so to do,) can be deemed to be protected by the policy? or, Whether that policy is not altogether void under the provisions of the 38 Geo. 3, c. 76, s. 4, which declares that every policy of insurance on any ship or cargo within the purview of the act which shall depart without convoy, or shall wilfully desert its convoy, shall be null and void? The preamble of that act states generally, "that it will aid to the security of trade to prevent ships sailing without convoy, except in certain cases;" and the first section enacts, "that it shall not be lawful for any ship or vessel belonging to [211]

(a) Vide *Sewell v. Royal, E. A. Company*, 4 Taunt. 856. *Campbell v. Innes*, 4 B. and A. 426. *Attorney General v. Wilson*, 3 Price, 435.

any of His Majesty's subjects, except as hereinafter provided, to sail or depart from any port or place whatever, unless under the convoy or protection of such ship or ships, vessel or vessels, as shall or may be appointed for that purpose." The principle of policy stated in the preamble to this act will undoubtedly apply to ships foreign built in the possession of British owners, as well as to ships British built. But whether it was intended to be carried to that extent is the question we are now to decide, and which we must decide by examining the clause which is to carry the principle into effect. The sixth section provides, that nothing in the act contained by which ships are required not to depart with convoy, shall extend "to any ship or vessel which is not required to be registered by any act or acts of parliament in force on or immediately before the passing of this act." It was contended on the part of the underwriters, that the words "not required to be registered," might be construed "not entitled to be registered." But it is clear from the context, that the legislature intended to use the words "not required" in another sense; for in the line immediately preceding, which describes the prohibitions of the act, the words are "required not to sail without convoy." The true question is, Whether this ship was required to be registered by any statute in force when the convoy act passed? It appears that she is foreign built, that she was purchased previous to the time when the prohibition took place; and in order to ascertain whether this ship being British owned is required to be registered, or not, we must look back to the provisions of our navigation laws. If, indeed, this ship be required to be registered, having departed from a British port without having procured herself to be registered, she is for that offence, by 26 Geo. 3, c. 60, s. 32, ipso facto forfeited. We therefore must be thoroughly satisfied, that we stand on the most solid grounds before we hold this ship subject to a regulation, by the having infringed which, if she be indeed subject to it, she has incurred the penalty of forfeiture. I shall not dwell upon any of the acts relative to navigation which were passed previous to the 12 Car. 2. But it may be observed in general, that it appears clearly from the uniform tenor of all the early acts upon the subject, whether passed during the time of the commonwealth (*a*), or subsequent to the restoration, that the policy of the legislature ever was to confine the privileges of our trade, as far as was consistent with the extent of that trade, to British built shipping. But as the quantity of British built shipping, at the several periods when [212] those acts were passed, was not adequate to carry on the whole trade of the country, it became the secondary object of the legislature to confer privileges on foreign built ships in British ownership. In proportion, however, as British built shipping increased, the privileges conferred on foreign-built ships in British ownership were from time to time restricted. On the head of registry I have not found anything worth stating, until the passing of the 12 Car. 2, c. 18. The first section of that act "for the increase of shipping, and encouragement of the navigation of this nation, wherein under the good providence and protection of God, the wealth, safety, and strength of this kingdom is so much concerned," enacts, "that no goods whatsoever shall be imported into, or exported out of any of the lands, islands, plantations, or territories in His Majesty's possession in Asia, Africa, or America, in any other ships but such as do truly and without fraud belong only to the people of England or Ireland, dominion of Wales, or town of Berwick upon Tweed, or are of the built of and belonging to any of the said lands, islands, plantations, or territories, as the proprietors and right owners thereof." This clause does not relate to the European trade, but only to the trade with the British settlements in Asia, Africa, and America. The effect of it is to give the privileges of that trade to all ships whatever owned by the people of England, Ireland, and Wales, but in the case of ships owned by the people of any British settlements, it also requires that such ships should be of the built of those settlements. The third section which relates to the importation of goods from the settlements into England, Ireland, and Wales, confines that privilege solely to ships in the ownership of those countries. The eighth section prohibits the importation of goods from Russia into England, &c. except in ships owned by the people of England, &c., and also prohibits the importation of goods of the growth of Turkey, except in ships English built; unless in ships of the built of the place from whence the commodities come, or of the port from whence they are most usually shipped for transportation. The tenth section then establishes a species of register; "and for prevention of all frauds which may be used in colouring or buying

(a) See Scobell's Acts, Anno 1651, c. 22.

foreign ships," it enacts that no foreign-built ship shall be deemed an English owned ship, or enjoy the privilege thereof, until such time as the owner shall have made the same appear by oath to the chief officer of the customs of the port where the ship is, which officer is thereupon directed to give a certificate of her being English owned, and to keep a register of all such certificates as he shall give, [213] and make a return thereof to the chief officers of the customs in London. Taking the whole of this act together, it appears to describe what are English built ships, and what are English owned ships; and in what cases a foreign built ship English owned shall have the privileges of an English ship: but there is nothing which requires any foreign ships to be registered. The result of the act is, that a foreign built ship, though English owned, unless registered as such, shall be treated as an alien ship. Though it was highly politic to confine the privileges of English ships to such as should be registered, there seems to be no reason why English owners should not be allowed to carry on foreign trade under the same advantages as foreigners, and liable to the same duties. By the 13 and 14 Car. 2, c. 11, s. 6, the officers of the customs in all the ports of England are directed to give an account to the collector of the port of London of all foreign built ships in their ports English owned, for which certificates have been granted, which account is to be transmitted to the Exchequer and there to remain of record; and it is enacted, that no foreign built ship not purchased before the 1st of October 1662, and expressly named in the said account, though English owned and manned, shall enjoy the privileges of an English ship, but shall be liable to alien duties; with the exception of such ships only as shall be captured by letters of marque or reprisal, and condemned in the Admiralty. The 15 Car. 2, c. 7, s. 6, which prohibits the importation of commodities of the growth of Europe into any of our colonies in Africa, Asia, or America, unless shipped from England and in English built shipping, or such as was purchased before the 1st of October 1662, and duly certificated, will not, I think, be found to carry the subject of English ownership beyond the preceding act. The next material act is the 7 & 8 Will. 3, c. 22, the second section of which prohibits the importation of any goods whatsoever into our colonies in Asia, Africa, or America, in any ship but what is of the built of England, Ireland, or the said colonies: and the seventeenth section declares, that no ship shall be deemed or passed as a ship of English or plantation built until it shall be registered by the owner in the manner and form directed by the act. Then follows a particular provision for the registering of prize ships in a special manner; and small vessels of a certain description employed in the rivers or on the coasts of the plantations are excepted altogether. This act of King William applying only to the plantation trade, left the employment of all other ships not engaged in that trade, whether British built, or [214] foreign built and British owned, exactly on the same footing as they stood before. Their situation seems not to have been altered till the passing of the 26 Geo. 3, c. 60, on which the present question principally depends. After the best consideration which I have been able to give that statute, and after conversing upon it with the noble lord who framed it (*a*), as well as with the learned author of the treatise (*b*) to which it gave rise, the determination I have come to is, that foreign built ships in British ownership are not required to be registered, and consequently that this verdict must stand. The preamble of that act recites, "that it is proper that the advantages hitherto given by the legislature to ships owned and navigated by His Majesty's subjects should from thenceforth be confined to ships wholly built and fitted out in His Majesty's dominions." The legislature thereby declared, that the time was then come when the policy of employing British built shipping exclusively in the commerce of this country might be employed in its utmost extent. But there is not a single word in the preamble from which it may be collected that any other than British built ships are required to be registered. The statute enacts, that after the 1st of August 1786, no foreign built ship except prizes, nor any ship built upon a foreign bottom, although British owned, "shall be any longer entitled to any of the privileges or advantages of a British built ship or of a ship owned by British subjects," but that such advantages shall be confined to ships wholly of the built of this country or of some of our possessions. Then follows a proviso, that nothing in the act contained should prevent such foreign built ships as before the 1st of May 1786 were British owned and registered, from continuing to enjoy the privileges

(*a*) Lord Hawkesbury, now the Earl of Liverpool.

(*b*) Reeve's Law of Shipping.

which they had before enjoyed ; nor to deprive any ship, built upon a foreign bottom, and registered before that day, from continuing to enjoy the privileges to which she was then entitled ; nor to prevent any such ship begun to be repaired or rebuilt before that day from being registered under the act by virtue of an order of the commissioners of customs. This order they were authorised to grant if it should appear to them upon oath that such ship was bona fide stranded, being the sole property of a foreigner, or that she was a droit of Admiralty, and under either of these circumstances was sold to a British subject, and was so much repaired that two-thirds of her were British built. It is clear from the last provision that the legislature meant to [215] require all those ships to be registered which were entitled to be registered, and to prevent those from being registered which were not required to be registered. On the third section of this act much reliance has been placed. The object of that clause was to extend the registry introduced by the 7 & 8 W. 3 into the plantation trade to the European trade. It therefore enacts, that "all and every ship" having a deck, and being of fifteen ton burthen and upwards and British owned, shall be registered in the manner therein-after mentioned. It is quite clear, however, that this clause must be construed according to the tenor of the act, and must be confined to such ships as could be registered in the manner therein-after directed ; for it is impossible to contend, that because the legislature uses the words "all and every ship," it meant therefore to require even those ships to be registered which, as appears from other parts of the act, were intended to be prevented from being registered. By the sixth section it is provided, that nothing in the act shall extend to require to be registered any ship of war, or vessel belonging to the royal family, or employed in inland navigation. And the 27 Geo. 3, c. 19, s. 8, further provides, that vessels not exceeding thirty tons, and not having a whole deck, and solely employed in the Newfoundland fishery, shall not be subject to be registered. The general principle introduced by the 26 Geo. 3 being, that all British built ships should be registered, it became necessary to introduce these exceptions : and I am of opinion, that the words "not required to be registered," employed in the sixth section of the convoy act, cannot be satisfied by being applied to these clauses, since the ships thereby excepted from the necessity of obtaining a certificate of registry, from the nature of their employment can never be in a situation to require convoy. It has been argued, that as the twenty-eighth section of the 26 Geo. 3, c. 60, has given two sorts of registry, one relating to British built ships, and one to foreign built ships, all foreign built ships are therefore within the meaning of the latter sort. But the meaning of the legislature upon this head is clear. It had been declared that all foreign built ships British owned, which had been registered previous to the 1st of May 1786, should continue to enjoy certain privileges ; and the twenty-ninth section required that all the old registers of such ships should be delivered up and new ones granted ; it is obvious, therefore, that the "certificate of foreign registry for the European trade, British property," mentioned in section twenty-[216] eight, was intended to apply to those ships which, though foreign built, were to continue to enjoy the privileges to which their former register entitled them. But it is impossible that it should be intended to apply to such foreign built ships as were not registered before the 1st of May 1786, since its object was to prevent them from enjoying the privileges which that certificate was calculated to confer. It appears from Reeve's Law of Shipping (see pages 437, 438, 447, 448), that as British built ships only were entitled to the plantation trade, the certificate of "British plantation registry" was adopted by the desire of the commissioners of the customs, to distinguish those ships from foreign built ships British owned, which were entitled to the European trade, and to which the certificate of "foreign ships registry for the European trade, British property," was given. The twenty-ninth section of that act also takes a distinction between those ships which are required to be registered from that time, viz. British built ships, and those ships which are entitled to be registered in consequence of the previous certificate of registry obtained by them ; and then directs that both shall obtain registers. Subsequent to this act, therefore, all those ships which are entitled to be registered, are required to be registered, and the thirty-second section of the act subjects them to forfeiture in case they attempt to proceed to sea without having been registered. It is material to observe, that this very case shews in what manner the above statute has been understood ; for if the ship which was the subject of the present insurance had been required to be registered, she would not have been permitted to clear out for sea, not having in fact been registered, but would have been

seized as forfeited. The last section of 27 Geo. 3, c. 19, which was passed for the express purpose of obviating doubts on the 26 Geo. 3, shews the intention of the legislature that the latter act should have that construction which has now been put upon it. It declares that all ships not entitled by the 26 Geo. 3 to the privileges of British built or British owned ships, and all ships not registered according to the said act, shall, although owned by British subjects, be deemed alien ships and be liable to the same penalties and forfeitures as alien ships. It is not said that ships not registered shall not be navigated or owned by British subjects; a British owner of a foreign built ship may engage in neutral trade, and will be liable to the alien duties, but [217] it was not the policy of the legislature to prevent British subjects from employing foreign ships in neutral trade, in as ample a manner as they can be employed by aliens. The 34 Geo. 3, c. 68, contains several provisions for granting new certificates upon a transfer of property; but it appears to me to proceed upon the same ground as the 26 Geo. 3, and to regulate those cases only in which a title to a certificate having been given, a certificate is required to be obtained, and in which the parties obtaining it are to derive some advantage from it.

In this view of the subject we are all of opinion, that the objection taken cannot be supported, and therefore that the verdicts must stand.

Per Curiam. Rule discharged.

PARKE v. MEARS. June 17th, 1800.

A bond having been executed by A., and attested by one witness, was carried into an adjoining room and shewn to B., who was desired to attest it also, which he accordingly did in the presence of A.—Held that B. was a good witness to prove the execution (a)¹.

Debt on bond and verdict for the Plaintiff on the issue of non est factum, with liberty to the Defendant from Lord Eldon, Ch. J., before whom the cause was tried, to move to set that verdict aside and have a nonsuit entered, if the Court under the following circumstances should think the execution of the bond was not sufficiently proved. The bond was executed in Ireland, and there were two attesting witnesses to it, one of whom, a person of the name of Hearne, was called at the trial to prove the execution. It appeared that the bond had been executed in a room adjoining to that in which Hearne was a few minutes previous to the time at which he was desired to attest, but the Defendant himself was present and heard the attorney request the witness to attest this among many other deeds; the other attesting witness however was still in the room where the deed had been executed. It was proved also that Hearne knew the Defendant's hand-writing, and that the Defendant knew he was acquainted with it, and that the Defendant himself had acknowledged the instrument.

Bayley, Serjt., now moved for a rule nisi to enter a nonsuit, and contended, that as no subsequent acknowledgment (b) of the instrument by the Defendant, could dispense with the regular proof of the execution of the deed, the case must stand as if none such had been made; that the evidence of Hearne was [218] insufficient, as he was not present at the time of the execution, and that evidence should have been produced to shew that the deed was not complete at the time Hearne was called on to attest, since if it was complete his attesting subscription was nugatory.

But the Court thinking the whole might be considered as one transaction, held the execution of the bond sufficiently proved (a)².

Bayley took nothing by his motion.

(a)¹ S. C. 3 Esp. Rep. 171.

(b) *Abbot v. Plumbe*, Doug. 216. *Laing v. Kaine*, ante, p. 85.

(a)² In the case of *Greller v. Neale and others*, Peake N. P. Cas. 146, a point nearly analogous to the present decision seems to have arisen. There "to prove a partnership deed the Plaintiff's counsel called the subscribing witness, who said she did not see the deed executed, but that Neale brought it to her and desired her to put her name thereto as a subscribing witness, which she did," and this appears to have been deemed sufficient proof of the execution of the deed by Neale.

NORTH AND ANOTHER v. LAMBERT. June 19th, 1800.

Where the Plaintiff enters an appearance for the Defendant under the statute, judgment may be signed without any demand of a plea.

In this action the declaration was filed by the Plaintiffs on the 1st of May, and notice thereof given and a rule to plead entered in due time. On the 16th of the same month the Defendant having entered no appearance, the Plaintiffs entered one for him, and signed judgment without demanding a plea.

Shepherd, Serjt., having on a former day obtained a rule nisi for setting aside this interlocutory judgment and all subsequent proceedings thereon with costs, on the ground of a demand of a plea being necessary ;

Marshall, Serjt., now shewed cause, and contended, that where the Defendant does not enter an appearance, the Plaintiff has a right to sign judgment without demanding a plea.

The Court on inquiry of the officers found the practice to be as stated on the part of the Plaintiffs, viz. that where the Defendant does not appear, judgment may be signed without any demand of a plea (a)¹.

Rule discharged with costs.

[219] (IN THE EXCHEQUER CHAMBER.)

WALKER v. BAYLEY IN ERROR. June 20th, 1800.

If judgment for the Plaintiff on an attorney's bill be affirmed in the Exchequer chamber, that court will not allow interest (a)².

The Court of King's Bench having given judgment against the Plaintiff in error, in an action upon an attorney's bill, he brought a writ of error in this Court, which was afterwards non-prossed and the judgment below affirmed.

Heath now moved that it might be referred to the clerk of the errors to compute interest on the judgment below, from the day of its being entered up to that of the affirmance ; and observed, that the case of *Shepherd v. Mackreth*, 2 H. Bl. 284, in which it was first settled that interest might be given by this Court, was an action on an attorney's bill.

But the Court said that similar applications had been frequently made and refused ; and that the Court in *Shepherd v. Mackreth* did not advert to the circumstance of the action being brought upon an attorney's bill, their attention being only directed to the general question. Whether interest could be given by this Court or not ?

Heath took nothing by his motion.*

DOE EX DEM. BANKS v. BOOTH. June 21st, 1800.

[Referred to, *Doe v. Lediard*, 1832, 4 B. & Ad. 143. Distinguished, *Doe v. St. Helens Railway*, 1841, 2 Q. B. 372. Referred to, *Pardoe v. Price*, 1847, 16 Mee. & W. 462.]

The trustees under a turnpike act, having demised to one of several mortgagees such proportion of the tolls arising from the road and of the toll-houses and toll-gates for collecting the same as the sum advanced by him bore to the whole sum raised on the credit of the tolls, the mortgagee brought ejectment for the toll-houses and toll-gates, in order to repay himself the interest due to him.—Held that he might well

(a)¹ Reg. Gen. B. R. T. 1 G. 2, Reg. Gen. C. B. M. 1 G. 2, *Jones v. Wilkinson*, Barnes, 249, and *Palk v. Rendle*, 8 T. R. 465. But where the Defendant has appeared, judgment cannot be signed against him without a previous demand of a plea, though he has neglected to take the declaration out of the office. *Nott v. Oldfield*, B. R. 1 Wils. 134, and *White v. Dent*, ante, vol. 1, p. 341.

(a)² Vide *Kingston v. Mackintosh*, 1 Campb. 518. *Atkins v. Wheeler*, 2 N. R. 285.

maintain his action, notwithstanding a clause in the act that all the mortgagees should be creditors upon the tolls in equal degree.

Ejectment for three toll-houses with the toll-gates thereunto belonging. The cause was tried before Rooke, J. at the spring assizes at York, when a verdict was found for the lessor of the Plaintiff, subject to the opinion of the Court on a case which stated in substance, that the trustees under an act of parliament made in the 17 Geo. 3, for repairing and widening the road from Halifax to Sheffield, by deed of the 5th April 1779, in consideration of 100l. paid by the lessor of the Plaintiff to the treasurer of the said road according to the direction of the statute, did grant, bargain (*a*), sell, and demise to the lessor of the Plaintiff such proportion of the tolls arising from [220] the road and of the turnpikes and toll-houses for collecting the same, (being the premises mentioned in the declaration,) as the said sum of 100l. should bear to the whole sum due and owing on the credit thereof, to be holden from the 5th of April 1779, during the continuance of the above statute, till the said sum of 100l. with interest at 5l. per cent. should be paid; that the said 100l. with four years interest up to the 5th of April 1799 is still due; that the sum of 3600l. 10s. is the whole principal money due and owing on the credit of the said tolls and the turnpikes and toll-houses for collecting the same; that the said tolls, turnpikes, and toll-houses, on the 22d of September 1798, were demised to the Defendant for two years from the 1st of October 1798 at 303l. per annum, and that he is now in possession thereof and has paid all rent due; that the costs of procuring the above act, as also of procuring another act of 38 Geo. 3, for continuing the same for 21 years, have been paid, except the sum of 12l. for payment of which the treasurer has sufficient money in his hands; that there is due to other mortgagees of the said tolls, turnpikes, and toll houses, three years interest on the several sums secured to them by their respective mortgages up to the 5th of October last, and to some of them four years' interest; that one year's interest on the said sum of 100l. due the 5th of April 1796 was in March 1799, and before any interest had been paid to any other creditors or mortgagees on the tolls due in 1796 tendered to the lessor of the Plaintiff, being as much as had or has been paid to any of the other mortgagees, which he then refused, insisting on the whole interest being paid; that the interest which became due in 1797 and since, has not yet been paid to any of the creditors or mortgagees, there not being sufficient money to pay the same and what is due for the repairs of the road; that at the time when the ejectment was served, the treasurer had in his hands 58l. more than sufficient to pay the costs of procuring both the above-mentioned acts; that the lessor of the Plaintiff gave notice to the Defendant, that the ejectment was brought for the purpose of recovering the possession of the toll-houses with the toll-gates thereto belonging, to the intent that the Plaintiff might pay and apply the money arising from the toll-gates in discharge of the interest due upon the sum of 100l. by him advanced on the credit of the tolls arising from the said toll-gates, and not to recover such possession to reimburse him the said principal sum of 100l. so advanced as aforesaid, or any part thereof.

[221] Williams, Serjt., was to have argued in support of the verdict, but the Court called on the other side to begin.

Clayton, Serjt., for the Defendant. This ejectment cannot be supported, being contrary to the policy of the act of parliament. The trustees and the lessor of the Plaintiff do not stand in the relation of a common mortgagor and mortgagee, for the trustees do not act for their own benefit but for the benefit of the public. In page 735 of the act, the trustees are authorised to remove, alter, or discontinue the turnpike gates or toll-houses or any of them as they shall think expedient, and in page 738 they are "authorised and empowered from time to time as they shall think proper to lessen, vary, or alter all or any part or parts of the tolls thereby granted at all, any, or either of the turnpikes within their respective districts, and to raise the same again so as they do not exceed the tolls by that act granted, and so as such reduction be with the consent of the several persons who shall be entitled to three-fifth parts of the money then due on the credit of the tolls." These discretionary powers in the trustees however will be nugatory, if the mortgagee may at any time take into his own hands the management of any of the toll-gates when recovered by action. Indeed in page 739

(a) This was according to the form of the mortgage inserted in the act, page 743.

the trustees are empowered to lease the tolls for three years, and apply the money arising therefrom in such manner as the tolls so leased are directed to be applied; now if the Plaintiff recovers, the above provision of the act will be altogether superseded, since the leases granted under it will be of no avail. Besides, in page 745, it is directed that all persons to whom any mortgage shall be made under the act, shall in proportion to the sum mentioned in the mortgage be creditors on the tolls in equal degree one with another, "and shall have no preference in respect of the priority of any money advanced." But if any one mortgagee be allowed to recover, he will thereby gain a priority denied him by the act. In *Fairtitle d. Myther v. Gilbert*, 2 T. R. 171, which was nearly similar to this case, the words of Mr. Justice Ashhurst are, "if any creditor had a power to enter and take possession of the toll-gates he would gain a priority which the act has denied, and it is very fit that this should not be taken out of the hands of the trustees, because they are trustees for all the creditors, and were considered by the legislature as the most proper persons to have the whole management of every thing to be done in pursuance of the act: it was foreseen that the whole sum wanted would not [222] be advanced by any one person, and therefore for the encouragement and security of all persons who were willing to advance money, it was necessary that the collection of the tolls should remain with the trustees." It is true that in that case the toll-houses and toll-gates were mortgaged as well as the tolls, though the words of the act only authorised the trustees to mortgage the latter; but it should seem that under a power to mortgage the tolls, a power to mortgage the toll gates as incident to it would pass; and though some stress was laid upon this objection by the Court, yet the principal ground of the decision seems to have been the inconvenience which would ensue if any one mortgagee were permitted to take the toll into his own hands. Besides, the lessor of the Plaintiff is only entitled to a proportion of the tolls and toll-houses. If therefore he were to recover such proportion only, he would not thereby be authorised to collect more than that proportion of the tolls, not being agent for the other creditors: and it would be impossible from the nature of the thing to collect that proportion only. If it be contended that the mortgagee will be without remedy, it may be answered, that the trustees are like other public officers liable to be punished for any misapplication of the money entrusted to them; or the mortgagee may recover his proportion when collected in an action for money had and received.

LORD ELDON, Ch. J. The case of *Fairtitle v. Gilbert* admits all that is necessary for the lessor of the Plaintiff to contend. The mortgage executed in that case was a mortgage of the whole, not of any aliquot part; and the toll-houses and toll-gates were also inserted in the mortgage, though the act only authorised the trustees to mortgage the tolls. The questions made were; 1st, Whether the trustees had any authority to mortgage the toll-houses and toll-gates? And 2dly, if they had not, Whether they were not estopped by their own deed? The Court held that the act gave no authority to mortgage the toll-houses and toll-gates, and that as the trustees were not acting for their own benefit, but for the benefit of the public, they were not estopped. It was there argued that the only mode of effectuating the conveyance of the tolls, was to enable the trustees to mortgage the toll-gates. But in answer to this, Mr. Justice Ashhurst observed, that "the act expressly gives the trustees power to mortgage the tolls, but the reason why it does not give them a further power is, because no creditor [223] is to have a preference. Now if any creditor had a power to enter and take possession of the toll-gates, he would gain a priority which the act has denied." But why would he have gained a priority? Because the mortgage was a mortgage of all the tolls, not of any proportion: for I deny that in the latter case any priority would have been gained, since the lessor of the Plaintiff would become the bailiff of the rest of the creditors as to all except his own proportion. It was thought that if a power had been given to mortgage the toll-gates a difficulty would have arisen, by giving a preference, which was contrary to the intention of the act. But it does not appear to me that this difficulty would have arisen even if such a power had been given. For I should have been inclined to hold, that whatever were the form of the demise, it could only operate so as to effectuate the act; that is, so that every other creditor should receive his due proportion, for which purpose the mortgagee must have stood in the situation of bailiff or trustee for all the other creditors. The act in this case however seems calculated to meet the very difficulty which the Court there felt: for this act empowers the trustees "to demise or mortgage

the said tolls or any part or parts thereof and the turnpikes and toll-houses for collecting the same" (page 743). If any one person advanced the whole sum, then the whole was to be mortgaged; if several, then the form of the mortgage inserted in the act shews, that each creditor was to have in mortgage only such proportion of the tolls as the sum advanced by him should bear to the whole sum advanced. All the difficulty therefore suggested in the argument of the case in the King's Bench is obviated by this act. For this act does contain a power to demise the toll-houses and toll gates; and it was admitted in the King's Bench that if the act in that case had contained such a power, the ejectment might have been maintained: at the same time this act cures the difficulty which was thought to be the consequence of allowing an ejectment to be maintained, by requiring that a proportion of the tolls only should be mortgaged to each creditor. There is a great difference between a demise of tolls, and of toll-houses. The former only gives a personal interest, in respect of which an action for money had and received may be maintained, the latter gives an interest in land which is within the statute of mortmain. The trustees in this case have executed an indenture under the act, the effect of [224] which was, to transfer the title vested in them. Being authorised to grant a real interest in the toll-houses, all the consequences of law must attach upon that interest unless excluded by the act; and it is not for this Court to say that the legislature ought to have restrained the mortgagee from seeking his remedy by ejectment. The money advanced by the mortgagee would be very ill secured if his only remedy was either an application to the vindictive power of the Court of King's Bench, or a suit in Chancery in which all the other thirty-five mortgagees must be made parties. With respect to the action for money had and received, it would be a sufficient defence for the trustees to shew that they had distributed all the money received according to the provisions of the act.

Per Curiam. Judgment for the Plaintiff.

WATSON v. CHRISTIE. June 21st, 1800.

[Followed, *Pergolas v. Holland*, 1841, 3 Ir. L. R. 536. Referred to, *Watt v. Watt*, [1905] A. C. 118.]

In trespass for assault and battery and not guilty pleaded, the jury are not at liberty to take into consideration the circumstances of the assault and battery, with a view to reduce the verdict below the amount of the damage actually sustained, if those circumstances could have been pleaded (a).

Trespass for assaulting and beating the Plaintiff. Plea not guilty. At the trial it appeared that the Defendant was the captain of a ship, and the Plaintiff one of his crew; that the Plaintiff while under the Defendant's command had been so severely beaten by order of the Defendant, that he had ever since that time been in a state of extreme ill health, and was likely to continue so during the rest of his life, which he was in some danger of ultimately losing in consequence of the assault. On the other hand, it was offered to be shewn that the beating in question was given by way of punishment for misbehaviour on board the ship, and it was insisted that the conduct of the Defendant at the time of the assault being necessarily in evidence proved that misbehaviour.

Lord Eldon, Ch. J. before whom the cause was tried, directed the jury, that the only questions for their consideration were, Whether the Defendant was guilty of the beating? and what damages the Plaintiff had sustained in consequence of it? that although the beating in question, however severe, might possibly be justified on the ground of the necessity of maintaining discipline on board the ship, yet that such a defence could not be resorted to unless put upon the record, in the shape of a special justification; that the Defendant had not said on the record that this was discipline, or justified it on any ground; that much evil [225] beyond the mere act of wrong had been actually suffered; which evil had been occasioned by a cause which the Defendant admitted he could not justify; that in his Lordship's judgment therefore the evil actually suffered in consequence of what was not justified ought to be compensated for in damages; that the jury should give damages to the extent of the evil

(a) And see *Boyce v. Bayliffe*, 1 Campb. 58.

suffered, without lessening them on account of the circumstances under which it was inflicted; that if they gave damages beyond a compensation for the injury actually sustained they would give too much, but that if they gave less they would not give enough.

The jury found a verdict for 500*l.* being all the damages laid in the declaration.

Shepherd, Serjt., now moved for a rule calling on the Plaintiff to shew cause why this verdict should not be set aside and a new trial be had, on the ground of the damages being excessive, and because the jury ought not to have been directed to exclude from their consideration those circumstances which tended to shew the necessity of that punishment being inflicted which was the cause of the action; for that although the Plaintiff might perhaps be entitled to some damages, since the circumstances alluded to did not amount to a legal defence, yet the Defendant had a right to the benefit of those circumstances by way of mitigation (*a*)¹.

[226] But The Court were of opinion that his Lordship's direction was perfectly right in point of law, and that it did not appear from the report that the damages given by the jury were excessive.

Shepherd took nothing by his motion.

MARSH v. HUTCHINSON. June 21st, 1800.

An Englishman employed in the service of the British Government, residing in a foreign country and having lands there, upon the cessation of his employment in consequence of war between the two countries, sent his wife and family to this country, but continued to reside abroad himself. Held, that the wife not having represented herself as a feme sole was not liable to be sued as such (*a*)².

This was an action for goods sold and delivered by the Plaintiff to the Defendant. Plea non assumpsit.

The cause was tried before Marshall, Serjt., at the summer assizes for Norfolk, 1799: the Plaintiff's demand was for coals supplied to the Defendant during the last

(*a*)¹ Upon this subject there seems to be some contradiction in the books. Thus in assumpsit and non assumpsit pleaded, a discharge was admitted in evidence by Hale, Ch. J., in mitigation of damages; though he said that exoneravit ought to have been pleaded. *Abbot v. Chapman*, 2 Lev. 81. In like manner a release was admitted; *Beckford v. Clarke*, 1 Sid. 236. And Holt, Ch. J., in case for words allowed the truth of the words to be given in evidence in mitigation of damages. *Smithies v. Dr. Harrison*, 1 Ld. Ray. 727. But the more reasonable rule seems to have been laid down by Price, Baron, in a case of *Dennis v. Pawling*, An. Do. 1716, Vin. Abr. tit. Evidence (l. b.), pl. 16, who in case for words refused to admit any thing in evidence which tended to justify the words, though in mitigation of damages only; saying, "that any thing which tended to shew a provocation or any transaction between the parties giving occasion for speaking the words was proper in the Defendant to make out, because these matters cannot be pleaded." Indeed so early as 21 H. 8, in trespass quare clausum fregit and not guilty pleaded, where the Defendant offered to give in evidence that the trespass was committed by his cattle through the default of the Plaintiff's fences, and this evidence was rejected because the matter ought to have been pleaded, the Defendant's counsel urged that it might be received in mitigation of damages; but Shelley, J., would not allow it, lest the jury should be induced to find a verdict contrary to law, and thereby incur an attain. Keilw. 203 b. Subsequent to the case of *Smithies v. Dr. Harrison*, viz. in Mich. 17 Geo. 2, Lee, Ch. J., refused to allow the truth of words spoken to be proved in mitigation of damages, saying, that at a meeting of all the judges, a large majority of them had determined not to allow it in future, but that it should be pleaded, and that this was now a general rule. *Underwood v. Parks*, 2 Str. 1200, in support of that part of the proposition laid down by Price, Baron, that what cannot be pleaded may be given in evidence, the case of *Cootte v. Berty*, 12 Mod. 232, may be referred to, where it was said, that in trespass for criminal conversation with the Plaintiff's wife, licence of the husband, or the bad character of the wife could not be pleaded in bar, but that those matters might be given in evidence in mitigation of damages. Vid. tam *Bingham v. Garnault*, cor. Bull. Esp. N. P. 337.

(*a*)² Vide *Bogget v. Frier*, 11 East, 301, *Kay v. Piennne*, 3 Campb. 123.

three or four years, and the defence was coverture. It appeared that the Defendant's husband was an Englishman; that in 1783 he left this country, and had occasionally been here since that period; but that about ten years ago having purchased the appointment of agent for the English packets at the Brill in Holland, he had resided there ever since; that he was possessed of madder grounds in that country, from the cultivation of which he derived considerable profit; that on the irruption of the French into Holland in 1795, his employment as agent having ceased, he sent the Defendant together with his wife and family to reside in this country, but remained himself in Holland to look after his madder grounds, and also with a view to recover his situation if the intercourse between England and Holland should be re-established; that the Defendant lived at Aylsham in Norfolk, and was there considered to be a married woman. Upon this the Plaintiff's counsel insisted that the Defendant's husband being domiciled in a foreign country from which he was not likely to return, the Defendant must be treated as a feme sole, and therefore capable of making contracts to bind herself. The learned Serjeant directed the jury to ascertain the amount [227] of the demand; but conceiving that the Defendant had sufficiently proved her coverture, and that her husband's residence in Holland did not, under all the circumstances, enable her to bind herself by her own contract as a feme sole, nonsuited the Plaintiff, with liberty to move to set that nonsuit aside, and enter a verdict for the Plaintiff to the amount ascertained by the jury.

Accordingly in Michaelmas term last a rule nisi having been obtained for that purpose,

Sellon, Serjt., shewed cause, and after observing that the cases respecting coverture might be divided into two classes, first, that of separate maintenance secured to the wife; secondly, that which proceeded on the old exceptions of abjuration, and exile; said, that he should dismiss the consideration of the former altogether: with respect to the second class, he argued that the principle on which they proceeded was, that the husband had it not in his power to return to this country. *Margery Weyland's case*, Ryley, Plac. Parl. 66. *Lady Maltraver's case*, 10 Ed. 3, 53. *Sybell Belknap's case*, 1 H. 4, 1 a. *Countess of Portland v. Prolgers*, 2 Vern. 104. *Sparrow v. Carruthers*, cited 2 Bl. 1197, 1 T. R. 7. He observed that the more modern authorities had been determined on the foundation of a case, upon which more stress had been laid than it deserved; namely, *Deerly v. The Duchess of Mazarine*, 1 Salk. 116, 2 Salk. 646; for that in fact that case was not decided on a principle of law but on an equitable point of practice: the reporter himself having entitled it in the margin, "New Trial not granted for mistake in point of law, against the equity of the case;" that it was also thrown out there that the husband was an alien, and that a divorce might be intended, and indeed Lord Camden in the case of *Goslin v. Wilcock*, 2 Wils. 308, had declared, that "the jury in the case of *Deerly v. The Duchess of Mazarine* were liable to an attain;," that moreover in *Walford v. Duchesse de Pienne*, Esp. Cas. N. P. 554. *Franks v. Duchesse de Pienne*, ib. 587, and *De Gaillon v. L'Aigle* (ante, vol. i. 357), the distinction was taken that the husband was an alien; that in those cases there was a complete desertion of the kingdom by the husband, and no animus revertendi to be presumed, whereas the husband in the present case being an Englishman, must be presumed to have the animus revertendi.

[228] Lens, Serjt., contrà, argued, that as in this case it did not appear that the Defendant on the one hand represented herself as a single woman, or that the Plaintiff on the other knew the circumstances of her situation, the question, Whether the latter were entitled to sue the former as a single woman? must depend upon a sound construction of that modification of the rule of law, that a feme-covert cannot be sued, which had already prevailed; that the first class of cases alluded to on the other side, proved that the general rule of law was subject to modification; and that the second class of cases, some of which were as ancient as the time of Edward the First, were in principle directly applicable to the present; that principle being, that where the husband is beyond the process of the Courts, and therefore not amenable to them, the rule of law ceases, that the liability of the wife is transferred to the husband: that though in *Deerly v. The Duchess of Mazarine* one point decided was, that the Court would not grant a new trial against the equity of the case, yet that another principle to be drawn from that case is, that the wife of a person not within the reach of the law is liable to be sued; that on the same principle proceeded the more modern cases of *Walford v. Duchesse de Pienne*, *Franks v. Duchesse de Pienne*, and *De Gaillon v.*

L'Aigle; that whether the husband be a foreigner or an Englishman can make no difference, provided he be beyond the jurisdiction of the Court that it mattered not whether the absence of the husband be for life or a shorter period, since it appeared both from *Belknap's case* and from *Sparrow v. Curruthers*, that a temporary suspension of the capacity of the husband to be sued, restored to the wife her liability for her own contracts; that the mere circumstance of the husband, in this case, being an Englishman, could not raise the presumption of an *animus revertendi*, he having been so long absent, having purchased property in Holland, and being domiciled there; and that such a presumption, if it could be raised, would be rebutted by his having made his election to remain in Holland, at the time when he found it necessary for temporary security to send his wife and family to England.

LORD ELDON, Ch. J. Suppose an Englishman going over to Holland, and residing there as agent for the British packets, should continue engaged in that single employment for 20 years, and should then die there, is it clear that his personal effects ought to be distributed according to the law of Holland? In the case of [229] *Bruce v. Bruce* (a) which I argued in the House of Lords, the question was, Whether the

(a) The Reporters have been favoured with the following note of that case.

(IN THE HOUSE OF LORDS.)

Elizabeth and Margaret Bruce daughters of David Bruce deceased, and James Hamilton husband of the said Margaret, *Appellants*.

James Bruce, *Respondent*, April 1790.

William Bruce, son of the late Mr. Bruce of Kinnaird, left Scotland when young, and was for some years in the navy. In 1767, he went to the East Indies in the military service of the company, and continued there till his death in 1783, having risen to the rank of a major. In many letters to his friends in Scotland he expressed an anxious desire to return and spend the remainder of his life in his native country; particularly he wrote to that purpose a few months before his death, and he was in the course of remitting home his money, meaning soon to follow it himself, when he died. At that time a part of his fortune was in the hands of people in England, and he had remitted a considerable sum to his attornies in Scotland, in bills on the India Company, which were on the way home at the time of his death. Having made no will, the question arose, Whether his effects were to pass according to the distribution of the law of England, in which case Mr. Bruce of Kinnaird, his brother of the half blood, would have a share; or the law of Scotland, which prefers the whole blood exclusively. It was insisted by Mr. Bruce, that according to a long train of decisions in the Court of Session [1], (with an exception in the year 1744) [2], the law of the place where the effects are situated is the rule, and he contended that here the money was either actually in England or in bills due by the English East India Company; and even if the domicile of the deceased be the rule, Major Bruce was at the time of his death domiciled in India, a country subject to the laws of England. On the other hand, the brother and sisters of the full blood pleaded, that according to the Law of Nations, adopted in cases of this kind by all the countries of Europe, and by the civil law, the distribution of the personal estate of an intestate is to be governed by the law of the place where he had his domicile, and that a man could not have a domicile, but at a place where he had taken up residence with intention to remain; that Major

[1] The authorities in the Scots law referred to were, Henderson's *Bairns* Durie, 88. *Melville v. Drummond* Durie, 723. *Schaw v. Lewins*, 10 Stair's Decisions, 252. *Brown and Duff v. Bizet*, 1 Stair's Dec. 398. Dirleton's Dec. 10, S. C. *Brown v. Brown*, Lord Kilkerran, voce Foreign, fo. 199. Falconer, 11, S. C. *Morrison v. Sutherland*, Lord Kilkerran, voce Foreign, fol. 209. *Mortimer v. Lorimer*, Erskine's Institute, fol. 601, in notis ed. 1773. *Davidson v. Elcherson*, Faculty Collection, 13th January 1778. *Maclean v. Henderson*, *ibid.* eod. die. Erskine's Institute, B. iii. tit. 9, s. 4. Lord Kaim's Princ. of Equity, B. iii. c. 8, s. 4. The authorities in the Law of Nations referred to in the above case, are collected in *Hunter v. Potts*, 4 T. R. 184, in notis; in the argument of which last case may also be found the authorities in the Law of England which bear upon the subject.

[2] *Brown v. Brown*.

personal estate of a Scotsman who [230] had died in the East Indies, in the service of the Company, should be distributed according to the law of Scotland, which was [231] his *domicilium originis*, or of the province of Canterbury which extends to the East Indies? Lord Thurlow in his judgment adopted this distinction; that if he had

Bruce never intended to remain in India, and had no fixed habitation there, and therefore Scotland, where he was born, and to which he expressed his resolution to return, and was actually preparing to go, was his country, and in the eye of law the place of his domicile all along. The Lord Ordinary (Lord Monboddo) pronounced the following interlocutor: "Finds, 1mo, That as Major Bruce was in the service of the East India Company, and not in a regiment on the British establishment which might have been in India only occasionally, and as he was not upon his way to Scotland nor had declared any fixed and settled intention to return thither at any particular time, India must be considered as the place of his domicile. 2do, That as all his effects were either in India or in the hands of the East India Company, or of others his debtors in England, though he had granted letters of attorney to some of his friends in Scotland, empowering them to uplift those debts, his *res sita* must be considered to be in England: therefore finds, that the English law must be the rule in this case for determining the succession of Major Bruce, and consequently that James Bruce of Kinnaird is entitled to succeed with the defenders his brother and sisters consanguinean; and decerns and declares accordingly.

The Court of Session having affirmed the Lord Ordinary's interlocutor, the children of the full blood entered their appeal.

After counsel on both sides had been heard, the Chancellor (Lord Thurlow) spoke to the following effect: That as he had no doubt that the decree ought to be affirmed, he would not have troubled their Lordships by delivering his reasons, had it not been pressed with some anxiety from the bar, that if there was to be an affirmance the grounds of the determination should be stated, to prevent its being understood that the whole doctrine laid down by the interlocutor appealed from, and particularly that on which it was said the judges of the Court of Session proceeded principally in this and former cases similar to it, had the sanction of this House. It had been urged that the judgment should contain a declaration of what was the law, and he had revolved in his own mind whether that would be expedient. It was not usual in this House, or in the courts of law, to decide more than the very case before them, and he had particular reluctance to go farther in the present case, because, as had been stated with great propriety by one of the Respondent's counsel, various cases had been decided in Scotland upon principles, which if this House were to condemn, a pretext might be afforded to disturb matters long at rest. But he could have no objection to declare what were the grounds of his own opinion, and how far he coincided with the rules laid down by the Court below. Two reasons were assigned for having declared that the distribution of Major Bruce's personal estate ought to be according to the law of England: 1st, That India, a country subject to that law, was to be held as the place of his domicile, and certain circumstances were mentioned from whence that was inferred; these he considered only as circumstances in the case, and not as necessary circumstances; that is, though these had been wanting, the same conclusion might have been inferred from other circumstances. In his mind, all the circumstances in Major Bruce's life led to the same conclusion. The 2d reason assigned by the interlocutor was, That the property of the deceased, which was the subject of distribution was, at the time of his death, in India or in England. As to this he founded so little upon it, that he professed not to see how the property could be considered as in England. It consisted of debts owing to the deceased, or money in bills of exchange drawn on the India Company. Debts have no situs, they follow the person of the creditor. That proposition in the interlocutor therefore fails in fact. But the true ground upon which the cause turned was, the deceased being domiciled in India. He was born in Scotland but he had no property there. A person's origin in a question of, Where is his domicile? is to be reckoned as but one circumstance in evidence which may aid other circumstances; but it is an enormous proposition that a person is to be held domiciled where he drew his first breath, without adding something more unequivocal. A person's being at a place is *prima facie* evidence that he is domiciled at that place, and it lies on those who say otherwise to rebut that evidence. It may be rebutted no doubt. A person travelling;—on a visit;—he may be there for some

gone out in a King's regiment, and died in the King's service, his domicile would not have been changed: but that having died in the service of the Company, it was changed. Had the Defendant's husband been engaged in the service of government only, it might have made a material difference in the case. The question however in the view of the law may perhaps be reduced to this, Whether the Defendant's husband having been employed in Holland by the British government, he has remained there after the cessation of that employment merely to collect what the civilians call *summas rerum*, or with any further views? And yet if it were clear that this man never intended to return to England, and might therefore be represented as incapable of being sued in this country, before we come to a conclusion upon the case, there are many considerations to be weighed. In the case of abjuration, and in those other cases which amount to a civil death, I think that I understand the situation in which the wife was placed. The husband being civilly dead, the wife was entitled to dower of his land in the same manner as if he were actually dead (a); so she became entitled

time on account of his health or business;—a soldier may be ordered to Flanders, and be detained at one place there for many months;—the case of ambassadors, &c. But what will make a person's domicile or home, in contradiction to these cases, must occur to every one. A British man settles as a merchant abroad; he enjoys the privileges of the place; he may mean to return when he has made his fortune, but if he dies in the interval, will it be maintained that he had his domicile at home? In this case Major Bruce left Scotland in his early years; he went to India; returned to England, and remained there for two years without so much as visiting Scotland, and then went again to India and lived there sixteen years and died. He meant to return to his native country it is said, and let it be granted; he then meant to change his domicile, but he died before actually changing it. These (His Lordship said) were the grounds of his opinion, though he would move a simple affirmance of the decree, but he would not hesitate as from himself, to lay down for law generally, That personal property follows the person of the owner, and in case of his decease must go according to the law of the country where he had his domicile; for, the actual situs of the goods has no influence. He observed that some of the best writers in Scotland lay this down expressly to be the law of that country; and he quoted Mr. Erskine's Institute as directly in point. In one case it was clearly so decided in the Court of Session, and in the other cases which had been relied on as favouring the doctrine of *lex loci rei sitæ*, he thought he saw ingredients which made the Court, as in the present case, join both *domicilium* and *situs*. But to say that the *lex loci rei sitæ* is to govern though the *domicilium* of the deceased be without contradiction in a different country, is a gross misapplication of the rules of civil law and *jus gentium*, though the law of Scotland on this point is constantly asserted to be founded on them."

Decree accordingly affirmed simply.

(a) This is supported by the authority of Bracton, lib. 4, Tract. 6, c. 7, fo. 301 b. Britton, cap. 106, fo. 251, and Fleta, lib. 5, cap. 28. In these books the wife seems to have been considered as equally entitled to dower in the case of a civil as of a natural death. With respect to entering into religion, they treat the wife as dowable where the husband is actually professed, though not where he is in a state of probation only; and lay it down that the fact of profession in such case must be tried by the certificate of the ordinary. It was said, however, in *M. 32 Edw. 1, Fitz. Abr. tit. Dower, pl. 176*, by Bereford, that although the husband be professed, the wife shall not have her dower until his natural death; this doctrine has been adopted in *F. N. B. 150. F. Co. Litt. 33 b. 132 b. Perkins, Sect. 307. Hale's MSS. Co. Litt. Book 1, Note 205, Ed. 15*, and Gilbert Treat. on Dower in Law of Uses, 401. The reason assigned in most of these books is, that the wife, by withholding her consent, might prevent her husband from becoming professed: Lord Chief Baron Gilbert treats profession as a separation, not a dissolution of the marriage, and observes, that although the ecclesiastical law gave alimony during the life of the husband, yet she could have no separate interest by way of dower while the marriage continued. Sir Edward Coke, indeed (1 Inst. 33 b.), goes so far as to lay it down generally, that dower arises on the natural, not on the civil death of the husband. This dictum, however, he no otherwise supports than by instancing the case of profession, which exception, if well founded, seems to proceed upon reasons not altogether applicable to the cases of abjuration and exile. With respect to abjuration for felony, though the

to the enjoyment [232] and profits of her own land, though if he had not been civilly dead, he would have been seised of the lands in her right (a): and indeed she might have sued for an assault in her own name, and might have been made a Defendant without her husband, in all cases in which the husband must otherwise have been joined. In those cases there is no difficulty, because the fiction of law which considers the husband as civilly dead, puts the wife in the same situation as if he were actually dead. With respect to the more modern cases, in which a separate maintenance has been secured to the wife, or in which the husband has left the kingdom either with or without the power or intention of returning, and in which the wife has been held capable of suing and being sued alone, I wish to know to what extent the principle goes on which they have proceeded: whether under such circumstances a married woman is to be considered as a feme sole on a principle which stops short as a matter of contract, or on a principle which goes to a greater extent and obliges us to consider her as a feme sole to all intents and purposes. Undoubtedly, the policy of the law which has considered a married woman as incapable of being called upon separate from her husband, admits of some modifications arising from particular circumstances. When the husband is banished he is considered as civilly dead; but transportation for a term of years may give rise to many difficulties with respect to the enjoyment of the husband's estate, both real and personal. But besides the difficulties which might arise during the term of the transportation, another difficulty of equal importance occurs where the wife has contracted debts after the period of her husband's transportation has elapsed, but before his actual return to this country. The case before us must be decided on some principle which will govern such a case as that. Though the case of *Sparrow v. Carruthers* was decided by Mr. Justice Yates (a name that will be illustrious as long as the law of England [233] remains), yet as far as his opinion can be collected, he seems to have treated it as a material circumstance in evidence, that the time of the transportation was not out; and he does not give any opinion as to what would have been the situation of the parties if it had been out. We cannot presume to say how he would have decided had the husband continued to reside abroad after the period of his transportation had expired, or had only remained there to collect his affairs with a view to return to this country when he had so done.

HEATH, J. There is a great difference between the cases of an Englishman residing abroad, leaving his wife in this country, and of a foreigner so doing. The former may be compelled to return at any time by the King's privy seal; but in the old cases of banishment and abjuration, as well as in the more modern one of transportation, the husband could not return, as it would have been contrary to law. There is no case in which the wife has been held liable, the husband being an Englishman.

As the case of *Marshall v. Mary Rutton*, 8 T. R. 545, in which it was expected that the whole doctrine respecting the liability of a feme covert to be sued would be fully discussed, was then pending before the twelve judges, the Court desired that this case might stand over until that had been determined.

And on this day Lord Eldon, Ch. J., said, that after all the discussion which the doctrine had undergone, the court could see nothing to induce them to think that the direction given to the jury in this case was wrong.

Per Curiam. Rule discharged.

dower of the wife was originally forfeited by the attainder with which it was attended, yet as the 1 Ed. 6, c. 12, removed that forfeiture, it should seem that between that time and the 21 Jac. 1, c. 28, which abolished the privilege of sanctuary and consequently put an end to abjuration altogether, the wife might have been entitled to dower on this civil death of the husband. Supposing this to have been the case, the same consequence would naturally ensue a transportation for life at the present day.

(a) So a jointress was entitled to her jointure upon the abjuration of her husband, *Margery Weyland's case*; so if the husband aliened the land of the wife, and afterwards abjured the realm, she might have had a *cui in vitâ*. Co. Litt. 133 a. But in the case of profession, if the wife aliened the land which was in her own right, and then deraigned her husband, he might enter and avoid the alienation. Hil. 33 Ed. 3, Fitz. Ab. tit. Entré congeable, pl. 52. Co. Litt. 132 b.

[234] FAIL V. PICKFORD. June 25th, 1800.

In assumpsit against a carrier for goods spoiled, the Defendant was not allowed to pay the invoice price into Court (a)¹.

This was an action of assumpsit brought against the Defendant as a carrier to recover the loss sustained upon a quantity of tea, which had been put on board the Defendant's barge to be carried from London to Liverpool, and which had been spoiled in consequence of the barge being sunk. The Defendant offered to pay for the damaged tea at the invoice price: the Plaintiff contended that he was entitled to more than the invoice price, on account of an alteration respecting the allowance of tret adopted by the East India Company since the invoice was made out.

Shepherd, Serjt., now moved on the part of the Defendant, that he might be allowed to pay the invoice price into Court. He contended that as the Defendant admitted that a specific sum was due, and the only question between the parties was, Whether he were liable to any thing ultra that sum or not? the Plaintiff ought not to be allowed to litigate that question without the risk of being subject to costs in case of failure. He relied on *Hulton et Ux. v. Bolton*, 1 H. Bl. 299, in notis, where in an action against a carrier who had advertised that he would not be liable beyond 20l. unless paid for in proportion to the risk, he was permitted to pay the 20l. into Court: and he said that the present case was not an action on a mere tort like *Bowles v. Fuller*, 7 T. R. 335, and *Salt v. Salt*, 8 T. R. 47, but was quasi ex contractu.

Lens, Serjt., shewed cause in the first instance, and insisted that the Plaintiff's demand in this case was for damages altogether uncertain; that no part of that demand was distinguishable from the rest; that the rule established by the case of *Hallet and others v. The East India Company*, 2 Burr. 1120, was, "that where the sum demanded is a sum certain, or capable of being ascertained by mere computation without leaving any other sort of discretion to be exercised by the jury, it is right and reasonable to admit the Defendant to pay money into Court;" and that the same principle was adopted in *Hulton et Ux. v. Bolton*, for the Court there held that the demand was substantially for a specific sum. But in the present case, he said, the Plaintiff demanded an adequate compensation for the injury sustained, which compensation was to be ascertained by the jury; and though the Defendant admitted a particular mode of estimating that compensa-[235]-tion, and offered to pay a sum of money calculated accordingly, yet that sum of money formed no part of the Plaintiff's demand, which was for a compensation to be calculated according to such mode as the jury should adopt. He also referred to the cases of *Bowles v. Fuller* and *Salt v. Salt*, the former of which was an action against the sheriff for a false return, and the latter an action for dilapidations, in both of which it was held that money could not be paid into Court.

HEATH, J. (absente Lord Eldon, Ch. J.). If we could find any principle upon which this application could be allowed, we should be very well inclined to grant it. But the Courts have not gone so far as to allow money to be paid in, in cases of uncertain damages. Where there is any contract between the parties upon which the Court can rest, it may be done: but in this case there is no such contract. Suppose an action on the case were brought for negligently driving a carriage, in consequence of which the Plaintiff's leg was broken, could the Defendant pay into Court the amount of the surgeon's bill?

Rooke and Chambre, Js., expressed a strong desire to accede to the application, but observed that it could not be done without violating the principle which had been established as the rule upon this subject.

Shepherd took nothing by his motion (a)².

(a)¹ Vide *Strong v. Simpson*, 3 B. and P. 14. *Solomon v. Bewicke*, 2 Taunt. 318.

(a)² "The true grounds on which rules for payment of money into court are granted, are accurately stated in Tidd's Pract. 408, ed. 1, 537, ed. 2." Per Grose J., 8 T. R. 49.

PINERO v. WRIGHT. June 25th, 1800.

A *capias ad respond.* against bail was teste'd of a day prior to the return of the *ca. sa.* against the principal, but was not in fact sued out till afterwards. Held regular.

Shepherd, Serjt., moved to set aside the *capias ad respondendum*, which had issued against the Defendant as bail, for irregularity. The supposed irregularity was, that the *capias ad respondendum* against the Defendant was teste'd of a day preceding that on which the *capias ad satisfaciendum* against the principal was returned. He contended that as the bail are not liable to be sued until the *capias ad satisfaciendum* has been returned, it appeared upon the very face of the process in this case that it had been sued out too soon.

Bayley, Serjt., stated, that in point of fact the *capias ad respondendum* did not issue until after the *capias ad satisfaciendum* had [236] been returned, and that the circumstance of its being teste'd of a day anterior to that time was not material, since the Plaintiff was at liberty to shew the time when it really issued.

The Court (absente Lord Eldon, Ch. J.) said, that no inconsistency would appear on the record (a)¹, and that there was no irregularity in the Plaintiff's proceeding.

Shepherd took nothing by his motion.

MARIA v. HALL. June 25th, 1800.

The Court will not compel a prisoner of war who sues for wages earned on board an English ship, to give security for costs (a)².

Shepherd, Serjt., moved for a rule to shew cause why the proceedings in this case should not be staid until the Defendant should give security for costs. The Plaintiff was a French prisoner of war confined in the prison at Liverpool, and had brought this action against the Defendant as master of a ship, to recover a compensation for working the ship home from the West Indies. He contended that the case of a prisoner of war was different from the common case of a foreigner resident in this country (b).

But HEATH, J., observed, that it had been determined that a prisoner of war may maintain an action on a contract for wages (c).

And the Court (absente Lord Eldon, Ch. J.) rejected the application.

Shepherd took nothing by his motion.

[237] ANDERSON, Administrator, &c. v. MAY. June 28th, 1800.

[S. C. 3 Esp. 167. Explained, *Colling v. Treweek*, 1827, 6 B. & C. 400. Observed upon, *In re Park*, 1889, 41 Ch. D. 326.]

A copy of an attorney's bill, the original of which has been delivered to the Defendant, may be admitted in evidence without proof of notice to produce the original; and is conclusive as to the reasonableness of the items (a)³.

This action was brought for business done as an attorney by the Plaintiff's intestate at the instance of the Defendant. At the Westminster sittings in this term the cause

(a)¹ Vide *Davis v. Owen*, ante, vol. i. p. 343.

(a)² And see *Oliiva v. Johnson*, 5 B. and A. 908.

(b) Vide *Porrier v. Carter*, 1 H. Bl. 106.

(c) *Sparenburgh v. Bannatyne*, ante, vol. i. p. 163. Indeed the Court having determined in *Henschen v. Garves*, 2 H. Bl. 389, and *Jacobs v. Stevenson*, ante, vol. i. p. 96, that a foreigner serving on board an English ship is not compellable to give security for costs, and in *Sparenburgh v. Bannatyne*, that a prisoner of war may maintain an action for wages, there seems to have been less reason for calling upon the present Plaintiff to give security who was actually within the kingdom, than on any foreign seaman serving out of the kingdom on board an English ship.

(a)³ And see *Philipson v. Chase*, 2 Campb. 110. *Kine v. Beaumont*, 3 B. & B. 285. *Hewitt v. Ferneley*, 7 Price, 234.

was tried before Lord Eldon, Ch. J., when, in order to prove the amount of the bill, the Plaintiff gave in evidence the copy of a bill delivered to the Defendant in 1796, and which had never been referred for taxation. The Defendant objected to this being received in evidence, inasmuch as no notice had been given to produce the bill delivered to the Defendant. But his lordship held that it ought to be received, and was conclusive as to the reasonableness of the charges (*b*), it being the Defendant's own fault that the bill had never been taxed. A verdict was accordingly found for the Plaintiff, and the point made by the Defendant reserved for the opinion of the Court.

Heywood, Serjt., now moved to set aside the verdict and have a new trial, contending that the rule was clear that no copy can be received in evidence until a notice has been given to produce the original; that this case was distinguishable from *Jory v. Orchard* (ante, p. 39), because here the bill was not delivered by way of notice of action, but in the usual way only, as a demand of so much money due; that the Court in the above case relied on the circumstance of the paper read in evidence being a duplicate original, and referred to the analogous case of a notice to quit, a copy of which is usually received; whereas that practice, he observed, was not founded on any authority, and was contrary to principle.

But the Court said, that it was the constant practice to receive a copy of this kind in evidence, and observed, that it was not a stronger case than *Jory v. Orchard*.

Heywood took nothing by his motion.

[238] SAUNDERSON v. JACKSON AND ANOTHER. June 28th, 1800.

[S. C. 3 Esp. 180. Distinguished, *Schneider v. Norris*, 1814, 2 M. & S. 290. Applied, *Allen v. Bennet*, 1810, 3 Taunt. 176; *Jackson v. Lowe*, 1822, 1 Bing. 12; *Hoadley v. McLaine*, 1834, 10 Bing. 489. Distinguished, *Squire v. Campbell*, 1836, 1 My. & Cr. 480. Applied, *Johnson v. Dodgson*, 1837, 2 Mee. & W. 660; *Dyas v. Stafford*, 1881, 7 L. R. Ir. 605.]

A bill of parcels in which the vendor's name is printed, delivered to the vendee at the time of an order given for the future delivery of goods, seems to be a sufficient memorandum of the contract within the statute of frauds. At all events, a subsequent letter written and signed by the vendor referring to the order, may be connected with the bill of parcels, so as to take the case out of the statute (*a*).

This was an action on the case against the Defendants for not delivering 1000 gallons of gin to the Plaintiff within a certain time, according to a bargain entered into between them. There was a second count for not delivering within a reasonable time.

The cause was tried before Lord Eldon, Ch. J., at the Guildhall sittings after last Easter term, when the contract for the delivery of the gin having been proved on the part of the Plaintiff, the Defendants insisted that the case was within the statute of frauds, inasmuch as there was no note or memorandum in writing of the bargain. The circumstances were as follow: At the time the order for the gin was given by the Plaintiff to the Defendants, a bill of parcels was delivered to the former, the printed part of which was, "London. Bought of Jackson and Hankin, distillers, No. 8, Oxford-street," and then followed in writing, "1000 gallons of gin, 1 in 5 gin 7s. 350l." About a month after the above period the Defendants also wrote the following letter to the Plaintiff: "Sir, we wish to know what time we shall send you a part of your order, and shall be obliged for a little time in delivery of the remainder; must request you to return our pipes. We are, your humble servants, Jackson and Hankin."

On this evidence his Lordship directed the jury to find a verdict for the Plaintiff, reserving the point made for the consideration of the Court.

(*b*) Vide *Loveridge v. Botham*, ante, vol. i. p. 49, also *Knox v. Whalley*, Esp. N. P. Cas. 159.

(*a*) And see *Champion v. Plummer*, 1 N. R. 252. *Hodgson v. Le Bret*, 1 Campb. 233. *Phillimore v. Barry*, Id. 513. *Egerton v. Matthews*, 6 East, 307. *Cooper v. Smith*, 15 East, 103. *Schneider v. Norris*, 2 M. & S. 286. *Kent v. Huskinson*, 3 B. and P. 233. *Allen v. Bennet*, 3 Taunt. 169. *Jackson v. Lowe*, 1 Bing. 9. *Kenworthy v. Schofield*, 2 B. & C. 945.

Accordingly Lens, Serjt., having on a former day obtained a rule nisi for setting aside this verdict and entering a nonsuit, he was now called upon to begin in support of his rule. He observed that the words of the 29 Car. 2, c. 3, s. 17, require that "some note or memorandum in writing of the bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorised;" and that in *Hawkins v. Holmes*, 1 P. Wms. 770, and *Stokes v. Moore*, ib. in the notes by Mr. Cox, the Court had held a signing by the party necessary, though the draught of the conveyance had in the former case been altered in the hand-writing of the purchaser, [239] and in the latter, the seller had himself written instructions for the renewal of a lease. He contended, that though the printed name contained in the bill of parcels might have amounted to a signature within the meaning of the act, if the bill of parcels had been intended to express the contract quasi a contract, yet that in this case it had not been delivered to the Plaintiff with that view; that the contract itself had never been reduced to writing or ever was intended to be so; and therefore the bill of parcels could only operate as evidence of a contract previously entered into; and that the subsequent letter of the Defendants, though signed by them, could not be treated as a note or memorandum of the contract, being accidental and only a reference to a pre-existing contract.

Shepherd, Serjt. *contra*, was stopped by the Court.

LORD ELDON, Ch. J. This bill of parcels, though not the contract itself, may amount to a note or memorandum of the contract within the meaning of the statute. The single question therefore is, Whether if a man be in the habit of printing instead of writing his name, he may not be said to sign by his printed name as well as his written name? At all events, connecting this bill of parcels with the subsequent letter of the Defendants, I think the case is clearly taken out of the statute of frauds. For although it be admitted that the letter which does not state the terms of the agreement would not alone have been sufficient, yet as the jury have connected it with something which does, and the letter is signed by the Defendants, there is then a written note or memorandum of the order which was originally given by the Plaintiff signed by the Defendants. It has been decided (a)¹ that if a man draw up an agreement in his own handwriting, beginning "I, A. B. agree, &c." and leave a place for a signature at the bottom, but never sign it, it may be considered as a note or memorandum in writing within the statute. And yet it is impossible not to see that the insertion of the name at the beginning was not intended to be a signature, and that the paper was meant to be incomplete until it was further signed. This last case is stronger than the one now before us, and affords an answer to the argument that this bill of parcels was not delivered as a note or memorandum of the contract.

Per Curiam. Rule discharged.

[240] PAGE v. FRY. June 28th, 1800.

[Distinguished, *Bell v. Ansley*, 1812, 16 East, 143. Not followed, *Cohen v. Hannam*, 1813, 5 Taunt. 107, 108. Held overruled, *Elsworth v. Alliance Marine Insurance Company*, 1873, L. R. 8 C. P. 644.]

In a declaration on a policy of insurance the Plaintiff averred that Messrs. H at the time of effecting the policy and at the time of the loss, were interested in the cargo which was the subject of the insurance "to a large amount, to wit, to the amount of all the money ever insured thereon;" at the trial it appeared that previous to effecting the policy, Messrs. H. had admitted another mercantile house to a joint concern in the cargo insured. Held that the averment was supported by the evidence (a)².

This was an action on a policy of insurance on the ship "Margaret" and a cargo of corn, at and from Dundee to Chichester, effected by the Plaintiff as agent of Messrs.

(a)¹ *Knight v. Cuckford*, Esp. N. P. Cas. 190. So it has been held, that if a will of lands begin "I John Stanley make this my last will, &c." it need not be otherwise signed to make it valid within the statute of frauds. *Lemayne v. Stanley*, 3 Lev. 1.

(a)² S. C. 3 Esp. Rep. 185. And see *Bell v. Ansley*, 16 East, 141. *Lucena v. Craufurd*, 3 B. and P. 75-91. *Cohen v. Hannam*, 4 Taunt. 101.

Hyde and Hobbs. In the declaration it was averred, "that certain persons using trade and commerce under the style and firm of Messrs. Hyde and Hobbs, were at the time of loading the said corn on board the said ship as aforesaid and at the time of subscribing the said writing or policy of insurance, and from thenceforth until the time of the loss hereinafter mentioned interested in the said corn to a large amount, to wit, to the amount of all the money ever insured thereon, and that the said writing or policy of assurance so made in the name of the Plaintiff, was made to and for the use, risk, benefit, and account of them the said Messrs. Hyde and Hobbs to wit, at, &c."

At the trial before Lord Eldon, Ch. J., at the Guildhall sittings after last Easter term, it appeared in evidence that Messrs. Hyde and Hobbs who were merchants at Chichester, had, through the agency of the Plaintiff, purchased a certain quantity of corn on their own account; that on the 27th of December 1798, they informed the Plaintiff by letter, that thinking the engagement might perhaps be too large for themselves, they had offered another house of the name of Hacks a joint concern in the corn, which the latter had accepted; and at the same time directed the Plaintiff to effect an insurance on the cargo, which he accordingly did on the 28th January 1799. The invoices were made out to Hyde and Hobbs, and payment for the cargo was made by them. It was objected on the part of the Defendant, that the evidence contradicted the averment in the declaration, that the whole interest in the cargo insured was in Messrs. Hyde and Hobbs. His Lordship directed the jury to find a verdict for the Plaintiff, but gave leave to the Defendant to move for a nonsuit.

Accordingly a rule nisi for that purpose having been obtained upon a former day; Lens, Serjt., now shewed cause. The whole question in this case is, Whether the variance between the averment of interest in the [241] declaration and the interest proved be material? Under the 19 Geo. 2, c. 37, it is undoubtedly necessary that the party for whom the policy is effected should be really interested, and it has been the practice since that statute to aver the interest. It seems however to be doubtful whether it be necessary so to do: the effect of the statute is not to make any additional averment in the declaration necessary, but only to throw upon the Plaintiff the burden of proving that the parties for whose benefit the policy is made are interested within the meaning of the statute. In this case the objection is not that Messrs. Hyde and Hobbs are not interested, but that their interest is not properly averred. If then the averment in question were unnecessary, it will not prevent the Plaintiff from recovering, being alleged under a scilicet; for as it does not relate to matters that are part of the contract, it is not to be considered as a material averment (a). At any rate this averment need not be construed so strictly as to exclude the interest of all other persons besides Messrs. Hyde and Hobbs. The substantial part of the averment is, that Messrs. Hyde and Hobbs were interested to a large amount, and indeed the other party who was partly interested with them had only an equitable claim on the proceeds. The *prima facie* interest is in those persons who paid for the cargo. In *Page v. Rogers, Park. Insur. 402*, it was averred that the Plaintiff was possessed of one-third of the ship insured, and it appearing that he had at one time purchased the whole ship, it was objected that as there was no evidence of his having since parted with two thirds, the allegation was not made out; but Lord Mansfield over-ruled the objection.

Shepherd and Best, Serjts. contra. Whether under the 19 Geo. 2 it be necessary to aver the Plaintiff's interest, is not the question here; but the objection is, that the Plaintiff has stated upon the record that an interest exists in certain persons in whom it is not, and that having so stated it upon record, he ought to have proved it. The true way of determining whether an unnecessary averment need be proved, is to consider whether if referred to the Prothonotary it could be struck out as impertinent. *Bristow v. Wright, Doug. 667*. In *Hare v. Cuter, Cowp. 766*, where it was averred that the Defendant was assignee of all the premises, and it turned out that he was assignee of a part only, the variance was held fatal. Now the necessary construction of this averment is, that the exclusive interest was in Messrs. Hyde and Hobbs. It can make no difference in the case whether Messrs. [242] Hyde and Hobbs purchased the cargo in their own name for others, or having purchased it on their own account they afterwards admitted others to a joint concern in it; now in the former case it is clear that if interest were averred to be in themselves, the variance would be fatal.

(a) *Frith v. Gray*, cit. in the note to *Drewry v. Twiss*, 4 T. R. 561, and *Peppin v. Solomon*, 5 T. R. 496.

The parties whom they admitted into the concern may be considered as partners in the transaction; they might have insured their proportion as such, and might have averred their interest in that proportion. The averment of the Plaintiff therefore which excludes the interest of any person except Messrs. Hyde and Hobbs is untrue (a)¹.

LORD ELDON, Ch. J. The question is, Whether Messrs. Hyde and Hobbs had such an interest in the whole cargo as will support the averment in question? An insurable interest is a very different interest from most others that can be stated. In *Le Cras v. Hughes* (Park. Insur. 269) it is very certain that the party insured had no interest in the subject of the insurance according to the common understanding of the word interest; for the prize taken not coming within the terms of the act of parliament, and consequently not within the terms of the proclamation, was completely at the disposal of the Crown. In that case, as counsel for the Defendant, I pressed upon Lord Mansfield the authority of a case before Lord Bathurst assisted by Sir Thomas Sewell, where the next of kin of a lunatic applied to the Court of Chancery praying that the evidence of his being the next of kin might be perpetuated, and stating that he had such an interest in the estate as the Court might take notice of (c). The application however was rejected on the ground of want of interest; and yet the interest in that case would generally be understood to be much more certain than that reasonable expectation on which *Le Cras v. Hughes* was decided. So in the case of the Dutch commissioners (d) which was lately decided, it is very difficult to define what their interest was, and yet they were held to have an insurable interest. My opinion therefore upon this case is very clear; I think the Plaintiff had a sufficient interest throughout the intirety of this cargo, notwithstanding other persons had a beneficial interest in a part to support the averment in this declaration.

[243] HEATH, J. I do not see why a joint-tenant or a tenant in common has not such an interest in the intirety as will entitle him to insure. A policy made by a person so interested is not to be considered as a wager policy.

ROOKE, J.—I think that Messrs. Hyde and Hobbs had such an interest in the cargo as will answer the terms of the averment.

CHAMBRE, J.—The averment in substance is nothing more than that the parties for whose benefit the insurance was made, had an interest in the subject of that insurance. They are not bound by the terms of the averment to shew any thing more than that they have an interest, and if they shew an interest to the extent of one hundredth part of the cargo it will be sufficient. The spirit of the 19 G. 2 only requires that the policy shall not be a gaming policy.

Rule discharged.

HOLLAND v. HOPKINS. June 30th, 1800.

If a bill of particulars state the Plaintiff's demand to be for goods sold and delivered to the Defendant, no evidence can be received of goods sold by the Defendant as agent for the Plaintiff (a)².

Indebitatus assumpsit "for certain horses mares and geldings before that time sold and delivered by the Plaintiff to the Defendant." There was also a count on a quantum meruit, and counts for money lent, paid, had, and received, and on an account stated. Plea Non assumpsit.

The cause was tried before Lord Eldon, Ch. J., at the Westminster sittings after

(a)¹ See *Perchard v. Whitmore*, ante, p. 155, in notis, where it seems to have been taken for granted, that if a third person had been interested in the goods jointly with the two co-plaintiffs at the time of effecting the policy, the Plaintiffs must have been nonsuited.

(c) In *Sackville v. Ayleworth*, at the house of Chan. Nottingham coram Charleton, J., the devisee of a lunatic, under a will made previous to the lunacy, having brought a bill against the heir at law to examine witnesses touching the will, in perpetuum rei memoriam, the bill was dismissed. 1 Vern. 106.

(d) *Crawford v. Hunter*, 8 T. R. 13.

(a)² S. C. 3 Esp. Rep. 168. And see *Halhead v. Abrahams*, 3 Taunt. 81.

last Easter term, when it appeared that the Plaintiff was a horse-dealer living in the country, and the Defendant a stable-keeper in London; that there had been considerable dealings between them, and on an account being taken a balance was found due to the former for horses sold up to the 11th of September 1797 by the Defendant as agent and broker to the Plaintiff; that on or about that day the Defendant received other horses from the Plaintiff, which he afterwards sold in the same character, and received the money for them; that on this action being commenced, a bill of particulars was obtained, which stated the Plaintiff's demand to consist of two items, first for money owing on an account settled and balanced for horses sold and delivered before the 11th of September 1797; secondly, for horses sold and delivered by the Plaintiff and his servants to the Defendant on or about the 11th of September 1797; that the Defendant had paid money into Court generally, and in so doing had paid a few pounds more than was sufficient to satisfy what remained due upon the account balanced. It was objected by the Defendant, that the second item of the bill of particulars [244] having stated the Plaintiff's demand to be for horses sold and delivered to the Defendant, no evidence ought to be received of a sale by the Defendant in the character of agent or broker for the Plaintiff, so as to entitle the latter to recover under the count for money had and received. To this it was answered, first that the Plaintiff by his bill of particulars was only confined to the transaction respecting the horses delivered to the Defendant on or about the 11th of September 1797, and that he was at liberty to make any claim arising out of that transaction; and secondly, that as the Defendant had paid money into Court generally the Plaintiff was at liberty to apply that money to the count for money had and received, and take a verdict for the remainder of his demand under the account stated. But his Lordship being of opinion against the Plaintiff on both points, directed a nonsuit, subject to the opinion of the Court.

Accordingly a rule Nisi for setting aside this nonsuit having been obtained on a former day,

Bayley and Best, Serjts., now shewed cause, and contended, 1st, that independent of the circumstance of money being paid into court, the Plaintiff was clearly precluded from going into evidence of a sale by the Defendant as his agent, since if it were otherwise a bill of particulars would afford the means of surprise upon the Defendant, instead of giving him notice of the case which he is to defend; that if the evidence offered by the Plaintiff were to be received merely because it related to the horses stated in the bill of particulars, it would be very difficult to draw any line; and that the Plaintiff could not suffer by being confined strictly to his bill of particulars, since if he wished to make a demand in the alternative he might have an opportunity of doing so, by stating his demand alternately in the bill of particulars: 2dly, That if the plaintiff were precluded by the bill of particulars from giving evidence of the transaction relative to the horses, he could not be at liberty to apply the money paid into court to the satisfaction of the demand arising out of that transaction; for though the Defendant by paying money into court generally had admitted the contract stated in the count for money had and received as well as in the other counts, yet the Plaintiff was under the necessity of shewing the amount due to him upon that contract to be equal to the sum paid in, from doing which he had precluded himself in this case.

Cockell and Shepherd, Serjts. contra, insisted, that by the bill of particulars they were merely confined to the transaction relative to the horses in question; that the object of a bill of particulars is to prevent the Defendant from being surprised, by informing him [245] of the subject of the Plaintiff's demand, and that if a Plaintiff is prevented from going into evidence to support the different counts of his declaration by the wording of his bill of particulars, it will become necessary for him to vary the wording of his bill of particulars with as much nicety as his declaration.

LORD ELDON, Ch. J.—We are of opinion, that under the circumstances of this case this bill of particulars is not sufficiently large to let in the evidence which the Plaintiff wished to introduce. The declaration contained counts for horses sold and delivered, for money had and received, and on an account stated. It is very clear that the count for money had and received is calculated to embrace the transaction of the sale of horses on the Plaintiff's account, and to entitle him to recover the proceeds of that sale. But the Defendant having applied to the Plaintiff to state the particulars of his demand, the latter informs him that it is of two sorts; 1st, For a

balance on an account stated between them, and 2dly, For the prices of horses sold and delivered. In consequence of this explanation the Defendant pays into court a certain sum which he acknowledges to be due upon the account stated, and considering that the rest of the declaration consists of a demand for the price of horses sold by him on account of the Plaintiff, and a demand for horses sold by the Plaintiff to himself, the former of which is abandoned by the terms of the bill of particulars, he comes prepared to say at the trial that he owes the Plaintiff nothing on his latter demand only. Will he not then be surprised if the Plaintiff should be permitted to give evidence applicable to that demand which seemed to have been abandoned? To me it appears, that a contract to repay money received on a sale of horses by commission, is as different from a contract for the absolute sale of horses to the Defendant, as a contract for the feed of the horses would be. It has been contended, that this decision will introduce great nicety into bills of particulars; but I think it would be sufficient for the bill of particulars to have stated, that on the 11th of September the horses in question were sent to the Defendant, and that the Plaintiff demanded the value of them or so much as they sold for. With respect to the payment of money into court, as the Defendant has admitted a balance to be due against himself, and no evidence was given applicable to the count for horses sold and delivered, he must be taken to have paid the money in on the account stated. On these grounds we think the nonsuit right.

The Court however gave the Plaintiff leave to amend his bill of particulars and go to a new trial on payment of the costs subsequent to the time of the money paid into court.

[246] ALLINGHAM v. FLOWER AND ANOTHER, Sheriffs of London.
June 30th, 1800.

[Overruled, *Birn v. Bond*, 1816, 6 Taunt. 556.]

If after the commencement of an action of escape against the sheriff for not taking a bail bond, good bail be put in and justified in the room of bail before put in who by the practice of the Court were a mere nullity, the Plaintiff cannot recover (a).

The Plaintiff having commenced an action against one John Blower, by *capias ad respondendum*, returnable in eight days of Saint Hilary, Blower on the 24th of January put in bail, but one of them being clerk to Blower's attorney, the Plaintiff treated the bail as a nullity and demanded an assignment of the bail-bond. Finding however that no bail-bond had been taken, and that Blower had been suffered to go at large upon the undertaking of his attorney, the Plaintiff on the 5th of March brought an action against the present Defendant for an escape; after the commencement of which action, viz. on the 30th of April, one new bail was added in the original action instead of the attorney's clerk, and justified together with the other.

Early in Easter Term a rule was obtained by Best, Serjt., calling on the Plaintiff to shew cause why all proceedings in the action of escape should not be set aside for irregularity.

On shewing cause it was insisted by Shepherd, Serjt., and admitted by Best, that there was no irregularity in the Plaintiff's proceedings; but it was agreed on both sides, that the parties should be bound by the opinion of the Court in this motion, respecting the propriety of the action.

Shepherd contended that the bail originally put in were as no bail, *Fenton v. Ruggles*, ante, vol. i. p. 356 (b); that the action of escape therefore was regularly commenced; and that being once regularly commenced it could not be defeated by bail subsequently put in. He observed, that in the case of *Pariente v. Plumbtree*, ante, p. 35, the bail were put in before the action was actually commenced, and the only question was, Whether the Plaintiff should be at liberty to contend in an action of escape, that bail were not put in at the return of the writ, when they had been allowed according to the practice of the Court?

On the other hand it was urged by Best, that the question now to be tried was purely a question of practice depending on the rules established by the Court respect-

(a) Vide *Turner v. Cary*, 7 East, 607. *Birn v. Bond*, 6 Taunt. 554.

(b) Vid. et. *Wallace v. Arrowsmith*, ante, p. 49.

ing the allowance of bail, and was therefore improper to be tried in the form of an action. He relied on the case of *Pariente v. Plumbtree*, and *Murray v. Durand*, Esp. N. P. Cas. 87, there cited by Mr. Justice [247] Heath, in which latter case the bail were not put in until after the action commenced.

LORD ELDON, Ch. J., said, that the present case certainly went further than *Pariente v. Plumbtree*, but observed that it seemed to have been the opinion of Mr. Justice Buller that the Court ought to endeavour to find some means of stopping proceedings of this kind in which questions of practice only were involved.

The Court having taken time to consider of their opinion,

LORD ELDON, Ch. J., on this day said; In the case of *Murray v. Durand* the action of escape was brought before any bail had been put in, yet on the rule for the allowance of bail being produced at the trial, Lord Kenyon said, "By the rule now produced it appears that the Defendant has satisfied the exigence of the writ; bail above having been put in, and having justified, that is now subsisting bail, and must be taken nunc pro tunc." My Brother Buller went the same length in *Pariente v. Plumbtree*, and the doctrine in *Fuller v. Prest*, 7 Term Rep. 109, seems to admit the principle.

Per Curiam. Rule absolute.

(IN THE HOUSE OF LORDS.)

MOOR v. DENN EX DEM. MELLOR; in Error. July 1st, 1800.

[S. C. 7 Bro. P. C. 607. See *Doe v. Allen*, 1800, 8 T. R. 503; *Roe v. Daw*, 1815, 3 M. & S. 522; *Tomkins v. Jones*, 1889, 22 Q. B. D. 602.]

A. after giving a life-estate in certain copyholds to B. devised as follows: "All the rest of my lands, tenements and hereditaments, either freehold or copyhold, whatsoever and wheresoever; and also all my goods, &c. after payment of my just debts and funeral expences, I give devise and bequeath the same unto my wife S. C." Held that under this devise S. C. took only an estate for life (a).

A writ of error having been brought to reverse the judgment given in this case by the Court of Exchequer Chamber (vid. ante, vol. i. p. 558), the Plaintiff in error prayed that the judgment of that Court might be reversed, and the former judgment of the Court of King's Bench in his favour (see 5 Term Rep. 558, and 6 Term Rep. 175) affirmed, for the following among other Reasons:

Because there are no words in the will of John Carr which can pass any more than an estate for life to Sissily Carr, consequently upon her death the estate of the Defendant in error ceased, and the premises in question descended to the Plaintiff in error as the heir of John Carr.

EDWARD LAW.

GEO. WOOD.

[248] The Defendant in error submitted that the opinion and judgment of the Court of Exchequer Chamber were right and according to law, and that the same ought to be affirmed, and the original judgment of the Court of King's Bench reversed for the following among other Reasons:

First, Because by the known and established rules of law in the construction of devises, the intention of the testator, as far as the same can be collected from the whole of his will, is to be carried into effect, although the words used by him in his will would not be sufficient if used in a deed to pass such estate as it appears to have been his intention to devise.

II. Because it was evidently the intention of the testator to give every thing absolutely to his wife which he had a power to dispose of, and which he had not before given to his kinsman Nicholas Lister. This intention is manifest from the general words used by him in the residuary clause, which to a person unacquainted with the strict rules of law must have appeared as comprehensive as possible; which do pass the absolute property in the testator's personal estate, and must have been supposed by him to operate in the same manner on the real.

(a) Vide *Goodtill v. Mullern*, 4 East, 496. *Doe d. Stevens v. Snelling*, 5 East, 87, 92. *Robinson v. Grey*, 9 East, 1-7. *Doe v. Ramshotham*, 3 M. & S. 516. *Roe v. Daw*, 3 M. and S. 518, 521.

III. Because it appears, that considering the said Sissily Carr as the great object of his bounty, and therefore best able to bear the burthen of paying his debts and funeral expences, the testator imposed on her the duty of paying the same, as the condition annexed to the enjoyment of the property devised to her. In consequence of which the said Sissily Carr either could not take the estate devised to her without discharging the testator's debts and funeral expences; or by accepting the same estate, became liable to the payment of those debts and funeral expences; a burthen which, if she only took an estate for her life in the premises devised to her, might by possibility have been greater than the benefit to be derived from such devise; whereas the law always presumes that by the devise of property the testator intends a benefit and not an injury to his devisee.

IV. Because the present case is not to be distinguished in principle from the case of *Doe on the demises of Palmer and others* against *Richards*, 3 Term Rep. 356, in which it was held that a devisee under a residuary bequest similar in effect to the present took a fee-simple in the lands devised. The words in that will were, "All the rest, residue, and remainder of my messuages, lands, tenements, hereditaments, goods, chattels, [249] and personal estate whatsoever, my legacies and funeral expences being thereout paid, I give, devise, and bequeath unto my sister Jane Dewdney; and do hereby constitute and appoint her whole and sole executrix and residuary legatee of this my will." Every argument of intention drawn from the expressions which are used in that will arises also out of the will in question, and may be applied at least with equal force to the present case. No material distinction can be taken between the form of the charge found in that will, viz. "my legacies and funeral expences being thereout paid," and in the present, viz. "after payment of my just debts and funeral expences." In both cases according to the strict grammatical construction, the payment of the charge should precede the estate. The word "thereout," which is used in the charge of *Doe v. Palmer*, must be implied in the present case, and then it ought to bear the same construction, or if some such word is not to be implied, the payment of the debts and legacies must be a precedent condition to the devisee's taking any estate, and the argument from it will be still stronger, that she takes a fee, as she might otherwise pay more than she would receive.

V. GIBES.

WM. LAMB.

This case was argued at the bar of the House of Lords on the 27th June by Law and Wood for the Plaintiffs in error, and by Gibbs and Lamb for the Defendants in error.

MACDONALD, Ch. B., on this day delivered the opinion of the judges, in substance as follows:—In offering to Your Lordships the reasons for the opinion which we have formed on this case, I shall avoid a minute examination of the great variety of cases which bear on this subject: contenting myself after what Your Lordships have already heard from the bar, with alluding to those from which the principles on this subject are chiefly to be extracted, and with the application of those principles to the present case.

The devise on which the question arises means to give some interest in a real estate to the widow of the testator to the prejudice of the heir at law. What quantity of interest it was his intent to give as disclosed by the words which he has used, is the question for Your Lordships' determination. One fundamental rule upon the construction of the words of a will is, that those words ought to have an apparent intent, and not be ambiguous or doubtful if the heir is thereby to be disinherited. [250] Another rule is, that the intention of the testator collected from the words he has used is to prevail, if it be not in contradiction to some established rule of law. And in order to preserve uniformity and consequently security in administering the law of real property devised by will, it is necessary that the sense which has been put upon particular modes of expression should be adhered to. If a devise of lands be to A. without words of limitation, an estate for life only shall pass by that devise, yet from other provisions and expressions an intent may be manifested which will supply the want of such words. The words in the present case are, "First I give and devise unto my kinsman Nicholas Lister of Creswick Greave in the parish of Ecclesfield yeoman all that my customary or copyhold messuage or tenement with the appurtenances situate and being in Ecclesfield aforesaid, as the same is now in

the tenure or occupation of Valentine Sykes; all the rest of my lands tenements and hereditaments either freehold or copyhold whatsoever and wheresoever and also all my goods chattels and personal estate of what nature or kind soever after payment of my just debts and funeral expences I give devise and bequeath the same unto my loving wife Sissily Carr, and I do hereby nominate and appoint her sole executrix of this my last will and testament." The question for Your Lordships' determination will be, Whether according to the established rules of construing devises of this sort an estate for life passes to the widow of the testator, or an estate in fee? It is clearly settled in a variety of cases, that if one devise his estate to another, paying his debts, or he paying his debts, or, paying a sum in gross, a fee must necessarily pass, because as the devisee is to pay the debts or money in all events, and his interest may cease before he is repaid out of the estate if it be only an estate for life, he may be a loser, which the testator cannot be supposed to have intended. The testator is therefore deemed to have devised an interest which will secure the payment of the debts or sum in gross by the devisee without the hazard of loss on his part. But if the testator direct the debts or sum in gross to be paid out of the profits of the land, then, inasmuch as the land and not the devisee is to bear the burden, no ground is laid for inferring that any greater quantity of interest was intended to be given than is precisely expressed. So if an annual payment by the devisee to another person be directed by the will to continue during the life of such other person, as the devisee may be a loser if he do not survive that person, an intent is from thence collected that he is to take a fee. The point to be considered then will be, Whether the words used in this will are materially distinguishable from those used in other wills, and which have been held not to denote an intention so expressed by the devisor as to enlarge that which would otherwise be an estate for life only into an estate in fee? This will depend upon the effect of the word "rest," of the word "hereditaments," and of the provision "after payment of my just debts and funeral expences."

In the case of *Canning v. Canning*, Mosely, 240, the words used by the devisor were, "all the rest residue and remainder of my messuages lands tenements and hereditaments after my debts legacies and funeral expences are fully satisfied I give in trust for my daughter:" the trustees took but an estate for life. The authority of this case has been said to be questionable by reason of the inaccuracy of many cases in the book in which it is reported. But one of the learned judges has compared the case as reported with the register's book, and it is found to be very correctly reported. It appears that the Court upon long debate declared that the words "rest residue and remainder" being without words of limitation could not operate on the inheritance: this therefore seems a direct authority on this part of the case. In the present case the testator has given an estate to N. Lister, which for want of words of limitation amounts only to an estate for life, and when he devises the rest of his lands, &c. it would be too strong a construction of that relative word "rest," after what had been determined in the cases referred to, to suppose it to pass all the interest he had in all other lands and the reversionary interest in the lands before devised. The circumstance therefore of this being a residuary devise does not seem sufficient to enlarge that devise beyond the legal import of the words used in the will itself.

Nor do I conceive the word "hereditaments" will have that effect. The settled sense of that word is to denote such things as may be the subject matter of inheritance, but not the inheritance itself, and cannot therefore, by its own intrinsic force enlarge an estate, *prima facie* a life estate into a fee (a). It may have weight under particular circumstances in explaining the other expressions, from whence it may be collected in a manner agreeable to the rules of law that the testator intended a [252] fee. This word occurred in the case of *Canning v. Canning*, but the effect now contended for was not allowed to it, and the case of *Hopwell v. Ackland*, Salk. 239, was there referred to by the Court as having settled that point.

The remaining consideration is, Whether by the words "after payment of my just debts and funeral expences" an intention to pass a fee is so denoted according to the established rules of construction, as to manifest an intention that those debts and expences should be a charge on the devisee or on the lands in her hands. If these words are considered as charging the lands in the hands of the widow, in that case

(a) In addition to the cases cited in the former argument on this head, see what is said by Lord Kenyon in *Doe d. Small v. Allen*, 8 T. R. 503.

according to the established principles she would take a fee, or she might otherwise be a loser by the devise; if on the rents and profits of the lands, her interest would be only for her life (a)¹. In *Dickins v. Marshall*, Cro. Eliz. 330, words nearly similar and of the same import were used, viz. "after my debts and legacies paid," but it was held that only a life interest passed. In *Canning v. Canning* the same was adjudged where the words were, "after my just debts funeral expences and legacies are fully satisfied and paid."

I am free to own that I formerly held an opinion that the words of charge in this will were a charge on the lands in the hands of the devisee; and that opinion was founded upon the then latest authority of *Doe d. Palmer v. Richards*, 3 T. R. 356. To me that case did then and does still appear to bear a very close resemblance to the present. The words used by the testator in that case are almost exactly similar to the present; excepting that in that case, after the devise of the rest and residue of his lands, tenements, and hereditaments, and all personal estate whatsoever, the testator adds, "my legacies and funeral expences being thereout paid;" whereas in the present case the words are, "after payment of my just debts and funeral expences." The word "thereout" is a word of reference: it would be the same thing therefore if the words referred to were themselves repeated, in which case the sentence would run thus: "My legacies and funeral expences being paid out of the rest and residue of my lands tenements and hereditaments and [253] all personal estate whatsoever." I am unable to distinguish the difference between devising lands to any one "after paying his legacies," or "his legacies being paid thereout." In both cases they are to be paid out of the land which is the subject of the devise. A devise to an individual after paying debts seemed to me to mark the same intent of charging the land in the hands of the devisee, as a devise to an individual, the testator's debts being paid out of the land devised. Accordingly I find, in the case of *Baddely v. Leppingwell*, that Mr. Justice Wilmott, in giving the judgment of the Court, (Mr. Justice Yates being present,) where copyhold tenements had been devised without words of limitation to one sister, she paying thereout an annuity to another sister, says thus: "It is objected that the testator has expressly directed 40s. a year to her sister Elizabeth to be paid thereout; and it is urged that this is equivalent to making it payable out of the rents and profits; and I think it is so" (3 Burr. 1541). If then that be so, though there be no substantial difference between *Doe d. Palmer v. Richards* and the present case, yet I am of opinion, that notwithstanding that determination the weight of authority obliges me to conclude that Sissily Carr took only an estate for life.

After hearing the opinion of the Judges, the House on the motion of the Lord Chancellor resolved, that the judgment of the Court of Exchequer Chamber should be reversed, and the judgment of the Court of King's Bench affirmed.

M. TATTERSALL, Administratrix of W. Tattersall, v. GROOTE. July 1st, 1800.

Covenant by the Plaintiff as administratrix on a breach subsequent to the death of her intestate, and judgment against her on demurrer: held that she was not liable to costs (a)².

Judgment for the Defendant having been given in this case, on demurrer to an action brought by the Plaintiff as administratrix, for breach of a covenant entered into with her intestate, but broken since his death (vide ante, p. 13), a rule nisi was obtained on a former day to direct the prothonotary to tax the Defendant his costs, notwithstanding the Plaintiff sued in the character of administratrix.

Shepherd, Serjt., shewed cause. In the 23 H. 8, c. 15, which gives costs to the

(a)¹ Upon this subject see Bro. Abr. tit. Testament, pl. 18, tit. Estates, pl. 78. *Colyer's case*, 6 Co. 16. *Wellock v. Hammond*, Cro. Eliz. 204. *Walker v. Collier*, Cro. Eliz. 378. *Spicer v. Spicer*, Cro. Jac. 527. *Greene v. Dewell*, Cro. Jac. 599. *Reed v. Hatton*, 2 Mod. 25. *Sir Thomas Muschamp v. Bluet*, Bridgm. 132. *Redoubt v. Redoubt*, Hil. 1713, Vin. Abr. tit. Devise, Q. a. pl. 13. *Goodright d. Baker v. Stocker*, 5 T. R. 18. *Andrew v. Southouse*, 5 T. R. 292. *Doe d. Willey v. Holmes*, 8 T. R. 1.

(a)² Vide *Cook v. Lucas*, 2 East, 395-398. *Hollis v. Smith*, 10 East, 293. *Comber v. Harlestone*, 3 B and P. 115. *Powley v. Newton*, 6 Taunt. 453. *Jones v. Jones*, 1 Bing. 249.

Defendant upon a nonsuit or verdict in his favour, and in the 8 and 9 W. 3, c. 11, s. 2, which gives him costs [254] upon demurrer, executors are not named; and the same construction has been put by the courts upon both statutes. The Plaintiff, therefore, is not liable to costs upon a demurrer, unless where he would be liable on a nonsuit or verdict against him. The principle on which the courts have proceeded, is, that where a Plaintiff is under the necessity of naming himself executor or administrator, there he shall not pay costs; but if he might have brought the action in his own name, and yet names himself executor or administrator unnecessarily, he shall pay them. *Harris et Ux. v. Hanna*, Cas. temp. Hardw. 204, and *Cockerill and Wife v. Kynaston*, 4 T. R. 277. In the present case it was impossible for the Plaintiff to have brought this action except in her character of administratrix; for though the breach was subsequent to the death of the intestate, yet the terms of the covenant under which the Plaintiff sues, only enable her to declare as administratrix, being a covenant between the parties for "themselves, their executors, and administrators."

Lees, Serjt., in support of the rule. The mere circumstance of the Plaintiff being under the necessity of naming herself administratrix is not sufficient to exempt her from the payment of costs. The cause of action arose within her own time and her own knowledge; and according to Lee, J., in *Harris v. Hanna*, "the rule is, that where the cause of action arises after the testator's death, the executor is liable for costs, because then he is supposed a sufficient judge of the cause to found an action." So, in *Jenkins and Wife v. Plume*, 1 Salk. 207, the Court say, "it is only by construction that an executor is out of the 23 H. 8, and the reason is, because he is not privy to the original cause of action." The same doctrine is recognized in *Bollard v. Spencer*, 7 T. R. 359, where Lord Kenyon observes, that "the rule excusing executors from paying costs is founded on this principle, that they are not supposed to be conscious of the real situation of the testator's affairs."

Cur. adv. vult.

On this day the opinion of the Court was delivered by

LORD ELDON, Ch. J. (who, after stating the case, proceeded thus): The ground on which this motion has been made is, that although the Plaintiff has sued in her character of administratrix, yet that she has sued upon a cause of action which accrued in her own time, namely, the refusal of the Defendant, after the [255] death of the intestate, to nominate an arbitrator. After looking into all the cases, we are of opinion, that if the cause of action arose in the time of the administratrix, and if it was not absolutely necessary for her to sue in her character of administratrix, she will be liable to costs. It is impossible to deny, that among the great variety of cases upon this subject, and owing to the inclination of the Court to narrow the indulgence given to executors and administrators in this respect, some cases are to be found in which the simple fact, that the cause of action has arisen subsequent to the death of the testator or intestate, has been held sufficient to subject the executor or administrator to costs. But on a review of all the cases, we think that the sound doctrine to be collected from them is, that if the executor or administrator must sue as such on the contract made with the testator or intestate, he is not liable to the payment of costs, though the cause of action arose after the death of the testator or intestate. This doctrine seems to be founded on the act of parliament, of which all the cases are an exposition, namely the 23 H. 8, c. 15. Attending to the language of that act, perhaps we may be authorized to say, that the sound principle on which the exemption of the executors and administrators rests, is not the degree of ignorance under which they may be supposed to lie, but that the exemption founds itself on the description of the actions contained in the statute in which costs are to be paid. The words are "Any action, bill, or plaint of debt or covenant upon any especialty made to the Plaintiff or Plaintiffs, or upon any contract supposed to be made between the Plaintiff or Plaintiffs and any other person or persons." The statute of 4 Jac. 1, c. 3, does not carry the matter farther. The exposition of the early cases seems to be, that if the contract be not made with the executor or administrator, but with the testator or intestate whom they represent, then it is not an action "upon a contract supposed to be made with the plaintiff and any other person or persons," in the language of the act. Certainly the subsequent cases have gone to the extent of saying, that if the Plaintiff could have declared on the transaction as on a contract made with himself, he shall be liable to costs, though he does unnecessarily describe himself executor or administrator. In a case as early as 21 Jac. 1, *Trehorn v. Claybrook*,

Winch, 70 (Hutt. 68, S. C.), it is laid down, "that if executors are nonsuit or judgment given against them upon a verdict, they shall not pay costs within the [256] 23 H. 8, or 4 Jac. for the statute speaks of any contract or specialty made with the Plaintiff, or between the Plaintiff and Defendant, and the executor brings an action upon the contract of another." So in *Anon.* 1 Vent. 92, the distinction taken is, that costs shall not be paid where the action is merely in right of the intestate; but where it is needless for the Plaintiff to name himself executor or administrator, there they shall be paid. In *Bigland v. Robinson*, 3 Salk. 105, it is laid down, that wherever an executor must sue as such, as for instance, where he brings debt on bond due to his testator, he shall not pay costs. And in *Portman v. Cane*, 2 Ld. Raym. 1413, the same doctrine was held, where a breach was assigned in the time of the executor, the Court saying the bond was the cause of action, and the Plaintiff could not sue but as executor. Again, in *Nicholas v. Killebrew*, 1 Ld. Raym. 437, it was agreed, that it is not to any purpose for a Plaintiff to name himself executor where he ought not so to do, but that if he ground his action upon the same contract that was to the testator, he shall not pay costs if he fail in the suit. This distinction saves whole all the cases where an executor could declare upon a conversion in his own time: in such case he stands in the situation of an assignee, and the contract may be considered as made with himself. And it does seem to me, that this distinction is the true principle to be extracted from the three cases in the Term Reports of *Cockerill and Wife v. Kynaston*, *Goldthwayte and Wife v. Petrie* (5 Term Rep. 234), and *Bollard and Wife v. Spencer*. Perhaps it may be enough to refer generally to these cases, the substance of which is well collected in Hullock's Law of Costs (from p. 173 to 199), in the new edition of Bacon's Abridgment, by Gwillim, and in p. 349, of a new treatise on the Law of Executors and Administrators, by a gentleman of Lincoln's Inn (c). Without stating it to be possible to reconcile all the cases, it is enough for us to say, that the doctrine last adopted proceeds on the principle which I have now mentioned. The case, therefore, is reduced to this: it being admitted that the cause of action arose in the life of the administratrix, could she declare on this contract as made with herself? We think that she necessarily named herself administratrix, and that she is therefore not liable to the payment of costs.

Per Curiam. Rule discharged (d).

[257] DA COSTA v. CLARKE. July 1st, 1800.

Plaintiff in replevin pleaded in bar to an avowry for damage feasant, that the locus in quo, from time whereof, &c. ought to be open and common "on or before the 15th of October, when the corn was cut and carried, and from thence for a long time, to wit, for three weeks and upwards;" that the Plaintiff, at the time when, &c. put in his cattle, "the same time being when the said field was and ought to be open and common as aforesaid." Held that the plea was bad for uncertainty even after verdict, the right of common being too generally described both in its commencement and conclusion (a).

Replevin of a cow. The Defendant pleaded, 1st, the general issue non cepit: 2dly, an avowry that as lessee of the locus in quo he distrained the cow damage feasant; 3dly, a cognizance as bailiff of one R. L., to whom he had underlet the locus in quo. After joining issue on non cepit, the Plaintiff pleaded in bar to the avowry, "that the said field called Broad Field, containing divers, to wit, 100 acres, whereof the said place in which, &c. was and is parcel as aforesaid from time whereof the memory of man is not to the contrary of right hath been, and ought to have been, and still of right ought to be open and common, in manner following; that is to say, open every third year, that is to say, on or before the 15th day of October, when the corn was cut and carried off the same for a long time, to wit, for three weeks and upwards;" and that before the said time, when, &c. one I. B. was seised in a fee of a messuage and two acres of land, with the appurtenances situate at, &c.; and that he and all those, whose estate he had and hath in the said messuage and land, with

(c) Toller's Law of Executors and Administrators.

(d) Vide etiam *Wilton Executrix v. Hamilton*, ante, vol. i. p. 445.

(a) S. C. post, 376, as to costs.

the appurtenances for the time being, from time whereof, &c. have used and been accustomed to have, and of right ought to have for themselves and their tenants, occupiers of the said messuage and land, with the appurtenances, common of pasture for all his and their commonable cows, levant & couchant, on the said messuage and land, with the appurtenances in the said field called Broad Field, of which the said place, in which, &c. is parcel, "every third year when the same was open, and not sown and cultivated in manner aforesaid," as to the said messuage and land, with the appurtenances appertaining; that the said I. B. demised to the Plaintiff from year to year; that by virtue of this demise the Plaintiff became possessed of the said messuage and lands, with the appurtenances, and being so possessed before the said time when, &c. put the said cow, being his commonable cow, levant & couchant, on his said messuage and land, with the appurtenances, into the said field, to use his common of pasture there, as it was lawful for him to do, "the same time and from thence until and at the taking of the same as aforesaid, [258] being when the said field was and ought to be open and common as aforesaid;" that the cow was in the said place in which, &c. parcel, &c. until Defendant of her own wrong, &c. And this, &c. wherefore, &c. To the cognizance a similar plea in bar was pleaded. The Defendant replied, that Broad Field ought to be open every third year, only whilst every part thereof has been unsown with corn or grain, and not at any time after or whilst the same or any part thereof hath been sown with corn or grain. This the Plaintiff traversed in his rejoinder, and upon that point issue was joined.

This cause was tried at the Westminster sittings after Hilary term, before Lord Eldon, Ch. J., when a verdict was found for the Plaintiff.

In Easter term Marshall, Serjt., moved for a rule, calling on the Plaintiff to shew cause why judgment should not be entered for the Defendant, non obstante veredicto: 1st, because the prescription as laid was uncertain, since it was not shewn how long before the 15th of October the right of common was to commence, or how long after the three weeks it was to continue. On this point he cited *Greene v. Berry*, Roll. Abr. 264, 5 Vin. Abr. tit. Prescription, D. where a prescription for copyholders to pay two years' rent, or less, upon renewal, was held void for uncertainty; and *Allen's case*, ibid., where the same was held of a prescription to pay one penny, or thereabouts, for tithes; also *Selby v. Robinson*, 2 T. R. 758, where the custom alleged was for poor necessitous and indigent householders to carry away rotten boughs in a chase; and *Broadbent v. Wilkes*, Willes, 360 (a), where the custom was for the owners of certain pits to lay the coals and rubbish near to such pits: 2dly, because the prescription for common was not conformable to the custom alleged at Broad Field, and that the exercise was not conformable to the prescription; for the custom laid was, that Broad Field, is open every third year when the corn is cut and carried off, the common prescribed for was, when Broad Field is open and not sown and cultivated; and the exercise was stated to have been not during the three weeks when the corn was cut and carried off, nor when the field was not sown or cultivated, but when Broad Field was open and common as aforesaid.

A rule nisi was granted; which, having been enlarged to this term, Bayley, Serjt., now shewed cause. The customs alleged in [259] the cases cited were positively uncertain. Uncertainty being made part of the custom, certainty was necessarily excluded. But in this case, the words "three weeks and upwards" are equivalent to "three weeks at least." How much longer, may depend upon many circumstances; which circumstances the Plaintiff is not bound to state, since it is unnecessary for a Plaintiff to state more of a prescription than will justify himself. The question then will be, Whether, as the Plaintiff has stated that the field ought to be "open and common for three weeks and upwards," and that when the Plaintiff's cattle were put in it was "open and common as aforesaid," the Court will not intend, after verdict and issue taken upon a collateral point, that the cattle were put in during the three weeks. Though these pleas might have been subject to demurrer, yet the matter of a plea must be taken most favourably for the party pleading after issue joined on a collateral point; and if it be doubtful in what manner words are to be understood, they shall be so taken as to support the verdict. *Stennet v. Hogg*, 1 Saund. 227. *Bedam v. Clerkson*, 1 Ld. Raym. 123. *Crowther v. Oldfield*, 2 Ld. Raym. 1225. *Avery v. Hoole*, Cowp. 825.

(a) See also the cases there collected by the learned Editor.

LORD ELDON, Ch. J. (stopping Marshall on the other side). We are of opinion, that the prescription stated is too uncertain, both with respect to its commencement and duration, to support the verdict. The reasoning in support of the plea in bar would have been very strong if the Plaintiff had averred that the cattle were put in within the three weeks. But the words are, "when the field was and ought to be open and common as aforesaid." And we think that these words must refer to the three weeks and upwards, and that they do not ascertain whether the cattle were put in during the three weeks, or during that time which is included under the words "and upwards." And though the words for "three weeks and upwards" are under a videlicet, yet if we could suppose them to be struck out, the averment would then be, that the field ought to be open on or before the 15th of October, when the corn is cut and carried off the same for a long time, which, without a qualification of the length of time, would be too uncertain to be supported. It also appears to us, that it is not sufficiently pointed out, when the common is to commence, since it may happen that the corn may not be cut and carried before the 15th of October, or even before the end of three weeks after that day. The Court will infer almost any thing after verdict; but we think [260] in this case there can be no inference to uphold the allegations of the special plea.

Per Curiam. Rule absolute.

HANDCOCK v. BAKER AND THREE OTHERS. July 1st, 1800.

A private person may justify breaking and entering the Plaintiff's house and imprisoning his person, to prevent him from committing murder on his wife.

Trespass for breaking the Plaintiff's dwelling-house and assaulting him therein, and dragging him out of bed, and forcing him without clothes out of his house along the public street, and beating and imprisoning him without cause.

Two of the Defendants suffered judgment by default, and the other two pleaded, 1st, not guilty: 2dly, that the Plaintiff in the said dwelling-house broke the peace and assaulted his wife, and purposed to have feloniously killed and slain her, and was on the point of so doing; and that her life being in great danger she cried murder and called for assistance; whereupon the Defendants, for the preservation of the peace, and to prevent the Plaintiff from so killing and slaying his wife, and committing the said felony, endeavoured to enter by the door, and knocked thereat; and because the same was fastened, and there was reasonable cause to presume that the wife's life could not have been otherwise preserved than by immediately breaking open the door and entering the said dwelling-house, and they could not otherwise obtain possession, they did for that purpose break and enter the said dwelling-house, and somewhat break, &c. doing as little damage as possible, and gently laid hands on the Plaintiff, and prevented him from further assaulting and feloniously killing and slaying his said wife; and for the same purpose and also for that of taking and delivering the Plaintiff to a constable, to be by him taken before a justice, and dealt with according to law, kept and detained him a short and reasonable time in that behalf, and because he had not then proper and reasonable clothes on him, took their hands off from him, and permitted him to enter a bed-chamber, and to remain there a reasonable time, that he might put on such clothes, which he might have done; and because he did not nor would so do, but wholly refused and went into bed there, and remained there at the end of such reasonable time, and would not quit the same, although thereto requested, the Defendants for the [261] same purposes as they so kept and detained the Plaintiff as above-mentioned, there being then no reasonable ground for presuming that he had changed his purpose of further assaulting and feloniously slaying his said wife, entered the bed-chamber in order for those purposes to take him therefrom, whereupon the Plaintiff assaulted and would have beat the said Defendants if they had not defended themselves, which they did, and if any damage happened to the Plaintiff it was occasioned by his own assault, and the Defendants for the purposes in that behalf aforesaid, gently laid hands upon the Plaintiff and took him from the bed and out of the dwelling-house along the public streets for a reasonable time, and kept and detained him for a short and reasonable time for those purposes, till they could find a constable, and as soon as they could find a constable delivered him to the constable for the purpose in that behalf aforesaid.

The Plaintiff replied *de injuria sua propria*, and by way of new assignment pleaded, that he sued out his writ and declared as well for the trespasses justified, as also for that the Defendants at the times when, &c. beat and ill-treated the Plaintiff with much greater violence and imprisoned him for a longer time than was necessary and proper for any of the purposes in the plea mentioned.

Issue having been joined on the replication and new assignment, the cause was tried before Grose, J., at the last Spring Assizes for Norfolk, when the jury found for the Plaintiff on the general issue, and for the Defendants on the special justification.

In Easter term last a rule *Nisi* was obtained calling on the Defendants to shew cause why the judgment for the Defendants on the special justification should not be arrested, and a verdict entered for the Plaintiff on the general issue, with 1s. damages. The case having stood over till this term,

Shepherd and Williams, Serjts., now shewed cause, and contended that if the Defendants were justified in entering the Plaintiff's house and preventing him from killing his wife in the first instance, they were also justified in taking the proper means to prevent him from accomplishing that purpose at any time while the same intent continued; that after verdict, the allegation that "there was no reasonable ground for presuming that he had changed his purpose of further assaulting and feloniously slaying his said wife" must be taken to have been proved; they cited 9 Ed. 4, 26 b. Bro. Ab. tit. Trespass, pl. 184, where to trespass for assault and imprisonment the Defendant [262] pleaded, that the Plaintiff was lying in wait in the highway to rob the King's subjects, that one Alice was riding on the same highway, against whom the Plaintiff drew his sword and commanded her to deliver her purse, whereupon she levied hue and cry, that the Defendant was riding there and heard the cry, and returned and took the Plaintiff, and because there were no stocks in the vill he carried him to S. and there delivered him to the constable; and the plea was held good by the whole Court, and Moile said, if one say to me, "See this man, I will certainly kill him," in this case I may hold him so that he do not kill the man, and this holding is no imprisonment (a); they also referred to 22 Ed. 4, 45 b. 2 Rol. Ab. tit. Trespass, E. 4, where it is said by Fairfax, "If you see two men fighting so that one may perhaps kill the other, it is legal for you to part them and to put one in your house till his passion be passed."

Sellon and Bayley, Serjts., in support of the rule observed, that the cases were distinguishable from the case in question, inasmuch as this was a case of interference between husband and wife, the former of whom has to a certain extent the power of correcting the latter; that although the Defendants, if they had seen the wife in actual danger, might perhaps have been justified; yet without any warrant of constable they could not interfere by way of prevention, merely because the intention continued; that the law has provided a remedy for the wife in case the husband threaten to beat or to kill her; she may either have a writ of *supplicavit* out of Chancery, F. N. B. 80, or exhibit articles of the peace in the King's Bench; that in this case it did not appear even that the wife was present at the time when the Plaintiff was taken out of bed; whereas it was necessary for the Defendants to allege, not only that the Plaintiff had the intent but the power to kill his wife: and that in order to justify the imprisonment, they should also have averred that the intention continued during the whole time in which the Plaintiff was detained by the Defendants.

LORD ELDON, Ch. J. If the reasoning be good that a wife ought to apply for assistance to those courts where the law has provided assistance for her, it will equally apply to the first entry of the house by the Defendants, as to the subsequent assault and imprisonment which is stated to have taken place in the bed-room. [263] I think, however, that a wife is only bound to apply to those remedies, where it is probable that the injury to be apprehended will be prevented by such application. In this case the Plaintiff being about to commit a felony by killing and slaying his wife, the Defendants interfered by breaking and entering the house in order to prevent the execution of that intent: and "for the same purposes," that is, with a view to prevent the Plaintiff from killing and slaying his wife, they afterwards committed the injury complained of in the bed-room, into which they had permitted him to enter in order

(a) In that case it is also said by Needham, "In these cases, he may arrest and commit to gaol if he intends to do a felonious act."

to put on necessary clothes. It is stated that there was no reasonable ground for presuming that the Plaintiff had changed his purpose; and it is argued that it ought to have been averred that his purpose actually continued: but if the preceding allegation be true, that the Defendants entered the bed-room for the same purposes for which they had previously entered the house, the latter allegation was unnecessary; since the averment that it was for the same purposes sufficiently brought the question before the jury, Whether or not the Defendants into the bed-chamber and detained the Plaintiff for the purpose of preventing him from killing and slaying his wife? It is not difficult to conceive that under some circumstances it might be more especially the Defendant's duty to interfere in that manner. Suppose A. endeavour to lay hold of B. who is in pursuit of C. with an intent to kill him, and B. thereupon ceases to pursue with the view of effecting his purpose with more cunning, the act of ceasing to run, so far from being evidence of an intention to desist from his purpose, might afford strong evidence of an intention to prosecute it with more effect; in which case the detention of B. would be justified. In this case the jury were competent to consider whether under all the circumstances of the case, including the presence or absence of the wife, the Plaintiff got into bed with a view of more effectually executing his intent to kill his wife. In fact the jury have found that the Defendants kept and detained the Plaintiff after he had gone into the bed-room for the same purposes for which they kept and detained him before. With respect to the averment which has been supposed to be necessary, it is sufficient to answer, that after verdict it must be presumed that every thing is proved which is necessary to support the verdict; and the jury have found that it was necessary for the preservation of the woman's life that the Defendants should do what they did.

[264] HEATH, J. I am of the same opinion. It is a matter of the last consequence that it should be known upon what occasions by-standers may interfere to prevent felony (*a*). In the riots which took place in the year 1780, this matter was much misunderstood, and a general persuasion prevailed that no indifferent person could interpose without the authority of a magistrate; in consequence of which much mischief was done, which might otherwise have been prevented. In this case

(*a*) Indeed there seems to be very high authority for the interference of private individuals in case of riot, though no felony be committed. The question underwent a very solemn discussion in 1597 (39 Eliz. at which time the country was in a very unquiet state,) before all the Judges in a case which is called "*Case of armes.*" Poph. 121, and is as follows: "Upon an assembly of all the justices and barons at Serjeant's Inn this term, on Monday the 15th day of April, upon this question moved by Anderson, Ch. J. of the Common Bench; Whether men may arm themselves to suppress riots, rebellions, or to resist enemies and to endeavour themselves to suppress or resist such disturbers of the peace or quiet of the realm? And upon good deliberation it was resolved by them all, that every justice of peace, sheriff and other minister or other subject of the king where such accident happen may do it; and to fortify this their resolution, they perused the statute of 2 Ed. 3, 3, which enacts, that none be so hardy as to come with force or bring force to any place in affray of the peace, nor to go or ride armed night nor day, unless he be a servant to the king in his presence, and the ministers of the king in the execution of his precepts, or of their office and those who are in their company assisting them, or upon cry made for weapons to keep the peace, and this in such places where accidents happen, upon the penalty in the same statute contained; whereby it appeareth that upon cry made for weapons to keep the peace, every man where such accidents happen for breaking the peace, may by the law arm himself against such evil-doers to keep the peace. But they take it to be the more discreet way for every one in such a case to attend and be assistant to the justices, sheriffs, or other ministers of the king in the doing of it." This case is spoken of with approbation by the judges in the great case of *Messenger and others*, Kel. 76, and its principle is adopted by Hawkins in his pleas of the crown, lib. 1, c. 65, s. 11, where he says, "it hath been holden that private persons may arm themselves in order to suppress a riot, from whence it seems clearly to follow that they may also make use of arms in the suppressing of it if there be a necessity for so doing." He adds indeed, that it seems hazardous for private persons to go so far in common cases, and that such violent methods seem only proper against such riots as savour of rebellion.

the Defendants broke and entered the Plaintiff's house in order to prevent the commission of murder, and that seems to have been admitted to be a good justification. The only dispute therefore turns on the propriety of their conduct towards the Plaintiff after they had suffered him to go into the bed-room. Now I think that enough is stated in the justification to support the verdict, since the jury have thought that the conduct of the Defendants was right. After verdict we may suppose any thing. We may suppose that the Plaintiff's passion continued, and that he again declared that he would kill his wife.

[265] ROOKE, J. I am of the same opinion. It is highly important that bystanders should know when they are authorized to interfere. In this case the life of the wife was in danger from the act of the husband. The Defendants therefore were justified in breaking open the house, and doing what was necessary for the preservation of her life. The jury find that they have done this.

CHAMBRE, J. There is a great difference between the right of a private person in cases of intended felony and of breach of the peace. It is lawful for a private person to do any thing to prevent the perpetration of a felony. In this case it is stated that the Plaintiff purposed feloniously to kill and slay his wife, to prevent which the Defendants interfered in the manner stated in the plea. The justification has been found by the verdict; and the Defendants therefore are entitled to the judgment of the Court.

Rule discharged.

WARD v. HARRIS. July 1st, 1800.

The declaration stated that in consideration that the Plaintiff had sold to the Defendant a certain horse of the Plaintiff, at and for a certain quantity of certain oil, to be delivered within a certain time, which had elapsed before the commencement of the suit, the Defendant promised to deliver the said oil accordingly. Held well enough after verdict (a).

Assumpsit. The first count of the declaration stated, that whereas on, &c. at, &c. in consideration that the Plaintiff, at the special instance and request of the Defendant then and there sold to the Defendant a certain horse of the said Plaintiff, at and for a certain quantity of certain oil, to be therefore delivered by the said Defendant to the said Plaintiff within a certain time, which elapsed before the commencement of this suit and then and there delivered the said horse to the said Defendant, he the said Defendant undertook and then and there faithfully promised the said Plaintiff to deliver the said oil to the said Plaintiff accordingly; yet, the Defendant although often requested, hath not delivered the said oil or any part thereof to the said Plaintiff, but hath hitherto wholly neglected, &c.

The other counts were general, and non assumpsit was pleaded.

The cause was tried before Lord Eldon, Ch. J., at the sittings after last Hilary term, and a verdict was found for the Plaintiff.

In Easter term last, Cockell, Serjt., having obtained a rule calling upon the Plaintiff to shew cause why judgment should not be arrested for the uncertainty of the declaration,

[266] Shepherd and Bayley, Serjts. shewed cause. Whatever might have been the fate of this declaration on special demurrer, still it is well enough after verdict. Indeed if the objection of uncertainty prevail in this instance, it must prevail in almost every action of assumpsit. It is true, that in trespass more certainty is requisite as to the thing demanded. But both Lord Mansfield and Yates, J., in *Bertie v. Pickering et Ux.* 4 Burr. 2455, observed that the reason of the distinction is, that the Defendant in trespass may be able to justify the taking. General words are sufficient where the certainty lies within the Defendant's notice, Com. Dig. tit. Pleader, C. 26. Indeed in this case, if the words of the declaration had been "a certain quantity, to wit, so many gallons, of certain oil, to wit, of such a sort," the declaration would clearly have been good. And although the omitting to specify the quantity and species under a

(a) Vid. *Andrews v. Whitehead*, 13 East, 102-108. *Cook v. Cox*, 3 M. and S. 110. *Mayor of Reading v. Clarke*, 4 B. and A. 268.

to wit, might have been cause of special demurrer, yet after verdict, it must be presumed that the jury have ascertained those circumstances. Besides, the count is not particularly uncertain. For if the agreement had been that the Plaintiff should sell his horse to the Defendant to be paid for in money without mentioning any price, the law would have implied that the Defendant should pay as much money as the horse was worth. So here the agreement being that the Plaintiff should sell his horse to be paid for in oil, the law will imply that the Defendant ought to deliver such a quantity of oil as would amount to the value of the horse, though he be at liberty to make up the amount in any species of oil which he may think proper.

Cockell, Serjt., contra, observed, that the Plaintiff professed to declare on a special contract, and yet had not specified what the terms of that contract were; that admitting this general mode of declaring to be good in the case of a sale for money, yet that this was not a sale but an exchange; the commutation of goods for money being a sale, but the commutation of goods for goods being an exchange. 2 Bl. Com. 446.

LORD ELDON, Ch. J. At the trial it appeared to me that it would be very difficult to support this count. It is true that it makes a difference whether the objection be taken before or after verdict; but on the best consideration which I have been able to give the case, it strikes me that the count cannot be supported even after verdict. The passage cited from Blackstone's Commentaries amounts to no more than this, that exchange is not a sale, [267] and sale is not exchange. If the consideration of a contract be goods, though in one sense of the word this contract may be called an exchange, yet in another sense it may be called a sale, for it is not necessary to a sale that money should pass. The declaration in this case states, that the Plaintiff at the special instance and request of the Defendant, sold to the Defendant a certain horse of the Plaintiff, but it does not state what the value of the horse was, and I do not know that it is a term of such a contract arising by necessary legal implication, that the horse was to be sold for its value. The declaration proceeds, "at and for a certain quantity of certain oil to be therefore delivered by the said Defendant to the said Plaintiff within a certain time, which elapsed before the commencement of the suit." In the case of a sale for money, as the law implies that so much money shall be paid as the article is worth, no dispute can arise concerning the quality of what is to be received, the quality of money being always the same. I incline therefore to think it necessary to express value in some manner in such a contract as this, where something other than money, is to be given for a commodity. Here the value of the horse is not stated; the value of the oil is not stated nor is any thing stated with respect to the quantity or quality of the oil. It appears to me, that the terms of the declaration leave it so wholly uncertain what the special contract was, that we cannot tell what we shall intend it to have been. Enough does not appear upon the declaration to enable us to say what the contract meant to be alleged must be, as it would have appeared on the record if some other averments had been put on that record, or as it must have been proved before a jury. This may have been a special contract that any quantity of any oil of the value of the horse should be given for the horse; it may have been a special contract, that a certain specific quantity of certain specified oil, not so great or greater in value than the horse should be given for the horse: the real terms of the contract may be different from either of these, and the proper damages may vary infinitely. I doubt whether this, after verdict, can be considered as a contract defectively stated. When it is to be collected from the record what special contract was meant to be stated, the defect of the statement on the record, may be supplied by intending proof before a jury; but here the record does not state any special contract, so that I can be certain what I can intend as having been proved [268] before the jury. Upon the whole, it does not appear to me that the declaration states enough of any contract.

Accordingly The Court made the rule absolute for arresting the judgment. But on the following day intimated that they wished to consider further of their opinion.

LORD ELDON, Ch. J., on this day said—My brothers Heath, Rooke, and Chambre are all of opinion that the objections which have been taken to this declaration cannot prevail after verdict. I yield to their authority.

Rule discharged.

COWELL, Administrator of Cowell, v. EDWARDS. July 1st, 1800.

[See *Davies v. Humphreys*, 1840, 6 Mee. & W. 168; *Stirling v. Burdett*, [1911] 2 Ch. 423.]

It seems that one of several co-sureties in a bond may recover against any one of the others his aliquot proportion of the money paid by him under the bond, regard being had to the number of sureties; though the insolvency of the principal and of the other sureties be not proved (a)¹.

Indebitatus assumpsit for money paid.

John Cowell, the Plaintiff's intestate, having entered into a joint and several bond with seven other persons, two of whom were principals and the five others as well as himself sureties, was together with his co-sureties called upon by the obligees to pay the sum engaged for; the Defendant and two of the other sureties paid each a part of that sum, but the present Plaintiff's intestate paid the residue. Upon this the Plaintiff considering the Defendant and one of the two sureties who had already contributed as the only solvent sureties, called upon them to pay their proportion and now brought this action to recover from the Defendant such a sum of money, as when added to what had been already paid by him would make up one-third of the whole sum paid to the obligees, deducting only what had been contributed by the fourth surety not called upon at this time.

The cause was tried before Lord Eldon Ch. J. at the sittings after last Easter term, when the Plaintiff obtained a verdict for a sixth of the whole sum paid, not allowing for the sum paid by the fourth surety, with liberty to move the Court to enter a verdict for the whole demand.

Lens, Serjt., however on the part of the Defendant obtained a rule calling upon the Plaintiff to shew cause why this verdict should not be set aside altogether and a new trial be had. He took these objections; that this action could not be maintained at law by one co-surety against another; that if the action could be maintained for one-sixth of the whole sum engaged for, and [269] which under the circumstances of the present case, he insisted was all that could be recovered from the Defendant; yet, that the insolvency of the two principals and of the three other co-sureties should have been proved in order to entitle the Plaintiff to the present verdict.

Shepherd and Vaughan, Serjts., were proceeding on this day to shew cause, and cited *Deering v. Lord Winchelsea* (a)², when they were stopped by

The Court, who observed that it might now perhaps be found too late to hold that this action could not be maintained at law, though neither the insolvency of the principals or of any of the co-sureties were proved; but that at all events the Plaintiff could not be entitled to recover at law more than one-sixth of the whole sum paid.

And Lord Eldon, Ch. J., said, that he had conversed with Lord Kenyon upon the subject, who was also of opinion that no more than an aliquot part of the whole, regard being had to the number of co-sureties, could be recovered at law by the Defendants; though if the insolvency of all the other parties were made out, a larger proportion might be recovered in a Court of Equity.

In consequence of these intimations from the Court, and of an opinion thrown out by them that the matter must ultimately be carried into a Court of Equity, an offer was made by the Defendant and acceded to by the other side, to enter a nonsuit without costs.

Nota; Lord Eldon also added a doubt of his own, Whether a distinction might not be made between holding that an action at law is maintainable in the simple case where there are but two sureties, or where the insolvency of all the sureties but two is admitted, and the insolvency of the principal is admitted, and holding it to be maintainable in a complicated case like the present, such insolvency being neither admitted nor proved, and where the Defendant after a verdict against him at law may still remain liable to various suits in Equity with each of his other co-sureties,

(a)¹ And see *Cole v. Sarby*, 3 Esp. Rep. 169. *Besford v. Saunders*, 2 H. Blac. 116. *Elliot v. Davis*, post, 338. *Collins v. Prosser*, 1 B. and C. 682.

(a)² See the next case.

and where the event of the action cannot deliver him from being liable to a multiplicity of other suits founded upon his character as a co-surety.

[270] (The Reporters have been favoured with a Manuscript Note of the Case of *Deering v. Lord Winchelsea* referred to in the preceding argument.)

(IN THE EXCHEQUER.)

SIR EDWARD DEERING v. THE EARL OF WINCHELSEA, SIR JOHN ROUS,
AND THE ATTORNEY-GENERAL. Feb. 8th, 1787.

[See S. C. 1 Cox, 318; 29 E. R. 1184, with note to which add *Robinson v. Harkin*, [1896] 2 Ch. 426; *Reuben SS. Company v. London Assurance*, [1900] A. C. 11; *In re Denton's Estate*, [1903] 2 Ch. 678; [1904] 2 Ch. 178; *Mills v. United Counties Bank Limited*, [1912] 1 Ch. 242.]

If A., B., and C. become bound as sureties for D. in three separate bonds, and any one of them be compelled to pay the whole debt of the principal, the two others are compellable to contribute in proportion to the penalties of their respective bonds (a).

Lord Chief Baron Eyre (present Hotham and Perrin, Barons) delivered the opinion of the Court.

Thomas Deering, younger brother of the Plaintiff, was appointed in 1778 receiver of fines and forfeitures of the customs of the outports, and entered into three bonds, each in the penalty of 4000l. with condition for duly accounting; in one of which the Plaintiff joined as surety, in another Lord Winchelsea, and Sir John Rous in the third. Thomas Deering became insolvent and left the country: the balance due to the crown was 6602l. 10s. 8d. part of which was levied on his effects, and when the bill was filed there was due 3883l. 14s. 8½d. which was rather less than the penalty of each of the bonds. The bond in which the Plaintiff had joined was put in suit against him, and judgment obtained. He filed his bill demanding contribution against Lord Winchelsea and Sir John Rous, and praying an account of what was due to the crown and money levied on the Plaintiff (supposing execution to follow the judgment), and that Lord Winchelsea and Sir John Rous might contribute to discharge the debt of Thomas Deering as two of the sureties for that debt. The appointment, the three bonds, and the judgment against the Plaintiff, were in proof, and the balances were admitted by all parties.

The Lord Chief Baron after stating the case observed, that contribution was resisted on two grounds; first, that there was no foundation for the demand in the nature of the contract between the parties, the counsel for the Defendants considering the title to contribution as arising from contract expressed or implied; secondly, that the conduct of Sir Edward Deering had deprived him of the benefit of any equity which he might have otherwise had against the Defendants.

[271] The Lord Chief Baron considered the second objection first. The misconduct imputed to Sir E. Deering was, that he had encouraged his brother in irregularities, and particularly in gaming, which had ruined him, and had done this knowing his fortune to be such that he could not support himself in his extravagances and faithfully account to the crown; that Sir E. Deering was privy to his brother's breaking through the orders given him to deposit the money he received in a chest under the key of the comptroller. His Lordship observed that this might be true, and certainly put Sir E. Deering in a point of view which made his demand indecorous; but it had not been made out to the satisfaction of the Court that this constituted a defence. Mr. Maddocks had stated that the author of the loss should not have contribution; but stated neither reason nor authority to support the principle he urged. If these were circumstances which could work a disability in the Plaintiff to support his demand, it must be on the maxim, "that a man must come into a court of Equity

(a) Vide *Elliot v. Davis*, post, 338. *M'Ivor v. Richardson*, 1 M. and S. 561. *Collins v. Prosser*, 1 B. and C. 682.

with clean hands;" but general depravity is not sufficient. It must be pointed to the act upon which the loss arises, and must be in a legal sense the cause of the loss. In a moral sense Sir E. Deering might be the author of the loss; but in a legal sense Thomas Deering was the author; and if the evil example of Sir E. Deering led him to it, yet this was not what a court of justice could take cognizance of. There might indeed be a case in which a person might be in a legal sense the author of the loss, and therefore not entitled to contribution; as if a person on board a ship was to bore a hole in the ship, and in consequence of the distress occasioned by this act it became necessary to throw overboard his goods to save the ship. This head of defence therefore fails. The real point is, Whether there shall be contribution by sureties in distinct obligations?

It is admitted, that if they had all joined in one bond for 12,000l. there must have been contribution (a)¹. But this is said to be on the foundation of contract implied from their being parties in the same engagement, and here the parties might be strangers to each other. And it was stated that no man could be called upon to contribute who is not a surety on the [272] face of the bond to which he is called to contribute. The point remains to be proved that contribution is founded on contract. If a view is taken of the cases, it will appear that the bottom of contribution is a fixed principle of justice, and is not founded in contract (a)². Contract indeed may qualify it as in *Swain v. Wall*, 1 Ch. Rep. 149, where three were bound for H. in an obligation, and agreed if H. failed to bear their respective parts. Two proved insolvent, the third paid the money, and one of the others becoming solvent, he was compelled to pay a third only (b).

There are in the Register, fo. 176 b. two writs of contribution, one, "De contributione facienda inter cohæredes," the other, "De feoffamento;" these are founded on the statute of Marlebridge, 52 H. 3, c. 9, which enacts, "that if any inheritance whereof but one suit is due descends unto many heirs as unto parceners, whoso hath the eldest part of the inheritance, shall do that one suit for himself and fellows, and the other coheirs shall be contributaries according to their portion for doing such suit. And if many feoffees be seised of an inheritance whereof but one suit is due, the Lord of the fee shall have but that one suit and shall not exact of the said inheritance but that one suit as hath been used to be done before. And if these feoffees have no warrant or means which ought to acquit them then all the feoffees according to their portion shall be contributaries for doing the suit for them." The object of the statute was to protect the inheritance from more than one suit. The provision for contribution was an application of a principle of justice. In Fitzh. N. B. 162 B. there is a writ of contribution where there are tenants in common of a mill and one of them will not repair the mill, the other shall have the writ to compel him to contribute to the repair. In the same page Fitzherbert [273] takes notice of the writs of contribution between co-heirs and co-feoffees; and supposes that between feoffees the writ cannot

(a)¹ See *Layer v. Nelson*, 1 Vern. 456, where it was held, that where one obligor that is surety is sued alone, by custom of London he shall make his co-sureties contribute. So where surety pays a debt and has no counterbond, by custom of London he shall maintain action against the principal.

(a)² On inquest of office a sci. fa. issued to M. and E. his wife ter-tenants, who alleged that the father of E. was seised of the lands and other lands which descended to E. and A. now wife of B., between whom purparty was made and the land in question allotted to the purparty of E., and so she held the land in purparty for other lands allotted for the purparty of A. and prayed aid of A. which was granted, and A. came not, but M. and E. came; and on the matter judgment for the king and execution awarded, and that M. and E. should have over pro ratâ, and as to the issues M. and E. his wife prayed, that as her parcener had taken the profits of other lands, she should be charged with issues pro ratâ, and accordingly judgment that M. and E. should recover pro ratâ, 40 Ass. 24. See also *Dame Gresham's case*, Moor, 429, Cro. Eliz. 506, S. C. where by way of plea in abatement to a recognizance in chancery against ter-tenants, it was pleaded that the cognizor was seised of other lands tempore recognitionis factæ.

(b) But see *Peter v. Rich*, 1 Ch. Rep. 35, where two out of three sureties were compelled to pay in moieties, the third being insolvent.

be had without the agreement of all (a)¹, and the writ in the register (b)¹ countenances the idea; yet this seems contrary to the express provision in the statute. In *Sir Wm. Harbel's case*, 3 Co. 11 b. many cases are put of contribution at common law. The reason is, they are all in æquali jure, and as the law requires equality they shall equally bear the burden. This is considered as founded in equity; contract is not mentioned. The principle operates more clearly in a court of equity than at law. At law the party is driven to an audita querela or scire facias to defeat the execution and compel execution to be taken against all. There are more cases of contribution in equity than at law. In *Equity Cases Abridged* there is a string under the title "Contribution and Average." Another case at law occurred in looking into Hargrave's Tracts in a treatise ascribed to Lord Hale on the prisage of wines. The King's title is to one ton before the mast and one ton behind the mast. If there are different owners they may be compelled in the Exchequer Chamber to contribute (c). Contribution was considered as following the accident on a general principle of equity in the Court in which we are now sitting.

In the particular case of sureties, it is admitted that one surety may compel another to contribute to the debt for which they are jointly bound. On what principle? Can it be because they are jointly bound? What if they are jointly and severally bound? What if severally bound by the same or different instruments? In every one of those cases sureties have a common interest and a common burthen. They are bound as effectually quoad contribution, as if bound in one instrument, with this difference only that the sums in each instrument ascertain the proportions, whereas if they were all joined in the same engagement they must all contribute equally (d).

[274] In this case *Sir E. Deering*, Lord *Winchelsea*, and *Sir J. Rous* were all bound that *Thomas Deering* should account (a)². At law all the bonds are forfeited. The balance due might have been so large as to take in all the bonds; but here the balance happens to be less than the penalty of one. Which ought to pay? He on whom the crown calls must pay to the crown: but as between themselves they are in æquali jure, and shall contribute. This principle is carried a great way in the case of three or more sureties in a joint obligation; one being insolvent, the third is obliged to contribute a full moiety. This circumstance and the possibility of being made liable to the whole has probably produced several bonds. But this does not touch the principle of contribution where all are bound as sureties for the same person.

There is an instance in the civil law of average, where part of a cargo is thrown overboard to save the vessel, *Show. Parl. Cas.* 19 Moor, 297. The maxim applied is qui sentit commodum sentire debet et onus. In the case of average there is no contract express or implied, nor any privity in an ordinary sense. This shews that contribution is founded on equality, and established by the law of all nations.

There is no difficulty in ascertaining the proportions in which the parties ought to contribute. The penalties of the bonds ascertain the proportions (b)².

The decree pronounced was, that it being admitted by the Attorney-General and all parties that the balance due was 3883l. 14s. 8½d., the Plaintiff *Sir E. Deering* and

(a)¹ Fitzherbert seems only to say that if one of the feoffees does the suit voluntarily, he shall not have contribution; and the statute seems not to have been construed as having given the writ, but a remedy to prevent one being distrained for the whole. See 3 Co. 14 b. as to lands extended.

(b)¹ Fo. 177, et prædictus A. sectam illam pro se et prædictis, B, C, D., et E. ex eorum assensu facit, &c.

(c) There being a charge on a manor for the repairs of bridges, and the whole levied on the lord, the Court of Exchequer on English bill for contribution, held that all those who held any part of the demesnes by purchase from the crown were liable to contribute. *Rich v. Barker*, Hard. 131. See also *Case de Loddon Bridge*, *Sir W. Jones*, 273, and the cases collected from *Vin. Abr. tit. Contribution and Average*.

(d) *Hargrave's Law Tracts*, p. 120.

(a)² See the clause in 33 H. 8, c. 39, s. 80, as to equal charging of lands liable to the King's debts. *Sir Thomas Cecil's case*, 7 Co. 20 b. *Primrose v. Bromley*, 1 Atk. 89, and *Sir Dennis O'Carrel's case*, *Ambler*, 61.

(b)² In the case of *Alen de Charleter*, Trin. 12 Ed. 2, Rot. 112, the barons of the Exchequer were commanded by writ to apportion among parceners a certain debt due from their ancestor to the king. *Madox Hist. Exchequer*, 667.

the Defendants the Earl of Winchelsea and Sir J. Rous ought to contribute in equal shares to the payment thereof, and that they do accordingly pay each 1294l. 11s. 6½d., and on payment the Attorney-General to acknowledge satisfaction on the record of the judgment against the Plaintiff, and the two bonds entered into by the Earl of Winchelsea and Sir J. Rous to be delivered up.

This being a case which the Court considered as not favourable to Sir E. Deering and a case of difficulty, they did not think fit to give him costs.

[275] PERKINS, Administrator, v. PETIT. July 2d, 1800.

A scire facias against bail in error may be amended by the record of the recognizance (a).

A rule nisi was obtained on a former day for leave to amend a scire facias against bail in error by the record of the recognizance; the amendment proposed was the insertion of the costs of the verdict.

Shepherd, Serjt. shewed cause and insisted that the Court would not allow this amendment (b), the effect of which might be to falsify the plea of nul tiel record though true when pleaded. *Buckson v. Hoskins*, Salk. 52. 2 Lord Raym. 1060, S. C. *Vavator v. Baile*, Salk. 52. *Hillier v. Frost*, 1 Str. 401; he admitted that two cases are referred to in 2 Lord Raym. 1060, where it was allowed, but observed that there it was before plea pleaded.

Cockell, Serjt., in support of the rule, relied on *Sweetland v. Beezely*, Barnes, 4, where the Court permitted a scire facias against bail to be amended after issue joined on nul tiel record. He observed, that though it had not been very usual to allow such an amendment as against bail to the original action, yet the reason on which it had been refused probably was that they might not thereby be prevented from surrendering the principal, whereas bail in error cannot surrender the principal, but must pay the debt.

The Court took till this day to consider of the case, when Lord Eldon, Ch. J., said, —We have no doubt of the power of the Court to amend a scire facias against bail, but as it does not appear to have been the modern practice to permit amendments in cases of this kind, we think the bail in this case ought not to be taken by surprise. At the same time we desire that our refusal to amend may not be drawn into precedent, since after this notice we shall not think ourselves bound to abstain from exercising the power of granting these amendments in future.

Per curiam. Rule discharged.

On the first day of this term Mr. Baron Chambre, who had during the vacation been appointed to succeed Mr. Justice Buller in this Court, took his seat and the oaths.

[276] Robert Graham of the Inner Temple, Esq. Attorney General to his Royal Highness the Prince of Wales, succeeded him in the Court of Exchequer and was knighted.

Arthur Onslow of the Middle Temple, Esq. was called to the honourable degree of Serjeant at law in the course of this term. The motto on his rings and on those of Mr. Baron Graham who was called to this degree at the same time, was, "Et placitum læti compositæ foedus."

End of Trinity Term.

[277] CASES ARGUED AND DETERMINED IN THE COURT OF COMMON PLEAS IN MICHAELMAS TERM, IN THE FORTY-FIRST YEAR OF THE REIGN OF GEORGE III.

WHITFIELD v. SAVAGE. Nov. 7th, 1800.

A. with a view to accommodate B. lent him a bill drawn by himself upon and accepted by C. who had effects of his in his hands; B. indorsed it to D. who indorsed it

(a) Vide *Braswell v. Jeco*, 9 East, 316. *Fulwood v. Annis*, 3 B. & P. 321. *Stevenson v. Grant*, 2 N. R. 103, 107. *Mann v. Calow*, 1 Taunt. 221.

(b) Vid. Tidd's Pr. K. B. 831, ed. 1, 1063, ed. 2, and 2 Sellon's Pr. C. B. 64, ed. 1798.

over; the day before the bill became due B. paid the amount to A. who on hearing that C. had failed gave B. a check for the amount of the bill, and sent him with it to D. to enable him to pay the bill when due: four days after that time A. learning that payment had not been demanded, desired D. not to pay the bill, as no notice of non-payment had been given by the holder, and offered to indemnify him; notwithstanding this D. afterwards paid the bill; held, 1st, that D. paid the bill in his own wrong; 2dly, that A. was entitled to recover back the money paid into the hands of D. by B., in an action for money had and received (a).

This was an action for money had and received, which came on to be tried before Lord Eldon, Ch. J., at the Guildhall sittings after last Trinity term.

The circumstances of the case were as follow: a person of the name of Dibdin being in want of 50l. applied to the Plaintiff for the loan of that sum, who gave him a bill for 55l. 6s. drawn by himself upon one Thornton, and accepted by the latter. Thornton had effects of the Plaintiff in his hands to the amount of the bill. Dibdin indorsed the bill to the Defendant from whom he received the full amount, and the Defendant indorsed it over to another person. The day before the bill became due Dibdin took 50l. in part payment of his debt to the Plaintiff, but soon after he had paid it into his hands, the Plaintiff in the presence of Dibdin being informed that Thornton the acceptor was become insolvent, [278] said, "that it would be of no use for him to keep Dibdin's money, as he should not like the bill to be returned upon him;" he therefore gave to Dibdin a check on his banker for 50l. (being the sum which he had just before received of him) desiring him to take it to the Defendant: Dibdin accordingly gave the check to the Defendant, together with 5l. 6s. of his own, to enable him to provide for the bill, telling him that Thornton had become insolvent, and was gone off. Four days after the bill had become due, the Plaintiff having learnt from the Defendant that payment of the bill had not been demanded, desired him not to pay it, as no notice had been given by the holder of its non-payment, and at the same time promised to indemnify the Defendant against the consequences of a refusal. Soon after this the bill was brought to the Defendant who paid it notwithstanding the caution he had received from the Plaintiff; whereupon the latter brought this action to recover the 50l. paid to the Defendant to enable him to provide for the bill. The jury found a verdict for the whole amount.

Shepherd, Serjt., now moved for a rule to shew cause why this verdict should not be set aside and a nonsuit be entered; contending, 1st, that in this case the Plaintiff had waived his right to notice from the holder of non-payment by the acceptor; inasmuch as he had deposited the amount of the bill in the hands of the indorser for the purpose of enabling him to discharge it, in contemplation of the inability of the acceptor so to do; that it was clear that the drawer might waive his right to notice, by promising the holder to pay the bill subsequent to the time of its becoming due; and for the same reason he might waive it by an antecedent promise, for that if the drawer do any thing from which the holder may infer that he does not mean to require notice, the notice is dispensed with; that it is not necessary that the holder should give notice of non-payment by the acceptor, for the acceptor himself may do it; that a notice before the bill becomes due, that it will not be paid when due, is tantamount to a notice after the bill has become due, that it was not paid when due; and that the Plaintiff in this case before the bill became due was so fully satisfied that it would not be paid when due, that he deposited the amount with the indorser, and thereby evinced that he did not require notice; that the indorser thereby became a trustee for the holder, and would not therefore have been justified in returning the money, for that when goods or money are deposited by A. with B. for the benefit of C. [279] upon a precedent consideration, the deposit is not revocable, though in cases where the deposit is made without a precedent consideration it is; *Clark's case*, 2 Leon. 30, 31. Dyer, 49, and *Alderson v. Temple*, 4 Bur. 2239. Per Lord Mansfield; 2dly, That this action could not be maintained by the present Plaintiff who had advanced nothing, the money paid into the hands of the Defendant being in fact the money of Dibdin; for the check for 50l. was nothing more than a return of the money previously paid by Dibdin to the Plaintiff, and was paid to the Defendant by Dibdin's hand.

(a) Vide *Esdaile v. Sowerby*, 11 East, 114. *Clegg v. Cotton*, 3 B. and P. 239.

LORD ELDON, Ch. J. In this case the acceptor having had effects of the drawer in his hands, it must be taken as clear that notice of non-payment was *prima facie* necessary. Thornton the acceptor was first liable, and in case of the Defendant being called upon as indorser he had a right to call upon Dibdin the prior indorser and upon the Plaintiff as drawer. Had Dibdin been really an indorser only, he would have had the same right to call upon the Plaintiff, but as the bill was given to him merely for his accommodation he had no such claim. Notwithstanding the insolvency of the acceptor, the law required that if the bill were not paid when due, notice of non-payment should be given. On the day before the bill became due the Plaintiff told Dibdin that from the nature of the acceptor's circumstances there was reason to apprehend the bill might be returned upon him, and in order to prevent that from taking place desired him to carry the check for 50l. to the Defendant. On that transaction, without more, it appeared to me impossible for the Defendant to contend that because the Plaintiff put money into his hands a priori to pay the bill in case a due demand thereof should be made; that he was therefore authorized to pay it whether a due demand should be made or not: admitting however that the act of the Plaintiff in sending the money before the bill became due amounted to an authority to pay whenever a demand should be made, provided nothing intervened, yet as the Plaintiff before any demand had been made, and after the holder had been guilty of laches, expressly cautioned the Defendant not to apply the money in payment of the bill, it seems to me that the Defendant paid it in his own wrong. The object of the Plaintiff in putting the money into the Defendant's hands was to protect him in case the latter duly paid the bill, and he did this under an impression that both the Defendant and himself were liable; but circum-^[280]stances having decided that neither were liable, he had a right to say that the money should not be applied in payment of the bill, and that it remained in the Defendant's hands for his own use. It has been argued from the case in *Burrow*, that if money be paid into the hands of A. for the use of B. on a precedent consideration, that payment cannot be countermanded; and I agree to the truth of this proposition, provided such payment constitute A. a holder for the use of B. at all events. But in a case like this, where money is paid by the drawer into the hands of an indorser, for the indemnity both of the indorsee and drawer, the question is, Whether it be not paid for the use of the holder so long as he shall have a right to demand it, and when he has no longer any right to demand it, that is, when the holder has been guilty of laches, then for the use of the drawer? In the present instance, the Plaintiff not only cautioned the Defendant against paying the bill because it was overdue without notice, but offered to indemnify the Defendant against the consequence of contesting the question with the holder. Could then the holder have recovered either against the Plaintiff or Defendant? The acceptor having had effects of the drawer in his hands, and the insolvency of the former not being sufficient to dispense with the necessity of notice, it is clear that he could not. With respect to the second objection, that this action for money had and received ought to have been brought by Dibdin instead of the present Plaintiff, it appears to me that the action is well brought, for these reasons: The night before the bill became due the Plaintiff sent the money in dispute to the Defendant; it was the Plaintiff therefore that advanced it. It is true indeed, that Dibdin being the person liable in conscience before either the Plaintiff or Defendant, had previously put 50l. into the Plaintiff's hands; but as the money in dispute was actually sent by the Plaintiff to the Defendant, the former had a right to call upon the latter to restore it to him. As between the Plaintiff and Defendant the money may be considered as advanced by the Plaintiff: and in what manner the Plaintiff and Dibdin might settle between themselves does not concern this Defendant. I should think, as having actually advanced it, he had a right to recover it, even if after the recovery he held it as a trustee for Dibdin. In contemplation of law the Plaintiff has lost the value of his effects in the hands of the acceptor; and it is on that principle that notice of non-payment is required. In contemplation of law he must ultimately have been the loser by the failure of the acceptor. He therefore ^[281]deposited the money with the Defendant to answer the bill if duly demanded. But when the holder was no longer entitled to enforce payment of the bill, the money so deposited must be considered as remaining in the Defendant's hands for the use of the Plaintiff, and the Defendant having taken upon himself to dispose of that money in payment of the bill, after notice to abstain from

so doing, and after an offer of indemnity, is in law liable to answer to the Plaintiff for the amount.

Heath and Rooke, Js., (absente Chambre, J.) concurring ;
Shepherd took nothing by his motion.

WILSON QUI TAM v. GILBERT, Clerk. Nov. 10th, 1800.

In an action for non-residence the parish was styled in the declaration Saint Ethelburg; evidence that the real name was Saint Ethelburga; held a fatal variance (a)¹.

This was an action for non-residence. In the declaration the parish was described as Saint Ethelburg. At the trial evidence was given on the part of the Defendant to shew that the real name was Saint Ethelburga. Upon this, Chambre, J., before whom the cause was tried at the Guildhall sittings after last Trinity term, nonsuited the Plaintiff.

Cockell, Serjt., now moved to set that nonsuit aside and have a new trial, contending that the names of Saint Ethelburg and Saint Ethelburga were the same; and that indeed the name in the declaration was sufficiently well stated, inasmuch as in Maitland's Hist. of London (b) the parish was styled Saint Ethelburg, and in Ecton's Thesaurus, p. 333, Saint Ethelburge, which is idem sonans with Ethelburg.

The Court observed, that Saint Ethelburg and Saint Ethelburga might be distinct Saints, the one male and the other female; but that at any rate, the non-suit, being right according to the evidence given at the trial, ought not now to be disturbed; particularly in this kind of action.

Cockell took nothing by his motion.

[282] DAVIES AND OTHERS, Assignees of Shivers, a Bankrupt, v.
CHIPPENDALE. Nov. 11th, 1800.

If a Defendant be holden to bail under a Judge's order, a material fact being concealed from the Judge, which would probably have induced him to refuse the order, the Court will on application discharge the Defendant, even though there was a sufficient affidavit of debt, independent of the order. But they will not discharge him from a detainer lodged against him by a third person while in custody under the Judge's order (a)².

The Defendant in this case having been holden to bail under a Judge's order for 5000l. and upwards, at the suit of Shivers the bankrupt; on the 26th of September last, a detainer was lodged against him on the 8th of November following for 1300l. at the suit of the Assignees.

On a former day in this term a rule nisi was obtained for discharging the Defendant from the original arrest upon an affidavit, stating that a settlement of accounts had taken place between the Bankrupt and the Defendant, and that the former had given to the latter a receipt in full of all demands: and because this circumstance was

(a)¹ And see *Bowditch v. Mawley*, 1 Campb. 195. *Willis v. Barrett*, 2 Stark. Ni. Pri. 29. *Pitt v. Green*, 9 East, 188. *Hoare v. Mill*, 4 M. and S. 470. *Goodtitle d. Bremridge v. Walter*, 4 Taunt. 671.

(b) Maitland says that it was so called from being dedicated to Ethelburge, vol. ii. p. 1098. In Stow's Survey of London, by Strype, vol. i. book 2, c. 6, p. 99, the church is called the parish church of Saint Ethelburge, virgin: but a table of benefactors to the church and poor of the parish of Saint Ethelburga, is there inserted. In Stow's Survey by Seymour, vol. i. p. 361, book 2, c. 5, the parish is called Saint Ethelburga, and the church the parish church of Saint Ethelburga. But Seymour says, that Stow himself calls the church the church of Saint Ethelburgh, virgin; which, says Seymour, seems to be a mistake, she being a widow; but he does not notice the variance in the name. Noorthouch, in his Hist. of London, p. 557, styles the church the church of Saint Ethelburg, so called from its dedication to Ethelburga. In Bacon's Liber Regis, p. 567, the name is Saint Ethelburga.

(a)² S. C. post, 367.

not disclosed to the learned Judge at the time when the order was applied for, the Court made the rule absolute for discharging the Defendant, though it was contended by Bayley, Serjt., that the original affidavit of debt was sufficient, independent of the order, and that no affidavit to contradict it could be admitted, for which the case of *Smith v. Fraser*, 1 Bl. 192, was cited.

After this, Best, Serjt., obtained another rule nisi for discharging the Defendant from the detainer at the suit of the Assignees; and on this day contended, that as the order upon which the original arrest was made had been discharged by the Court, the Defendant never was legally in custody under that arrest, and that consequently the detainer which was lodged against the Defendant while in such illegal custody could not be supported. He cited a case in 1 Sellon's Pract. p. 586, in the Appendix; ed. 1792, where a Defendant having been arrested upon process which had expired and detained by a continuance of the same process, was discharged by the Court because the original arrest was illegal.

The Court were of opinion that the authority cited was not applicable to the case of a Plaintiff lodging a detainer against a Defendant in custody at the suit of a stranger; that whatever might be the case with respect to the Plaintiff who made the original arrest, it would occasion extreme inconvenience if a third person were to be put under the necessity of examining into the validity of the custody of the Defendant before he lodged his detainer; that the assignees of a bankrupt were to this purpose to be considered as strangers to the original arrest; and that independent of these considerations the original ar-[283]-rest was not void since it was made under the order of a Judge, which order was good at the time of the arrest, though the Court for particular reasons had since thought proper to discharge it.

Rule discharged.

SINGLETON AND OTHERS, Assignees of Howell, v. BUTLER. Nov. 11th, 1800.

The acceptor of a bill of exchange two days before the expiration of the time for which the bill was originally drawn, called upon the indorser and informed him privately that he was insolvent; the indorser insisted on being paid the amount of the bill, offering at the same time to become security to the creditors for so much as the estate should produce, whereupon the acceptor paid it, and four days after became bankrupt; it also appeared that the bill had been altered so as to make it fall due before this transaction, but without the Defendant's knowledge. Held that this was sufficient proof of fraudulent preference to defeat the payment of the bill (a).

This was an action for money had and received.

At the trial before Lord Eldon, Ch. J., at the Guildhall sittings after last Trinity term the following case was proved: The Defendant having drawn a bill of exchange on Howell the bankrupt, dated the 1st of March 1796, payable to his own order three months after date, it was accepted by Howell, and indorsed by the Defendant to his bankers. On the 2d of June, which was two days before the bill would become due as it was originally drawn, Howell came to the Defendant and told him that in consequence of several houses having failed he had lost large sums of money, and his bills had been returned upon him; and he informed the Defendant as his friend (but informed no other person thereof) that his affairs were bad, and would not pay above 10s. in the pound. Upon this the Defendant said that Howell must pay his bill, and that if he would, he the Defendant would be security to Howell's creditors for so much as the estate should produce if they agreed to a composition. Howell accordingly paid the bill, and on the 5th of June became bankrupt. It also appeared that the date of the bill had been altered from the 1st to the 21st of March, and that the time of payment had been altered from three months after date to two months after date. There was no evidence however to shew by whom this alteration was made, or that the Defendant had any knowledge of it, but the circumstances of the case rather afforded a presumption that he did not. His Lordship observed to the jury that this was a bargain for a fraudulent preference, the consideration of which was of no value;

(a) S. C. 3 Esp. Rep. 215. And see *Hartshorn v. Slodden*, post, 583. *Reed v. Ayton*, Holt, Ni. Pri. 503. *Graff v. Greffulke*, 1 Campb. 89.

that the circumstance of the bankrupt having called upon the Defendant two days before the bill became due, and after disclosing his situation having acceded to the Defendant's offer, afforded strong ground for them to infer fraud, and that the inference of fraud as far as related to the bankrupt was rather strengthened by the alteration which had taken place in the date and [284] time of payment of the bill. The jury found a verdict for the Plaintiffs for the amount of the money received by the Defendant on the bill.

Shepherd, Serjt., now moved for a rule calling on the Plaintiffs to shew cause why there should not be a new trial, contending that the preference given to the Defendant was not voluntary, inasmuch as the Defendant had insisted on having the bill paid, and that it was not necessary there should be any threats of legal process to rebut the presumption of fraudulent preference. He cited *Smith v. Payne*, 6 T. R. 152, where a security given to a creditor by a debtor at the mere instance of the former, but without any threats of an arrest, was held valid, though the debtor himself informed the creditor of the bad situation of his affairs.

LORD ELDON, Ch. J., having stated the case to the Court with his directions thereupon, declared himself of the same opinion which he gave at the trial, and distinguished this from the case of *Smith v. Payne*, because there the creditor came to the debtor, and the security was taken for a debt actually due.

Heath, Rooke, and Chambre, Js., concurring with His Lordship, Shepherd took nothing by his motion.

MORRIS v. LANGDALE. Nov. 11th, 1800.

[Referred to, *Foulger v. Newcomb*, 1867, L. R. 2 Ex. 330.]

In a declaration for slander the Plaintiff stated that he was a jobber or dealer in the funds, and as such had been accustomed lawfully to contract; that the Defendant said of him, as such jobber or dealer, "He is a lame duck;" meaning that he had not fulfilled his contracts in respect of the said stocks or funds; in consequence of which divers persons refused to fulfil their contracts with him (specifying the contracts), and he was prevented from fulfilling his contracts with other persons. Held, that it did not sufficiently appear either that the words were spoken of lawful contracts, or that the Plaintiff was a lawful jobber or dealer in the funds; and that the declaration was therefore bad. Qu. Whether it can be stated as a special damage that divers persons refused to fulfil their contracts with the Plaintiff, since he might recover a compensation by action, if the contracts were lawful.

Action on the case for defamation. The declaration stated, "that whereas at the time of speaking and publishing the several false, scandalous, and malicious words hereinafter mentioned, the Plaintiff was and for a long time to wit &c. before then had been a jobber or dealer in the public funds or securities of this kingdom commonly called the stocks, to a great amount or value; and the Plaintiff had been for all that time as such jobber or dealer in the said funds or stocks as aforesaid accustomed lawfully to contract, and had from time to time lawfully contracted with divers persons for the purchase and sale of divers shares and interests in the said stocks or funds, to be delivered and transferred as well immediately as at future days from the times of making such contracts, by means of which said trafficking [285] and exchanging of his property in the said funds or stocks and other the ways and means aforesaid he the said Plaintiff had acquired, and was daily from time to time acquiring great profits and emoluments to the comfortable support of himself and his family, and to the great increase of his riches at &c. And whereas the said Plaintiff had at all times conducted himself with great punctuality and fidelity in fulfilling his contracts relating to the said public funds or stocks, and until the speaking and publishing of the said false, scandalous and malicious words, hereinafter mentioned, never had been insolvent or was suspected of insolvency, or of not fulfilling or of not being able to fulfil his contracts and engagements as such jobber or dealer in the said stocks or funds or otherwise, to wit at &c. Nevertheless the said Defendant well knowing the premises but falsely and maliciously devising, contriving, and intending to injure the said Plaintiff in his good name, credit, and reputation, and also as such jobber or dealer in the said stocks or funds as aforesaid, and to bring him the said Plaintiff into great

scandal, disrepute, and mistrust amongst all his neighbours and other the subjects of our said Sovereign Lord the King, to whom he was known on, &c. at &c. in a certain discourse which the said Plaintiff then there had at a certain place there called the Stock Exchange, the same being a place where brokers and jobbers in the said stocks or funds usually meet and transact their business, with one Benjamin Mason of and concerning the said John, as such jobber or dealer in the said stocks or funds as aforesaid, falsely and maliciously said, spoke, and published to the said Benjamin Mason in his presence, and hearing of and concerning the said Plaintiff as such jobber or dealer in the said stocks or funds as aforesaid, these false, scandalous, and malicious words following (that is to say) "He" meaning the Plaintiff, "is a lame duck" (meaning that the said Plaintiff had not fulfilled his contracts in respect of the said stocks or funds).

There was another count which only varied from the above, by stating that the words were spoken in a conversation with divers other subjects of this realm; and that the words were "Morris is a lame duck" (a).

The declaration by way of special damage then averred that certain persons (naming them) had refused to fulfil their contracts with the Plaintiff (specifying the contracts) in consequence of the words spoken. "By reason whereof the Plaintiff had not only lost great gains which he would otherwise have acquired by the fulfilment of the said contracts, but had also been greatly hindered from fulfilling his contracts made with divers other persons in respect of the said stocks or funds, and had been greatly embarrassed in his said employment, and had been for a long time to wit, &c. prevented from following the same, by being in consequence of the said words publicly reported, announced, posted, and considered at the said Stock Exchange and elsewhere as a person unable to perform his contracts in regard to the said stocks or funds, so that very many persons to wit (naming them) and others not only refused to fulfil their contracts in regard to the said stocks or funds before then made with the Plaintiff, but also to have any farther dealings in the said stocks or funds with him. By reason whereof the Plaintiff had lost great sums of money, &c. and had been put to great expense, &c. and was much injured in his credit and employment," &c.

To these counts the Defendant pleaded *actionem non*, "because the said Plaintiff at the said several times of speaking and publishing the several supposed words in these counts mentioned had not fulfilled his contracts in respect of the said stocks or funds. And this, &c. Wherefore," &c.

The Plaintiff demurred specially to the above plea, "for that the said Defendant hath not shewn or disclosed any particular contract or contracts of the said Plaintiff in respect of the said stocks or funds which the said Plaintiff had not fulfilled as aforesaid, nor hath the said Defendant shewn or disclosed what such contracts or contract were or was or with whom made or in what manner the same were or was broken by the said Plaintiff, and also for that the said Defendant hath not in or by his said plea set forth any day, time and place when or where the said several facts alleged by him in that plea against the said Plaintiff or any of them happened, and also for that the said Defendant hath set forth the charges and allegations in that plea contained in so general and uncertain a manner that the said Plaintiff cannot know what particular facts the said Defendant will attempt to establish by evidence on the trial of this cause, in support of the matters alleged in the same plea; and therefore the said Plaintiff cannot be prepared to disprove or answer the same or safely take issue thereon, and for that the said plea is in various other respects uncertain, defective, insufficient and informal."

Shepherd, Serjt., in support of the demurrer, relied on *J'Anson v. Stuart*, 1 T. Rep. 748, and *Newman v. Bayley* cited there-[287]-in and also in 1 Williams's Saunders, 241, in notis, and observed that the rule laid down in *Underwood v. Parks*, 2 Str. 1200, that the truth of the words must be pleaded was expressly said to be founded in this principle, that "the Plaintiff might come prepared to defend himself;" which principle would be utterly defeated if the truth of the words were allowed to be given in evidence under a plea so general as the present.

Clayton, Serjt., contra, observed, that if the Court should determine that it was necessary for the Defendant to allege all the circumstances of time and place, and the particular persons with whom the contracts broken by the Plaintiffs were made, it

(a) The third and sixth counts only are here stated, as none of the others came in question upon this demurrer.

would introduce extreme prolixity on the pleadings ; but he insisted that at all events the declaration was bad, for that the trade concerning which the Plaintiff complained that the words were spoken, had been declared illegal by the 7 Geo. 2, c. 8 ; the title of which act is, "An Act to prevent the infamous practice of stock-jobbing," and the preamble of which speaks of the same trade as "the wicked pernicious and destructive practice of stock-jobbing ;" that although it might be true that a person as a jobber in stocks might make certain contracts which were not illegal, yet as the act had treated stock-jobbing eo nomine as illegal, the Plaintiff was bound to shew that the words in question were spoken of such contracts as were legal and might have been enforced ; he also contended that the innuendo in the declaration which stated the words to mean "that the Plaintiff had not fulfilled his contracts in respect of the said stocks or funds," was much too vague and general, and not warranted by the preceding colloquium, it being the province of an innuendo to explain only and not to enlarge. *Rex v. Greepe*, 2 Salk. 513.

Shepherd in reply argued, that it was clear from the very act of parliament which had been cited, that all jobbing in the funds was not illegal, since certain sorts of stock-jobbing were recognized by the Act itself, and that it could not therefore be necessary for the Plaintiff to aver that the trade which he carried on was legal, for that the Court would not presume that it was otherwise ; that if it were necessary to make such averment in the present case the Plaintiff had done it by stating that he as such jobber had been accustomed lawfully to contract ; that the innuendo which explained the words must also necessarily relate to lawful contracts, since the very word "contract" imports legality ; that the words were alleged to be spoken of the Plaintiff as such jobber or dealer, and it had before been averred, that [288] as such jobber or dealer he was accustomed to make lawful contracts ; and that with respect to the generality of the words "his contracts" as the object of an innuendo is only to explain the meaning of ambiguous words, and not to introduce any specific allegation, if the meaning of the words to be explained be general, the innuendo must be general also.

Cur. adv. vult.

On this day the opinion of the Court was delivered by

LORD ELDON, Ch. J., who, after stating the pleadings, proceeded as follows :—In support of the demurrer to the plea it has been very strongly argued, that in consequence of its generality the Plaintiff must proceed to trial at the hazard of being able to produce evidence applicable to every contract which he ever made. The objection was then taken, that the Plaintiff had not stated a sufficient cause of action. We are all of opinion, that the innuendo "meaning that the said Plaintiff was incapable of fulfilling his contracts in respect of the said stocks or funds" does not necessarily import that he was incapable of fulfilling his legal contracts, notwithstanding the argument that the word "contract" ex vi termini imports legality. The declaration states, that the Plaintiff as a jobber or dealer in the public funds or stocks, had been accustomed lawfully to contract, but it is not averred what kind of jobber or dealer he was. We do not consider a jobber or dealer in the funds as a known trader and having a character as such. My Brother Heath has indeed removed from my mind the impression which it had at first received, viz. that a jobber or dealer in the funds was always to be considered as a culpable person, by shewing the necessity of such persons for the accommodation of the market ; yet that circumstance will not obviate the objection that all the acts of parliament consider stock-jobbers as of two species, viz. that which is called the infamous practice of stock-jobbing, and that which is honest. The infamous practice is that in which a man enters into those engagements respecting the public funds which are prohibited by the act of parliament. The honest practice is that in which a man engages for the purchase or sale of stock whereof the vendor is possessed at the time. In this case no averment has been introduced distinguishing of which species the Plaintiff was. It is true that he has averred that as such jobber or dealer he was accustomed lawfully to contract, but this amounts to no more than saying, that he had entered into some lawful contracts, and non constat [289] that he may not as such jobber or dealer have entered into some which were unlawful. It was contended, that engagements contrary to law are not contracts. I answer, that in the language of the act of Parliament they are treated as contracts : and the act points out the distinction between contracts which are lawful and contracts which are unlawful. The innuendo therefore which explains the words "lame duck" to mean that the Plaintiff has not fulfilled his contracts, may apply equally to lawful

or unlawful contracts; and consequently no special damage can be said to have arisen from words which may import an accusation that the Plaintiff has not done that which the law prohibits. Another doubt has arisen in the mind of the Court, whether the special damage has been so laid as to support the action, even supposing a jobber or dealer in the funds to be a known trader. A great part of the special damage consists in an allegation that other persons did not perform their lawful contracts with him. Now if the Plaintiff has sustained any damage in consequence of the refusal of any persons to perform their lawful contracts with him, it is damage which may be compensated in actions brought by the Plaintiff against those persons; and the law supposes that in such actions the Plaintiff would receive a full indemnity. Perhaps indeed that part of the declaration in which the Plaintiff complains, that he had been prevented from performing his contracts with other persons, might be sufficient to support the action. Independent however of this latter consideration respecting the defect in stating the special damage, we are of opinion that the third and sixth counts of the declaration are bad.

The Court however gave leave to amend.

DOE ON THE DEMISE OF JOHN PLANNER AND CATHERINE his Wife v.
SCUDAMORE. Nov. 18th, 1800.

Devise to G. L. the testator's heir at law for life, and from and after his death to C. B. her heirs and assigns in case she shall survive and outlive the said G. L. but not otherwise, and in case she shall die in the life-time of the said G. L. then to G. L. his heirs and assigns for ever.—Held that the devise to C. B. was a contingent remainder; and barred by a fine levied by G. L.(a).

This was an ejectment to recover possession of a messuage and lands described in the declaration which came on to be tried at the last assizes for Bedfordshire, when a verdict was found for the Plaintiffs, subject to the opinion of the Court, on a case in substance as follows:

Thomas Lane on the 9th of March 1792, by his will duly executed, devised as follows: "I give and devise my messuage or [290] tenement and farm called Buckingham-hall with the lands and appurtenances thereunto belonging and all other my real estate whatsoever situate lying and being in the parishes of Higham Gobias Pulloxhill and Barton or elsewhere in the county of Bedford unto and to the use of my brother George Lane of the city of Canterbury and his assigns for and during the term of his natural life without impeachment of waste, and from and immediately after his death then I give and devise the same unto and to the use of my amiable friend Catherine Benger (niece to Mrs. Mary Shindler of Burgate Street Canterbury and who at this time lives with me and superintends the management of my family) her heirs and assigns for ever in case she the said Catherine Benger shall survive and outlive my said brother but not otherwise; and in case the said Catherine Benger shall die in the life-time of my said brother then and in such case I give and devise my said messuage farm lands and real estate in the said county of Bedford unto and to the use of my brother George Lane his heirs and assigns for ever." In March 1793 the said Thomas Lane died without having altered or revoked his said will, leaving the said George Lane, his brother, and heir at law, him surviving, who thereupon entered on the estate so devised, being the premises in question. In Trinity term 1793 the said George Lane levied a fine sur conuzaunce de droit come ceo, &c. with proclamations of the premises in question, and declared the use of the said fine to himself in fee. On the 15th December 1796 the said George Lane, by his will duly executed, devised the said premises to Edward Scudamore the Defendant in fee; and in November 1799 the said George Lane died in possession of the premises, without having altered or revoked his said will. On the 29th May 1798 the said Catherine Benger made an actual entry upon the premises in question, being within five years after the levying the said fine, and for the purpose of avoiding the same. Catherine Benger afterwards married John Planner, and on the 17th of January 1800, before the bringing of this ejectment, the said John and Catherine Planner, the lessors of the Plaintiff, made an actual entry on the said premises.

(a) Vide *Doe v. Nowell*, 1 M. and S. 327, 333.

The question for the opinion of the Court was, Whether the lessors of the Plaintiff were entitled to recover? If they were, the verdict was to stand, but if not, a verdict to be entered for the Defendant.

Williams Serjt. for the lessor of the Plaintiff. I contend that the fine levied by George Lane, the tenant for life, did not bar [291] the estate devised to Catherine Benger. It may clearly be collected from the will, that it was the intention of the testator to give his estate to C. Benger in case she survived his brother; for it is not to be supposed that in limiting an estate for life to his brother, he could have intended to give him the power of defeating the immediate devise over to C. Benger. If therefore this intention be clear the Court will give it effect, provided that can be done without militating against any known rule of law. Now this intent may be effectuated either by considering the devise to C. Benger as a vested remainder subject to be divested upon a condition subsequent; or by considering it as an executory devise. 1st, The words, "In case she the said C. Benger shall survive and out-live my said brother but not otherwise," may be considered as a condition subsequent. In *Sir John Robinson v. Comyns*, Cas. temp. Talb. 164, R. Sheffield devised his lands to the use of Defendant and his heirs in trust for payment of his debts, and afterwards in trust for his grand-daughter Mary (the Plaintiff's late wife) and the heirs of her body, remainder to the Defendant and his right heirs, upon condition that he should marry the testator's grand-daughter. The grand-daughter refused to marry the defendant, and having married the Plaintiff joined with her husband in suffering a recovery of the premises. Lord Chancellor Talbot observed that one question was, Whether the condition annexed to the Defendant's remainder was a condition precedent or subsequent? and as to that he was inclined to think it a condition subsequent; saying "there are no technical words to distinguish conditions precedent and subsequent; but the same words may indifferently make either, according to the intent of the person who creates it." The reasoning of Lord Talbot applies strongly to this case, and he collected the intent of the testator from the whole will. Here the intent of the testator to make the condition a condition subsequent very plainly appears. The limitation to C. Benger is immediate; and then follow the words by which the condition is created. Lord Ch. J. Willes in *Acherley v. Vernon*, Willes, 156, observes, "I know of no words that either in a will or deed necessarily make a condition precedent: but the same words will either make a condition precedent or subsequent according to the nature of the thing and the intent of the parties." Provided the intent be clear, the case of *Edwards v. Hammond*, 3 Lev. 132, may be cited to shew that a devise like the present may be construed to be a vested remainder, subject to be divested by a condition subsequent. In that case a [292] copyholder surrendered to the use of himself for life, and afterwards to the use of his eldest son and his heirs, if he should live to the age of twenty-one years, provided and on condition that if he should die before twenty-one, that then it should remain to the surrenderor and his heirs; and the Court held that it was an immediate surrender to the eldest son, subject to be defeated by condition subsequent, if he did not attain twenty-one; and compared the case to *Springe v. Cæsar*, Sir W. Jones, 389. 1 Rol. Ab. 415, pl. 12, where a fine was levied to the use of A. and his heirs, if B. did not pay him 10s. on the 10th of September, and if B. did pay it, to the use of A. for life, remainder to B. and his heirs, and it was held that an estate in fee vested immediately in A. subject to be divested by the payment afterwards. The words "and not otherwise" added at the end of the devise to C. Benger, can scarcely be supposed to alter the nature of the condition, since they import nothing more than what might have been implied without them. It may be said that if this doctrine be well founded it would have equally applied to the case of *Plunket v. Holmes*, 1 Lev. 11, Sir T. Ray. 28, S. C. (1 Sid. 47, S. C. 1 Keb. 29, 119, S. C.) where the devise was to Thomas the eldest son for life, and if he died without issue living at the time of his death, to Leonard another son and his heirs, but if Thomas had issue living at his death that then the fee should remain to the right heirs of Thomas for ever. But it may be observed that the condition upon which the estate to Leonard depended preceded the limitation of that estate, which estate could not be intended to vest until the death of Thomas without issue, whereas in the present case an immediate estate is limited in terms to C. Benger, which estate is made by subsequent words to depend on a contingency that might well happen after the vesting of the estate. 2dly, Supposing that this devise is not to be considered as a vested remainder with a condition subsequent, I contend that it

may be construed to be an executory devise. G. Lane the tenant for life, with the ultimate reversion in fee, was the heir at law of the devisor. The devise therefore is to be considered in the same light as if the devisor had said, "If G. Lane my heir at law shall die in the life of C. Benger, then I give an estate to C. Benger in fee;" which would unquestionably have created an executory devise in fee to C. Benger. It was a rule of law long before the case of *Plunket v. Holmes*, that a devise to the heir at law is void. *Cownden v. Clerke*, Hob. 30, indeed it was so held at common law; [293] for Lord Bacon says, "Clausula vel dispositio inutilis are said when the act or the words do work or express no more than the law by intendment would have supplied; and therefore the doubling or iterating of that and no more which the conceit of the law doth in a sort prevent and pre-occupate is reputed nugation." Bacon's Maxims of the Law, Reg. 21. And the rule has been held equally to apply to a devise of a reversion as of an estate in possession. Thus where a man devised land to his wife for life, remainder to J. S. his next heir in fee, it was held that the heir should be in of the reversion by descent, and not of the remainder by devise. *Preston v. Holmes*, 1 Rol. Abr. 626 (I), pl. 2. Suppose in this case that C. Benger had died in the lifetime of G. Lane, and the latter had been sued on the bond of his ancestor, is it possible to contend that he could have pleaded *riens per descent*? It is true that in this case there is a devise to G. Lane for life: but since the estate so devised is nothing more than G. Lane would have taken had no devise to him been made, the devise to him must be considered in law as void altogether; and the devise to C. Benger must be considered as if the preceding limitation to G. Lane were struck out of the will. In this view of the case the devise to C. Benger would stand as a devise to her in fee in case she survived the testator's heir at law, which would be a clear executory devise. Where A. devised to his eldest son in fee, upon condition that if he paid not 20l. to the second son and daughter, the land should be to the second son and daughter and their heirs, it was resolved that "the first devise to the eldest son and his heirs, being no more than the law gives, is void; and it is but a future devise to the second son and daughter upon the eldest son's default of payment: and the case is no other but as if one had devised that if his eldest son did not pay all legacies that his lands should be to the legatees." *Haynsworth v. Pretty*, Cro. Eliz. 833, 919. It is further established by the cases of *Kent v. Harpoole*, 1 Vent. 306. Pollexfen, 92, S. C. Sir T. Jones, 76, S. C. (3 Keb. 500, 731, S. C.) and *Hooker v. Hooker*, Cas. temp. Hardwicke, 13, that if the ultimate reversion in fee comes upon the tenant for life, the life estate is merged, and an estate in fee is immediately executed in him; the consequence of which is that all contingent remainders depending on the estate for life are barred. Now as the reversion in fee was devised to G. Lane as well as an estate for life, an estate in fee was executed in him immediately on the death of the devisor; and it is clear that if G. Lane took a fee immediately on the death of the devisor, the [294] devise to C. Benger must have been an executory devise. In both the last-mentioned cases *Lewis Bowles' case*, 11 Co. 79, was cited to shew that the life-estate and the reversion in fee though united to certain purposes, might open upon the happening of the contingency, so as to let in the remainder; but the Court was of a contrary opinion; and indeed the doctrine in *Lewis Bowles' case* is not very intelligible. In the case of *Plunket v. Holmes* before referred to, it is true the devise to Leonard was construed to be a contingent remainder: as to which it must be observed, that this case stands alone opposed to all the above principles and authorities, and seems to have proceeded on the doctrine in *Lewis Bowles' case*: and it may be added that the decision of *Plunket v. Holmes* has been much doubted by very great lawyers.

Bayley, Serjt., contra, was stopped by the Court.

LORD ELDON, Ch. J. There can be no doubt that if this be a contingent remainder it will have been destroyed by the operation of the fine, but if it be a vested remainder or an executory devise no such effect will have taken place. In my opinion the devise of the fee to C. Benger is contingent, and the devise of the fee to G. Lane is contingent also. This is not like the cases last cited by my Brother Williams, particularly of *Hooker v. Hooker*; there the estate being limited to A. for life, and after his death to B. the heir at law of A. for life, and then without any estate to preserve contingent remainders to the first and other sons of B. in tail, reversion to A. in fee, A. died, in consequence of which the reversion in fee, which was parcel of the inheritance, descended on B. and the question was, Whether his life estate was thereby merged? The Court there held that it was merged, and that the contingent

remainders never came into existence, the particular estate on which they depended having determined before the contingency had taken place. If I understand the reasoning on which the case of *Plunket v. Holmes* proceeds, it is this, that a particular estate was there given to the heir at law, which was an estate of freehold and not an estate in fee; and then an estate in fee was given upon a contingency to the second son if it happened one way, and to the heir at law if it happened the other, which was a contingency applying to two separate devises. That therefore was not like the case where the heir at law takes an estate in fee by express devise or by executory devise inferred from a condition of which no one but himself can take advantage. In determining what was the intent of this testator we are not to [295] take into consideration that G. Lane the heir at law had an estate independent of the effect of the will. The fee devised to C. Benger, and that devised to G. Lane, being both contingent, there was an estate somewhere not depending on a contingency; and that estate was in G. Lane as heir at law. In the case of *Plunket v. Holmes* the Court would not hold that the estate for life limited to the heir at law was merged by the subsequent limitation to him of a contingent remainder in fee; for that remainder was not executed. They held therefore that the eldest son took an estate for life; which estate for life being sufficient to support the remainder in fee to the second son, and also the remainder in fee to the eldest son as contingent remainders, they determined that these limitations should be supported as contingent remainders. The estate for life by which these contingent remainders were supported having been destroyed by the recovery before the contingency had taken effect, the contingent remainders were destroyed also; and the heir at law came in by virtue of that reversion which descended to him independent of the will. With respect to the cases which have been cited relative to conditions, I take it to be fully settled that a condition is to be construed to be precedent or subsequent as the intent of the testator may require. But there is a wide difference between those cases in which this rule of law is to be applied to conditions, and those in which we find a limitation preceded by an estate of freehold sufficient to support it as a contingent remainder. Lord Kenyon has laid it down, that where a limitation may be construed as a contingent remainder, it shall not be considered as an executory devise (a)¹: and that on principles of policy the Court is rather to suppose that the testator intended to give a contingent estate, than an estate upon condition. With respect to the case before Lord Talbot it is not applicable to this, for as the first estate was an equitable estate tail in possession, a recovery suffered would have barred all remainders whatever, and consequently all argument respecting the policy of construing the subsequent limitation to be a vested remainder on condition, a contingent remainder, or an executory devise was excluded. It was argued that the second estate was a legal estate, and consequently not barrable by a recovery of the equitable estate, but his Lordship only determined them both to be equitable estates, and the latter to be as well bound by the recovery as the former. In *Edwards v. Hammond*, it was matter of necessary implication [296] that the estate should vest in the eldest son during his infancy; for whatever might be the construction of the prior words, it was clearly expressed that unless the son died before twenty-one the estates should not remain to the surrenderor. So in *Haynsworth v. Pretty*, the proviso to pay legacies was necessarily holden to create an executory devise to the legatees on failure of payment, because if it had not been so, nobody but the eldest son could have taken advantage of the breach of the condition. I am not sure whether there is not a class of cases which decides that where an estate is given to a man for life, and from and after his death to another for life in case he survives, the latter is not a contingent but a vested remainder: for being an estate for life the enjoyment of that estate must necessarily depend upon the second devisee surviving the first, and therefore the words "in case he survives" being in such case necessarily included in the preceding words "from and after his death," they shall not convert a vested into a contingent remainder (a)². But here the second estate is given in fee, and it is therefore impossible to argue from the duration of the estate, that in the present case the words "in case she the said C. Benger shall survive and outlive my

(a)¹ See *Doe d. Mussel v. Morgan*, 3 T. R. 765.—See also *Puresoy v. Rogers*, 2 Saund. 388.—And *Ives v. Legge*, 3 T. R. 489, in notis.

(a)² See *Webb v. Hearing*, Cro. Jac. 415, also *Fearne's Contingent Remainders*, p. 367.

said brother" are necessarily included in the preceding words "from and immediately after his death." With respect to the arguments which have been used to shew that the limitation to C. Benger is an executory devise, I take this distinction to be clearly settled, that where a fee is given to the first taker, and afterwards an estate in fee is limited to some other person, the Court will construe the latter to be an executory devise, provided it be limited to take effect within the time prescribed by the rules of law: but where a freehold only is given to the first taker and afterwards a fee is limited upon a contingency, the subsequent devise is in the nature of a remainder, and being capable of being supported by the precedent freehold estate as a contingent remainder, it shall not be deemed an executory devise. The argument of my Brother Williams, if admitted, would overthrow the practice of every day. For if an estate be devised to the eldest son for life, remainder to the first and other sons of such son in tail, without the interposition of trustees to support contingent remainders, remainder to the heirs of such eldest son; it is clear that such eldest son, though he be heir at law, takes an estate for his life, and if by fine or any other act he destroys such life estate, the limitations to his first and other sons will never take effect. The result of the case is this; the testator gives [297] an estate for life to his brother, and if C. Benger survives his brother he gives her an estate in fee; but on the contrary, if C. Benger does not survive his brother he gives his brother an estate in fee. The brother being tenant for life, destroys his life estate before the contingency of survivorship has taken place; consequently the remainders depending thereon are destroyed, and the brother comes in as heir at law.

HEATH, J. I am of the same opinion. Two questions have been made in this case; first, Whether the condition be precedent or subsequent? Secondly, Whether the devise to C. Benger be a contingent remainder or executory devise? It has been truly said, that there are no technical words by which a condition precedent is distinguishable from a condition subsequent; but that each case is to receive its own peculiar construction according to the intent of the devisor. The question always is, Whether the thing is to happen before or after the estate is to vest? If before, the condition is precedent; if after, it is subsequent. In this case it is clear that the event is to happen before the estate can vest: for the brother is to die before C. Benger can be entitled to the estate, the words being "in case the said C. Benger shall survive and outlive my said brother, and not otherwise." In all the cases which have been cited to prove this a condition subsequent, the intent of the testator has been clear that the estate should vest immediately in possession. Such was the case before Lord Talbot, and such was the case of *Edwards v. Hammond*. This case therefore is distinguishable from the cases cited, since in those cases the estate was not intended to vest in possession immediately. As to the second question, it has been decided so long ago that it will not admit of discussion. The case is not distinguishable from *Plunket v. Holmes*. Where a freehold is limited to the first taker and afterwards a fee is given on a condition, if it may take effect as a contingent remainder it shall do so; and it is not material that a fee might have descended to the first taker independent of the will.

ROOKE, J. I am of opinion that this is a contingent remainder, and I found that opinion on the case of *Plunket v. Holmes*. It was the intent of the testator that G. Lane should take for life, and that after his decease C. Benger should take an estate in fee if she survived him, but if she did not survive him that G. Lane, who was the heir at law, should take an estate in fee. Here therefore there was a particular estate for life, [298] which was sufficient to support the devise over as a contingent remainder; and it is a settled rule of law that where the Court can construe a devise to be a contingent remainder, they will never construe it to be an executory devise.

CHAMBRE, J. I am of the same opinion. The case is perfectly clear both on reason and authorities.

Judgment for the Defendant.

GARNHAM, Executrix, v. HAMMOND. Nov. 18th, 1800.

If a Plaintiff executor hold a Defendant to bail upon an affidavit stating the debt to be due, "as appears by the testator's books," but omitting to add, "and which the

deponent believes to be true;" the Court of C. B. will allow the Plaintiff to swear to his belief in a supplemental affidavit (a).

The Plaintiff having held the Defendant to bail upon an affidavit, which stated that the Defendant was indebted to the Plaintiff in his character of executor, "as appeared by the testator's books;" a rule was obtained calling on the Plaintiff to shew cause why the Defendant should not be discharged on entering a common appearance.

Cockell, Serjt., now shewed cause, and urged that although the affidavit which had been made must be considered as insufficient in its present form, for want of the words "and which the deponent believes to be true" (b); yet that, consistently with the practice of this Court, a supplemental affidavit might be allowed in order to remove this objection; and cited *Roche v. Carey*, 2 Bl. 850, as precisely in point (c).

Best, Serjt., on the other side insisted that a supplemental affidavit could never be allowed except for the purpose of explaining an ambiguity in the original affidavit for the satisfaction of the Court: and referred to *Green v. Redshaw*, ante, vol. i. p. 227, where Eyre, Ch. J., said, "If it were allowed in this case, it would be making that right which was wrong at the time when it was done, and would be in the nature of an amendment" (d).

[299] The Court gave leave to the Plaintiff to file a supplemental affidavit.

HOSIER v. SEARLE. Nov. 18th, 1800.

Debt on bond conditioned for the performance by R. G. of all the covenants on his part mentioned in a certain indenture bearing even date with the bond, made or expressed to be made between the Plaintiff and the said R. G. Plea that before the execution of the bond it was agreed that the Plaintiff should grant to R. G. a lease under certain covenants, and that the Defendant should enter into a bond as surety for the performance of those covenants; that the Defendant did accordingly enter into the bond on which the action was brought, and that the indenture mentioned in the condition thereof is the lease so agreed upon and no other; but that the said lease never was executed. Held on demurrer that the Defendant was estopped by the condition of the bond from pleading this plea.

Debt on bond.

The Defendant prayed oyer on the bond, which appeared to be a joint and several bond of R. Gilder, the Defendant, and one Robert Kent, the condition of which was, "that if the above bounden R. Gilder his executors, administrators and assigns do and shall well and truly pay, observe, perform, fulfil and keep the rent and all and singular the payments, covenants, articles, clauses and agreements whatsoever which on the part and behalf of the said R. Gilder his executors, administrators or assigns are and ought to be paid, observed, performed, fulfilled and kept comprised or mentioned in a certain indenture, bearing even date with the said obligation, made or expressed to

(a) And see *Mann v. Sheriff*, post, 355.

(b) See *Barclay v. Hunt*, 4 Burr. 1992. *Sheldon v. Baker*, 1 T. R. 83, and *Swayne v. Grammond*, 4 T. R. 176.

(c) See also *Hobson v. Campbell*, 1 H. Bl. 245, where the Plaintiff after stating in his affidavit to hold to bail, a bond of the Defendant conditioned for payment of bills which should be returned from India protested for non payment, alleged that certain bills were returned protested for non acceptance; and the Court held that the defect might be remedied by a supplemental affidavit.

(d) In *Reeks v. Groneman*, 2 Wils. 224, C. B. where the Plaintiff's affidavit had stated that the Defendant "in justly indebted," instead of "is justly indebted," and a supplemental affidavit was produced, the point was much debated, Lord Ch. J. Pratt and Bathurst, J., at first inclining to allow it, but Clive and Gould, Js., opposing it, because as the first was no oath at all, it could not be made good by any supplemental affidavit. Afterwards the case being argued a second time, the supplemental affidavit was refused, Lord Ch. J. Pratt adopting the opinion of Clive and Gould, Js., and saying that the Court "had never gone so far as to admit a supplemental affidavit, where the first amounted to no oath at all, but had only supplied small defects in affidavits which had not been quite full enough." Bathurst, J., retained his former opinion.

be made between J. Hosier, J. Carter, &c. thirteen of the trustees appointed to put in execution an act of parliament made, &c. and entitled, &c. of the one part, and the said R. Gilder of the other part, in all things according to the true intent and meaning of the same; then the above written obligation shall be void, otherwise the same shall remain in full force." He then pleaded, first, *non est factum*; secondly, "that before the making of the said writing obligatory in the said declaration mentioned, to wit, on the day of the date of the said writing obligatory at, &c. it was agreed by and between the said Plaintiff as one of the trustees for putting in execution the said several acts of parliament in the said condition of the said writing obligatory mentioned, and the said Robert Gilder in the said condition also named, that a certain indenture of lease should be made and granted to the said Robert Gilder by a competent number of the said trustees of certain tolls and duties in the said acts mentioned for a certain term of years, at and under a certain rent and [300] upon and subject to certain covenants to be respectively reserved and contained in the said lease; and that the said Robert Gilder and the Defendant, and the said Robert Kent in the said writing obligatory mentioned, as his sureties should make and execute the said writing obligatory in the said declaration mentioned, by way of security for the payment of the said rent and the performance of the covenants to be mentioned in the said intended lease; and the said Defendant in fact further saith, that the said agreement being so made as aforesaid, he the said Defendant and the said Robert Kent as such sureties as aforesaid, of and for the said Robert Gilder in pursuance and performance of the said agreement and on no other account and for no other consideration whatsoever, afterwards to wit, on the same day and year in the said declaration mentioned, made and executed the said writing obligatory in the said declaration mentioned with such condition as aforesaid thereto subjoined; and the said Defendant in fact further saith, that the said indenture in the said condition mentioned was and is the very same indenture which was so agreed to be made and granted unto the said Robert Gilder as aforesaid and no other or different indenture; and that although such indenture was and is in manner aforesaid in the said condition alleged to have been made, yet in truth and in fact no such indenture nor any other lease whatsoever of the aforesaid tolls and duties before or at the time of making the said writing obligatory had been or was nor hath as yet been made or executed by and between the said several trustees in the said condition of the said writing obligatory named, or any other of the trustees for putting in execution the aforesaid acts of parliament of the one part, and the said Robert Gilder of the other part; nor hath the said Robert Gilder as yet executed or accepted any such lease, or entered into or executed the said writing obligatory, and this, &c. wherefore," &c. 3dly, "That no such indenture as was and is in the said condition of the said writing obligatory alleged to have been made, was or hath been as yet made or executed as was and is by the said condition above supposed, and this, &c. wherefore," &c.

The Plaintiff joined issue on the first plea, and demurred generally to the two last. Shepherd, Serjt., in support of the demurrer. The Defendant is estopped by the condition of his bond from averring that no such indenture was executed as that referred to in the condition; [301] the distinction established by the course of authorities being this, viz. that where the condition refers to a generality, the party may aver that the matter referred to does not exist, but where it refers to a precise thing as in existence at the time of the bond given, the obligor is estopped from denying its existence; thus where a bond was conditioned to pay all the legacies which J. S. had devised by his will, the Court held that the Defendant was estopped from saying that J. S. made no will, but that he might say that J. S. gave no legacies by his will, *Paramoure v. During*, Moor, 420; to the same effect is *Willoughby v. Brook*, Cro. Eliz. 756, where the Court say, if a man be obliged to perform the covenants in an indenture on his part to be performed, it is not any plea to say there were not any covenants therein to be performed; so in *Jewel's case*, 1 Rolle Rep. 408. 1 Rol. Abr. 872, l. 30. *Rainsford v. Smith*, Dy. 196, and *Hart v. Bulkminster*, Sty. 103. But in *King v. Perseval*, 1 Rolle Rep. 430. 1 Rol. Abr. 872, l. 25, the condition being to perform all the agreements already set down by J. S., the Defendant was allowed to plead that no agreement was made because it was in the generality; and the same distinction was recognized in *Stroul v. Willes*, Cro. Eliz. 362, and *Paine v. Shettroppe*, All. 13. These cases were reviewed and the doctrine confirmed in *Shelley v. Wright*, Willes, 9, and *Cassens v. Cossens*, Willes, 25.

Marshall, Serjt., contra. Admitting the proposition that where the condition of a bond recites an actually existing indenture, the obligor cannot deny that indenture, yet unless it appear on the face of the condition that such an indenture did actually exist, the Court will not support this demurrer in favour of an estoppel; for "estoppels are odious in law and admitted merely out of necessity, because they are concluding to speak the truth," *Skipwith v. Green*, 8 Mod. 312. The words of this condition only import, that if such an indenture be made and the Defendant shall keep the covenants therein, the bond shall be void; but non constat that the lease was not to have been executed after the execution of the bond on the same day, in which case if the obligor had refused to execute the lease it would have been impossible to perform the condition of the bond. Now though he might be estopped from saying that there was no such deed, yet it appears from *Skipwith v. Steed*, Cro. Eliz. 769, that he was at liberty to plead that he had never executed such a deed. In that case the [302] Defendant to debt on bond conditioned for the performance of covenants in an indenture between W. S. and Anne his wife on the one part, and the Plaintiff on the other part, pleaded the indenture as an indenture of W. S. and Anne his wife, whereas the feme never sealed it; the Plaintiff therefore replied non fuit facta between W. S. and Anne his wife on the one part, and himself on the other, and it was found for him by the jury; and the Court held that the Plaintiff was not estopped from shewing the deed not to be the deed of baron and feme, but that he was estopped to say there was not any such indenture. 2dly, Since the 8 and 9 of W. 3, c. 11, s. 8, is compulsory upon a Plaintiff in a case like this to suggest breaches upon the roll (a)¹, until which he can have no remedy upon the bond, and since it is impossible to suggest breaches of covenants never entered into, the Court will not pronounce a judgment for the Plaintiff from which he can derive no advantage.

LORD ELDON, Ch. J., said, The present opinion of the Court is, that the Defendant is estopped by the condition of the bond. In addition to the arguments at the bar it may be observed, that the condition of the bond is for the performance of covenants comprised in a certain indenture made or expressed to be made between the trustees and the Defendant. The object of introducing the words "made or expressed to be made" seems to have been, that whether the execution of the indenture could be proved or not, the covenants contained in the paper writing which purported to be an indenture between the trustees and the Defendant should be considered as the covenants of the Defendant.

The Court having taken time to consider, on this day, gave Judgment for the Plaintiff.

TIPPING v. JOHNSON. Nov. 22d, 1800.

To a replication of nul tiel record and day given, if the Defendant demur, the Plaintiff need not join in demurrer; but if the record is not produced, may sign judgment.

The Defendant in this case having pleaded judgment recovered, the Plaintiff replied nul tiel record and gave a day to produce the record. To this plea the Defendant demurred; the Plaintiff did not join in demurrer, but finding that the record was not produced at the day, signed judgment.

A rule having been obtained by Cockell, Serjt., calling on the [303] Plaintiff to shew cause why this judgment should not be set aside for irregularity,

Shepherd, Serjt., shewed cause, and insisted that where the Plaintiff replies nul tiel record and gives a day (a)², it makes a complete issue; and that the demurrer was therefore improperly put in by the Defendant.

(a)¹ *Drage v. Brund*, 2 Wils. 377. *Goodwin v. Crowle*, Cowp. 357. *Roles v. Rosewell*, 5 T. R. 538, and *Hardy v. Bern*, cit. 5 T. R. 540

(a)² This seems the proper method of concluding the replication where the record is of the same court. *Cremor v. Wickett*, 1 Ld. Raym. 550. Carth. 517, S. C. Where the record is of another court, it has been held correct to conclude with a verification; though it appears that either way will do. *Cremor v. Wickett*, ubi supra. *Sandford v. Rogers*, 2 Wils. 113, Barnes, 161, ed. 1798, and *Newberry v. Strudwick*, Barnes, 161 and 335. Com. 533, S. C. See also the note by Mr. Serjt. Williams, 1 Saund. 392.

LORD ELDON, Ch. J. (after referring to the officers), said, that the replication constituted a complete issue of fact, and that the judgment was therefore regular.

Per Curiam. Rule discharged (*b*)¹.

THOMPSON v. LADY LAWLEY AND OTHERS. Nov. 24th, 1800.

[Referred to, *Watkins v. Lea*, 1802, 6 Ves. 640. Approved, *Hobson v. Blackburn*, 1833, 1 Myl. & K. 579. Referred to, *Swift v. Swift*, 1859, 1 De G. F. & J. 173; *Holmes v. Milward*, 1878, 47 L. J. Ch. 525.]

Under a general devise of all manors, messuages, lands, tenements and hereditaments, leasehold messuages will not pass, unless it appear to have been the evident intent of the devisor that they should pass (*a*).

This was a case sent by the Lord Chancellor for the opinion of this Court.

Beilby Thompson, Esq., being seised in fee of the manor of Wheldrake, in the county of York, and other real estates, and also possessed of a considerable personal estate, including among other things, two leasehold houses, one situate at Putney in Surry, and the other in Mortimer Street, Cavendish Square, holden on beneficial leases (in each of which about 70 years were unexpired (*b*)²), on the 28th May, 1794, duly made his will, attested so as to pass real estates. After directing that his funeral expences debts and legacies should be paid out of his personal estate, but if his personal estate should not be sufficient to pay the same, his real estate should be charged with the deficiency, he gave and devised his manor of Wheldrake and all other his manors messuages lands tenements and hereditaments to trustees therein named and their heirs to the uses upon and for the trusts intents and purposes therein mentioned, that is to say, as to his said manor of Wheldrake, and all his other tenements and hereditaments in the parish of Wheldrake to the intent that his wife should receive thereout during [304] her life the yearly sum of 200l. in addition to the yearly sum of 800l. provided for her by his marriage settlement, and that certain other persons therein named should receive the annuities thereby provided for them, and he then devised as follows, that is to say "as for and concerning the said manors and messuages and other hereditaments so charged with the said annuities with all their rights members and appurtenances and as for and concerning all other his manors messuages lands tenements and hereditaments with their rights members and appurtenances in the said county of York or elsewhere in the kingdom of Great Britain, to the use of his first and other sons in tail male and for want of such issue to the use of his first and other sons in tail general, remainder to his daughters in tail as tenants in common if more than one, with cross remainders, and for want of such issue to the use of his brother Richard Thompson and his assign for his life without impeachment of waste, remainder to the said trustees to preserve contingent remainders, remainder to the use of the first and other sons of the said Richard Thompson successively in tail male, remainder to the use of Paul Beilby Lawley, the third son of his sister, Lady Lawley, for life, remainder to his first and other sons in tail male, remainder to the use of Francis Lawley, the second son of his said sister for life, remainder to his first and other sons in tail male, remainder to the use of Sir Robert Lawley, the eldest son of his said sister for life, remainder to his first and other sons in tail male, with the ultimate remainder to his own right heirs." Then followed a proviso, that if P. B. Lawley, or F. Lawley should succeed to the premises they should take the name and arms of Thompson, and other provisoes empowering the several devisees to jointure and to raise portions by demise or mortgage, redeemable by the person who for the time being should be intitled to the freehold and inheritance. He then limited an estate in Nottinghamshire to other persons, and after having declared that it was his

(*b*)¹ See *Fox and others v. Lewing*, Cooke, Cas. Pr. 56, Pr. Reg. 227, and the cases cited in the preceding note.

(*a*) Vide *Doe d. Vernon v. Vernon*, 7 East, 8, 21. *Doe d. Belasyse v. Lucan*, 9 East, 448. *Doe d. Jersey v. Smith*, 1 B. and B. 97, 160.

(*b*)² This fact was admitted though not stated in the case, and indeed as the whole will was taken as part of the case, though many parts relied upon in the judgment were not introduced at first, they are now added.

intention to have given his wife the choice of any one of his mansion-houses in Yorkshire or London, or the house that he had lately purchased at Putney, but that she had declined the acceptance of either of them, and would have no house of her own to go to after his decease, gave her therefore 5000*l*. He then, after giving several legacies, expressed himself as follows, "Lastly, I give and bequeath all my monies, securities for money, goods, chattels and effects, and all other my personal estate not herein before by me disposed of, or to be disposed of by any codicil or codicils to this [305] my will unto my said brother Richard Thompson and unto my sister Lady Lawley in equal shares and proportions:" and he appointed his said brother and sister executor and executrix of his will.—The testator died on the 10th June 1799, without having revoked his will. The question for the opinion of the Court was, Whether the leasehold houses and premises late belonging to the testator in Mortimer-Street, Cavendish-Square, and at Putney in Surrey, passed by his will under the general devise of all his manors, messuages, lands, tenements and hereditaments, with their rights, members and appurtenances in the county of York or elsewhere in the kingdom of Great Britain?

Bayley, Serjt., for the Plaintiff. In the first place the leasehold property can only pass by way of executory devise, and being limited after an indefinite failure of issue, the limitation as an executory devise is too remote. Independent of this consideration, however, it may be stated as a general proposition, established by a long series of cases, that where a man is possessed of freehold and leasehold property, the leasehold will not pass by a general devise applicable to freehold, unless an intention that they should pass can be collected from the face of the will, or from the nature of the leaseholds themselves. It was resolved in *Rose v. Bartlett*, Cro. Car. 292, "that if a man hath lands in fee, and lands for years, and deviseth all his lands and tenements, the fee-simple lands pass only and not the lease for years: and if a man hath a lease for years and no fee simple, and deviseth all his lands and tenements, the lease for years passeth: for otherwise the will should be merely void" (a). This case is a leading authority, and the doctrine has been recognized in a variety of subsequent decisions. The case of *Davis v. Gibbs*, where the same proposition was adopted, was first decided at the Rolls, as appears from Fitzg. 116, and that decision was afterwards confirmed by the Lord Chancellor, and on an appeal from him, by the House of Lords, 3 P. Wms. 26. The words used in that case were particularly strong, being "manors, messuages, lands, tenements, hereditaments, and real estates whatsoever of which the testatrix was any ways seised or entitled to," which last expression might seem to apply to leasehold estate. Lord Hardwicke in *Knotsford v. Gardiner*, 2 Atk. 450, cites the case of *Rose v. Bartlett*, and adds, that although in the case before him he had no doubt at all of the intention of the testator, yet the rule of law must prevail, and directed an issue to try whether the testator at the time of making his will [306] had both freehold and leasehold estates. The opinion of Lord Hardwicke respecting this rule of law is shewn still more strongly in *Chapman v. Hart*, 1 Vez. 271, for the will in that case having been executed in the presence of two witnesses only could not pass the real estate, and yet his Lordship held that the devise of all his lands and tenements must, according to *Rose v. Bartlett*, be confined to the freehold estates, and that therefore the leasehold would not pass. These cases are confirmed by *Pistol v. Riccardson*, K. B. Hil. 1784, 2 Cox's P. Wms. 459, n. 1, 1 H. Bl. 26, in notis, S. C. where Lord Mansfield observed, that a system of legal construction had been established by former cases, especially *Rose v. Bartlett*, and *Davis v. Gibbs*, which precluded the Court from considering the intention of the testator on the words of the devise as they otherwise might have done, and bound them in their decision of the principal case. Yet in that devise the words "seised of interested in or intitled unto" might seem applicable to leasehold as well as freehold property. It was indeed lamented by Lord Kenyon in *Lane v. Lord Stanhope*, 6 Term Rep. 353, that the case of *Addis v. Clement*, 2 P. Wms. 456, was not cited in *Pistol v. Riccardson*, since his Lordship seemed to think that Lord Mansfield might have been induced by the authority of that case to have decided otherwise. But it appears from a manuscript note of *Pistol v. Riccardson*, that the case of *Turner v. Husler* (reported 1 Bro. Cha. Cas. 78), which proceeded on the authority of *Addis v. Clement*, was noticed by Lord

(a) Indeed leasehold houses will pass under a devise of all the testator's freehold houses in A. if he had no freehold houses. *Day v. Trigg*, 1 P. Wms. 286.

Mansfield in his judgment, who received his account of it from Mr. Baron Eyre: it is therefore to be inferred, that the case of *Addis v. Clement*, had it been cited, would not have altered his Lordship's opinion. It is to be observed, however, that the case of *Addis v. Clement* is very distinguishable from the present. Lord Chancellor King observed, that the words "possessed of or interested in" properly referred to a leasehold, and expressly distinguished the case before him from *Rose v. Bartlett* on that ground; and his Lordship further relied on the circumstance of the leaseholds being perpetually renewable, which he thought might have induced the testator to look upon himself as having a kind of inheritance. This last circumstance also distinguishes *Turner v. Husler* from the present case; for there the leasehold tithes were perpetually renewable without fine, and Mr. Baron Eyre's opinion appears to have been founded on the ground of the testator's intention to pass the leasehold, inferring that the resemblance which those particular leaseholds bore to an inheritance made the testator forget the distinction. With respect to *Lane v. Lord Stanhope* it might be sufficient to say, that the word "farm" there used, was particularly descriptive of leasehold property, if it was not clearly distinguished from the present case by another circumstance, namely, that the freehold and leasehold property was so blended together that it was quite impossible to suppose that the testator could have intended to separate them. The case of *Louther v. Cavendish*, Amb. 356, was decided simply on the ground of intention apparent on the face of the will that the leaseholds should pass. In the present case it is impossible to discover any intention of the testator expressed upon the face of his will to pass the leasehold. All the limitations are applicable to freehold property only: and the words "executors and administrators" never once occur. Besides, as the lands, &c. are limited by the general devise to trustees to uses, if the leaseholds were included in this devise, the legal property of the freehold would go to one person and of the leasehold to another; for the use of the former would be executed in the cestuy que use by the statute, whereas the legal estate in the latter would remain in the trustees.

Runnington, Serjt., for the Defendants. The general terms used in the clause in question are sufficient to pass the leasehold together with the freehold property. Though in *Rose v. Bartlett* the language used is undoubtedly very strong in support of the argument urged on the other side, yet subsequent to that case the rule has been varied in many instances, and the Courts have inclined to decide, that where they can collect from the will that it was the intent of the testator to pass his leasehold together with his freehold property under a general clause of this kind, the leasehold is passed accordingly. In *Turner v. Husler* Mr. Baron Eyre observes, that the determination of *Rose v. Bartlett* was very early, and that he was led to think it arose from the old idea of the dignity of the freehold, and the small value of the interesse termini; but that from the change of circumstances the rule was become unsatisfactory. *Davis v. Gibbs* was decided on the intent of the party devising, the clause in dispute being a devise of all "manors messuages lands tenements hereditaments and real estate" and there being another clause under which the leasehold evidently passed. Though the general rule is recognized in *Knotsford v. Gardner*, and *Chapman v. Hart*, yet in *Pistol v. Riccardson* the observation of Lord Mansfield, that nothing appeared in the will indicating an intention to pass the leaseholds, seems to shew, that if any such intention could have been discovered, His Lordship would have held the words of the devise sufficiently comprehensive. Certain it is that *Addis v. Clement* was not referred to in that case; and in *Lane v. Lord Stanhope* Lord Kenyon [308] observes, that in *Pistol v. Riccardson* Lord Mansfield seemed to feel himself pressed by a torrent of authorities, and that if *Addis v. Clement* had then been mentioned the Court would have decided the other way with less reluctance, and that the ground of determination was, that all the words there used had received in other cases a certain technical construction. That case of *Lane v. Lord Stanhope*, if correct, has put the question at rest, inasmuch as the word "farms" was there held to pass the leaseholds, as it appeared from the circumstances of the case, that the testator must have intended them to pass. The strict rule therefore laid down in *Rose v. Bartlett* is no longer the governing principle, but the intention of the testator must prevail, and if the words of the will are sufficiently general to include leasehold, the Court will not restrain them. Here the words are as general as possible, being his "manors messuages lands tenements and hereditaments," and if in *Turner v. Husler* the word "tithes," and in *Lane v. Lord Stanhope* the word "farms," were held to carry leasehold, why should not

the word "messuages" in this case? Here the testator had 70 years to run in the leaseholds, which amounting to the value of the whole fee, he might look upon them in the light of freehold property. It has been objected that the strict limitations in this will not being applicable to leasehold property, shew that the testator did not intend the leaseholds to pass in a clause the contents of which are made subject to those limitations: but the same limitations existed in those Equity cases where due weight was given to intention. Having given 5000*l.* to his wife in lieu of these very leaseholds, it is clear that he had them in contemplation at the time of making his will, and if he had not supposed them to pass under the general clause they would have been specifically mentioned in the residuary clause.

LORD ELDON, Ch. J. Though the Court is not called upon in this case to state the reasons for the certificate, which it is disposed to return to the Lord Chancellor, yet, as it has not been unusual upon similar occasions to mention the grounds upon which the opinion of the Court has proceeded, I shall follow the example of Lord Kenyon in *Lane v. Lord Stanhope*, and state my reasons for thinking that the leaseholds do not pass under the general devise of the testator's manors, messuages, &c. I adopt the words of his Lordship in that case: "It is our duty in construing a will to give effect to the deviser's intention as far as we can consistently with the rules of law, not conjecturing but expounding his will from the words used." And I am particularly impressed with the [309] latter expression "not conjecturing, but expounding his will from the words used." I will first consider this will, as if the construction was unprejudiced by any rule of law, or by any decisions in which distinctions respecting such rules may have been taken. When we find limitations in a will, inapplicable to personal estate, though we are not thereby authorised to say that the personal estate shall not pass, provided the testator has used words clearly sufficient to pass it; yet the acknowledged inapplicability of those limitations to personal estate is a circumstance from which the intent may be collected if the words of devise are ambiguous. In an accurate sense when a man says "my lands and hereditaments" he means those which are throughout his own. When therefore we see limitations which apply to real estate as distinguished from personal estate, or even when we find that by holding the latter to be included in the general devise the wish imputed to the testator to give it to the same person as the freehold may not, by virtue of such limitations, be gratified for above one moment; we may consider the nature of the limitations as affording strong evidence that the testator really had not the intention that the personal estate should pass. I consider the whole of this will as part of the case referred. I find no circumstance stated which goes beyond the mere fact, that the testator was possessed of two leasehold houses for terms of about 70 years. It does not appear that there was any equitable right of renewal, nor were the premises in question blended in enjoyment or otherwise, with any freehold land; there is no difficulty in distinguishing them from each other; they have never been demised together at one rent reserved to heirs; they are short terms. No one of those particular circumstances which were relied upon in former cases exists in this; it is the simple case of terms for years, and a case of property, *prima facie*, that sort of property which a disposition of personal estate must be intended to pass. In this will, in the first place, the testator directs that his debts and funeral expences shall be paid out of his personal estate, but if that shall not be sufficient, he charges his real estate with the deficiency. Here in the beginning of the will then a distinction between real and personal estate is introduced. In the last clause of the will he devises "all his money securities for money goods chattels effects and all other his personal estate not therein before disposed of or to be disposed of by any codicil." It has been observed, that by the words "personal estate," in this last clause, must be meant personalty *ejusdem generis* with money, &c. But am I conjecturing, or am I [310] expounding when I say that he meant one thing by the words "personal estate" at the beginning of the will, and another by the same words at the end? Look at this in another point of view; the general rule respecting the application of assets is very much like that which the testator has here appointed. First, the personal estate is to be applied, and then the real. But the personal estate so to be applied is the personal estate not specifically disposed of. Now if the leaseholds in question passed with the freeholds, then those leaseholds are specifically disposed of; and if the personal estate not specifically disposed of should happen to be insufficient for the payment of debts, out of what fund and in what manner are we to suppose that the testator has directed them to be paid? He has settled his different

freehold estates on different persons. If therefore it be necessary to resort to the real estates for payment of debts, a valuation of them must be taken, and they must contribute pro rata; but personalty specifically disposed of must also contribute; and then in the construction of a will which says, the personalty is first to be applied, we are, if the general personal estate is insufficient, to consider it as agreeable to the testator's intention, though he has not bequeathed his leasehold estates eo nomine, that they should be preserved as anxiously as the freehold, and should only contribute together with them, according to their value. With respect to the word "messuages" as used in this will, it is to be observed, that in the devise of the manor of Wheldrake it is most clearly applied to freehold estate only: and therefore there is no reason to suppose, that when he used the same word in the general clause, under which it is contended that the leaseholds pass together with the freeholds, he meant to apply it in both those species of property. The estates included in the general devise are limited to the issue (if he should have any) of the devisor in tail, with several remainders over: now if the devisor had left a son living at the time of his death, and that son had died instantly afterwards, the leasehold property would have been necessarily separated from the freehold, since the former would have gone to the administrator of such son, and the latter would have vested in the remainder-man. Why are we then to be so anxious to impute intentions to testators, the gratification of which they use means and terms so little calculated to secure? It was observed, that the limitation being after failure of issue of his body was too remote: but attending to his real intention, and the case of *Pelham v. Gregory* (5 Bro. Parl. Cas. 435) [311] in the House of Lords, we might hold, that if he had issue, the leasehold would vest in the issue, and if he had none in actual existence at his death, the leasehold, if it vested in the aftertakers, would be subject to be divested as soon as any issue of his should come into actual existence. In that part of the will where a power is given to charge the estates devised with portions for younger children, it is clear he meant the power should extend to all the property which he devised under the general words; but he provides that if such portions shall be raised by demise or mortgage the same shall be redeemable by the person entitled to the freehold and inheritance of the demised or mortgaged premises: he thought therefore that he had an inheritance in the property he devises, and which he gives a power of mortgaging. Then follows the only clause which could suggest any doubt to an unlettered mind; in which the devisor declares that it was his intention to give his wife the choice of one of his mansion-houses in Yorkshire or London, or the house that he had lately purchased at Putney, but that she had declined it, and that he therefore gave her 5000*l*. Now although the wife might have chosen the Yorkshire house, which was a freehold; yet it is observable, that, as his will finally stands, the compensation is taken out of the personal estate: and it seems not unreasonable therefore that the residuary legatees who are to pay that 5000*l*. should take the leasehold in lieu of it. By the last clause the testator gives "all his personal estate not herein before disposed of, or to be disposed of by any codicil." Now it seems impossible to say, that the words "herein before disposed of" may not be satisfied by the legacies before given; but this testator might mean by a codicil to dispose of those leaseholds, suffering them to pass by the general clause if he made no codicil. As to the argument that the personal estate must mean personalty ejusdem generis, I cannot trust my mind with an argument so like a conjecture: the words are large enough to pass personalty of any sort; and I do not understand how that mind reasons, which deems the intention of a testator satisfactorily made out by that kind of argument. I was struck with the observation, that as the property is limited to trustees to uses, the statute draws the legal estate in the freeholds out of the trustees, and vests it in the cestuy que use, whereas the legal estate in the leaseholds remains in the trustees. As to the supposed anxiety of the testator, that the two species of property should go together, it is more usual to demonstrate that anxiety either by directing that the leaseholds shall be enjoyed together with the [312] freeholds as long as the rule of law and equity will admit, or by introducing very special words and limitations for that purpose, adapted to the nature of the leaseholds. No testator who meant that they should go together, ever made a will under reasonably good advice in its terms so little calculated to produce the intended effect as this testator has done: though in truth a similar observation may be made upon the inefficacy of the terms used to secure such a supposed intention in almost every case, where upon the ground of intention lease-

holds have been held to pass under general words. As to the cases ; the first mentioned is *Rose v. Bartlett*. It was supposed in *Turner v. Husler* that the rule there laid down originally obtained on the ground of the small value formerly attached to leasehold interest as opposed to the dignity of the freehold. It may be so, though I doubt whether it was so : but where I do not know the origin of the rule I cannot reason from the supposed causes of the rule, without knowing them, till I allow myself, in that state of uncertainty, to deny effect to the rule. Finding messuages and lands limited to uses inapplicable to leasehold interests, I think I may more safely suppose that the testator intended to pass such messuages and lands as might be limited to such uses. Lord Hardwicke seems to have considered the rule acknowledged in *Rose v. Bartlett* to have been a rule proceeding on intention, and to have thought that where a testator gives his lands and tenements he must, *primâ facie*, be taken to mean those lands and tenements which are strictly his, viz. those in which he has an inheritance. Whether the rule laid down in *Rose v. Bartlett* were wisely adopted or not, it is unnecessary for us to determine ; but that case having once established a general rule, I had rather consent pointedly and avowedly to contradict that rule in terms than to acknowledge it in words and deny it in effect, by raising distinctions which in fact make it impossible for any man to decide in any particular case what is the legal construction of a will as to this point, till he has obtained the authority of a court of law, in a judgment upon the will, for the opinion which he gives. I observe that the rule has not been denied in any of the cases which have followed *Rose v. Bartlett*. Lord Hardwicke in *Knotsford v. Gardiner* speaks of it with the greatest respect ; and indeed Mr. Atkyns seems to make him speak of it in stronger terms than the rule itself will warrant, since he reports His Lordship to have said, that although he had no doubt [313] of the intention of the testator, yet the rule of law must prevail. In *Chapman v. Hart*, Lord Hardwicke again recognized the rule, and even carried his respect for it so far, that although the will was executed in such a manner as to carry personal property only, yet as the words of the devise were properly applicable to freehold only, His Lordship would not suppose that the testator by those words intended to pass that species of property which could pass by a will so executed. Both in *Addis v. Clement*, and *Davis v. Gibbs*, the rule was expressly acknowledged. It is not my business to consider whether the distinction raised on the former of those cases was fairly sufficient, consistently with the safety of property and titles, to exempt it from the application of the general rule : but when the rule is once admitted, I must decide upon my own conviction respecting its applicability to the particular case which comes before me. No doubt, those who decided the cases in which the general rule has been held not to apply, were satisfied that the circumstances before them were sufficient to warrant the exception, and that the exception could be taken with safety to the rules of property : but it is enough for me to say, that none of the circumstances relied on in those cases are to be found in this. I cannot help adding, that if the principle be just that we are not to conjecture, but to expound, it does appear to me that we do not strictly abide by the rule, that we indulge in what is rather conjecture than exposition, if we are to proceed on suppositions of what the testator may be imagined to have understood as to the nature of his own property, of what he forgot and of what he remembered concerning it ; suppositions not founded in his acts or expressions. It is not very easy, in my judgment, to find a sound distinction, sound as obviously consistent with the safety of titles, between the case of *Addis v. Clement*, and *Davis v. Gibbs*, if the distinction is to rest only upon such words as "possessed of or interested in," and yet the former of those cases does afford a distinction between that and *Pistol v. Riccardson*, aimed at by Mr. Justice Lawrence in *Lane v. Lord Stanhope*, viz. that the words "possessed of" occurred in that case, and not in *Pistol v. Riccardson* ; and authority has certainly laid stress upon the distinction. Yet it cannot be denied that these words are very frequently, if improperly, used as to freehold as well as leasehold : and if those words follow expressions which, according to the rule, are *primâ facie* to be taken to signify freehold, as "lands, tenements, and he-[314]-reditaments," are we sure that we are expounding and not conjecturing when we say that the testator intended to apply them both to freehold and leasehold, though his limitations are ill adapted to leasehold property ; and very ill adapted to it if meant to secure, as far as may be, the enjoyment of it together with freehold. And yet the case of *Addis v. Clement* must be understood to proceed upon the word "possessed ;" at least the most material reasoning in the judgment proceeds upon it. But the distinction between

that case and *Davis v. Gibbs*, and between that case and *Pistol v. Riccardson*, does not rest merely upon such words. The nature of the testator's interest in leaseholds and in renewable leaseholds is very different, and something is due to the consideration, whether the property is or is not blended in enjoyment. It was argued in *Davis v. Gibbs*, that as the testatrix had no freehold interests except in Kent, and the general devise related to Kent, Essex, and Bucks, the chattel interests in the two latter counties must pass in order to satisfy the will: on the other hand it was said, that this clause might be satisfied by the fee-simple in Kent, and that if the chattel interests passed under it, there would be nothing to satisfy the word "mortgages" in the last clause relative to the personal estate; and the judgment seems to have turned upon this. It must however be observed, that though when a will speaks of lands, it means lands which the testator has at the time of making the will, and it will pass those and those only; yet when it speaks of personalty, it will pass such as the testator shall have at the time of his death, though he had it not at the time he made his will. It seems singular to insist that the words "mortgages and credits" in that residuary clause as to the personal estate, necessarily meant the mortgage for years, and the extended interest which the testator had at the time of making his will; when it must be admitted that if before his death he had parted with them and acquired others, the words would have passed such others though he had acquired them after he made his will. And it is difficult to admit the consistency of that reasoning, which says that the terms "lands in Kent, Essex and Bucks," are all satisfied by lands in Kent only, though he had a mortgage in Essex and an extended interest in lands in Bucks, and yet at the same time insists that mortgage and extended interest are necessary to satisfy the words "mortgages and credits" in the residuary clause, which would have their operation if the testator had before his death any [315] other, and had not at his death that very mortgage or that very extended interest. The argument seems to treat a general residuary clause containing an enumeration of particulars, as if it operated only as a specific bequest of such particulars of personalty as the testator had at the time of making the will, answering in description to the particulars enumerated; though it would operate upon those also which he should afterwards acquire and have at his death. In fact it must often happen that where all personal estate is given, and an enumeration of particulars unnecessary, because all personal estate is given, is added, the testator enumerates some particulars which he has, and many which he has not, and arguments drawn from intention founded upon the terms occurring in such enumerations are not perhaps of all arguments the most satisfactory, if in truth they are not the least so. In the cases of *Knotsford v. Gardiner*, and *Chapman v. Hart*, Lord Hardwicke came to very strong decisions in favour of the rule in *Rose v. Bartlett*, and considered it at least as a rule not to be departed from without demonstration plain of the intent of the testator; and when we recollect how thoroughly Lord Hardwicke was versed both in law and equity, it is not to be supposed that he was ignorant either of *Addis v. Clement*, or *Davis v. Gibbs*. Next came the case of *Lowther v. Carendish*, which appears to me to be very loosely reported by Ambler; and I am not disposed to believe that Lord Northington ever made use of the expressions respecting *Rose v. Bartlett*, which are there attributed to him. We all know that he was possessed of great law learning and a very manly mind; and I cannot but think that he would rather have denied the rule altogether, than have set it afloat by treating it with a degree of scorn, and by introducing distinctions calculated to disturb the judgments of his predecessors and remove the landmarks of the law. But be that as it may, the point on which Lord Northington put the case was, that it was the obvious intention of the testator that one of his name should take all his estates in one county and another in another county; that his general primary intention was to make one great Cumberland man, and one great Yorkshire man, and that the property in each county, with exceptions, ought to go accordingly. That case therefore is to be considered as a case of exception from the general rule. In *Turner v. Husler*, Mr. Baron Eyre, then sitting for Lord Thurlow, was of opinion, that by the word "tithes," attending to the nature of the testator's interest in them, and conjecturing what [316] he might think about them, both the freehold and leasehold tithes of the testator might pass. In coming to that decision, however, he lays hold of particular circumstances in the case, such as the perpetual interest in the renewal, but he does not at all deny the general rule in *Rose v. Bartlett*, or say that it is to be no longer considered as an authority in the law. Whether that decision be altogether satisfactory I will not presume to say;

but thus much I may observe, that I should have had considerable difficulties in the case; and sitting as a Judge in a court of equity, I should have felt myself much relieved in being able, in conformity to its practice, and out of respect to the decision of Judges and Courts in former times, to have asked the opinion of a modern court of law on the subject. This was followed by the case of *Pistol v. Riccardson*, which appears to me to be a case of great authority, Lord Mansfield was very unwilling to come to the decision which he ultimately made; the case was twice argued before him. It has been supposed indeed that His Lordship was not aware of the case of *Addis v. Clement*. Whether His Lordship would have come to a different determination had the case of *Addis v. Clement* been cited, or whether any distinction so satisfactory as to be confidently acted upon is to be found between the two cases, I do not feel myself bound to examine: but it does not appear to me that any very useful purpose would have been served by a contrary decision, considering how short a time even in that case the freehold and leasehold estates would probably have gone together. In all the cases, or almost all of them, the testator has had an intention imputed to him that his freehold and leasehold estates should be kept together, and this has been imputed in cases where the will appears to have been skilfully and artificially drawn. Is it possible if a testator had disclosed such an intention to his man of business, that he would have so inadequately expressed that intention as to use the terms occurring in this case, and in many of the other decided cases? I can hardly say that in any one of them there is an attempt by words or limitations to make the leasehold go together with the freehold as far as the rules of law and equity will admit, that is, to render the leasehold inalienable till about the same time at which a recovery can be suffered of the freehold. Why are we to be anxious to impute an intention which, the testator, if he entertained, has expressed in terms so little calculated to give it effect, that the doctrines of law, operating upon the words which he has actually used, will not permit any court to effectuate it but in a degree al-[317]-together short of the extent to which it is imputed to him? The mode of limiting them so that they may go together is familiar to every man of business; that mode is not pursued in any of the cases I have met with; yet in all those cases the wills are ably and artificially drawn: the inference may be thought to be that the intention had not occurred either to the testators or their men of business. The case of *Lane v. Lord Stanhope*, however, furnishes a principle upon which I am disposed to decide the present, because it professes to proceed upon the intent. In that case the freehold and leasehold parts were so blended that they were incapable of being distinguished, and they had been enjoyed together from time immemorial. They had been demised as one term under a rent reserved to the lessor and his heirs. This reservation is a fact from which we may infer that the testator thought the whole his inheritance: it is not a case in which we are conjecturing about his thoughts without acts upon his part to serve as the grounds of conjecture. The premises were also held with a right of renewal. The first taker of the real estate was also the residuary legatee of the leasehold estate: if therefore the testator did not intend that the freehold and leasehold should go together, he must have had this special intent, namely, that the first taker should have an estate for life in the freehold part, and under the residuary clause an absolute interest in the leasehold part; from which circumstance this consequence might have arisen, that when the first-taker died there would have been a separation of the different parts of a farm stated to be incapable of being distinguished. That difficulty must have been got over; and if it could not be done in any other way, so many acres must have been set apart (according to the rule of equity) for the freehold interest, and so many for the leasehold. The difficulty however was thought to afford a strong ground for inferring the intention of the testator that the whole should pass together, in a case where he had devised the farm as a farm. In truth the devise of a farm as one entire thing, where the testator had a farm composed of these different parts, is perhaps as sound a ground for the judgment as any in the case. With respect to the supposed intent of the testator that the freehold and leasehold should go together, how imperfectly was that secured in this very case! If the first-taker for life of the freehold, and who was entitled to the leasehold either for life by virtue of the limitations, or absolutely as residuary legatee, had a son who had come into existence, and continued in it but for [318] a moment, the intended union of enjoyment would have been instantly severed between his administrator and the remainder man. If the testator had any intention upon the subject, the carelessness of the person who framed his will had left it exposed to immediate disappointment, and yet the general tenor of

the will bespeaks legal skill in the person who penned it, and skill abundantly competent to secure the execution of the testator's purpose, if he really meant to keep the freehold and leasehold together as long as the law would allow. It is utterly impossible to assert that such an intention is in any reasonable degree effected by the terms of that will. The case of *Rose v. Bartlett*, however, was thought not to apply, because it was conceived that it manifestly appeared not to be the intention of the testator to pass the freeholds only: but it was admitted that if the case had been similar in terms to *Rose v. Bartlett*, the same intention would have been inferred upon the rule of law. The case of *Lane v. Lord Stanhope* was decided on its own circumstances; but this case not only has none of those circumstances, but is as different in circumstances of fact from *Lane v. Lord Stanhope* as any which ingenuity could state. The rule in *Rose v. Bartlett* is a rule which has been acknowledged for ages, and upon which I shall act until I am informed by the highest authority that I am no longer to regard it. Till I shall be so informed I shall substantially regard it in judgment, for I think it better to overrule it altogether, which I must not do, than to deny to it its effect upon grounds which do not completely satisfy my mind as solid and safe grounds of distinction.

HEATH, J. The case has been so fully discussed by my Lord, that I shall state my reason very shortly. I have always understood the rule of law laid down in *Rose v. Bartlett* to be a rule of property not to be shaken; and I have often heard it cited and recognised. It is a rule founded on intention; and therefore in the cases cited the Judges have proceeded on intention, and where they could collect that the intention of the testator was that both freehold and leasehold should pass, they have so determined. Thus the cases of *Addis v. Clement*, *Turner v. Husler*, and *Lane v. Lord Stanhope*, whether well or ill decided, have all proceeded on special circumstances from whence the intention was collected. It is sufficient to say that no such circumstances occur in this case. Besides, the testator used the words "messuages" and "hereditaments" in the same sense; and it is therefore to be inferred, that by the word [319] "messuages" he could mean those messuages only which were hereditaments. In some places he says "messuages lands tenements and hereditaments," but in others he says "messuages and other hereditaments."

ROOKE, J. My opinion is founded on the case of *Rose v. Bartlett*; which I consider as a rule of property not to be shaken. The cases cited in opposition to the rule have all admitted it, but have proceeded on special circumstances. With respect to the rule itself, Lord Hardwicke expressly said that it was not to be departed from, and Lord Mansfield held the same doctrine. I cannot agree that the rule has been so far shaken that the onus is to be thrown on the personal representative of shewing that the leaseholds are not intended to pass: on the contrary I think that the leaseholds must be taken not to pass unless special circumstances can be shewn clearly demonstrative of a contrary intent; and no such circumstances are to be found in this case.

CHAMBERE, J. Whether we argue this case upon the rule in *Rose v. Bartlett*, or upon the intention of the testator, we must come to the same conclusion. The rule laid down in *Rose v. Bartlett* is now so fully established that all the courts of justice are bound to conform to it: it has been considered as in force from the time of Charles the First to the present period, and has been recognised by the highest authority. With respect to the intent of the testator, this case abounds with pregnant circumstances to shew that he did not mean to include the leaseholds in the general devise.

The following certificate was sent to the Lord Chancellor:

We have heard this case argued by counsel, and attending to the whole of the will of the testator Beilby Thompson, We are of opinion that the leasehold houses and premises in Middlesex and Surrey did not pass by the general devise stated in this question.

ELDON. G. ROOKE.
J. HEATH. A. CHAMBERE.

[320] WILSON v. HARRIS. Nov. 24th, 1800.

Taking out a summons for further time to plead, is no waiver of the Defendant's right to move to change the venue.

The Defendant in this case took out a summons for a month's time to plead on the 14th of November, and served it on the Plaintiff's attorney; on the next day it was returned indorsed with the Plaintiff's consent for a week's further time, on the

terms of the Defendant pleading issuably, rejoining gratis, and taking short notice of trial for the adjournment day at the sittings in London after this term. The Defendant not liking the terms offered pleaded within the time he originally had to plead in, and did not accept the consent for further time to go before a judge upon the summons. On the 15th he obtained a rule nisi for changing the venue; and Lens, Serjt., in support of that rule now referred to Tidd's Pr. 364, ed. 1, 528, ed. 2, to shew that merely taking out a summons for further time to plead is no waiver of the Defendant's right to apply to change the venue, inasmuch as an order for time to plead is no waiver of that right, except in cases where the order being obtained on the terms of pleading issuably and taking short notice of trial for London or Middlesex by changing the venue a trial would be lost (a)¹.

Shepherd, Serjt., contra, insisted, that the party who moves to change the venue ought to apply before he does any thing to shew that he means to proceed in the county where it is laid, and that the Defendant by taking out a summons had accepted the venue as laid.

CHAMBRE, J. observed, that this kind of case had often occurred within his recollection in practice, and that parties were never held to waive their right to change the venue unless where they expressly accepted the terms offered. He added, that the point had lately been so decided in the Court of Exchequer.

The rest of the Court were of the same opinion.

Rule absolute.

[321] BLAKEY v. DIXON AND OTHERS. Nov. 24th, 1800.

[Referred to, *Allison v. Bristol Marine Association Company*, 1876, 1 App. Cas. 217.]

Declaration "that in consideration that the Plaintiff had taken Defendants' goods on board his ship to be carried to A., the Defendants promised 'to pay the money due for freight and carriage of the same on the delivery of the bill of lading;' that the bill of lading was delivered, by reason whereof the Defendant became liable to pay a large sum, to wit, 20l. for freight and carriage of the said goods." Held bad on demurrer, because it did not appear that anything became due for freight on the delivery of the bill of lading. Qu. Whether in alleging the promise to pay, the Plaintiffs should not have stated a specific sum, or said so much as should be reasonably due (a)²?

Assumpsit. The first count of the declaration stated, "that on &c. at &c. in consideration that the Plaintiff at the special instance and request of the Defendants had received and taken on board a certain ship or vessel of him the Plaintiff divers goods wares and merchandise to wit a two-wheeled carriage and harness to be carried on board the said ship or vessel from the port of London to parts beyond the seas to wit to Surinam they the Defendants undertook and then and there faithfully promised the Plaintiff to pay him the money due to him for freight and carriage of the same on the delivery of the bill of lading thereof to them; that the bill of lading thereof was afterwards, to wit on the same day and year aforesaid delivered to them, to wit at &c. and by reason thereof the Defendants then and there became liable to pay to the Plaintiff a large sum of money, to wit the sum of 20l. for the said freight and carriage of the said goods wares and merchandise whereof they the Defendants had notice." There were other counts in indebitatus assumpsit.

The Defendants demurred specially to the first count, and assigned for causes "that the Plaintiff had not in and by his said first count averred nor doth it thereby appear that any sum of money was at any time due to the Plaintiff for freight or carriage of the said goods wares or merchandise in that count mentioned, and that it

(a)¹ In support of this position see *Shipley v. Cooper*, 7 T. R. 698, and the cases there cited in the note.

(a)² And see *Mashiter v. Buller*, 1 Campb. 84. *Andrews v. Whitehead*, 13 East, 108. *Dobree v. E. I. Company*, 13 East, 290, 300. *Phillips v. Rodie*, 15 East, 547. *Davidson v. Willasey*, 1 M. and S. 313. *Birley v. Gladstone*, 3 M. and S. 205, 211. *De Shirate v. Kendall*, 4 M. and S. 37. *Andrew v. Moorhouse*, 5 Taunt. 435.

does not appear in or by the said first count of the said declaration that the said Plaintiff ever carried the said goods wares and merchandise from the port of London aforesaid, and that the said first count of the declaration aforesaid is in various other respects insufficient uncertain inconclusive and informal." There was also a general demurrer to the other counts.

Bayley, Serjt., in support of the demurrer. The promise on the face of this first count is to pay on the delivery of the bill of lading the money due for freight and carriage; unless therefore something was due for freight and carriage at the time of the delivery of the bill of lading, the Defendants have made no promise to pay any thing. Now according to the general rule of law nothing is due for freight until the ship has arrived, and it does not appear from this first count that the ship had ever quitted the port of lading. If there was any stipulation taking [322] this case out of the general rule it should have been specially stated. It is impossible for the Plaintiff to contend that the concluding words "and by reason thereof the Defendants became liable to pay a large sum of money, to wit 20l. for the said freight and carriage," &c. can amount to an averment of any such stipulation, for these words only state a conclusion of law, and unless that conclusion be warranted by the premises it must fall to the ground. Thus in *Rushton v. Aspinall*, Doug. 679, where no demand on the acceptor was alleged in an action against the indorser of a bill of exchange, Lord Mansfield said, "the promise alleged to have been made by the Defendant is an inference of law and the declaration does not contain premises from which such an inference can be drawn." With respect to the demurrer to the other counts it cannot be supported.

Shepherd, Serjt., contra. I admit that the concluding averment will not cure the defect in the declaration if there be any. But although freight is not in general payable until the arrival of the goods, yet by special contract it may be made payable at any other period. In point of fact it is always customary in the carriage of goods to India to contract for payment of the freight previous to the sailing of the ship. Here the Defendants have promised to pay the money due for freight at the time of the delivery of the bill of lading, and it is matter of evidence whether any thing were due for freight at that time or not. If the Plaintiff prove at the trial that the Defendants contracted to pay the freight on the delivery of the bill of lading, that will sufficiently establish that the freight was then due.

LORD ELDON, Ch. J. It is very clear what the parties meant to state on this record. The Plaintiff was to convey a carriage of the Defendants to Surinam; at which place, according to the general rule of law, the freight would become due. But as it might happen that the Plaintiff might find no one at Surinam to pay the freight, he contracts to have it paid ab ante. What difficulty there could have been in stating this contract upon the record I cannot conceive; but the strong inclination of my opinion is, that it is not stated upon the first count of this declaration. If the Plaintiff meant to say that the Defendants undertook to pay for freight and carriage of the goods on the delivery of the bill of lading, though no money should be then due for freight, he ought not to have laid the promise to pay the money due for freight; if on the other hand he meant to say that the Defendants undertook to pay such sum of money as should be due for freight and carriage on the delivery of the [323] bill of lading, another objection occurs, namely, that he has not averred that any thing was due for freight and carriage on the delivery of the bill of lading. Nothing could be due on the delivery of the bill of lading but by special contract, for *prima facie* the freight is not due until the arrival of the goods (*a*). Though it be true that the Plaintiff is not bound to state all this evidence on the face of his declaration, yet he cannot be permitted to explain one contract by another: having declared on a promise to pay the money due for freight on the delivery of the bill of lading, he cannot give in evidence another promise to pay the freight when the bill of lading should be delivered.

HEATH and ROOKE, Js., expressed themselves of the same opinion.

CHAMBRE, J. There could have been no difficulty in adapting the declaration to the Plaintiff's case. By the general rule of law both freight and mariner's wages are lost unless the goods are carried to the port of delivery. But where a party demands

(a) Even an inchoate right to freight does not attach, until the ship has broken ground. *Curling v Long*, ante, vol. i. p. 634.

freight under any other circumstances he must declare specially. He must so state his facts that the Court may see on the record that he is clearly entitled. The receiving goods on board to be carried to a foreign port is a good consideration to found a promise to pay the freight immediately. But in this case the Plaintiff states a promise by the Defendant to pay the money due for freight on the delivery of the bill of lading. Two circumstances therefore must concur. First, there must be something due for freight; secondly, there must be a delivery of the bill of lading: but with respect to the former of these, the Plaintiff has not stated any special manner in which anything has become due for freight. I am therefore clearly of opinion that the first count of this declaration is bad. Perhaps the count is informal in other respects; though it is not necessary to pursue the objections. In stating a promise to pay the money due for freight, the Plaintiff has not specified any particular sum, or averred that the Defendants promised to pay what was reasonably due; but has merely inserted the sum in his statement of the general inference of law at the conclusion of his declaration.

Judgment for the Defendants on the first count, and for the Plaintiff on the other counts (*b*).

[324] DOE EX DEM. BARNFIELD AND OTHERS v. WETTON. Nov. 24th, 1800.

Devise "to S. S. her heirs and assigns for ever; but if she shall happen to die leaving no child or children lawful issue of her body living at the time of her death, then to F. B. and his heirs." Held that the devise in fee to S. S. was not restrained by the subsequent words to an estate-tail: and that the devise over to F. B. was a good executory devise (*a*).

At the trial of this action before Lord Eldon, Ch. J., at the Sittings after last Trinity term, a verdict was found for the Plaintiff, subject to the opinion of the Court, upon a case which stated in substance as follows:

G. Taylor being seised in fee of the premises in question, which were copyhold, and having previously surrendered the same to the uses of his will, on the 18th of May 1761 devised as follows: "I give devise and bequeath unto my wife Phebe Taylor all my freehold copyhold and leasehold messuages tenements hereditaments and premises with their appurtenances wheresoever situate for and during her natural life." After several bequests of personal property, and charging the said premises with an annuity secured by bond he proceeded as follows: "And from and after the decease of my said wife I give devise and bequeath all my said freehold premises together with my said leasehold premises (charged and chargeable nevertheless as aforesaid) unto my friend Francis Barnfield his heirs executors and administrators, upon trust nevertheless from and after payment and satisfaction of the said bond debt to permit and suffer my said son John Taylor to have receive and take the rents issues and profits thereof to and for his own use and benefit for and during his natural life, and from and immediately after his decease then upon trust to and for all and every the sons and daughters of the body of my said son John Taylor lawfully issuing and their heirs, and from and after the decease of my said wife as aforesaid I give devise and bequeath all my said copyhold messuages and premises (charged and chargeable nevertheless as aforesaid) unto my Daughter Susannah Saunders her heirs and assigns for ever, but if my said daughter shall happen to die leaving no child or children lawful issue of her body living at the time of her death then I give devise and bequeath all the said copyhold premises chargeable as aforesaid unto the said Francis Barnfield and his heirs upon trust nevertheless by and out of the rents and profits thereof to keep the said premises in good and substantial repair as occasion shall be or require and to pay or permit and suffer my said son John Taylor to have receive and take the rest and residue of the rents issues and profits of the said copyhold premises to and

(*b*) In *Chase and Another v. Lovering*, Sty. 220, the Plaintiffs declared "upon a promise made by Defendant to the Plaintiffs, to pay unto them 84l. out of the freight of a ship." On non assumpsit and verdict for the Plaintiffs, the Defendant moved in arrest of judgment, for that it did not appear that any freight was due out of which the money was to be paid: and the objection was held good.

(*a*) Vide *Dansey v. Griffiths*, 4 M. & S. 61, 65. *Doe d. Smith v. Webber*, 1 B. and A. 713, 722. *Clayton v. Lowe*, 5 B. and A. 636.

for his own use and benefit for and during his natural life and from and after his decease then upon [325] trust to and for all and every the sons and daughters of the body of my said son lawfully issuing and their heirs and for want of such issue then upon trust for my right heirs for ever." The testator George Taylor, afterwards died seised of the premises, without altering his will, and upon the 21st May 1770 his daughter Susannah Saunders was admitted to the premises to hold to her and the issue of her body lawfully begotten in reversion expectant upon the death of the said Phebe Taylor, and at the same court at which the said Susannah Saunders was so admitted in reversion, the said Phebe Taylor and Susannah Saunders together with her husband Constable Saunders duly suffered a recovery according to the custom of the said manor, to the use of the said Phebe Taylor for life, with remainder in fee to the said Susannah Saunders; who were severally admitted accordingly. The said Phebe Taylor died in March 1786 in the lifetime of Susannah Saunders; who survived her husband the said Constable Saunders, and afterwards intermarried with the Defendant Humphrey Wetton. The said Susannah Wetton (formerly Saunders) died about 11th December 1799, leaving no lawful issue of her body then living, having first surrendered the premises to the uses of her will, and having also afterwards made her will or testamentary writing of appointment and thereby given the premises to her husband the Defendant and Henry Taylor in trust as mentioned in her will; and the Defendant and the said Henry Taylor were afterwards admitted to the same accordingly. Francis Barnfield the devisee in trust in the will of the said George Taylor died on the 18th April 1763, leaving the lessors of the Plaintiff his only sons and heirs at law according to the custom of the manor him surviving, who were thereupon admitted to the premises in question in fee at the will of the lord. The question for the opinion of the Court was, Whether the Plaintiff under the circumstances stated was entitled to recover?

Best, Serjt., for the Plaintiffs. The question is, Whether the devise over to Francis Barnfield be a good executory devise? and this will depend upon another question, Whether the previous devise to Susannah be an estate in fee? for if that be an estate in fee, the devise over is an executory devise or nothing. The limitation "to Susannah Saunders, her heirs and assigns for ever," *prima facie* imports a fee, and if it had been intended by the testator that the words immediately following should restrain that estate to an estate tail, he would not have confined the failure of issue to the time of her death. In *Pells v. Brown*, Cro. Jac. 590, [326] the devise was to Thomas and his heirs in perpetuum, and if Thomas died without issue living William his brother, that then William should have the lands to him his heirs and assigns for ever; and it was resolved that Thomas took an estate in fee and not in tail; for the limitation respecting issue was not absolute and indefinite whensoever he died without issue, but with a contingency, if he died without issue living William. So in 1 Roll. Abr. 835, pl. 4, where there was a devise of lands to B. in fee, and of other lands to C. in fee, subject to a proviso, that if either died before they were married or before twenty-one and without issue, then the estate of him so dying should go to the survivor, it was held that each took an estate in fee, with an executory devise over to the survivor for life. To the same effect is *Gulliver v. Wicket*, 1 Wilson, 105; and the cases of *Porter v. Bradley*, 3 T. Rep. 143, and *Roe d. Shears v. Jeffery*, 7 T. Rep. 589, are in point. Besides, the word "assigns" would never have been inserted in the former part of this devise, if the testator had intended that the word "heirs" should denote special heirs; an estate-tail not being in its nature assignable.

Clayton, Serjt., *contra*. Though the first words of this limitation import a fee, they are so controlled by those which follow that S. Saunders could only take an estate-tail. It appears to have been the general intent of the testator to provide for his two children and their issue. Having limited an estate to the son and his children, he proceeds to give the estate in question to his daughter and her children. Now if the devise be construed strictly, the consequence must be, that if all the children of S. Saunders should die before her, the estate would go over, though such children may have left children living at the death of S. Saunders. In order therefore to effectuate the intent of the testator, the Court must hold that the estate would descend to such grandchildren; and this cannot be done without giving S. Saunders an estate-tail. This circumstance distinguishes the case from *Porter v. Bradley* and *Doe v. Jeffery*, in which the intent of the testator seems to have been in favour of a fee. In *Clutch's case*, Dyer, 330 b., 1 Roll. Abr. 839, pl. 3, S. C. "one devised a messuage to Alice his

daughter and her heirs, and another messuage to Thomasin his daughter, then eight years old and her heirs, and if she died before she attained the age of sixteen years living Alice, then he willed that Alice should have Thomasin's share to her and her heirs; and if Alice died having no issue, [327] living Thomasin, that Thomasin should have and enjoy Alice's share to her and her heirs; and if both daughters should die having no issue, devise over to J. S. and his heirs: and it was held (a) that the daughter took an estate-tail, and not a fee on a contingent subsequent." This case comes very near the present, and though Pemberton, Ch. J., in *Holmes v. Meynell*, Sir T. Jones, 173, observes that he had heard great opinions that it was not law, yet it has never been expressly denied. A very strong authority for the construction for which I am contending is *Morgan v. Griffith*, Cowp. 234, where the testator having devised to T. G. for and during his natural life and after his decease to his right and lawful heirs and assigns for ever, and for want of such lawful heirs to T. E. his heirs and assigns for ever, T. G. was held to take only an estate-tail. It has been a general rule ever since the case of *Luddington v. Kime*, 1 Salk. 224, 1 Ld. Ray. 203, S. C. that the Court will not construe a limitation to be an executory devise, if they can construe it to be a contingent remainder.

LORD ELDON, Ch. J. This case has on the part of the Defendant been put upon the only ground on which it was capable of being put, viz. that it was the manifest intention of the testator, that the property in question should go to the issue of S. Saunders. Some principles may be taken as quite clear. If this be a good executory devise a recovery will not bar it, and it is equally true that the courts always endeavour to construe a limitation a contingent remainder rather than an executory devise. The policy of the latter rule is founded on the very circumstance that an executory devise cannot be barred. After giving the estate to S. Saunders her heirs and assigns for ever, the testator proceeds to limit it over to J. Taylor in the following terms: "But if my said daughter shall happen to die leaving no child or children lawful issue of her body living at the time of her death then &c." Now J. Taylor to whom the estate is here given certainly was a relation of S. Saunders, and if the devise had been "if my daughter shall die without heirs," as J. Taylor was the next heir to S. Saunders after her own children, it would have shewn that the testator by the word "heirs" meant heirs of the body, because J. Saunders could not die without heirs so long as J. Taylor existed. On similar grounds *Clatch's case* may have been decided. It was impossible that the second limitation to Thomasin should ever take place if Alice took an [328] estate in fee by the first limitation. For the estate being limited to Alice and her heirs, if Alice died without children, living Thomasin, Thomasin the sister would take as heir general of Alice: when therefore the testator says, "if Alice die without issue, living Thomasin," the latter words circumscribe the former, and shew that by the word "heirs" must be intended "issue." It is probable however that this case was determined upon the last limitation, "if both daughters shall die having no issue devise over to J. S." It has been argued in this case that it was manifestly the testator's intention that the children and grandchildren of S. Saunders should be benefitted. But however that may be, the question is, Whether the testator intended that the children and grandchildren should be benefitted by this will or by some disposition to be made by S. Saunders? If she had any children living at the time of her death, the estate being given to her in fee, she would have abundant power to provide both for children and grandchildren. Nothing however is given to them by this will; they are merely named in the description of the contingency on which the estate is to go over. It only remains to be considered, whether this limitation be within the time allowed to executory devises; and that it is, there can be no doubt. With every inclination to make this a contingent remainder, yet unless we can construe the devise to be to Phebe Taylor for life, and in case S. Saunders shall leave children living at her death, then to S. Saunders in fee, but if not, then to her for life, remainder over in fee, we must hold it to be an executory devise. But by the mode of construction to which I have alluded S. Saunders would not know at the time when her interest commenced, whether she was to have a life-estate or a fee. We are bound to hold that the whole fee being given to S. Saunders her heirs and assigns in remainder, no further remainder over can be limited upon that

fee, and that the estate given to the lessor of the Plaintiff is a new fee limited upon a contingency.

HEATH, J. I think this case clearly falls within the principles laid down in *Pells v. Brown*, and has not been taken out of those principles by the arguments which have been employed. A fee having been given to S. Saunders, the rule that a limitation shall be construed a contingent remainder rather than an executory devise cannot apply to the limitation over in this case.

ROOKE, J. I am of the same opinion.

CHAMBRE, J. I am of the same opinion.

Judgment for the Plaintiff.

[329] MILLER v. COUSINS. Nov. 25th, 1800.

If Defendant's attorney admit in effect, though not in terms, that a writ of error sued out by him has been brought for delay, the Plaintiff is at liberty to proceed on the judgment (a)¹.

The Plaintiff in this case having signed judgment for want of a plea, the Defendant sued out a writ of error thereon; and the Plaintiff brought an action on the judgment. The Defendant then applied to the Court and obtained a rule Nisi to stay the Plaintiff's proceedings in the second action, pending the writ of error, he giving judgment in that action, with stay of execution, and undertaking not to bring a writ of error thereon.

Bayley, Serjt., in answer to the application, produced an affidavit to shew that the writ of error was merely for delay, which stated that the Defendant's attorney had applied to the Plaintiff's attorney for six months' time to pay the money due, and for which the action on the judgment was brought, alleging "that unless that request was granted the Defendant must put himself to great expence to obtain that time and in the end must go to gaol and thus the Plaintiff would lose his money," but never intimated that there was any error in the judgment. He cited *Law v. Smith*, 4 T. R. 436, n. (a), where on account of a similar declaration of the Defendant's attorney the Court of King's Bench refused to stay proceedings on the Plaintiff's judgment, pending a writ of error brought by the Defendant.

Shepherd, Serjt., contra, insisted, that it was not a necessary inference from this declaration of the Defendant's attorney, that the writ of error was brought for delay, and that the Court had always held a writ of error a stay of proceedings, except in cases where there has been an unequivocal declaration of its being merely for delay.

But the Court held the rule to be, that where the Defendant's attorney has in effect, though not in terms, admitted the writ of error to be brought for delay, there the Plaintiff is notwithstanding at liberty to proceed on the judgment (b).

Rule discharged.

[330] PENSON v. LEE. Nov. 25th, 1800.

In an action on a policy of insurance, with a count for money had and received, if the Defendant pay no money into court, but establish as a defence that the risk never commenced, the Plaintiff is entitled to a verdict for the premium, though no demand of premium was made by his counsel in opening the case. In such case neither party is entitled to the costs of the 1st count, but the Plaintiff is entitled to the costs of the count on which he succeeds and so much of the expences of the trial as were necessarily incurred by him in support of that count (a)².

Assumpsit on a policy of insurance, with a count for money had and received. The Defendant paid no money into Court.

At the trial before Lord Eldon, Ch. J., at the Guildhall sittings after last Easter

(a)¹ Vide *Rawlins v. Perry*, 1 N. R. 307. *Savelby v. Moor*, 3 Taunt. 51.

(b) *Entwistle v. Shepherd*, 2 T. R. 78, and *Masterman v. Grant*, 5 T. R. 714. See also 1 Sellon's Pract. 544, ed. 2, where the authorities on this point are collected.

(a)² Vide *Vollum v. Simpson*, post, 368. *Skarratt v. Vaughan*, 2 Taunt. 266. *Morgan v. Edwards*, 6 Taunt. 394. *Lopes v. De Tastet*, 3 B. and B. 292.

term, the case was opened for the Plaintiff merely on his right to recover upon the policy. The defence set up was, that the ship was not sea-worthy; and upon this point, without any direct evidence of fraud, the case went to the jury. While they were deliberating upon their verdict, the counsel for the Plaintiff observed to His Lordship, that in case the jury should be of opinion that the ship was not sea-worthy, the Plaintiff would be entitled to a verdict for a return of premium. The jury having no intimation of this claim brought in their verdict generally for the Defendant.

A rule Nisi having been obtained upon a former day, to enter a verdict for the premium upon the count for money had and received,

Cockell and Vaughan, Serjts., shewed cause, and admitted that upon enquiry the practice had been found to vary, with respect to allowing the Plaintiff to take a verdict for the premium in cases of this kind, contending that as no mention had been made by the Plaintiff in the opening of his case respecting the return of premium, under the apprehension that such a claim might prejudice the jury against him on the principal point, he ought not now to be permitted to set it up; that the Defendant had been deprived of the opportunity of contesting the claim by cross-examining the Plaintiff's witnesses, or producing evidence on his own part to establish fraud, and that therefore if the Plaintiff were now permitted to insist upon it, he would take advantage of his own wrong. They cited the case of *Nesbitt v. Whitmore*, B. R. E. 40 Geo. 3 (*h*), where a case having been reserved for the opinion of the Court, in which no mention was made respecting a return of premium, the Court being of opinion with the Defendant upon the principal point, did not think proper to direct a verdict to be entered for the Plaintiff for the premium, though to prevent another action being brought they subjected the Defendant to the terms of paying the premium to the Plaintiff on having judgment entered for himself without costs. They also referred to *Mackenzie v. Duff*, Park. Insur. 377.

[331] Shepherd, Lens, and Bayley, Serjts., in support of the rule observed, that had they not considered it as the constant practice for the Plaintiff in such cases to have a verdict on the count for money had and received, they should have made the claim at an earlier period of the cause; that whenever the defence set up imports that the risk never has commenced, it is a consequence of law that the Plaintiff is entitled to a verdict for the return of premium; that if the facts of this case had been stated on a special verdict, the Court would have been bound to enter judgment for the Plaintiff. They cited *Burman v. Woodbridge*, Dougl. 781, and *Rothwell v. Cooke*, ante, vol. i. p. 172, and *Hogg v. Horner*, Park. Insur. 377, ed. 4, to shew that the Plaintiff is entitled to a verdict, though the right to a return of premium were never mentioned during the progress of the cause; and relied on *Nesbitt v. Whitmore*, where, although judgment was entered for the Defendant, he had been compelled to pay the premium to the Plaintiff.

LORD ELDON, Ch. J. I will state the present inclination of my opinion upon this subject: but before the case is ultimately decided I should wish to have some conversation with Lord Kenyon, and learn whether any or what practice has hitherto prevailed. If any practice has prevailed it will be unnecessary to enter into the theory of the subject. The Plaintiff's language upon the record is this; I am entitled to recover as for a total loss, and if I fail in that I am entitled to recover so much money as the Defendant withholds from me contrary to good faith. The language of the Defendant is, that he owes nothing upon either demand. If the nature of the defence be such that the Plaintiff must necessarily recover back the premium if he fail in his demand upon the underwriters as for a total loss, his counsel need not state a single word to the jury respecting the return of premium. But if the failure on the greater demand does not necessarily infer a right to recover upon the lesser demand, the question will be, Whether if the Plaintiff's counsel confine himself to the former, the Defendant's counsel will not have a right to conclude that the latter has been abandoned. The Plaintiff has his choice; he has stated two demands upon the record, and he may insist upon both, or upon one only; if he be apprehensive that setting up a claim for the return of premium will prejudice the jury against him as to his claim for the total loss, and therefore suffers the cause to proceed to its conclusion without saying one word about the premium, how [332] is the Defendant's counsel to act? If there be any settled practice upon the subject, they may conduct them-

(b) See this case mentioned with some slight difference, 1 East, p. 97, in notis.

selves accordingly; but supposing no settled practice to exist, they will have lost the opportunity of cross-examining the Plaintiff's witnesses, as well as of producing evidence on their own part, to rebut the demand for a return of premium. Does the defence established in this case necessarily infer a right to a return of premium? Certainly not, if gross fraud would have been an answer (a). *Primâ facie* the Plaintiff's counsel had nothing to do but to make the demand; but if gross fraud had been shewn it will not be admitted that they could have succeeded upon that demand: and the question is, Whether it was necessary for the Defendant to combat a claim which had never been made? If it was my duty to have stated to the jury, that if they found the ship not sea-worthy they must give the Plaintiff a verdict for the premium, on the count for money had and received, I do not think that the mere circumstance of this verdict being found generally for the Defendant ought to conclude the Plaintiff. But if gross fraud be a material ingredient in summing up where a return of premium is demanded, though I will not take upon me to say that actual fraud was proved in this case, yet I shall not have done my duty in not stating to the jury that there were circumstances very material for their consideration, and that if they amounted on their judgment to gross fraud, that would overthrow the claim for a return of premium. Suppose the Defendant's counsel, upon the demand being set up at the conclusion of the trial, had then desired leave to go into evidence of fraud; could it have been refused? The inconvenience will be extreme if the Plaintiff's counsel can be permitted to open as many cases as they please *gradatim et seriatim*. I do not conceive that this case can be decided merely with reference to actions on policies of insurance; it must be decided with reference to all other cases in which several demands can be made under the different counts in the declaration. If the practice is already settled it must prevail: but if it be yet unsettled, I think the Plaintiff ought to be bound by his opening.

HEATH, J. If the practice upon this subject be settled, I see no reason why the Defendant should complain of surprise, for the common and ordinary practice is sufficient notice to him.

[333] ROOKE, J. I shall yield to the practice whatever it may turn out to be. But on principle, it appears to me, that it would be attended with great inconvenience, if the Plaintiff were suffered to take a verdict in cases of this kind. I think that the Plaintiff ought to make a full disclosure of his case to the jury: the jury only have power to give a verdict for the return of premium; the Court cannot order it. Suppose the Plaintiff were to admit that the ship was not sea-worthy, the Court could not refer the case to the prothonotary to ascertain the premium. The Defendant may go into evidence of fraud; and if the demand be capable of being rebutted, it should have been stated to the jury.

CHAMBER, J. In practice great indulgence is allowed to the counsel in cases of this sort. Some inconvenience may perhaps arise from not stating the whole case to the jury in the opening; but justice is often better obtained by not holding the counsel too strictly to the statement in the opening. On the part of the Plaintiff all that was necessary was proved; and if the Defendant intended to prevent the Plaintiff from recovering the premium he should have proved fraud. The Court indeed ought not to suffer the Defendant to be surprised, or to preclude him from entering into evidence if he has it in his power. In general, every thing is taken to be proved which is not objected to. In drawing up a demurrer to evidence, many facts are stated which never were actually given in evidence. If it were not so, the business of the sittings would be protracted to an intolerable length. The determination of this case must depend entirely on the practice.

LORD ELDON, Ch. J. On this day said—We have made inquiries respecting the practice on this subject, and find that Lord Kenyon is of opinion that in cases of this kind, the Plaintiff is intitled to a verdict for the premium. Without entering into any reasoning upon the subject, we have only to say, that the verdict in this case must be entered for the Plaintiff on the count for money had and received; but as there may be cases in which the application of this practice may work injustice, we hope that the Plaintiff's counsel will in future demand the premium in his opening where he means to insist upon it on failure of his claim for the loss.

(a) See this point discussed, *Park. Insur.* 215-218, and finally settled in *Chapman and others v. Fraser*, B. R. Trin. 33 Geo. 3, *Park. Insur.* 218.

Per Curiam. Rule absolute.

Afterwards on the taxation of costs the prothonotary allowed to the Plaintiff the costs of the count for money had and re-[334]ceived on which he had succeeded, in doing which he included all the expenses attending the trial, but allowed no costs to either party on the counts upon which the Plaintiff had failed. In consequence of this a rule nisi was obtained calling on the Plaintiff to shew cause why the prothonotary should not review his taxation and allow costs to the Defendant on all the counts except that for money had and received.

Shepherd, Lens, and Bayley, Serjts., now shewed cause, and argued, 1st, that the Plaintiff was entitled to all the costs of the trial since he could not have recovered upon the count for money had and received without going into all the circumstances of the case, and that it was no hardship upon the Defendant, inasmuch as he might have saved that expence and trouble by paying the premium into court; 2dly, that according to the case of *Spicer v. Teasdale*, ante, p. 49, where the Plaintiff in this court recovers upon one count he is entitled to the costs of all the counts; but even supposing that practice to have been since altered and the rule of the King's Bench to have been adopted (*a*)¹, yet the Defendant could not be entitled to any costs in a case where the Plaintiff has succeeded upon one count on the trial of the general issue; though where different issues were tried it might be otherwise.

Cockell and Vaughan, Serjts., in support of the rule contended, 1st, that the Plaintiff's success upon the last count did not arise out of the evidence adduced by the witnesses on the part of the Plaintiff, but out of the total failure of the Plaintiff on that part of the case which it was brought to support and out of the case established by the Defendant; 2dly, that where the Court see two separate causes of action on record, if the Plaintiff succeed on one and the Defendant on the other, they will allow costs to each party, and that no two causes of action could be more distinct than those upon which issue was taken in this case. They referred to *Day v. Hanks*, 3 T. R. 654, *Braithwaite v. Bradford*, 6 T. R. 599, and to the case in this court, T. 32 G. 3, cited by Le Blanc, J., 8 T. R. 467.

LORD ELDON, Ch. J. Subsequent to the case of *Spicer v. Teasdale* the Court declared, though whether in such a manner as to be heard by all the bar I will not take upon me to say, that the practice of this Court should in future be conformable to that of the King's Bench. On this record there are manifestly distinct causes of action; and if consistently [335] with the practice of the King's Bench, the Court could order the prothonotary to allow costs to the Plaintiff upon that count only on which he has succeeded, and to the Defendant upon the others, I think that we should promote the justice of the case; but as it appears that the Defendant in a case like this would not be allowed his costs in the King's Bench, I am to presume that the practice of that Court is founded on equity and reason. In the present instance, however, as the prothonotary has taxed the costs under the supposition that he was bound to allow all the costs of the trial to the Plaintiff, the taxation must be reviewed. In making his review he will consider whether the witnesses adduced by the Plaintiff were bonâ fide brought forward to support the count upon which the Plaintiff has recovered either wholly or in part, and will allow for them accordingly; if he shall be of opinion that they were not brought forward with the intention of supporting that count, either wholly or in part, he will disallow the costs respecting them altogether.

HEATH, J., observed, that in the case of *Day v. Hanks*, the judgment entered for the Plaintiff had been suffered by the Defendant to go by default (*a*)²; and that the Plaintiff who carried down the record to trial failed there altogether.

ROOKE J., concurred.

CHAMBER, J. The case of *Day v. Hanks* does not apply to this; for in that case the Plaintiff had judgment upon an inquest of office only, whereas the Defendant had judgment upon the only issue that went down to trial. It seems to me to be the settled practice of the King's Bench, that if a trial takes place, and any one issue be

(a)¹ Which the Court intimated to have been the case, when the rule nisi was obtained.

(a)² In *Braithwaite v. Bradford*, 6 T. R. 602, however, Grose, J., thought that "if that case were considered as so many rights claimed in different counts, and separate issues taken on each, it would fall within the reason of the determination in *Day v. Hanks*."

found for the Plaintiff, he must have the general costs; though on the taxation of those costs, the officers are authorized to deduct the costs of all such parts of the pleadings, of such parts of the briefs, and of such witnesses as are not applicable to the points on which the verdict proceeds.

The prothonotary was ordered to review his taxation on the above principles (b).

[336] BROOKER v. SIMPSON. Nov. 25th, 1800.

A joinder in demurrer must be signed by a Serjeant.

The Defendant, a prisoner, having demurred and given a rule to join in demurrer, the Plaintiff filed a joinder in demurrer in the office which was not signed by a Serjeant; whereupon the Defendant signed judgment of nonpros; and then obtained a rule to shew cause why he should not be discharged out of custody.

Bayley, Serjt., on shewing cause cited *Hubert v. Lord Weymouth*, 2 Bl. 816, where the Court held that the replication of nul tiel record does not require a Serjeant's hand, and overruled the case of *Simson v. Neale*, 2 Wils. 74, in which the contrary had been decided; he also referred to *Ellis v. Govey*, ante, vol. i. p. 469, where the Court said that a similiter was an exception to the rule, "that where the plea is signed by counsel the replication must be signed also," and urged that a joinder in demurrer was a mere similiter.

Marshall, Serjt., contra, cited *Douglas v. Child*, E. 33 Geo. 3, C. B. (a)¹.

The Court (after conferring with the officers) said, that a joinder in demurrer ought to have a Serjeant's hand; for that a Serjeant ought to be met by a Serjeant.

Rule absolute.

ATKINSON v. NEWTON. Nov. 25th, 1800.

Fi. fa. being made returnable on a King's Bench return day, instead of a Common Pleas return day, was amended by the award of execution on the roll (a)².

The writ of fieri facias in this case having been made returnable "on the Thursday after the morrow of All Souls," which is the return day in the King's Bench, instead of "on the morrow of All Souls," the return day in this Court, cross motions [337] were made, viz. on the part of the Plaintiff to amend, and on the part of the Defendant to set aside the proceedings on the execution for irregularity. Both these applications now coming on to be considered,

Shepherd, Serjt., in support of the former motion, cited *Browne v. Hammond*, Barnes, 10. *Newnham v. Law*, 5 T. R. 577. *Shaw v. Maxwell*, 6 T. R. 450. *Bourchier v. Whittle*, 1 H. Bl. 291. *Carr v. Shaw*, 7 T. R. 299, and *Stevenson v. Danvers*, ante, p. 109.

Best and Onslow, Serjts., contra, insisted that the Court would not give leave to amend unless with a view to further the justice of the case, which in this instance would be defeated by the amendment proposed. They also contended that there was nothing to amend by, and cited *La Roche v. Wasbrough*, 2 T. R. 737, where the Court

(b) The case most analogous to the present, is *Butcher v. Green*, Doug. 678, cited ante, p. 50, note (b). In that note an observation is made on *Butcher v. Green*, which observation, as well as the general inference there drawn from *Day v. Hanks*, must, after the present decision, be abandoned.

(a)¹ *Douglas v. Child*, E. 33 Geo. 3, C. B. The Defendant delivered a demurrer without being signed by a Serjeant; whereupon the Plaintiff signed judgment.

The Court after hearing Bond and Runnington, Serjts., and having considered the point, declared that it would be extremely improper to allow an attorney to sanction so important a step in the cause, as that which admits all the facts to be well pleaded on the other side. And Eyre, Ch. J., said, that it would be great presumption in an attorney to take upon himself to decide when a party might demur or join in demurrer; and that this could in no case be such a matter of course that the attorney might do it himself.

(a)² Vide *Simon v. Gurney*, 5 Taunt. 605, S. P.

in granting leave to amend laid stress on the circumstance of there being something by which the mistake might be amended.

But the other side observing, that on a reference to the record as now made up, it would appear by the award of execution that the writ was awarded "returnable here on the morrow of All Souls, &c." and this being proved by production of the record,

The Court made the rule for amending absolute, and discharged the rule for setting aside the proceedings.

MOUNTFORD v. WILLES. Nov. 27th, 1800.

In a contract for the sale of goods, if any particular time be limited for the payment of the price, the vendor is entitled to interest on the price from that time (a).

Action for goods bargained and sold. In support of the Plaintiff's demand, a note of the Defendant's was given in evidence at the trial, requesting the Plaintiff to furnish one W. Julien with timber to the value of 30l. or thereabouts, for which the Plaintiff undertook to be answerable. At the bottom of the note was written, "Credit till Christmas." A verdict was found for the Plaintiff which included interest on the sum demanded from the Christmas referred to in the note.

Marshall, Serjt., having obtained a rule nisi to set aside the verdict and have a new trial on some other points which were overruled, now objected that the Plaintiff could not retain the verdict as it included interest, which ought not to be given for goods sold. He cited *Blancy v. Hendrick*, 3 Wils. 205, where [338] though it was ruled that interest might be given on an account stated from the day on which it was stated, yet Gould, Blackstone, and Nares, Js., (absente De Grey, Ch. J.,) said, that "for money owing for goods sold and delivered no interest shall be allowed."

But The Court held that the Plaintiff was entitled to interest from the period mentioned in the note.

Rule discharged.

ELLIOT AND OTHERS v. DAVIS. Nov. 27th, 1800.

A. executed a bond as the joint and several bond of himself and B. and signed it "A. and B." having no authority from B. so to do. Held that the bond was good as the several bond of A.

Debt on bond. Plea non est factum.

At the trial before Lord Eldon, Ch. J., it appeared that the bond in question was given to the Plaintiffs by the Defendant as surety for a third person; that previous to its execution, the Defendant having brought the bond to the Plaintiff's counting-house filled up with his own name only as surety, it was objected on the part of the Plaintiffs that they meant to have the joint security of the Defendant and his partner, one Marsh; that upon this objection being made the bond was, with the consent of the Defendant, but in the absence of Marsh, altered into a joint and several bond in the names of the Defendant and Marsh, and being signed by the Defendant "Davis and Marsh" was by the former regularly sealed and delivered as his deed; and that Marsh, on being informed of the transaction, expressed his disapprobation of what the Defendant had done. Upon this evidence it was insisted on the part of the Defendant that there was no regular single execution of the bond, there being but one seal, against which were set the names of "Davis and Marsh," and that the execution therefore being insufficient as against both, was insufficient also as against the Defendant. A verdict was found for the Plaintiffs, with leave to the Defendant to move to have that verdict set aside and a nonsuit entered. Accordingly a rule nisi having been obtained for that purpose on a former day,

Cockell, Serjt., now shewed cause, and contended that the bond was well executed

(a) And see *Tapenden v. Randal*, post, 472. *De Havilland v. Bowerbank*, 1 Campb. 50, 52, and the cases there cited. *Contra*, *Gordon v. Swan*, 12 East, 419. *Slack v. Lowell*, 3 Taunt. 157.

as against the Defendant, the signing being immaterial, as appears from the form of pleading, where the sealing and delivery only are averred, both which latter acts the Defendant alone performed. He cited *Cromwell v. Grunsden*, 2 Salk. 462, 1 Lord Raymond, 335, S. C., where the Plaintiff, having declared on a bond of the Defendant's testator Robert Erlin, and it appearing to have been signed [339] "Robert Erlwin" the Court on an objection taken, said, "the variance between the name signed which is Erlwin and the name in the obligation which is Erlin, is not material, because subscribing is no essential part of the deed, sealing is sufficient."

Sellon, Serjt., in support of the rule, insisted, that though signature might not be necessary to the validity of a bond, still if any signature be actually put to it, the parties to the bond must abide by that signature; that in this case the alteration in the bond was made at the instance of the Plaintiffs, who having at the time the Defendant entered into this engagement refused to take his single security, ought not now to be allowed to resort to him alone, since if it had been a good joint and several bond, he would have been entitled to contribution from his co-surety (a)¹.

LORD ELDON, Ch. J. The alteration which was made in the bond appears to have been as much the act of the Defendant as of the Plaintiff, so that no argument in his favour can be drawn from that circumstance. His single security being objected to, he offered to execute a bond for himself and his partner Marsh, having no authority from the latter to bind him. The way in which this obligation begins is this, "Know all men by these presents I T. Davis and G. Marsh," &c. The Defendant meant it to be his several bond, and the joint and several bond of himself and Marsh. Having had no authority to bind Marsh, the bond becomes the several bond of the Defendant, but not the joint and several bond of himself and Marsh. The bond being sealed and delivered is sufficient, and we would, if it were necessary, hold him to have described himself by the name of "T. Davis and G. Marsh," and to be estopped from shewing that his name is T. Davis only.

The other Judges concurring in opinion. Rule discharged.

SMITH v. TYSON. Nov. 27th, 1800.

If an affidavit to hold to bail made by the Plaintiff's clerk expressly negative a tender in bank notes, it is bad: for a clerk cannot have certain knowledge of a mere negative (a)².

The Defendant in this case was holden to bail on an affidavit made by the Plaintiff's clerk, who swore positively to the debt, "and that no offer or tender had been made to the said Plaintiff to pay the same or any part thereof in notes [340] of the governor and company of the Bank of England expressed to be payable on demand."

Onslow, Serjt., having obtained a rule nisi for discharging the Defendant on a common appearance on the ground of the tender in bank-notes having been expressly negated by a clerk, whereas that fact could not be sufficiently within his knowledge to warrant the affidavit;

Bayley, Serjt., contra, insisted that the affidavit being positive was sufficient, for that if it was false the clerk was indictable for perjury, and that a positive affidavit of the debt by a clerk had been held good.

Chambre, J., observed that a clerk may have knowledge of a debt being due to his master, that being a certain fact, and if that debt has been discharged it is matter of defence; but that in this case the clerk had also sworn to a mere negative, of which he could have no certain knowledge (a)³.

(a)¹ See *Cowell v. Adams*, ante, 268, and *Deering v. Lord Winchelsea*, ante, 270.

(a)² Vide *Knight v. Keyte*, 1 East, 415. *Hammersley v. Mitchell*, post, 389. *Bolt v. Miller*, post, 420. *Smith v. Barclay*, 3 B. & P. 219.

(a)³ If the clerk had negated the tender according to the best of his knowledge and belief it would have been equally bad in this case. *Cass v. Levi*, 8 T. R. 520. Though if the Plaintiff had been abroad it should seem that such an affidavit by the clerk would have been sufficient. See *Munro v. Spinks*, 8 T. R. 284, where the agent of a Plaintiff abroad swore positively to the debt, and negated the tender in bank-notes according to the best of his knowledge and belief.

The Court were of opinion that the affidavit was bad, and refused to allow a supplemental affidavit.

Rule absolute.

RUSHTON v. CHAPMAN. Nov. 28th, 1800.

The day inserted in the notice to appear to a common capias must be the return day of the writ.

The defendant in this case was served with a common capias, returnable in fifteen days of the Holy Trinity, (the 22d of June,) to which a notice was subjoined to "appear in His Majesty's Court of Common Pleas at the return thereof being the 25th day of June, which was the quarto die post. A rule was obtained calling on the Plaintiff to shew cause why the proceedings should not be set aside for irregularity; and the case was mentioned several times in this term.

Best, Serjt., in support of the rule, relied upon the words of the 5 Geo. 2, c. 27, s. 4, and the constant practice of the Court antecedent to the case of *Sumner v. Brady* in 1791, 1 H. Bl. 630; with respect to which case he observed, that as the proceedings there appeared by the report to have been founded upon an original clausum fregit, the statute did not apply, and added, that as the Defendant, after having received notice to appear at the return, could not be in contempt until the quarto die post, he would be deprived of the latitude which the law allows, if the Plaintiff were permitted to give notice for him to appear on that very day upon which if he does not come in he will be in contempt.

The officers reported to the Court, that upon search made it appeared that the process in *Sumner v. Brady* was a common capias.

Runnington, Serjt., in shewing cause, relied on the authority of *Sumner v. Brady*, and adopted the reasoning there made use of, that the quarto die post is to be considered as the effectual return day, and that the notice would be equally good whether the return day or the quarto die post were inserted.

LORD ELDON, Ch. J., upon the argument inclined to think that it was impossible for the Court to hold that the notice would be equally good either way, for that the words of the act of parliament must be taken to mean one day or the other; and if the summons in this case was good, a notice in which the words of the act were strictly followed and the return day inserted must be bad.

On this day his Lordship said:—We understand that the practice of the Court has been to support notices similar to the present. If that had not been the practice, I should have entertained doubts upon the case. My Brothers however are disposed to think that in future at least that practice ought to be altered, and that those notices will be more conformable to the act of parliament if they are drawn up according to the practice which existed previous to the case of *Sumner v. Brady*. We desire therefore it may be understood that the Court now orders that in future the return day be inserted in the notice.

Per Curiam. Rule discharged.

HOLLAND v. WHITE. Nov. 28th, 1800.

If the rule of allowance of bail be not served on the Plaintiff's attorney he may take an assignment of the bail-bond, though he knows of the justification (a).

In this case the son of the Plaintiff's attorney was present in Court when the bail justified, but the Plaintiff's attorney, not having been served in time with a rule allowing the justification, took an assignment of the bail-bond, and proceeded thereon. To set aside this assignment and the proceedings thereon a rule nisi was obtained;

[342] Against which Runnington, Serjt., now shewed cause, and cited *The King v. The Sheriff of Middlesex*, 4 T. R. 493, and *Roberts v. Gilbert*, E. 34 Geo. 3, C. B. to shew that the rule allowing the justification must be actually served although the Plaintiff's attorney be present at the justification.

Clayton, Serjt., was proceeding to support the rule nisi, and observed that no

(a) Vide *Quin v. Reynolds*, 3 M. and S. 144.

fraud had been practised on the revenue (a)¹, inasmuch as the rule had been actually drawn up, though not served in time.

But the Court, on reference to the officers finding the practice to be as stated on the part of the Plaintiff, and that it proceeded not only on the ground of protecting the revenue, but also on the notion that the Defendant must be taken to have waived his justification unless he served the rule for the allowance,

Discharged the rule.

The end of Michaelmas Term.

[343] CASES ARGUED AND DETERMINED IN THE COURT OF COMMON PLEAS, IN HILARY TERM, IN THE FORTY-FIRST YEAR OF THE REIGN OF GEORGE III.

HILL, ONE, &C. v. HUMPHREYS. Jan. 27th, 1801.

[Approved, *Ivimey v. Marks*, 1847, 16 Mee. & W. 850.]

Delivery of an attorney's bill at the compting-house of his client one month before the commencement of an action upon the bill is not a good delivery within the 2 Geo. 2, c. 23. If an attorney introduce into his bill certain items connected with his professional capacity though not immediately within the terms of the 2 Geo. 2, c. 23, and in an action upon the bill fail because it was not properly delivered according to the directions of the statute he must fail altogether, and will not be allowed to recover for such items only.—Quare, Whether the same rule would not prevail if such items were not at all connected with his professional capacity (a)².

The Plaintiff in this case having brought an action to recover the amount of a bill for business done by him as attorney to the Defendant, the cause came on to be tried before Lord Eldon, Ch. J., at the Westminster Sittings after last Michaelmas term. On the part of the Plaintiff it was proved, that a month before the commencement of the action, a copy of the bill signed according to the statute had been left at the Defendant's compting-house. Upon this his Lordship nonsuited the Plaintiff, observing, that as the Stat. 2 Geo. 2, c. 23, requires that the bill should either be delivered to the party personally, "or left at his dwelling or last place of abode" a month before the commencement of the action, the terms of that act had not been complied with by a delivery at the compting-house of the Defendant. Liberty however was given to the Plaintiff to move that the nonsuit might be set aside.

[344] The counsel for the Plaintiff did not think it worth while to controvert the above decision; but having afterwards discovered that the bill contained two items which could not be considered as "fees, charges, or disbursements at law, or in equity," within the meaning of the statute, viz. 9l. for costs paid upon a discontinuance, and 2l. 13s. 4d. for preparing a case and laying it before a special pleader; they obtained a rule to shew cause why a verdict should not be entered for the Plaintiff for those two sums.

Shepherd, Marshall, and Vaughan, Serjts., in support of the rule contended that the items in question not being taxable, the Plaintiff was therefore entitled to recover upon them without the previous delivery of a bill; that although they might have become the subject of taxation if inserted together with taxable items in a bill which had been regularly delivered, yet as the ground of the defence in this case was, that no delivery had been made, it was not competent to the Defendant to say, that the bill had been delivered for the purpose of rendering these items subject to taxation, but that it had not been delivered for the purpose of defeating the Plaintiff's right to recover upon it. They cited a case of *Lloyd v. Mead*, cor. Buller, J., Easter 1787, which was an action by the solicitor to a commission of bankrupt for the amount of his

(a)¹ In *The King v. The Sheriff of Middlesex* the Court said they were bound to take care that the revenue was not defrauded.

(a)² Vide *Crowder v. Shee*, 1 Camp. 437. *Mowbray v. Fleming*, 11 East, 285. *Vincent v. Slaymaker*, 12 East, 372. *Howard v. Ramsbottom*, 3 Taunt. 526, 529. *Luxmore v. Lethbridge*, 5 B. and A. 898.

bill; the defence was, that no bill had been delivered, but it appearing that the bill among other items contained one of 7l. 10s. for money paid to the messenger, Buller, J., held, that the Plaintiff was entitled to recover upon that item: for although the money was expended because he was attorney, yet he did not expend it as attorney. They also relied on *Miller v. Towers*, Peake, N. P. Cases, 102, where Lord Kenyon allowed the Plaintiff to give evidence of conveyancing business, though he was precluded from recovering upon the rest of his demand, on account of having omitted to deliver a bill according to the statute.

Cockell and Best, Serjts., after insisting that as the point was not made at the trial it could not now affect the nonsuit, urged that it was not competent to the Plaintiff to sever his demand; that as one part of it consisted of taxable matter, the whole became subject to the jurisdiction of the prothonotary, and that the Plaintiff therefore could not recover upon any part without a previous delivery of a bill under the statute. They cited *Winter v. Payne*, 6 Term Rep. 645, in which it was admitted, that if any one item of the bill was taxable the Plaintiff must fail in toto, since no bill had been delivered according to the statute; and also a case of [345] *Benton v. Garcia*, cor. Heath, J., Spring Assizes for Kingston 1800, where the Plaintiff having delivered a bill containing some items which were taxable, and some which were not, brought his action before a month had expired from the delivery, but the learned Judge held that the Plaintiff could not recover for any part.

LORD ELDON, Ch. J.—In this case the question does not arise on the payment of money for the Defendant's use respecting which the Plaintiff was not called upon to exercise his skill and knowledge as attorney; but it arises upon the payment of certain sums respecting which the Plaintiff was called upon as attorney in a cause to exercise his judgment and advise his client. The rule which has been adopted concerning charges for conveyancing either stands upon no principle, or it decides this case. The expences of conveyancing as such are not taxable: they are not to be considered as "fees, charges, or disbursements at law or in equity;" but if one single item which may be so considered, though to the amount of 3s. 4d. only, is to be found in the bill, the Plaintiff cannot recover for the conveyancing without a delivery of such bill; for in such case the charges for conveyancing fall within the rule of the statute. And on these principles; namely, that what is paid for conveyancing is paid in the character, and in the exercise of the duties of an attorney; that a person shall not split the demand which he has in the character of an attorney; and that the statute attaches upon the whole demand which he has in that character. If that be so, how are the charges of conveyancing to be distinguished from the two items in the present case? In the case of *Miller v. Towers*, as no bill had been delivered the Plaintiff was not allowed to recover the costs out of pocket; but as no bill had been delivered Lord Kenyon felt himself at liberty to consider the demand for conveyancing in the nature of a demand made in an action for conveyancing only. Had any bill been delivered, the costs out of pocket would have appeared upon the face of that bill, and these costs being taxable, the expences of conveyancing contained in the same bill, must, according to all the authorities, have followed the same fate. I do not enter into the question, whether if any items not connected with the profession of an attorney had been included in this bill, the Plaintiff would have been precluded from recovering upon them. Perhaps however we should not feel great difficulty in holding, that an attorney who inserts his whole demand upon his client in a bill containing taxable items, shall be taken to agree that he will not bring an action upon any part of such demand [346] until the bill has been delivered a month. Had the point now made been taken at the trial, I should have thought myself bound to hold that these were items fit to be inserted in a taxable bill, and that as the bill was not properly delivered they must be nonsuited upon the whole contents.

Heath, Rooke, and Chambre, Justices, concurring,
Rule discharged.

ASTLEY v. FRANCES WELDON. Jan. 27th, 1801.

[See *Ranger v. Great Western Railway*, 1854, 5 H. L. C. 119. Applied, *In re Newman*, 1876, 4 Ch. D. 731. Commented on, *Wallis v. Smith*, 1882, 21 Ch. D. 265. Principle applied, *Calton v. Bennett*, 1884, 51 L. T. 72. Approved, *Elphinstone v.*

Monkland Iron and Coal Company, 1886, 11 App. Cas. 347. Applied, *Law v. Redditch Local Board*, [1892] 1 Q. B. 130.]

By articles of agreement between the Plaintiff and Defendant it was agreed on the part of the former that he should pay the latter so much per week to perform at his theatres, with her travelling expences of removing from one theatre to another except extra baggage; and on the part of the Defendant, that she should perform at the theatres such things as she should be required by the Plaintiff, and attend at the theatre beyond the usual hours on any emergency and at rehearsals or be subject to such fines as are established at the theatres, and be at the theatre half an hour before the performances begin, and abide by the regulations of the theatres and pay all fines; and it was agreed by both parties that "either of them neglecting to perform that agreement should pay to the other 200l." Assumpsit upon this agreement stating several breaches, and concluding to the Plaintiff's damage of 200l.—Held that the sum mentioned in the agreement was in the nature of a penalty, not of liquidated damages (a).

Assumpsit. The declaration stated an agreement between the Plaintiff and the Defendant, whereby the Plaintiff in consideration of the services of the Defendant therein after mentioned, agreed to pay her during the term of three years the sum of 1l. 11s. 6d. per week, and to pay her travelling expences in her removal at the usual seasons of the year from the Plaintiff's Theatres in London, Liverpool, and Dublin, or elsewhere, save and except her extra luggage, which was to be paid for by herself; and the Defendant in consideration of such weekly salary agreed, that she would during the said term of three years, "at the usual and accustomed time or times in each day and at all other times when required by the Plaintiff or his assigns to the best of her judgment power and ability do and perform on the respective theatres of the said Plaintiff all and every such matters and things as might from time to time be required of her as a performer or otherwise by the said Plaintiff or his assigns in the several public performances to be from time to time exhibited on the several stages of the respective theatres of the said Plaintiff either in England Ireland or Scotland when and as often as need or occasion should be or require and when directed or requested thereto by the said Plaintiff or his assigns; he the said Plaintiff thereby agreeing to find fit and proper theatrical dresses for the occasion; And likewise it was thereby further covenanted and agreed on between the parties aforesaid that she the said Defendant should and would during the said term thereby agreed on over and above the usual and customary hours of attendance and on any emergent [347] occasion attend as well as assist at either of the said theatres of the said Plaintiff in forwarding the several performances as well as attend all rehearsals at the respective theatres of the said Plaintiff or subject herself to the payment of the fines and forfeitures established in the respective theatres; and also that the said Defendant should and would on every night's public performance at the respective theatres and before the performance attend and be there at least one half hour before such public performance should begin unless permission should be had and obtained from the said Plaintiff or his assigns in writing to the contrary; And also that the said Defendant should in all things conform to and duly comply with and abide by the several rules and regulations of the respective theatres in every respect in common with the several performers employed therein; and likewise pay all fine or fines that might become due and payable by means of any forfeiture or other matter cause or thing whatsoever; Provided that the Plaintiff should have power to determine the agreement by notice in writing, and that if any of his theatres should be shut on particular occasions therein specified or the Defendant should be prevented from attending, the Plaintiff should be at liberty to deduct a proportionable part of her salary, and that if the Plaintiff should be minded to shut up his theatres sooner than the usual season, for a period not exceeding a month, he should be at liberty to stop the Defendant's salary, she being at liberty to perform elsewhere; but that if either of his theatres should remain shut for more than a month during the usual season, then the agreement should be at an end; And lastly it was thereby agreed on by and between the

(a) And see *Barton v. Glover*, Holt. Ni. Pri. 43. *Wilbean v. Ashton*, 1 Camp. 78. *Harrison v. Wright*, 13 East, 343. *Edwards v. Williams*, 5 Taunt. 247. *Reilly v. Jones*, 1 Bing. 303.

said parties that either of them neglecting to perform that agreement according to the tenor and effect and the true intent and meaning thereof should pay to the other of them the full sum of 200l. of lawful money of Great Britain to be recovered in any of his Majesty's courts of record at Westminster." The declaration then stated, that in consideration that the Plaintiff had undertaken to perform all things in the said agreement on his part to be performed the Defendant undertook to perform all things therein on her part to be performed, by virtue of which agreement the Defendant was afterwards received into the Plaintiff's service on the terms therein mentioned. It then averred, that although the Plaintiff was willing that the Defendant should remain in his service during the whole term and had performed every thing on his part to be performed [348] yet (protesting that the Defendant had performed nothing on her part to be performed) the Defendant did not during such part of the said term of three years as was then elapsed, at the usual and accustomed times, &c. (in the words of her agreement) perform at the Plaintiff's theatres, but on the contrary thereof on &c. at &c. refused to perform such things as were exhibited on the stage of one of the theatres in the said agreement mentioned, to wit, &c. notwithstanding the Plaintiff had provided proper theatrical dresses, contrary to the form and effect of the said articles of agreement and the promise and undertaking of the said Defendant so by her made as aforesaid and in breach and violation thereof; And further that the Defendant did not attend at the respective theatres half an hour before the respective performances began, but on the contrary refused to attend and absented herself without leave, contrary to the form and effect &c.; And further that the Defendant voluntarily withdrew herself from the service of the Plaintiff for a long time during which she refused to perform at his theatres in the public performances which were legally exhibited during that period, contrary to the form and effect, &c. "By means of which said premises and by force of the articles of agreement and the promise and undertaking of the Defendant so by her made as aforesaid she became liable to pay to the Plaintiff the sum of 200l. in the said articles mentioned," of which she had notice and was requested to pay, but refused &c. to the Plaintiff's damage of 200l.

Plea, Non assumpsit.

The cause was tried before Lord Eldon, Ch. J., at the Westminster Sittings in last Trinity Term, when the agreement having been proved, and that the Defendant absented herself from the theatre, and evidence having been adduced to shew that by the regulations of the theatre the performers are subject to certain small fines for late attendance, inebriety, &c., a verdict was found for the Plaintiff with 20l. damages; but liberty was reserved to the Plaintiff to enter a verdict for 200l. if the Court should be of opinion that the sum of 200l. mentioned in the agreement was to be considered in the nature of liquidated damages.

A rule nisi for that purpose having been obtained accordingly,

Shepherd and Best, Serjts., now argued, in support of the rule, that it appeared from the tenor of the articles to have been the intention of the parties that the 200l. should be considered as liquidated damages; that in those cases where particular fines were [349] imposed by the laws of the theatre, those fines were to be considered as the damages agreed to be paid; but for the breach of the articles in every other instance, the sum of 200l. was agreed to be paid, without regard to the quantum of injury which the particular breach might have created; that these articles resembled some Acts of Parliament in which specific penalties being imposed in particular clauses, and a general penalty given at the end, the general penalty operates upon all breaches of the act to which no specific penalties have been annexed; that in many cases it might be advantageous to the Defendant that the sum of 200l. should be considered as liquidated damages, since it might be worth while for her to pay that sum in order to be released from her engagement, whereas if it were not so considered it would be impossible for her to quit the Plaintiff's service without being liable to a new action for every day's absence; and that it appeared from the nature of the agreement to have been the intention of the parties that upon payment by either of them to the other of 200l. they should be released altogether; they cited the opinion of Lord Somers, mentioned Prec. in Chan. 487, "that where the party might be put in as good a plight as where the condition itself was literally performed, there the Court of Chancery would relieve though the letter of it were not strictly performed, as payment of money &c. but where the condition was collateral and no recompence or value could be put on the breach of it, there no relief could be had for the breach of

it;" and relied upon the following cases, viz. *Ponsonby v. Adams*, 6 Brown Parl. Cas. 417, where it was covenanted, that if the tenant failed to reside on an estate in Ireland leased to him, his rent should rise from 125l. to 150l. and it was decreed that the 25l. additional rent was to be considered as liquidated damages; *Rolfe v. Peterson*, 6 Brown Parl. Cas. 470, where the same doctrine was laid down respecting a covenant that the tenant should pay 5l. per annum for every acre broken up and converted into tillage; *Lowe v. Peers*, 4 Burr. 2229, where the same was holden of a promise to pay 1000l. if the Defendant married any woman except the Plaintiff; and *Fletcher v. Dyche*, 2 Term Rep. 32, where the Plaintiff having agreed to perform certain work, and that if he did not do it in a certain time, he should "forfeit and pay to the Defendant the sum of 10l. for every week after the time agreed upon," the Court allowed the 10l. per week to be set off by the Defendant as liquidated da-[350]-mages, in an action on a bond brought against him by the Plaintiff.

Vaughan, Serjt. contra, observed, that the Plaintiff by assigning several branches in his declaration had shewn that he considered the sum contained in the articles in the nature of a penalty out of which he was to recover to the amount of the injury actually sustained; and that the same appeared from the articles themselves, in which a number of stipulations of different degrees of importance were inserted, and for the breach of which very different sums must have been intended to be paid: he mentioned *Sloman v. Walter*, 1 Brown Chan. Cas. 418, where Lord Chancellor Thurlow held that a bond having been entered into by the Plaintiff to the Defendant in the penalty of 500l. to secure to the former the use of a room in the Chapter Coffee-house, the penalty being merely to secure the enjoyment of a collateral object, nothing but the damage actually sustained by breach of the agreement could be recovered: and also *Hardy v. Martin*, *ibid.* 419, in notis, where a brandy merchant having purchased of his partner the good-will of the shop, and the latter having entered into a bond in the penalty of 600l. not to sell any brandy within five miles of the place, on payment of the damage actually sustained, the Plaintiff was restrained by the Court of Chancery from taking out execution for the penalty.

LORD ELDON, Ch. J.—When this cause came before me at Nisi Prius, I felt as I have often done before in considering the various cases on this head, much embarrassed in ascertaining the principle upon which those cases were founded: but it appeared to me that the articles in this case furnished a more satisfactory ground for determining whether the sum of money therein mentioned ought to be considered in the nature of a penalty or of liquidated damages, than most others which I had met with. What was urged in the course of the argument has ever appeared to me to be the clearest principle, viz. that where a doubt is stated whether the sum inserted be intended as a penalty or not, if a certain damage less than that sum is made payable upon the face of the same instrument, in case the act intended to be prohibited be done, that sum shall be construed to be a penalty. The case of *Sloman v. Walter* did not stand in need of this principle: for there by the very form of the instrument the sum appeared to be a penalty; in which case a Court of Equity could never consider it as liquidated damages, but must [351] direct an issue of quantum damnificatus. A principle has been said to have been stated in several cases, the adoption of which one cannot but lament, namely, that if the sum would be very enormous and excessive considered as liquidated damages, it shall be taken to be a penalty though agreed to be paid in the form of contract. This has been said to have been stated in *Rolfe v. Peterson* where the tenant was restrained from stubbing up timber. But nothing can be more obvious than that a person may set an extraordinary value upon a particular piece of land, or wood on account of the amusement which it may afford him. In this country a man has a right to secure to himself a property in his amusements: and if he choose to stipulate for 5l. or 50l. additional rent upon every acre of furze broken up, or for any given sum of money upon every load of wood cut and stubbed up, I see nothing irrational in such a contract; and it appears to me extremely difficult to apply with propriety the word "excessive" to the terms in which parties choose to contract with each other. There is indeed a class of cases in which Courts of Equity have rescinded contracts on the ground of their being unequal. It has been held however that mere inequality is not a ground of relief; the inequality must be so gross that a man would start at the bare mention of it. Necessity in these cases seems to have obliged the Courts to admit a principle nearly as loose as that to which I have before alluded. But with respect to the case of *Ponsonby v. Adams* the landlord may have set a value

upon the residence of a particular tenant on his estate; and why should he not upon that ground have stipulated that if such tenant should cease to reside there, his rent should rise to 150l.? Both in *Rolfe and Peterson* and in *Ponsonby v. Adams* I should have said, that what was matter of contract bottomed on a good consideration, should not be looked upon as penalty, but should be considered as rent reserved, or liquidated damages. In *Lowe v. Peers* it is quite clear that the breach of promise of marriage was to be compensated for in damages: it was a contract that in case the party failed to perform his promise he should pay the sum of 1000l. The case of *Fletcher v. Dyche* is very strongly to the present purpose. In that case a bond in a penal sum was conditioned, to perform certain work within a certain time, or to pay 10l. for every week beyond that time. The 10l. per week was secured by the penalty of the bond: and to have said, that one term of a contract secured by a [352] penal sum, should also be a penal sum, would have been absurd. Indeed Lord Hardwicke in *Roy v. The Duke of Beaufort* (2 Atk. 190) was of opinion, that a person who had entered into a bond with a penalty of 100l. if he poached, must have paid the 100l. if he had committed any act which amounted to poaching. But suppose the Duke had taken a bond in a penalty of 100l. with condition that the obligor should not kill a partridge, or if he did, that he should pay 5l. in that case it is most clear that the 5l. must have been considered as liquidated damages. With respect to the case of *Hardy v. Martin*, I do not understand why one brandy merchant who purchases the lease and goodwill of a shop from another may not make it matter of agreement, that if the vendor trade in brandy within a certain distance, he shall pay 600l.; and why the party violating such agreement should not be bound to pay the sum agreed for, though if such agreement be entered into in the form of a bond with a penalty, it may perhaps make a difference. I must wish, that the principle laid down by Lord Somers in *Pre. in Chan.* had been adhered to. Let us then see what this case amounts to. It was contended at the trial that the last clause is not in the form of a penal bond. It is thus, "and lastly it is hereby agreed that either party failing to perform their undertaking shall pay to the other 200l." *Primâ facie* this certainly is contract, and not penalty; but we must look to the whole instrument. In consideration of the Defendant's services the Plaintiff undertakes to pay her 1l. 11s. 6d. per week, and also her travelling expences. It would be absurd to hold that, because the 1l. 11s. 6d. is a liquidated sum, therefore the Plaintiff could not be called upon for more, and yet that in consequence of his non-payment of the Defendant's travelling expences he should be liable to the whole sum of 200l. because those expences are not ascertained. Again, there are many instances of the Defendant's misconduct which are made the subject of specific fines by the laws of the theatre. Are we then to hold, that if the Defendant happens to offend in a case which has been so provided for by those laws she shall pay only 2s. 6d. or 5s. but if she offend in a case which has not been so provided for, she shall pay 200l.? I can find nothing in these articles which can satisfy my mind judicially, that the 200l. is to be paid in one case and not in the other. The clause is general and contains no exception. If that [353] be so, the case of *Fletcher v. Dyche* is an authority strongly in point. It therefore does appear to me that the true effect of this agreement is, to give the Plaintiff his option either to proceed upon the covenants toties quoties, or upon the first breach to proceed at once for the 200l. out of which he may be satisfied for the damage actually sustained, and which may stand as a security for future breaches.

HEATH, J. I am of the same opinion. It is very difficult to lay down any general principle in cases of this kind; but I think there is one which may be safely stated. Where articles contain covenants for the performance of several things, and then one large sum is stated at the end to be paid upon breach of performance, that must be considered as a penalty. But where it is agreed that if a party do such a particular thing such a sum shall be paid by him, there the sum stated may be treated as liquidated damages. In *Rolfe v. Peterson* it was held that the sum mentioned was in the nature of increased rent, because it was said that the tenant was liable to distress. But if the tenant had only covenanted generally not to cut down the furze, and at the end of the lease a sum of money had been inserted to be paid in case of breach of performance of the covenants, that sum would have been in the nature of a penalty. It is a well-known rule in equity, that if a mortgage covenant be to pay 5l. per cent. and if the interest be paid on certain days then to be reduced to 4l. per cent. the Court of Chancery will not relieve if the early day be suffered to pass without pay-

ment; but if the covenant be to pay 4l. per cent. and if the party do not pay at a certain time it shall be raised to 5l. there the Court of Chancery will relieve. In the present case, by the laws of the theatre, the Defendant was to pay a small sum in every case of absence, which proves that the sum to secure performance of the articles must be considered in the nature of a penalty.

ROOKE, J. The determination of the Court in construing this instrument must be guided by the intention of the parties. Now it appears very clearly from the stipulation that small sums of money should be paid in certain cases, that the parties considered the larger sum as a penalty. The case of *Fletcher v. Dyche* is very strong upon this head; and is not to be distinguished from the present case.

CHAMBRE, J. Though this in point of form is an action for damages, yet if the parties are to be considered as having stipulated for certain damages, the jury ought to have been directed [354] to find damages to the amount of the whole sum so agreed for; and the effect of the case must have been the same as if the Plaintiff had declared in debt for a penal sum. The jurisdiction of Courts of Equity in relieving on penalties is of very high antiquity. The Legislature has now adopted this practice, and affords the same benefit to Defendants in actions at law: and it has lately been settled that it is not matter of election in the Plaintiff to proceed under the statute, but that the directions are compulsory, and must be pursued (a)¹. The question is then, what is the fair presumable intention of the parties? I do not quarrel with any of the cases which have been cited. A man in possession of his own estate may set his own value upon the view, the timber, or other ornaments and conveniences of the estate, and if he part with the possession, he may part with it on the terms that the tenant shall cultivate it in such a particular way, but if he vary from that mode of cultivation then so much additional rent shall be paid. I remember that the case of *Rolfe v. Peterson* was not thought altogether satisfactory at the time when it was decided: though I do not feel any objection to the determination. The case of *Lowe v. Peers* could not be considered as any thing but a case of stipulated damages. There is one case in which the sum agreed for must always be considered as a penalty; and that is, where the payment of a smaller sum is secured by a larger. In this case it is impossible to garble the covenants, and to hold that in one case the Plaintiff shall recover only for the damages sustained, and in another that he shall recover the penalty: the concluding clause applies equally to all the covenants. If any thing is to be collected from the form of this declaration, it should seem that the Plaintiff meant to sue only for the damages actually sustained. If he had declared in debt and assigned breaches he would have been considered as having made his election to proceed under the statute, and by varying the form of the action he shall not elude the statute. I rely on the form of the instrument and on the statute of William. With respect to the case of *Hardy v. Martin*, in which I was concerned, Lord Mansfield upon the trial at law inclined to think it a case of stipulated damages: though I see by the printed Report that it was considered otherwise in the Court of Equity.

Rule discharged.

[355] WHITBURN v. STAINES. Jan. 27th, 1801.

It seems the Court will not change the venue in an action on an award, even though the declaration contain the common counts (a)². Nor will they oblige the Plaintiff to undertake to give evidence on the count upon the award.

Assumpsit. The first count of the declaration was upon an award; which was followed by the common counts.

Bayley, Serjt., applied for a rule nisi to change the venue from Middlesex to Sussex: and observed, that although in actions on some instruments the Courts had refused to change the venue, yet that in the case of *Pinkney v. Collins*, 1 Term Rep. 571, where the Court refused to change the venue in an action on a bill of exchange, the reason given was, that such instruments were bona notabilia in any county, which does not apply to an award.

(a)¹ See *Roles v. Rosewell*, 5 Term Rep. 538, and *Hordy v. Bern*, 5 Term Rep. 636.

(a)² And see *Morrice v. Hurry*, 7 Taunt. 306. *Greenway v. Carrington*, 7 Price, 564. *Stanway v. Heslop*, 3 B. and C. 9.

Upon this *Chambre, J.*, read a manuscript note of a case of *Orme v. Almay*, B. R. M. 26 Geo. 3, where the Court refused to change the venue, the action being on a note to pay 15l. if the Defendant did not complete his contract for an inn purchased at an auction, which was not a negotiable note.

Bayley then urged that the Plaintiff ought to be bound to confine his evidence to the count on the award, as in *Maugir v. Hinds*, Barnes, 487, ed. 3; or at least should undertake to give evidence on that count at the peril of a nonsuit, as in *The Duke of Bedford v. Bray*, Barnes, 491, ed. 3; for unless the Court should put Plaintiffs under these terms, they would always be at liberty to lay the venue where they pleased, by introducing a count upon an instrument which never existed.

The Court intimated an opinion that the application could not succeed, but offered to grant a rule nisi.

Whereupon Bayley desired to take nothing by his motion.

MANN v. SHERIFF. Jan. 28th, 1801.

In an affidavit to hold to bail the Plaintiff deposed that at the time of the assignment thereafter mentioned, the Defendant was indebted to him on a bill of exchange, and that he afterwards assigned the debt by indenture to A. B. C. and D. in trust. A. then deposed that at the time of the affidavit being made the Defendant was indebted to them A. B. C. and D. as such trustees and assignees as aforesaid. Held, that the affidavit was insufficient, because it did not deny that the debt had been satisfied to the Plaintiff between the assignment and the time of the affidavit being made. But a supplemental affidavit was allowed.

The Defendant in this case was held to bail upon an affidavit made by the Plaintiff and one Robert Geddes. In that affidavit the Plaintiff deposed "that at the time of making the [356] assignment hereinafter mentioned the Defendant was justly indebted to him the Plaintiff in the sum of 37l. as the acceptor of a bill of exchange payable to the order of Thomas Watson and duly indorsed to the Plaintiff, and that the Plaintiff by a certain indenture bearing date, &c. assigned the said debt among divers other debts and effects to the other deponent Robert Geddes together with J. L., J. C., W. M., and J. H., in trust for the benefit of the creditors of the said Plaintiff." Robert Geddes then deposed "that the Defendant is justly and truly indebted to him and the said J. L., J. C., W. M., and J. H., as such assignees and trustees as aforesaid in the said sum of 37l. upon and by virtue of the said bill of exchange and the said assignment." Lastly, the Plaintiff and Geddes deposed "for themselves and each of them that no tender of the said sum of money or any part thereof hath been made in any note or notes of the Governor and Company of the Bank of England expressed to be payable on demand."

A rule nisi having been obtained for discharging the Defendant upon a common appearance;

Vaughan, Serjt., in support of the rule contended, that it ought to appear by the affidavit that the Defendant was indebted to the Plaintiff on record at the time of the affidavit made; whereas in this case it only appeared that the Defendant was indebted to him at the time of the assignment.

Bayley, Serjt., contra, insisted that in cases like the present, it was quite sufficient if the assignees who have the equitable interest swear that the Defendant is indebted to them as such assignees at the time of the affidavit made: he cited *Creswell v. Lovell*, 8 Term Rep. 418.

LORD ELDON, Ch. J., said, The case of *Creswell v. Lovell*, as far as it affects that now before the Court, seems to have been founded upon the authority of some cases of legal assignees; which cases do not appear to me to bear any analogy to it; for neither in *Creswell v. Lovell*, nor in this case, could the action be brought in the name of the assignees. Though the Plaintiff in the present instance swears that the Defendant was indebted to him at the time of the assignment, yet subsequent to that time the Plaintiff may have received the money and given a discharge; and consequently, it is possible consistently with the Plaintiff's affidavit that nothing may have been due at the time of the affidavit made. If however the Plaintiff had added that subsequent [357] to the assignment nothing had been paid to him, the affidavit would have been sufficient.

Bayley then applied for leave to file a supplemental affidavit in order to make that addition (a)¹; which after some opposition was granted.

TIPPING v. JOHNSON. Jan. 28th, 1801.

Plaintiff may sue out execution by a different attorney from the attorney in the cause, without obtaining an order of Court for changing the attorney.

A rule having been obtained by Bayley, Serjt., calling on the Plaintiff to shew cause why the execution sued out in this case should not be set aside for irregularity, 1st, Because it had been sued out after service of the allowance of a writ of error;

2dly, Because it was sued out by an attorney different from the one who had been attorney in the cause, and no order for changing the attorney had been obtained (a)²;

Shepherd, Serjt., as to the first point produced an affidavit stating a declaration of the Defendant, that the writ of error was sued out for delay; and was proceeding to argue on the second point,

When Heath, J., said, that it appeared by several cases collected in Rol. Abr. (b) that the authority of an attorney determines with the judgment, and therefore no order to change the attorney was necessary.

Per Curiam. Rule discharged with Costs.

[358] KERR v. SHERIFF. Feb. 4th, 1801.

If the writ be that the Defendant answer "in a certain plea of trespass on the case on promises," and the declaration be in debt "for goods sold and delivered and money borrowed" the Court will discharge the Defendant on entering a common appearance (a)³.

A rule nisi was obtained in this case for entering a common appearance and having the bail-bond delivered up to be cancelled, on the ground of a variance between the writ and the declaration; the *ac etiam* clause of the *capias* being, that the Defendant should answer "in a certain plea of trespass on the case on promises to the damage of the Plaintiff, &c." and the declaration being debt for goods sold and delivered and money borrowed.

Shepherd, Serjt., now shewed cause, and contended that the Court would look to the affidavit to hold to bail, to see whether the same cause of action had been pursued in the declaration as that for which the Defendant had been arrested, and that the affidavit in this case being "for money lent and advanced" the same cause of action had been pursued; he admitted that if the affidavit be for trover and the declaration on promises the Court will discharge the Defendant on common bail, under 13 Car. 2, st. 2, c. 2, as was done in *Tetherington v. Golding*, 7 Term Rep. 80; and that on the same ground proceeded the cases of *De la Cour v. Read*, 2 H. Bl. 278, and *Spalding v. Mure*, 6 Term Rep. 363; whereas the only question in this case was, whether the Court would discharge the Defendant because the declaration was debt on promises instead of case on promises.

(a)¹ Vide *Garnham v. Hammond*, ante, 298.

(a)² See Reg. Gen. A.D. 1654, B. R. s. 10. C. B. s. 13. *Kaye v. De Muttos*, 2 Bl. 1323, and *Macpherson v. Rorison*, Doug. 217.

(b) Vol. I. fol. 291, M. But the attorney in the suit may sue out execution within a year after the judgment without a new warrant, 2 Inst. 378; or sue out a *scire facias* against bail, and pray an alias, *Burr v. Atwood*, 1 Salk. 89; though when the *scire facias* is returned there must be a new warrant, *ibid*. Indeed the reason given by Holt, Ch. J., why he may sue out the *scire facias* is, that any one might sue out or pray the *scire facias*, and therefore the old attorney might. It is also laid down, that the attorney after judgment may acknowledge satisfaction on the record, upon receiving the money, 1 Rol. Rep. 366; or even without having received the money, per *Dodderidge* and the clerks, though Coke thought otherwise, 1 Rol. Rep. 367. In 1 Rol. Abr. 291, l. 10, it is said that the attorney after judgment cannot release damages; but in *Lamb v. Williams*, 1 Salk. 89, it was determined that he might.

(a)³ And see *Christie v. Walker*, 1 Bing. 68.

Vaughan, Serjt., contra, observed, that the case depended on the statute of Car. 2, and that in *Lockwood v. Hill*, 1 H. Bl. 310, where the ac etiam was case on promises, and the declaration was in debt, an application to discharge the Defendant was only refused because the sum sworn to was under 40l.; in which case the ac etiam not being necessary, the variance was immaterial. He cited a case of *Barnes v. Trompowsky*, K. B., where the ac etiam being in covenant, and the affidavit to hold to bail on a foreign charter-party, the Plaintiff having declared in debt on the charter-party, the Defendant was discharged on common bail; and also urged that if in these cases the Court did not interfere, bail would be made liable for causes of action for which they did not mean to bind themselves.

The Court observed, that the condition of the bail-bond expressed the cause of action, and in so doing followed the words of the ac etiam clause literally, and that therefore if the Plaintiff's [359] declaration varied from his writ, the Defendant could never be said to be condemned in the action mentioned in the condition, so as to charge the bail.

Per Curiam. Rule absolute (a).

HAWKINS v. ECKLES, WILSON, SMITH, AND ROUTH. Feb. 4th, 1801.

In an avowry Defendant averred that all those whose estate he now has, &c. from time whereof, &c. have been accustomed to have and of right during all the time aforesaid ought to have had and still of right ought to have common of pasture in the locus in quo—Held bad, and that it did not amount to an averment of right of common at all times of the year. If Defendant in replevin plead by way of justification of the taking that he was possessed of a messuage with common appurtenant, and that the Plaintiff's cattle were damage feasant on the common, and conclude in bar, without praying a return, it seems that such a plea is bad.

Replevin of cattle.

1st, The Defendant Routh in his own right and the other Defendants as his bailiffs acknowledged the taking, because the Defendant Routh was seised in his demesne as of fee of and in a certain messuage with the appurtenances situate, &c. "and the said Routh and all those whose estate he now has and at the same time when, &c. had, of and in the said messuage, &c. with the appurtenances from time whereof, &c. have had and have been used and accustomed to have and of right during all the time aforesaid ought to have had, and the said Routh still of right ought to have common of pasture in and throughout the said place in which, &c. called, &c. for two cows or heifers as to the said messuage with the appurtenances belonging and appertaining:" they then acknowledged the taking of the cattle as damage feasant, and prayed a return.

2dly, The Defendant pleaded by way of justification "that the said Routh before and at the said time when, &c. was possessed of a certain other messuage with the appurtenances situate, &c. and that the said Routh being so possessed thereof before and at the said time when, &c. was lawfully entitled to and of right ought to have had common of pasture in and throughout the said place in which, &c. to depasture the same at the said time when, &c. with two cows or heifers as to the said last-mentioned messuage with the appurtenances belonging and appertaining." They then averred, that the cattle [360] were damage feasant, so that the said Routh could not enjoy his common tam amplo modo, and therefore the said Routh in his own right and the other Defendants, as servants of the said Routh, took them and detained them as a distress for such damage; and concluded by praying judgment si actio, &c.

3dly, The Defendants also pleaded by way of justification, that the Defendants Wilson and Smith were possessed of the place in which, &c. with the appurtenances,

(a) Where a writ is sued out by Plaintiffs as executors, and a declaration is afterwards delivered in their own right, the Court will discharge the Defendant on filing common bail. *Douglas and others v. Irlam*, 8 Term Rep. 416. So if Plaintiff take out a writ in his own name and declare as executor; or sue out a writ quare clausum fregit, and declare in trover; Per Cur. 5 Term Rep. 402. But if the writ be in debt for a sum certain, and the declaration in debt also but for a less sum, the Court will not discharge the Defendant. *Turing v. Jones*, 5 Term Rep. 402.

and being so possessed thereof the said two Defendants in their own right, and the other two as their servants, took the cattle damage feasant; concluding as in the second plea.

The Plaintiff demurred specially, and assigned for causes, "that the said Defendants have not shewn in the first avowry and cognizance at what time or times and when, nor for what period of time the said Defendant Routh is entitled to common of pasture in the said place in which, &c. but have only alleged that he has common of pasture in the said place in which, &c. generally without specifying whether he has common every year and at what period of the year or how otherwise, so that it does not appear that the said Defendant Routh at the time of taking the said heifers had any right of common in the said place in which, &c. And also for that said Defendants have in their said second avowry and cognizance stated that said Defendant Routh was possessed of a certain messuage and as such was lawfully entitled to common of pasture in the said place in which, &c. which allegation is too general, and no certain issue can be taken either upon the possession of said Defendant Routh of the said messuage or upon title to common of pasture in the said place in which, &c. And also for that it is alleged in the last avowry and cognizance that the said Defendants Wilson and Smith were possessed of the said place in which, &c. whereas it ought to have been stated that some person was seised thereof in fee and deduced a title to the said messuage from such person to the said Defendants Wilson and Smith. And also for that the second and last avowries and cognizances begin and conclude in bar of the action instead of averring and acknowledging respectively the taking of the said heifers and praying a return of them. And also for that all the said avowries and cognizances are defective, uncertain, and want form, &c."

Williams, Serjt., in support of the demurrer, after stating it to be "a common learning that avowries must shew a good title in [361] omnibus" so as to entitle the Defendant to a return, and citing *Goodman v. Ayling*, Yelv. 148, *Matthews v. Cary*, Carth. 74. Salk. 107, S. C. and *Butt's case*, 7 Co. 23, was proceeding to argue on the pleas,

When Vaughan, Serjt., was called upon by the Court to state the grounds on which he thought the demurrer might be resisted. In respect of the avowry he observed, that as it was averred that the avowant and all those whose estate he had, "from time whereof the memory of man was not to the contrary," were accustomed to have a right of common, "and during all the time aforesaid" of right ought to have had it, it amounted to an averment that the avowant was entitled to common at all times of the year, and that if any right more limited than that had been proved at the trial, the avowry could not have been supported. As to the pleas, he said, that he meant to contend that they amounted to a sufficient justification of the taking; and that it was not necessary, in a mere justification, to shew a title in omnibus (a), as no return is prayed (b).

(a) In trespass it is sufficient to justify under a possession if the title does not come in question. As in assault and battery and molliter manus pleaded. *Skevill v. Avery*, Cro. Car. 138. So in quare clausum fregit Defendant may plead that he was possessed of a close called A., and the Plaintiff of a close called B., that the latter ought to repair the fences, and that for default thereof Defendant's cattle escaped into B. *Falbo v. Ridge*, Yelv. 74. So to trespass for taking cattle, possession of the locus in quo for a term of years was pleaded, and that the cattle were damage feasant therein. *Anon.* 2 Salk. 643. *Searl v. Bunion*, 2 Mod. 70. *Langford v. Welber*, 3 Mod. 132. And in *Randle v. Dean and Another*, Lutw. 1496, which was trespass for beating the Plaintiff's servants and horses, the Defendant pleaded that he was possessed of the locus in quo, and that the servants and horses were damage feasant. The Reporter indeed observes at the end of this last case, that no exception was taken, that possession only was pleaded without shewing what estate; but had it been taken it should seem from the current of authorities that it would not have availed. There is however a case in Moor, 846, *Smith v. Bull*, where the Defendant in an action of assault and battery having pleaded that he molliter manus imposuit on the Plaintiff

(b) There are many instances in which the Defendant in replevin cannot avow, but can only plead a justification of the taking, in which cases he is not to pray a return. See Gilbert's Replevin, c. 7, s. 3, p. 132, ed. 2.

[362] But The Court being clearly of opinion that the avowry was bad, offered the Defendants leave to amend, intimating that if they persisted in arguing the pleas they must do it at their peril, since they would not be allowed to amend, if upon argument the Court should hold the pleas to be bad.

On hearing this, Vaughan consented to amend on payment of costs.

STEEL v. ALAN. Feb. 5th, 1801.

If a person against whom a commission of lunacy has issued, be arrested, the Court of Common Pleas has no power to discharge him (a).

Marshall, Serjt., moved to discharge the Defendant out of custody upon a common appearance, on the ground of his being a lunatic, and a commission of lunacy having issued against him previous to the arrest.

LORD ELDON, Ch. J.—I am afraid that there is no prohibition in the law of England from arresting a lunatic. I have often known the Court of Chancery go out of its jurisdiction in order to assist a lunatic in this respect; and order a Master to take an account of his debts, considering it to be for the benefit of the lunatic that they should be paid, as he would otherwise be subject to arrest by all his creditors.

Marshall took nothing by his motion (b).

[363] HIFFERMAN v. LANGELE. Feb. 5th, 1801.

If a declaration be indorsed “to plead in ———;” it must be understood to mean within the number of days allowed by the rules of the Court. An order for a bill of

who entered into his close, the Court held that the Defendant should have shewn what estate he had in the close, and that the Plaintiff came to eject or dispossess him; but it is observable that there the Defendant did not aver that he was in possession, but only that it was his close, which might be true, and yet he not in possession: independent of which, this case stands contradicted by the authority of *Osway v. Bristow*, 10 Mod. 37, where the Defendant in trespass having justified taking the Plaintiff's cattle, because they were damage feasant in clauso suo, it was held good. Indeed the doctrine that possession may be pleaded in trespass is confirmed by a late case. *Taylor v. Eastwood*, 1 East, 212; though it was there resolved, that such a plea might be answered by replying title in a third person.—But in replevin, where an avowant pleaded generally, that he was seised of the locus in quo without saying of what estate, and avowed that he took the cattle damage feasant, and prayed a return, the avowry was held bad. *Saunders v. Hussey*, 2 Lutw. 1231. Carth. 9, S. C. 1 Ld. Raym. 332, S. C. Indeed in *Langford v. Webber*, 3 Mod. 132, where possession was pleaded in justification of trespass, it was admitted arguendo, that it might have been otherwise in replevin; and in *Silly v. Dally*, 1 Ld. Raym. 331, this precise point came before the Court, and a consuance by the Defendant as bailiff to J. T. stating that the grandfather of J. T. being possessed of the locus in quo leased the same for years, and deriving a title to the lease to J. T., was held bad. In that case was cited *Pushley v. Seymour*, 2 Show. 484, where an avowry of this kind was held good; but the Court expressly denied that case to be law; and the decision in *Silly v. Dally*, is confirmed by *Challoner v. Clayton*, 3 Salk. 306, Comb. 472, S. C. and *Freeman v. Jugg*, 3 Salk. 307, in which last case however the Court held that the objection must be taken advantage of on demurrer, and cannot prevail in arrest of judgment. From the above cases it appears to have been determined that in a justification of trespass where the title does not come in question, possession alone may be pleaded, but in an avowry or consuance in replevin it cannot. Whether it may be pleaded in replevin where the taking only is justified, and no return prayed, does not appear to have been hitherto expressly decided.

(a) And see *Steel v. Allan*, post, 437.

(b) The Court of King's Bench rejected similar applications in *Kernot and Another v. Norman*, 2 Term Rep. 390, and *Nutt v. Verney*, 4 Term Rep. 121; in the former of which cases it appeared by affidavit that the Defendant had become insane after the arrest, and in the latter that he was insane at the time of the arrest.

particulars does not suspend the time for pleading; and therefore Plaintiff may sign judgment immediately after delivering the particular, if the time for pleading be then out (a)¹.

The declaration in this case, which was a town cause, was delivered *de bene esse* on the 17th of November, indorsed "to plead in ———." On the 19th the Defendant obtained an order for a particular, which was complied with on the 20th, and on the 21st judgment was signed for want of a plea.

The Court on a motion to set aside the judgment, held that the indorsement on the declaration amounted to a notice to plead according to the rules of the Court, viz. in four days; that the time for pleading was not suspended by the order for a bill of particulars; and that although a Plaintiff cannot sign judgment until the order for a particular has been complied with, yet he may do so immediately after having delivered the particular, provided the time for pleading be then elapsed.

Bayley, Serjt., for the Plaintiff.

Shepherd, Serjt., for the Defendant.

SINCLAIR v. CHARLES PHILLIPE, MONSIEUR DE FRANCE. Feb. 5th, 1801.

The Defendant an alien within the terms of the 38 Geo. 3, c. 50, s. 9, having entered into an agreement with the Plaintiff in a foreign country, the latter in pursuance of the agreement laid out money in England, after which the parties came to an adjustment in England, and the Defendant acknowledged the debt. The Defendant having been holden to bail for money laid out by the Plaintiff in England and on an account stated in England, disclosed the above circumstances, by affidavit, upon which the Court discharged him upon a common appearance.

The Defendant in this case was arrested and holden to bail on the following affidavit: "T. G. Sinclair, of, &c. maketh oath that Charles Phillipe is justly and truly indebted unto him this deponent in the sum of 589l. and upwards for money had and received to and for the use and on the account of the said T. G. S. and for money by the said T. G. S. paid, laid out and expended, lent and advanced in England to and for the use and on the account of the said Charles Phillipe, and for interest due thereon, and upon an account stated in England." The Plaintiff then negatived any tender in bank notes.

On a former day Shepherd, Serjt., obtained a rule *Nisi* for discharging the Defendant on a common appearance under the [364] 38 Geo. 3, c. 50, s. 9 (a)², and produced an affidavit stating that the Defendant was an alien abiding in this kingdom and a person who quitted his country of France by reason of the revolution and troubles in France in 1789; that in 1791 the Defendant, together with his brother Louis Stanislaus Xavier since King of France, being resident at Coblenz in Germany, entered into an agreement with the Plaintiff respecting his raising men for the service of the King and Princes of France, and that he was not indebted to the Plaintiff in any sum of money whatsoever contracted in the dominions of His Majesty King George the Third, to the best of his knowledge and belief, on or any other account, or other-

(a)¹ Vide *Mowbray v. Schuberth*, 13 East, 508. *Decker v. Thompson*, 3 B. & P. 319. *Heath v. Rose*, 2 N. R. 223. *Rumsay v. Reay*, 2 N. R. 361.

(a)² Which provides that "aliens abiding in this kingdom having quitted their respective countries by reason of any revolution or troubles in France or in countries conquered by the arms of France, shall not be liable to be arrested, imprisoned, or held to bail, or to find caution for the forthcoming or paying any debt, nor to be taken in execution on any judgment, nor by any caption for or by reason of any debt or other cause of action contracted or arising in any parts beyond the seas other than the dominions of His Majesty, while such aliens were not within the said dominions of His Majesty; and in case any such alien shall have been or shall be arrested, &c. contrary to the intent of this act, such alien shall be discharged therefrom by order of any of His Majesty's Courts in Westminster Hall, or of the Courts of Session in Scotland, or of any Judge of such Courts in vacation time."

wise, or elsewhere, than in consequence of the said agreement made at Coblenz, and that he verily believed the Plaintiff's demand arose out of the said agreement.

Best, Serjt., now shewed cause against the rule, and relied on an affidavit of the Plaintiff, which alleged that he had expended in England, previous to the Defendant's arrival here, several sums of money in pursuance of the above-mentioned contract, and also that several adjustments of his demands had taken place in this country, upon which occasions the Defendant acknowledged himself indebted to the Plaintiff in considerable sums. He argued from thence that though the commencement of these transactions took place out of England, yet that as money had been expended and an account had been stated in England, there was a sufficient debt to support the arrest notwithstanding the 38 Geo. 3. He also urged, that the affidavit being positive with respect to the debt arising in England, it was not competent to the Defendant to controvert that fact, and that if there was any ambiguity on the face of the affidavit the Court would allow the Plaintiff to explain it by a supplemental affidavit.

Shepherd and Runnington, Serjts., in support of the rule, were stopped by the Court.

[365] LORD ELDON, Ch. J. The case of this illustrious person must be decided on the same grounds that would operate in favour of the meanest individual falling within the purview of the 38 Geo. 3. Whether under the circumstances stated to the Court he does fall within the description of persons entitled to be relieved by that act, is the question for us to decide. It appears to me that he is entitled to be discharged, first, because the affidavit under which he has been holden to bail is not sufficiently distinct to meet that case in which the act prohibits the arrest of an alien abiding in this kingdom, having quitted his country by reason of the troubles in France. It would have been very easy for the Plaintiff to have stated, that the Defendant was indebted to him in a certain sum of money for a debt not contracted or arising in parts beyond the seas; but this affidavit may be equally true whether the debt were contracted or arose within or without the kingdom. For though the money is said to have been paid in England, yet the contract being in Germany, the debt in the eye of the law arises there, and is not altered by the locality of the expenditure. Had no other affidavit therefore been produced to the Court on the part of the Plaintiff, I should be of opinion, that in a case where the original affidavit is so guardedly sworn, no supplemental affidavit ought to be allowed. But taking the affidavit now produced by the Plaintiff as a supplemental affidavit, it does not appear to me to state sufficient grounds for holding the Defendant to bail, for notwithstanding the transactions and adjustments subsequent to the original contract, the debt still remains a debt within the meaning of the statute. These adjustments amount to nothing more than an endeavour to provide for the original debt, and if the Court were to hold that every acknowledgment of such a debt created a new demand, it would be the means of preventing these persons to whom the act extends from furnishing to their creditors any vouchers against that period when they should be enabled to pay, or having any the most honourable and well-intentioned communication with them. It has been said that it is not competent to the Defendant to controvert the affidavit to hold to bail; but had there been more doubt than there is upon the question of law I am inclined to think that the Defendant's affidavit ought to have been admitted; for where the right to be discharged depends upon a question of law it would be very harsh to say, that because the Plaintiff has undertaken to swear positively to a point the truth of which must depend on an [366] accurate legal investigation, the Defendant must therefore lie in gaol.

HEATH, J. It appears that this affidavit was drawn with a view to the act of Parliament; but it does not state a case exempt from the provisions of the act. It does not speak of any contract in England, but merely of money paid and laid out in this country, whereas it is the original contract which the act contemplates. There are two periods to be considered; the 1st, before this Defendant came to England, the 2d, since his residence here. During the 1st there is no pretence to say that the Defendant was not within the operation of the act, the contract having been made abroad. With respect to the 2d it is said that the adjustments and settlements which have since taken place are to be considered as equivalent to new promises and new debts; but if that were so, the consequences of the act would be very fatal to honourable men. For what honourable man being asked whether he owed a debt contracted abroad would not immediately acknowledge it, or being desired to adjust it, would refuse so to do? The property of persons in the Defendant's situation may be

resorted to, and if the evidence they themselves afforded so as to affect that property were to affect their persons also, and deprive them of the protection afforded by parliament, the intention of the legislature would be completely defeated.

ROOKE, J. I am of the same opinion, and should not add any thing to what has been said by my Lord and my Brother Heath, if I did not think it necessary to declare my opinion that it would be of very dangerous consequence to hold, that an honourable acknowledgment made in England of a debt contracted abroad would charge the person of the Defendant when his person would not be chargeable by reason of the contract itself.

CHAMBRE, J. I am clearly of opinion that the act intended to refer to the original contract. It has been argued that the account stated in England amounts to a new cause of action; but unless we consider the act as looking to the original transaction, the protection which it holds out would be merely delusive. A Plaintiff may proceed to judgment against the property of a person within the protection of the act; now a judgment is technically speaking a new cause of action; but it would be absurd to hold that the same act which meant to prevent the imprisonment of a particular class of persons for particular debts, meant also to permit a new cause of action to be raised against [367] them by a judgment against their property, which cause of action should lead to the imprisonment of their persons.

Rule absolute.

DAVIES AND OTHERS, Assignees of Shivers a Bankrupt, v. CHIPPENDALE.
Feb. 9th, 1801.

If a prisoner be prevented from justifying bail by the Plaintiff's desiring further time to enquire into their sufficiency, he is from the time of his notice of justification intitled to a demand of a plea before judgment can be signed against him.

This was a rule nisi for setting aside an interlocutory judgment signed under the following circumstances: The Defendant (*vid. ante*, p. 282) having been continued in custody under a detainer for 1,300*l.* a declaration was delivered on the 8th of November last; special bail was put in to the action in the country on the 24th of the same month, and on the same day notice served that the bail would justify by affidavit on the 28th; the justification was opposed on the ground of the Plaintiff's not having had time to inquire into the sufficiency of the bail; but a rule was obtained for a justification before a Judge at chambers; on the 2d of December notice was served of the Defendant's intention to justify bail on the 4th of the same month, on which day they did justify without any opposition; but on the 3d of December the Plaintiff had signed judgment for want of a plea, though no plea had ever been demanded.

Bayley, Serjt., shewed cause and contended that the Defendant being in custody till his bail were actually justified, no demand of a plea was necessary, inasmuch as a prisoner is bound to plead without any demand of a plea (*a*), and that in this case the judgment being signed on the 3d of December, when his bail had not justified, was a judgment regularly signed as against a prisoner.

Best, Serjt., *contra*, insisted that as the Defendant was only prevented from justifying his bail on the 28th of November by the Plaintiff's desiring further time to inquire after the bail, the former must be considered from the 28th as a person entitled to a demand of a plea before judgment could be signed against him.

The Court expressed themselves clearly of this opinion.

Rule absolute.

[368] VOLLUM v. SIMPSON. Feb. 9th, 1801.

If Plaintiff in replevin plead several pleas in bar, upon which issues are joined, and some issues are found for the Plaintiff and some for the Defendant, the latter is

(*a*) If he be in the custody of the sheriff; *secus* if in the custody of the marshal. *Rose v. Christfield*, 1 Term Rep. 591. But even in the latter case no demand of a plea is necessary if the prisoner has been removed out of the custody of the sheriff without notice to the Plaintiff. *Wilkinson v. Brown*, 6 Term Rep. 524.

intituled to such costs of the trial as relate to the issues on which he has succeeded as well as to the costs of the pleadings (a).

This was an action of replevin; in which the Defendant made two cognizances. To each of the cognizances the Plaintiff pleaded three pleas in bar, whereupon six issues were joined. At the trial a verdict was found for the Plaintiff on the 1st, 3d, and 6th issues, and for the Defendant upon the 2d, 4th, and 5th. In taxing costs the Prothonotary allowed to the Plaintiff the costs of so much of the pleadings, briefs, and witnesses as related to the issues upon which he had succeeded, amounting to 125l. 15s. and to the Defendant, in the same manner, the costs of so much of the pleadings, briefs, and witnesses as related to those issues upon which he had succeeded, amounting to 127l. 3s.

The Prothonotary having reported to this effect;

Heywood, Serjt. now moved that he might be ordered to review his taxation, arguing thus—Although the Plaintiff, according to the rule lately laid down by the Court (b), may not be entitled to the costs of the issues on which he has failed, yet the Defendant can only be entitled to the costs of the pleadings on those issues, not to any costs of the trial. The stat. 4 Ann. c. 16, after enacting in s. 4 that any Defendant or Tenant in any action, or suit, or any Plaintiff in replevin may plead several matters, provides in s. 5, “that if any such matter upon demurrer joined, be judged insufficient, costs shall be given at the discretion of the Court; or if a verdict shall be found upon any issue in the said cause for the Plaintiff or Demandant, costs shall also be given in like manner, unless the Judge who tried the said issue shall certify that the Defendant, or Tenant, or Plaintiff in replevin, had a probable cause to plead such matter which upon the said issue shall be found against him.” In case of a verdict therefore costs are to be allowed in like manner as upon demurrer; but on demurrer there can be no costs but of the pleadings. Nothing but the costs of the pleadings appear to have been allowed in *Dodd v. Joddrell*, 2 Term Rep. 235, and in the case of *Page v. Creed*, 3 Term Rep. 391, it was expressly said by the Court, that “the stat. 4 & 5 Ann. only gives the costs of those pleadings;” and that it was not intended thereby to repeal the statute of the 22d & 23d of Car. 2, c. 9, which enacts that if the Plaintiff recover under 40s. [369] in assault and battery, he shall recover no more costs than damages: now if a Defendant in such an action plead several matters and the Plaintiff be entitled to all the costs of trial relating to those issues on which he succeeds though he recovers 1s. damages only, the whole effect of the statute of Car. 2 will be defeated. The only case to support the present taxation in the Defendant’s favour is that of *Broke v. Willett*, 2 H. Bl. 435; but in that case the only authorities cited in the Defendant’s favour and on which the judgment may be supposed to have proceeded, were *Butcher v. Green*, Dougl. 678, and *Dodd v. Joddrell*; the former of which cases was inapplicable to the point in contest, and the latter is subject to the explanation above stated.

Cockell, Serjt., contra, relied on *Brooke v. Willett*.

LORD ELDON, Ch. J. We are informed by the Prothonotary, that it has been the invariable practice of the Court to tax the costs in the manner which is now contended to be incorrect. The very point now in dispute came directly before this Court in 1795, in the case of *Brooke v. Willett*, at which time this Court, after having made inquiry of the Judges of the Court of King’s Bench, held that the practice which had prevailed was consistent with the true construction of the act. It is sufficient for me to add, that on looking into the statute the practical construction appears to me to be consistent with the words used in the act. Indeed if I had doubts upon the subject, I think my doubts ought to be controlled by the uniform practice of the Court.

HEATH, J. The statute of Anne being a remedial statute ought to be so construed as to advance the remedy. The costs intended to be given appear to me to be all those costs which follow the unnecessary plea. This construction is analogous to that which has been put upon the statute of Gloucester, by which the costs of the writ only

(a) Vide *Richmond v. Johnson*, 7 East, 583. *Cook v. Green*, 5 Taunt. 594. *Hopkins v. Barnes*, 2 Price, 136.

(b) Vide *Penson v. Lee*, ante, 330.

are given to the Plaintiff if he succeed, and yet that statute has always been held to give all the costs of the suit.

Rooke and Chambre, Justices, concurring,
The Prothonotary's Report was confirmed.

[370] MEAGHER v. VANDYK. Feb. 10th, 1801.

A writ of error operates as a supersedeas from the time of the allowance, though it be not served till after execution.

The Defendant in this case having sued out a writ of error, obtained an allowance thereof at 12 o'clock at noon on the 28th of January, but did not serve the allowance on the Plaintiff before half-past six on the same day; in the mean time the Plaintiff sued out a scire facias and levied on the Defendant's goods. A rule nisi having been obtained to have this execution set aside and the goods restored to the Defendant;

Clayton, Serjt., shewed cause and contended, that although the allowance of the writ of error might amount to a supersedeas where the fi. fa. has not been executed, yet that if execution has taken place before the service, the allowance will not have the effect of avoiding the execution, and thereby making the sheriff a trespasser. He mentioned *Incedon v. Clarke*, Barnes, 212, to shew that though under a ca. sa. the person shall be discharged, yet in the case of a fi. fa. the proceedings so far as the sheriff hath gone must stand.

Best, Serjt., in support of the rule, insisted that the allowance is a supersedeas of all proceedings on the judgment, and that the service has no other effect than to bring the party into contempt; *Jaques v. Nixon*, 1 Term Rep. 279. *Lane v. Bacchus*, 2 Term Rep. 44, and *Meriton v. Stephens*, Barnes, 205.

The Court at first inclined to think that as the execution had taken place before notice of the allowance it would be going too far to hold the sheriff a trespasser, but took time to consider of their opinion.

On this day LORD ELDON, Ch. J., said—Upon looking into the authorities and considering this question, we are fully satisfied that the writ of error must be deemed a supersedeas from the time of the allowance (a)¹, and that the execution of the fi. fa. was therefore irregular.

Rule absolute.

[371] AUBERT v. MAZE. Feb. 11th, 1801.

Money paid by one of two partners for the other on account of losses incurred by them on partnership insurances, cannot be recovered in an action brought by him against the other partner. And if this with other causes of dispute between the two be referred to an arbitrator who awards a sum due from one to the other for money so paid, the Court will set aside that part of the award (a)².

A verdict in this case having been taken for the Plaintiff by consent, subject to the award of an arbitrator, and the order of reference made a rule of Court, the arbitrator found that the Plaintiff was indebted to the Defendant in 95l. 14s. 9d. on the balance of an account between them for money lent, advanced, and paid by the latter, and awarded that sum to the Defendant. He then proceeded as follows: "And I also find and determine that the said Plaintiff is further indebted to the said Defendant in the sum of 680l. 2s. being one moiety of divers sums of money paid by the Defendant for and on account of losses on policies of insurance underwritten by agreement between the said Plaintiff and the said Defendant at their joint risk and for their joint benefit," and accordingly awarded that sum to the Defendant.

A rule Nisi having been obtained on a former day for setting aside this award;

Cockell and Vaughan, Serjts., now shewed cause. The arbitrator has stated upon

(a)¹ Vid. *Gravall v. Stimpson*, ante, vol. i. p. 478.

(a)² Vide *Ex parte Bell*, 1 M. and S. 752. *Webb v. Brooke*, 3 Taunt. 6, 12. *Simpson v. Bloss*, 7 Taunt. 246. *Cannan v. Bryce*, 3 B. and A. 179. *Bensley v. Bignold*, 5 B. and A. 335.

the face of the award the circumstances under which the 680l. 2s. has become due for the purpose of taking the opinion of the Court, whether the Defendant be entitled to recover the money so paid on account of an illegal partnership. Although it be illegal for underwriters to enter into partnership, yet they are liable to the insured for the amount of the sums underwritten, since it is not competent to them to set up the illegality of their own conduct by way of defence (*b*), and therefore as the Defendant has only paid on behalf of the Plaintiff what the Plaintiff himself would have been bound to pay, the former is entitled to recover the amount as money paid to the use of the latter. In *Faikney v. Reynous*, 4 Burr. 2069, it was held that the Plaintiff was entitled to recover upon a bond given to secure the repayment of money advanced by him to settle stock-jobbing differences, on the ground of the advancement of the money being collateral to the illegal concern. In *Petrie v. Hannay*, 3 Term Rep. 418, Mr. Justice Buller observes, "there is a wide difference between partners engaged in legal and illegal contracts; in the former, if one of the partners pay the whole of a partnership debt without any express promise from [372] the other, the law gives him a right to recover it back in an action for money paid to the use of that other partner, and it proceeds on this ground, that both are liable to pay: but in the case of illegal contracts, as they are not bound to pay, one of them cannot acquire a right of action against the other by paying the whole without his consent; in such cases it is necessary to have the consent and direction of that other." Now in this case both parties being compellable to pay the money, either of them had a right to advance the whole, and to call upon the other to repay a moiety, upon the same principle that a partner in a legal partnership may do the same, namely that the payment is not voluntary. In *Watts v. Brook*, 3 Ves. jun. 612, the Master having been directed to take an account in a partnership concern, and having included money advanced on transactions similar to the present, exceptions were taken to that account, but the Lord Chancellor ordered it to stand.

Shepherd, Lens, and Bayley, Serjts., contra. If one partner in an illegal concern, make a payment for the other at his express desire, such a payment may be considered as made for the use of the latter: but if a moiety of the money paid by one partner in the course of an illegal concern, without such express desire, may be recovered as money paid to the use of the other, the statutes prohibiting illegal partnerships are altogether nugatory. The cases of *Faikney v. Reynous* and *Petrie v. Hannay* have been considerably impeached by *Stears v. Lashley*, 6 Term Rep. 61, and *Mitchell v. Cockburne*, 2 H. Bl. 379. At any rate this case does not fall within the principle of *Faikney v. Reynous* and *Petrie v. Hannay*, of which Eyre, Ch. J., in *Mitchell v. Cockburne* observes, that they were one step removed from the illegal contract itself, and did not arise immediately out of it: and indeed His Lordship adds, that perhaps it would have been better if those cases had been decided otherwise, for when the principle of a case is doubtful he thought it better to overrule it at once than build upon it at all. The cases of *Sullivan v. Greaves*, Park Insur. 8, and *Booth v. Hodgson*, 6 Term Rep. 405, are strong authorities to shew that money paid or received on account of partnership insurances cannot be recovered.

LORD ELDON, Ch. J.—This case coming before the Court on a point expressly reserved for their opinion by the arbitrator, we are not called upon to unravel the facts on which he has come to a determination either one way or the other, but to form a determination on the facts submitted to our judgment. Some of the [373] cases on this subject, especially that of *Petrie v. Hannay*, have proceeded on a distinction, the soundness of which I very much doubt. It has been said, that if one partner in an illegal partnership concern pay money for the other without his authority, that money cannot be recovered; but if the money be paid with his authority it may be recovered. It seems to me, however, that if two persons engage in partnership in an illegal concern, each of them gives an authority to the other to transact all that business relating to the partnership without transacting which no profit can ever arise from the concern. In *Sullivan v. Greaves*, a third person undertook to bear half the Plaintiff's risk in an insurance; the Plaintiff therefore underwrote for the joint use of both, and the agreement amounted to an implied authority to the Plaintiff in case of a loss to pay the whole. Indeed if it were otherwise, the partnership must have been put an end to the moment occasion arose for the first transaction in it. The

(*b*) *Sullivan v. Greaves*, Park. Insur. 8.

consequence therefore seems to be this, that if a partnership be legal the law raises an implied consent, and if it be illegal, yet if the payment be made in the course of the partnership business, a jury will be warranted in finding an implied consent to that payment without which the partnership could not subsist an instant. Lord Kenyon does not appear to have taken any distinction between an express and an implied promise in *Sullivan v. Greaves*; his words are "here the Plaintiff is himself the underwriter who comes to enforce an illegal contract; it is a partnership pro hac vice, and this party cannot apply to a court of justice to enforce a contract founded in a breach of the law." So in *Mitchel v. Cockburne*, Lord Chief Justice Eyre, speaking of this sort of partnership, says "no contract can arise directly out of such a proceeding so as to be the foundation of an action." His Lordship reasons on the cases of *Faikney v. Reynous* and *Petrie v. Hannay*, observing that "they were one step removed from the illegal contract itself, and did not arise immediately out of it," and adds "perhaps it would have been better if they had been decided otherwise." Indeed it seems to me that if the principle of those cases is to be supported, the Act of Parliament will be of very little use. My Brother Heath in that case agreed with the Lord Chief Justice; and I do not understand him to have said more of *Petrie v. Hannay*, than, that if right it proceeded upon a principle not applicable to the case before him: not that the principle itself was right. In *Booth v. Hodgson*, which was another case of an insurance partnership, one of the partners and a stranger acted as brokers, [374] and having received the premiums were sued by the other partners for their shares. Now there, it might have been insisted that the premiums being received by the consent of the other partners, the parties receiving were liable to account for them; but the Court held otherwise. In addition to this, the cases of *Steers v. Lashley* and *Brown v. Turner*, 7 Term Rep. 630, stand in opposition to *Petrie v. Hannay*, *Faikney v. Reynous*, and *Watts v. Brook*. With respect to *Petrie v. Hannay* very great weight is due to the opinion of Lord Kenyon, who dissented from the rest of the Court. It is unnecessary to give a decided opinion on the determination in *Faikney v. Reynous*, since the circumstance of a specialty given to secure the money advanced, and which was there considered as amounting to a new contract, does not exist in this case. And as to the case in Chancery it may be observed, that it is possible that where parties have settled the balance of a mixed account between them of long standing, and one party has had an advantage for many years of credit being given to him for certain sums therein, a Court of Equity may feel itself called upon in justice to open the whole account, if the party who has already had credit for those sums think proper to object to an account being taken of the residue. But if that is to be considered as a case in which it was dryly decided that if a Master in the course of taking an account find certain sums paid on account of any of these illegal transactions, he may, on the ground of consent to such payment, view them in the same light as the other items of the account, it does not appear to me that the case proceeds upon a principle sufficiently consistent with the Act of Parliament to justify the adoption of it.

HEATH, J.—I am of the same opinion as my Lord, who has so fully gone through the cases, that I shall only hint at them. I take it to be by no means settled that if one partner in an illegal concern pay money for the other with his consent, the money so paid can be recovered. There are great authorities and opinions both ways, and we are therefore at liberty to decide upon principles. If the concern in which the money is advanced be *malum in se*, it will not be disputed that it cannot be recovered. For if two agree to assassinate a person and hire a third to do it, and one of the two former pay the whole reward, it is clear that he cannot maintain an action for a moiety. Now I do not see any sound distinction between the case of money paid in a concern which is *malum in se* and money paid in a concern which is *malum prohibitum*. The latter as well [375] as the former tends to encourage a breach of the law. With respect to what was said by me in *Mitchell v. Cockburne*, though I observed that it was distinguishable from the cases in Burrow and in the Term Reports, it is not a fair inference that I meant to approve of the latter cases. Many Judges have avoided giving extrajudicial opinions, and had I given an express opinion on those cases it would have been extrajudicial.

ROOKE, J.—I perfectly agree with my Brother Heath in reprobating any distinction between *malum prohibitum* and *malum in se*, and consider it as pregnant with mischief. Every moral man is as much bound to obey the civil law of the land as the law of nature. With respect to this transaction, I do not mean to give any opinion how far

the Court would have been called upon to set aside this award upon an affidavit stating the special circumstances, had nothing appeared upon the face of the award itself. But in this case the arbitrator has stated all the circumstances of the case especially for our opinion. Then the question is, Whether as the arbitrator has asked for our opinion, we are not bound by the authority of *Mitchell v. Cockburne* to say that the latter part of the award must be set aside? I think we are.

CHAMBERE, J.—I have no doubt upon the case. The question for us to decide is not, whether we shall open transactions closed by a general award which is apparently good; since the whole case arises on inspection of the award itself, and is therefore in the nature of a case reserved for special verdict. There is no doubt that an arbitrator is bound by the rules of law like every other Judge, and if it appear on the face of the award that the arbitrator has acted contrary to law, his award must be set aside. In this case the Plaintiff wants to avail himself of an agreement entered into contrary to law, and calls upon us to enforce that agreement. To shew that it is contrary to law *Booth v. Hodgson* is a very strong authority. In that case the Court refused to assist a partner in an illegal concern in recovering money paid to his partner in the course of the concern, and which he was unconscientiously endeavouring to keep in his own pocket. The cases of *Falkney v. Reynous* and *Petrie v. Hannay* were there very much doubted. I think we cannot do otherwise in this case than decide the question submitted to us according to law, and therefore that so much of the award as is founded on this illegal partnership must be set aside.

Accordingly The Court set aside the latter part of the award.

[376] DA COSTA v. CLARKE. Feb. 11th, 1801.

If an Avowant in replevin after trial and verdict for the Plaintiff obtain judgment non obstante veredicto in consequence of the Plaintiff's pleas in bar being bad, he is not entitled to any costs upon the pleadings subsequent to the pleas in bar, because he should have demurred to them.

The Prothonotary in this case (ante p. 257) not having allowed to the avowant any costs upon the pleadings subsequent to the pleas in bar, nor any costs of the trial, Marshall, Serjt., obtained a rule to shew cause why he should not be directed to review his taxation, and allow to the avowant the costs upon all the pleadings;

Shepherd and Bayley, Serjts., now shewed cause, and contended that the statute of 21 H. 8, c. 19, s. 3, which gives costs to an avowant, does not contain any expressions to prevent the Court from regulating the costs to be allowed according to the general rules which have prevailed respecting costs in other cases; that as all the pleadings subsequent to the pleas in bar had been occasioned by the default of the avowant, who might have obtained judgment at that stage of the cause by demurring, it was not just that he should receive the costs of those pleadings; that the case of a replender was very analogous to the present, in which case no costs are allowed to either party upon the pleadings subsequent to the point at which the fault is made; and that the case of *Kirk v. Nowell*, 1 Term Rep. 266, was in point, where the Defendant in trespass having pleaded several pleas on which issues were joined, a verdict was given for the Plaintiff on all the issues but one, and for the Defendant upon that one; but the plea on which the Defendant succeeded being shewn to be bad, and the Plaintiff obtained judgment non obstante veredicto, the Court of King's Bench held that the Plaintiff was not entitled to any costs of the issue on the Defendant's bad plea (a).

Marshall, Serjt., in support of the rule admitted that the avowant was not entitled to the costs of the trial, but contended that as he had judgment on the whole record, he ought to have the costs of all the pleadings; that the statute of 21 H. 8 expressly directed that if the avowry, cognizance, or justification be found for the avowant, or the Plaintiff be nonsuit or otherwise barred, he shall recover his damages and costs in the same manner as the Plaintiff would have done if he had recovered; that it might often be ad[377]-viseable for an avowant to take issue and proceed to trial rather

(a) Bayley, Serjt., was about to contend that the Plaintiff was entitled to the costs of the issue on non cepit under the stat. 4 Ann. c. 16, but as that point could not be brought under discussion by the present rule, nothing was said on that head.

than demur to a doubtful plea; and that if he failed by any accident at the trial, and afterwards succeeded by resorting to any fault in the pleadings, he ought not to be prevented from recovering those costs to which the justice of the whole case entitled him. He observed that the case of *Kirk v. Nowill* differed materially from the present, inasmuch as the Plaintiff in trespass is only entitled by the words of the statute of Gloucester to the costs of his writ, and whatever more he receives proceeds from the equitable construction put upon that statute by the Court; besides, as the opinion of Buller, J., in that case was founded on the supposition that other cases had been decided against the Plaintiff, and no such cases are to be found, the authority of that opinion is less to be relied on; whereas the case of *Broadbent v. Wilks*, Barnes, 266, is directly contrary to *Kirk v. Nowill*. He added, that at all events the Court would rather abide by the decision of the former case which had settled the practice of this Court, than adopt that of the latter, by which the practice of the King's Bench was regulated.

LORD ELDON, Ch. J. This case has been put upon two grounds; 1st, the justice of the case; 2dly, the stat. of H. 8. With respect to the first, though it may often be prudent for a party to overlook a fault in the pleadings and proceed to trial, yet it appears to me that the advantage which he derives from that mode of proceeding is a sufficient compensation for his being deprived of the costs of the pleadings subsequent to that fault. Certainly he may be said to have been to blame by contributing to the costs of those pleadings, though he ultimately succeed. If however by the necessary construction of the statute of H. 8 the avowant be entitled to the costs of all the pleadings, whatever the moral justice of the case may be, the Court cannot refuse to allow them. But the next question is, whether that be the necessary construction of the statute! In the case of *Kirk v. Nowill* we find the authority of Mr. Justice Buller (and a very considerable authority it is on such a point) for saying that a Plaintiff in trespass under similar circumstances is not entitled to all the costs. In that case he alludes to cases lately decided, and though we do not find any such decisions in print, we have no reason to conclude that they were not treasured up in the mind of the learned Judge. In deciding *Kirk v. Nowill* he proceeded on these principles, which he seems to have considered as the principles of the former cases, viz. that [378] the Plaintiff had contributed to the costs as well as the Defendant, that he should have demurred to the Defendant's plea, and that by going on to trial he was equally in fault. With respect to the difference between the statute of Gloucester and the statute of H. 8, as the Courts have decided that the words "costs of the writ" meant costs of the action, the statute of Gloucester must be considered as if the latter words had been used, and then all the cases decided upon that statute will become direct authorities in cases arising on the statute of H. 8. The case of *Broadbent v. Wilks* is then relied on; if that had been followed up by long, invariable, and known usage, the Court would have been bound to enforce that usage at least pro hac vice; but as it is not even pretended that any rule has been brought into familiar practice in consequence of that decision, I think we are at liberty notwithstanding that case to adopt the rule which was laid down in the King's Bench in *Kirk v. Nowill*, and which appears to me most conformable to justice and to the fair construction of the statute of H. 8.

HEATH, J. I am of the same opinion. It appears to me that this application is not founded either in reason or justice; that it is not supported by precedent, or conformable to the true construction of the statute. As to reason and justice, if the Avowant will not take advantage of a fault in the Plaintiff's pleadings when he has an opportunity of so doing, he becomes particeps criminis. The statute of Gloucester gives to a Plaintiff the costs of his writ; and the statute of H. 8 puts an Avowant in the same condition as a Plaintiff would be in by the statute of Gloucester. Both statutes were made in *pari materiâ*: the Avowant therefore under the statute of H. 8 is to recover such costs as a Plaintiff in a common action would recover under the statute of Gloucester. With respect to the authority relied on by the Avowant, there are many cases in Barnes which are not law: and whether the mistake in this instance arose from the decision of the Court, or the inaccuracy of the reporter, still a single decision is not entitled to great weight when opposed by the authority of another determination in the King's Bench, and when it stands in contradiction to reason and justice and the fair construction of the statute.

ROOKE, J. I am of the same opinion. The Avowant in this case derives sufficient

advantage from the statute of H. 8: for if we were at liberty to follow our own inclination, so far from giving him these costs, we should direct him to pay them to the [379] Plaintiff. He has taken two issues, neither of which he ought to have taken; and all the costs of the trial have been occasioned by his default. That statute was not intended to give costs to an Avowant in replevin in a different manner from what they are given by other statutes respecting other actions. When costs are taxed under this statute it must be done subject to the same regulations as in other cases, in which the costs of superfluous counts and similar proceedings are deducted. Then by what better rule of discretion can we proceed than that which has been adopted in the case of a repleader? If a party go to trial upon an immaterial issue, the Court must go back to the first fault upon the pleadings, and award a repleader; in which case no costs are paid by either side upon the pleadings subsequent to the fault. In this case the Plaintiff by the plea in bar has confessed the matter of the avowry, and the Avowant if he had adopted the proper means might have obtained judgment on the confession, without the expense of the subsequent proceedings. The case of *Broadbent v. Wilks* is certainly an authority for the Avowant: but we are to consider whether we can accede to the propriety of that decision. It stands opposed to the authority of *Kirk v. Nowill*, which though it relate to an action of trespass is not to be distinguished from it: and it appears to me that the latter determination is most conformable to the true principles of the law.

Rule discharged without costs.

SPARKES v. SIMPSON. Feb. 12th, 1801.

Oyer may be prayed at any time before the expiration of 24 hours after the demand of a plea, though the rule to plead be out.

In this case a rule to plead in four days was entered on the 24th of January, and a plea demanded thereon on the 30th of the same month at a quarter before four in the afternoon; on the 31st of January at two o'clock in the afternoon a demand, in writing, of oyer of the bond on which the declaration was founded, was served on the Plaintiff's attorney, who without granting oyer signed judgment on the same day. A rule nisi for setting aside this judgment having been obtained,

Best, Serjt., shewed cause and urged, that where oyer is not demanded until the time for pleading is expired, the Plaintiff is entitled to treat the demand as a mere nullity, and referred to 1 Sellon Pr. 263, ed. 2, and the authorities there cited. He observed that though the rule be otherwise where further time [380] to plead is obtained from a Judge, yet in this case as no time had been obtained, the time for pleading expired before the demand of oyer was made.

Lens, Serjt., contra, admitted that oyer must be demanded before the time for pleading is out, but insisted that notwithstanding the expiration of the rule the Defendant has twenty-four hours after the demand of the plea, and that as oyer had been demanded in this case within twenty-four hours after the demand of a plea, the Plaintiff was not entitled to sign judgment without granting oyer.

The Court were of this opinion, and relied on the case of *The Duke of Leeds v. Fevers*, Barnes, 268, ed. 3.

Rule absolute.

The end of Hilary term.

During the Vacation the Great Seal was, on the resignation of Lord Loughborough, delivered to Lord Eldon, Lord Chief Justice of the Court of Common Pleas, who was appointed Lord High Chancellor of Great Britain. His Lordship however continued to hold the situation of Lord Chief Justice of the Court of Common Pleas.

Sir John Mitford, Knt., His Majesty's Attorney General, resigned his office at the latter end of Hilary Term, and was elected Speaker of the House of Commons.

Edward Law, Esq. one of his Majesty's Counsel learned in the law, was appointed Attorney General, and was knighted.

Sir William Grant, Knt., His Majesty's Solicitor General, resigned his office, and was succeeded by

The Honorable Spencer Perceval, one of his Majesty's Counsel learned in the law.

[381] CASES ARGUED AND DETERMINED IN THE COURTS OF COMMON PLEAS AND EXCHEQUER CHAMBER, IN EASTER TERM, IN THE FORTY-FIRST YEAR OF THE REIGN OF GEORGE III.

SCURRY QUI TAM v. FREEMAN. April 23d, 1801.

A. lent B. 500l., and at the time of the loan it was agreed that the latter should give something more than legal interest as a compensation, but no particular sum was specified. After the execution of the deed, B. gave A. 50l. and paid interest at the rate of 5l. per cent. on the 500l. for five years, at the end of which time an action was brought against A. for usury.—Held that the action was not barred by lapse of time, for that the loan was substantially for no more than 450l. and consequently the interest at the rate of 5l. per cent. on the 500l. received within the last year was usurious. If a draft be given for usurious interest and a receipt taken for it in the county of A., and the draft be afterwards exchanged for money in the county of B.; the usury is committed in the county of B. and the venue must be laid there (a)¹.

Debt on the statute of Usury.

The cause was tried before Chambre, J., at the Guildhall Sittings after Hilary Term, when the facts in evidence were as follow:—In September 1794 the Defendant lent the sum of 500l. to one Robert Hooley upon his bond, and an assignment by way of mortgage of certain leasehold premises. At the time of the loan it was understood that Hooley was to give something more than legal interest as a compensation, but no particular sum was agreed upon. After the securities were executed and the money advanced the parties went together to another place where Hooley offered the Defendant 50l., who directed him to give it to his son then present; which was accordingly done. Interest at the [382] rate of 5l. per cent. was paid on 500l. until the 19th of January 1797, when the securities were changed and new deeds given to secure the 500l. and 5 per cent. interest, which was paid from time to time up to the 26th December 1799. On the last mentioned day 25l. was paid to the Defendant as one year's interest on 500l. by a draft on a banker, which draft was received as cash and a receipt accordingly given for it by the Defendant at a house in Bedford-Row in the county of Middlesex, but which was afterwards exchanged for money by him with a third person in West Smithfield London. The venue was laid in London. At the trial it was contended on behalf of the Defendant, 1st, That as the crime of usury, so as to subject the party committing it to penalties, is complete on the taking of the usurious interest, the crime of usury was in this case complete on the receipt of the 50l. given by way of compensation for the loan in September 1794 (a)², and consequently the time was long since expired within which this action should have been brought; for that since that time nothing more than 5l. per cent. had been received on the 500l.; 2dly, That the venue was improperly laid in London, for supposing the receipt of the last 25l. as one year's interest to be deemed usurious, still it was received in Bedford-Row, which is in Middlesex. The jury under the direction of the learned Judge found a verdict for the Plaintiff.

Best, Serjt., now moved to have a nonsuit entered, relying on the objections taken at the trial, and in support of the first referred to *Lloyd qui tam v. Williams*, 3 Wils. 250, and *Fisher qui tam v. Beasley*, Dougl. 235.

But The Court (consisting of Heath, Rooke, and Chambre, Judges,) were very clearly of opinion, that the receipt of 25l. as one year's interest was usurious, inasmuch as the loan could only be deemed a loan of 450l. since the Defendant had taken back 50l. out of the 500l.; and also that the draft on the banker was merely a promise to pay, whereas the actual receipt of the money constituting the usury took place in Smithfield, which was in London (b).

Best took nothing by his motion.

(a)¹ Vide *Lee v. Cass*, 1 Taunt. 511, 516. *Pearson v. McGowran*, 3 B. and C. 700.

(a)² On a contract to forbear 600l. for a year, reserving interest at the rate of 5l. per cent., if a premium be taken at the time of the loan, the crime of usury is complete the instant any part of the growing interest is received by the lender. *Wade q. t. v. Wilson*, 1 East, 195.

(b) If an usurious contract be entered into by a deed executed in London appointing

[383] CASTLEMAN, Executor of Castleman, v. RAY, Executor of Ray.
April 24th, 1801.

An unstamped draft drawn on "A. B. bricklayer" is not within the exception of 23 Geo. 3, c. 49, s. 4, in favour of drafts drawn on persons acting as bankers within 10 miles of the place where the draft is drawn. If at the bottom of such a draft there be an acknowledgment of the drawee that a third person paid for him, that acknowledgment cannot be received in evidence.

Indebitatus assumpsit for money had and received and on an account stated. The Defendant pleaded a tender as to part and a set-off as to the rest.

At the trial of this cause at the Guildhall Sittings after last Hilary Term before Chambre, J., the Defendant in order to support his plea of set-off, tendered in evidence an unstamped paper of which the following is a copy—

"Mr. Castleman,—Please to pay the bearer 30l. 8s.; his receipt will be your discharge, from—Yours, &c.
Standgate, Sep. 3, 1790.

THO. MOSELEY.

Mr. Castleman, Bricklayer,
Camberwell.

Paid by Rich^d. Ray
for Charles Castleman."

The words "Paid by Rich^d. Ray" were in the hand-writing of the Defendant's testator, and the words "for Charles Castleman" in the hand-writing of the Plaintiff's testator. It was objected that this paper not being stamped could not be received in evidence, being a draft or order within the meaning of 23 Geo. 3, c. 49, s. 2, (which act was in force at the time the draft was drawn) and not falling within the exception in s. 4 of that act which exempts every draft or order for the payment of money on demand upon any banker or person or persons acting as a banker residing or transacting the business of a banker within ten miles of the place of abode of the person or persons drawing such draft or order, from being stamped. The learned Judge being of that opinion, refused to receive the paper in evidence, and a verdict was found for the Plaintiff.

Runnington, Serjt., now moved for a rule calling on the Plaintiff to shew cause why a new trial should not be had, contending 1st, That Castleman upon whom the draft was drawn, though not a banker by business, might be considered as a person acting as a banker within the meaning of the act, having been treated by the drawer as such; 2dly, Admitting that the paper could not be [384] received in evidence as a draft, yet that as Castleman had acknowledged at the bottom of it, under his own hand, that Ray had paid the money mentioned in the paper for his use, the Defendant ought not to be precluded from giving that acknowledgment in evidence merely because it stood on the same paper as the draft; that the acknowledgment if written on a separate piece of paper would not have required a stamp since it was not in the nature of a receipt. *Fisher v. Leslie*, Esp. N. P. Cas. 426.

But The Court (consisting of Heath, Rooke, and Chambre, Judges) were of opinion, that the evidence was properly rejected, for that the acknowledgment of Castleman could not be made available without giving effect to the draft.

Runnington took nothing by his motion.

ONSLow, *Demandant*, v. SMITH, *Tenant*. April 24th, 1801.

Aid-prayer is a dilatory plea within 4 Ann. c. 16, and must be verified by affidavit.

If the tenant in a writ of right pray aid after a general imparlance it is good cause of demurrer: and the Court will give judgment thereupon that the tenant answer alone.

This was a writ of right brought to recover a piece of garden ground and curtilage with the appurtenances, in the borough of Horsham.

A. the lender to be receiver of B. the borrower's rents in Middlesex, with a pretended salary, and A. receive the rents in Middlesex, but settle for the balance with B. in London, the venue in an action on the statute is well laid in London. *Scott q. t. v. Brest*, 2 Term Rep. 238. Indeed it seems that it might be laid either in London or Middlesex, per Ashhurst J. *Ib.* 240.

The Demandant counted in Easter Term 1800, and laid the right and seisin within sixty years by taking the esplees in his father Denzill Onslow from whom the right descended to himself. The tenant obtained three general imparlances, 1st, To the Morrow of the Holy Trinity, 2dly, To the Morrow of All Souls, and 3dly, Till Eight Days of Saint Hilary. "At which day the Demandant cometh here into court by his said attorney, and the tenant by his attorney aforesaid, and the said tenant says, that long before the day of suing out the original writ of the said Demandant, the Right Honourable Charles Lord Viscount Irwin of the kingdom of Scotland was seised of the tenement aforesaid with the appurtenances in his demesne as of fee, and being so seised on, &c. made his last will and testament; (Here the tenant set out the limitations in the above will, by which a title was derived to Lady Irwin for her life, remainder to Lord Irwin's daughter Isabella Ann Lady Beauchamp for her life, remainder to the second third and other sons of Lady Beauchamp in tail male, remainder to his daughter Frances for her life, remainder to her first and other sons in tail male, remainder to his daughter Elizabeth for her life, remainder to her first and other sons in tail male, with several [385] other remainders over; the tenant then averred the death of Lord Irwin, whereby Lady Irwin became seised for her life, and that she by lease and release of the 28th and 29th of May 1790, conveyed her life interest to the tenant; and that Lady Beauchamp had no second son, and Frances no son.) And the said tenant further says that the said Elizabeth afterwards and before the suing out of the said original writ of the said Demandant, as the borough of Horsham aforesaid, intermarried with one Hugo Meynell, Esquire, and the said Hugo Meynell and Elizabeth have issue between them lawfully begotten one Hugo Meynell their first son who is now living, to whom and to the heirs male of his body issuing, the tenement aforesaid with the appurtenances after the death of the said Viscountess, and after the respective deaths of the said Isabella-Ann, Frances, and Elizabeth, and in default of such issue of their respective bodies as aforesaid doth belong and without which said Hugo Meynell the son, the said tenant cannot draw into plea the aforesaid tenement with the appurtenances nor answer the said Demandant thereof, wherefore he prays aid of the said Hugo Maynell the son."

"And the said Demandant protesting that the said Charles Lord Viscount Irwin of the kingdom of Scotland was not so seised of the tenement aforesaid with the appurtenances as the said tenant hath above supposed, says that the matters alleged by the said tenant in manner and form as the same are above stated and set forth, are not sufficient in law for the said tenant to have aid of the said Hugo Meynell the son, wherefore he prays judgment, and that the said tenant may answer the said Demandant in the plea aforesaid without the aid of the said Hugo Meynell. And for causes of demurrer in law the said Demandant sets down and shews to the Court here the following, that is to say, for that the said tenant hath prayed the aid of the said Hugo Meynell the son, in a term subsequent to that in which the said Demandant counted against the said tenant, and after an imparlance had been prayed by and granted to him; and also for that the said tenant hath not made any profert of the said several indentures which he hath alleged to have been respectively made on the 28th and 29th days of May in the year of our Lord 1790 aforesaid, or of either of such indentures, nor hath he set forth any legal excuse for not shewing the same or either of them to the Court here; and for that the said aid-prayer is in various other respects uncertain, insufficient, and informal."

[386] "And the said tenant says that the matters and things by him alleged in manner and form as the same are above stated and set forth, are sufficient in law for him the said tenant to have aid of the said Hugh Meynell the son, and this he is ready to verify and prove as the Court, &c. And because the said Demandant hath not made any answer to the said aid-prayer, nor hitherto denied the same, the said tenant prays judgment and also as before prays aid of the said Hugo Meynell the son."

This case was to have been argued last Michaelmas Term by Best, Serjt., in support of the demurrer, and Bayley, Serjt. contra;

But The Court being of opinion that the aid-prayer was a dilatory plea within the statute of Ann, and indeed the most dilatory which could be pleaded, since infant in arms might be prayed in aid and the parol would demur till he came of age, observed that it must be verified by affidavit.

Best then insisted, that as the tenant had omitted to verify by affidavit, the Court

would not then give him time to do so, but would give judgment on the demurrer that the tenant should answer to the Demandant without aid.

But The Court answered that no such judgment could be given, until default after default; that the course which the tenant ought to follow was to sue out a writ of summons *ad jungendum auxilium*, and that if the prayee then made two defaults judgment might be given that the tenant should answer without him. They therefore gave leave to the tenant to verify his plea by affidavit, saying at the same time that the Demandant was at liberty to withdraw his demurrer.

The tenant accordingly verified his aid-prayer by affidavit; but the Demandant not having withdrawn his demurrer, it now came on to be argued;

Best, Serjt., for the Demandant. The first objection to the aid-prayer is, that it has been prayed after a general imparlance, Booth on Real Actions, p. 61. Now that an aid-prayer is a dilatory plea need not be argued, since the Court have decided that point, by requiring that it should be verified by affidavit. If indeed it be contended that the consequence of establishing that aid cannot be prayed after a general imparlance would be, that aid so prayed might be treated as a nullity, and could not be demurred to; it may be answered that in *Buddle v. Wilson*, 6 Term Rep. 369, which was a demurrer to a plea in abatement [387] pleaded after a general imparlance, the Court gave judgment of respondeas ouster on the demurrer. So in the present case the Court may give judgment that the tenant answer without aid. In fact the tenant for life and the remainder-man may be compared to two joint-tenants, one of whom if sued alone has a right to plead in abatement, but may be deprived of that advantage if he neglect to plead in abatement until after a general imparlance. The second objection is, that no profit has been made of the deeds stated in the aid-prayer, under which the tenant derives his title.

[HEATH, J.—There is nothing in this last objection: for it is unnecessary to make profit of any deed which has its operation under the statute of Uses (a).]

Bayley, for the Tenant.—The objection which has been taken to this aid-prayer, that it cannot be pleaded after a general imparlance, is not well founded. The passage referred to in Booth, 61, is this; “In real actions aid ought to be demanded at the first day the tenant hath to plead, that is before imparlance.” In support of this Booth refers to 3 H. 6, 5, which does not support the above proposition. Indeed Booth himself in p. 94, speaking of the writ of right patent, says “After the view and imparlance, the tenant may plead or vouch, or pray in aid if he be tenant for life.” And in Co. Entr. 48, tit. Annuities, pl. 1, there is a precedent in which aid was not only once prayed after a general imparlance, but the prayees after having been joined in aid obtained another general imparlance, and then prayed in aid the reversioner. To grant aid where it ought not to be granted, is not error, but to refuse it where it ought to be granted, is error. Bro. Abr. tit. Ayde, pl. 118 (b).

Best, in reply.—Precedents of pleading cannot be opposed in point of authority to decided cases, since they are not sanctioned by the judgment of the Court. Viner, when considering at what time aid ought to be demanded by the tenant, says “He ought to demand it the first day of the term he begins to plead.” Vin. Abr. tit. Aid of a Common Person, F. a. and cites 2 H. 6, 5 b.(c); and in the next paragraph he adds “If a plea be adjourned [388] from one term to another, in the other term he shall not have it. 3 H. 6, 5 b.” Now an imparlance is an adjournment. The two passages in Booth may be reconciled, by supposing that in one he speaks of a general, and in the other of a special imparlance.

The Court at first inclined to overrule the demurrer, and observed, that the tenant having only a life-estate was bound at the peril of a forfeiture to pray in aid the remainder-man; that in this case therefore the only question was, whether aid had been properly prayed; and that although it might perhaps have been a subject

(a) See the cases on this subject collected by Williams, Serjt., in his edition of Saunders, *Jevens v. Harridge*, p. 9 a. in notis, and also 8 Term Rep. 573, *Banfill v. Leigh* and another, where Lord Kenyon mentions a conveyance to uses as an instance in which profit need not be pleaded.

(b) See also to the same effect 8 H. 7, 11, per Hussey. And the same rule prevails with respect tooyer. 6 Mod. 28. 2 Salk. 498. 2 Ld. Raym. 969, *Longueville v. Thistloworth*.

(c) This is misprinted in Viner for 3 H. 6, 5 b.

of demurrer, if it had appeared on the face of the aid-prayer that the tenant had no right to demand aid of the prayee, yet it did not follow that the Demandant was entitled to demur on account of a supposed informality in the aid-prayer, since if it were quashed on this demurrer, the interests of the remainder-man would be affected without his being in Court to defend himself, and the tenant could not be adjudged to answer by himself until the prayee had made default after default.

Cur. adv. vult.

On this day the judgment of the Court (present Rooke and Chambre, Justices) was delivered by

HEATH, J.—The question is, whether after a general imparlance aid-prayer lies? It is a clear principle of law that no dilatory plea can be pleaded in another term after a general imparlance, and it is clear that aid-prayer is a dilatory plea: the law is so laid down in Booth, 61. 1 Rol. Abr. 185, and Hard. 179. On behalf of the tenant, there have been cited as authorities, Booth, 94, and two precedents in Coke's Entries, fo. 48. As to the passage in Booth it is extremely inaccurate, for it refers to a former passage in the same book, which directly contradicts it, and cites Coke's Entries, fo. 182, pl. 4, where I find that no imparlance whatever was antecedently granted. I have looked into Coke's Entries, fo. 48 a. and 629 b. (tit. Scire facias, pl. 12). In the first of these Entries the imparlance was granted in the same term: the second of these Entries is a precedent for the tenant so far as it goes, but I think it is of but little weight, because the granting aid where none is of right demandable is not error. It might be the interest of the Demandant to acquiesce in the demand, inasmuch as it enabled him to obtain a more complete judgment against the tenant for life and remainder-man, instead of obtaining it against the tenant for life only. Quisque potest [389] renuntiare juri pro se introducto. The distinction is clearly taken by Martin, once a justice of this bench, that an indefinite number of aid-prayers may be successively taken after an imparlance in the same term, but the tenant shall not have aid after a general imparlance in another term, 3 H. 6, 5 b. We are all of opinion, that in this case the demurrer ought to be allowed, and the judgment of the Court is, that the tenant shall answer alone without the aid of Hugo Meynell the son (a)¹.

HAMMERSLEY v. MITCHELL. April 27th, 1801.

An affidavit to hold to bail made by Plaintiff's clerk expressly negating a tender in bank notes, held bad.

In this case the Plaintiff's clerk having made an affidavit of debt to hold the Defendant to bail, in which he had sworn positively to the debt and negated any tender in bank-notes, in the same way as in *Smith v. Tyson*, ante, p. 339;

Best, Serjt., on the authority of the above case obtained a rule Nisi for discharging the Defendant on a common appearance.

Shepherd, Serjt., now shewed cause, and urged, that notwithstanding the case of *Smith v. Tyson*, the Court would probably choose to reconsider the rule they had adopted, inasmuch as the Court of King's Bench had since the determination of that case, and with a full knowledge of it, decided (a)² differently, and refused to grant such

(a)¹ There seems to be a distinction between judgments against the tenant upon demurrer to the aid-prayer and judgments against him where the Demandant counterpleads the aid-prayer; in the former case it is not final, in the latter it is. Thus in Bro. Ab. tit. Peremptory, pl. 76, it was said by Seton "if the tenant prays aid, and the Demandant counterpleads, and the tenant pleads estoppel against the counter plea, which is adjudged against him, this is peremptory; but upon demurrer upon the aid this is not peremptory." So in 2 Leon. 52, where in a writ of partitione facienda the Defendant prayed in aid, and the Plaintiff counterpleaded, upon which issue was joined and found for the Plaintiff, it was held to be peremptory, and that the judgment should be non quod respondeat, sed quod partitio fiat. In this respect, as in many others, the aid-prayer appears to resemble a plea in abatement; to which if Plaintiff demur and succeed on the demurrer, judgment shall be that Defendant respondeat ouster; but if issue be taken on the plea, and found against the Defendant, the judgment shall be final. See Com. Dig. tit. Abatement, 1, 14, 15.

(a)² The name of the case was *Madox v. Abercromby*, the application was made by

an application as the present, observing that if the principle of that case could be supported, it would be necessary for all the partners to join in the affidavit where they were joined in the action.

[390] But The Court (consisting of Heath, Rooke, and Chambre, Justices) adhered to their former opinion; and Chambre, J., observed, that it would be difficult to say that the Deponent had not committed perjury, since he had sworn to a fact not within his knowledge.

Rule absolute.

CHATTERLEY v. FINCK. HOLLINGS v. SAME. April 27th, 1801.

A person employed in London as agent to one residing at a distance in the country with a power of attorney to collect his debts, may make an affidavit of debt positively denying any tender in bank notes (a).

In these cases the affidavits to hold to bail were made by one Robert Anderson, agent to the Plaintiffs, and were precisely similar to that in the last case. Accordingly

Vaughan, Serjt., obtained a rule Nisi for discharging the Defendants on entering common appearances.

Against those rules Best, Serjt., now shewed for cause affidavits stating that the Plaintiffs resided at Stafford, and that the said Robert Anderson being resident in London, was appointed their agent by power of attorney, for the special purpose of obtaining payment of the debts for the recovery of which these actions were brought, and for compounding and settling the same as he should in his discretion think most fit.

The Court (consisting of Heath, Rooke, and Chambre, Justices) were of opinion that the facts disclosed in the affidavit now produced, sufficiently accounted for the Plaintiff's agent being able to negative so positively the tender in bank-notes.

Rules discharged.

STACEY AND TWO OTHERS v. FEDERICI. April 28th, 1801.

An affidavit of debt made by one of three partners denying any tender in bank-notes to himself "or to either of his partners to the best of his knowledge and belief," is sufficient. The Court will not discharge a Defendant on common bail on the ground of his having obtained a certificate as a bankrupt, and of the debt being thereby barred, if the validity of the certificate is meant to be disputed.

One of the three Plaintiffs, who were partners, having made the affidavit to hold to bail, in which he swore positively to the debt, and expressly negatived any tender in bank-notes having been made to himself, or to either of his partners to the best of his knowledge and belief:

Best, Serjt., obtained a rule Nisi for cancelling the bail-bond and entering an exoneration on the bail-piece, 1st, because all the Plaintiffs had not joined in the affidavit to hold to bail; and 2dly, on an affidavit stating that a commission of bankrupt had [391] issued against the Defendant, who had obtained his certificate, and that the debt in question had accrued previous to the issuing of the commission.

Shepherd, Serjt., shewed cause, and contended, 1st, that as it was not necessary before the passing of the bank act that all the Plaintiffs should join in an affidavit to hold to bail, it was not the intention of the Legislature to compel them to do so now; 2dly, that it did not appear by the Defendant's affidavit that the debt accrued prior to the act of bankruptcy, without which the certificate would be no bar. *Bamford v. Burrell*, ante, p. 1. He also produced an affidavit, stating that the validity of the

E. Morris on facts precisely similar with those of *Smith v. Tyson*, and on the authority of that case in Hil. 41 Geo. 3, and refused by the Court of K. B. See also *The Mayor of London v. Dios*, 1 East, 239, and *Knight v. Keyte*, 1 East, 415, to the same effect.

(a) But see *Bolt v. Miller*, post, 420. *Lawson v. McDonald*, post, 590.

certificate was the point intended to be contested at the trial; and urged that the Court would not prejudice that question on a summary application.

The Court (consisting of Heath, Rooke, and Chambre, Justices) were of opinion, that the affidavit to hold to bail was sufficient; and that though the affidavit upon which the rule was granted was good *primâ facie* evidence of the debt having accrued prior to the act of bankruptcy, yet that as the validity of the certificate was disputed they could not interfere in a summary way.

Rule discharged.

THE EARL OF RADNOR v. REEVE. April 28th, 1801.

[Applied, *Allen v. Sharp*, 1848, 2 Ex. 366.]

If the judgment of Commissioners of appeal in certain cases be declared final by statute, their judgment cannot be questioned in an action of trespass.

Trespass for breaking the Plaintiff's house and taking away his goods. Plea, Not guilty.

This action was brought against the Defendant who was collector of the duties on male-servants, houses, windows, horses and dogs, for distraining goods in the Plaintiff's house for one year's duty and surcharge on one male servant. The Plaintiff had appealed against the surcharge to a meeting of the Commissioners, on the ground that the male-servant in question was a day-labourer. The Commissioners dismissed the appeal (a)¹, and the Defendant in consequence made a distress upon the Plaintiff's goods to satisfy the duty. When this cause came on to be tried before Lord Eldon, Ch. J., at the Westminster Sittings after last Michaelmas Term, a verdict was [392] found for the Plaintiff subject to the opinion of this Court upon a case reserved.

The case being now called on for argument, and the Court intimating that it was not open to discussion, inasmuch as they had no jurisdiction, the determination of the Commissioners being final;

Lens, Serjt, endeavoured to obviate that objection by citing *Milward v. Caffin*, 2 Bl. 1830, and *Harrison v. Bullock*, 1 H. Bl. 68, in the former of which cases the Court of Common Pleas had entertained a question respecting a poor-rate which had been confirmed by the Sessions on appeal, and in the latter a question on the land-tax, after an appeal to the Commissioners which had been dismissed, and observed that if the Commissioners in this case had taxed the Plaintiff for a servant not falling within the description of the act they had exceeded their jurisdiction.

But the Court (consisting of Heath, Rooke, and Chambre, Justices) said, that it had been determined by all the Judges of England, that when a statute provides that the judgment of Commissioners appointed thereby shall be final, their decision is conclusive, and cannot be questioned in any collateral way.

Judgment for the Defendant (a)².

(a)¹ By 25 Geo. 3, c. 43, s. 35, the appeal is given; and by s. 38 and 39, declared final unless a case be stated for the opinion of a Judge. By 37 Geo. 3, c. 107, the duties are increased, and the former powers reserved to the Commissioners.

(a)² See the words of Yates, J., in *Strickland v. Ward*, 7 Term Rep. 634, in notis, "that a conviction of a justice could not be controverted in evidence, that the justice having a competent jurisdiction of the matter, his judgment was conclusive till reversed or quashed; and that it could not be set aside at *Nisi Prius*." But where a statute (13 G. 3, c. 78, s. 19) directed that an order of justices for turning a footway confirmed on appeal to the Quarter Sessions should be final; and in a subsequent section (s. 69) provided that certain forms set forth in a schedule should be used on all occasions, and that no objections should be taken for want of form in any such proceedings; it was held that a material variance from the form prescribed was fatal to the order, and might be taken advantage of in an action of trespass, notwithstanding the order had been confirmed on appeal to the Sessions. *Davison v. Gill*, 1 East, 64.

VAUGHAN v. BARNES. April 28th, 1801.

The Court will not order money paid into Court by the Defendant through a mistake to be restored to him. Though perhaps in case of fraud they may.

Two actions having been commenced against the Defendant in this case for goods sold and delivered, one of which was at the suit of the Plaintiff, and the other at the suit of a third person; the Defendant to the first pleaded a tender of 28l. 8s. and paid the same into Court, which was taken out by the Plaintiff; and to the last he pleaded the general issue, considering that the Plaintiff Vaughan was the only person entitled to recover for any [393] of the goods delivered, but that he had demanded more than was actually due. The action to which the general issue only was pleaded coming on to be tried first, the Plaintiff obtained a verdict; after which the Defendant procured a bill of particulars from the present Plaintiff, which stated his demand to be 20l. 3s. Upon this Best, Serjt., having obtained a rule calling on the Plaintiff to shew cause why the sum of 8l. 5s. being the difference between the sum paid into Court and that stated in the Plaintiff's particulars, should not be refunded to the Defendant, was now called upon to support his rule. He urged that although the Court would not in general order money to be refunded which had been paid into Court by a Defendant, yet that in a case like the present where the Defendant had acted under a complete mistake, and where the Plaintiff's own particulars shewed that his demand did not amount to so much as he had taken out of Court, they would not adhere to a rule which would work injustice.

But The Court (consisting of Heath, Rooke and Chambre, Justices,) were of opinion, that the Defendant pays money into Court at his peril, and that the Court would never order it to be restored unless it appeared that some fraud or deceit had been practised upon him; and added, that almost every Defendant pays something more into Court than he believes to be due, that he may be certain of covering the just demand, and that consequently if the Court were to attend to the present application there would be no end to motions of this kind.

Rule discharged (a).

THOMAS v. WARD. April 29th, 1801.

The rule that final judgment cannot be signed till four days after the return of the habeas corpora juratorum does not extend to a case where the term closes before the four days are expired.

In this case the writ of habeas corpus juratorum was returnable on the 9th day of the month; on the evening of the 12th being the last day of the term final judgment was signed. On this, Best, Serjt., obtained a rule Nisi for setting aside the judgment, and now in support of that rule referred to 1 Sell. [394] Pr. ed. 1792, p. 496, where it is laid down that four days exclusive from the return of the habeas corpus are allowed for any motion in arrest of judgment or for a new trial.

Shepherd, Serjt., contrâ, was stopped by The Court (consisting of Heath, Rooke, and Chambre, Justices,) who after enquiry of the officers declared the rule laid down in Sellon's Practice not to extend to cases where the term closes before the four days are expired.

Rule discharged.

WILSON QUI TAM v. VAN MILDERT, Clerk. April 29th, 1801.

Where three parish churches have been united by 22 Car. 2, c. 11, the benefice may be described in pleading as one rectory.

This was an action for non-residence. The first count in the declaration described

(a) In *Crockay v. Martin*, Barnes, 281, the Plaintiff having died before trial, the Defendant moved to have the money paid back to him, but the Court refused the application. See on the general head of taking money out of Court, the note of Mr. Serjt. Williams in *Birks v. Tippet*, 1 Saund 33, also *Le Grew v. Cooke*, ante, vol. i. p. 332, and the notes to that case.

the Defendant's benefice as "the parsonage of the rectory and parish church of the united parishes of St. Mary le Bow St. Pancras Soaper-Lane and Alballows Honey-Lane." The second count described it as "a certain rectory, to wit, the rectory of the parish church of the united parishes, &c." as in the preceding count.

The cause was tried before Lord Eldon, Ch. J., at the Guildball Sittings after last Michaelmas Term, when a verdict was found for the Plaintiff, with liberty to the Defendant to move to enter a nonsuit, on the ground of the benefice being improperly described in the declaration. By the statute of 22 Car. 2, c. 11, s. 63, which was passed for the uniting certain parishes after the fire of London, it is provided that "the parishes of St. Mary le Bow St. Pancras Soaper-Lane and Alballows Honey-Lane shall be united into one parish and the church heretofore belonging to the said parish of St. Mary le Bow shall be the parish church of the said parishes so united." The 68th section also enacts "that notwithstanding such union as aforesaid each and every of the parishes so united as to all rates taxes parochial rites charges and duties and all other privileges liberties and respects whatsoever other than what are herein mentioned and specified shall continue and remain distinct and as heretofore they were before the making of this present act, and that the several and respective patrons of the said churches so united shall and may present by turns to that church only which by this act is appointed to be rebuilt and [395] established for the parish church of the parishes so united as aforesaid, the first presentment to be made by the patron of such of the said churches the endowments whereof are of the greatest value." In the letters of institution the Defendant was described "as rector of the rectory and parish church of St. Mary-le-Bow with the rectories of St. Pancras Soaper-Lane and Alballows Honey-Lane thereunto annexed."

A rule Nisi for setting aside the verdict and entering a non-suit having been obtained in the course of last term,

Bayley, Serjt., now shewed cause. The question is, whether the Plaintiff has done right in describing the Defendant's benefice as one rectory? In Spelman's Glossary *Rectoria* is put *pro integrâ ecclesiâ parochiali cum omnibus suis juribus pratis decimis aliisque proventuum speciebus; aliâs vulgò dictum beneficium*. The rectory and benefice therefore are considered as synonymous. In 1 Bl. Com. 384, it is said "that a parson is one that hath full possession of all the rights of a parochial church, and that he is sometimes called the rector or governor of the church." The rectory therefore means that over which the parson of the church is rector, and if there be but one parish there can be but one rectory. It is true that before the statute of Car. 2 there were three rectories, but the effect of that statute was to make a union of the three and convert them into one. Previous to the statute there were three churches, but by the statute the churches are united; there is now but one church, one benefice, one advowson, and therefore there can be but one rectory. It appears from the opinion of Powell, J., in *Reynoldson v. Blake*, 1 Ld. Raym. 196, that after a union at common law there is but one church, and one benefice and one advowson. To the same effect is Dyer, 269 b. Cro. Car. 987. In the case of *The Grocers' Company v. The Archbishop of Canterbury*, 3 Wils. 214, which related to the very parishes mentioned in this declaration, they were described in the pleadings as one rectory. And it appears from the case of *St. Swithin v. St. Mary Bothaw*, Skin. 588 and 616, that under a union by the statute of Charles the Second, not only the churches but the parishes are united.

Shepherd and Best, Serjts., in support of the rule. The 68th section of the act provides, that the parishes therein mentioned shall continue distinct in all respects whatsoever except in those which are expressly mentioned; and as it is not declared in any part of the act that the rectories of the several parishes in question shall be united, they must still be considered as three separate rectories.

[396] If the argument used for the Plaintiff were sound, it would follow that a rectory and a vicarage in two parishes united by the act, would also be united, and that the latter would be swallowed up by the former; but it is clear from the case of *Reynoldson v. Blake*, that if there be a rectory in one of the two parishes united under the act and only a vicarage in the other, that the rectory and vicarage continue distinct notwithstanding the union of the parishes. The statute 4 W. & M. c. 12, plainly shews, that parishes after the union of the churches remain distinct, except for the purposes specified in the act of union; since if they were united, to all intents, that act which obliges all the parishes to contribute to the repairs of the church would not

have been necessary. So in the Building Act 14 Geo. 3, c. 78, s. 79, it is expressly declared, that whereas several parishes were united together after the fire of London "any two or more of the said parishes so united shall for the purpose of this act be deemed one parish only." The letters of institution afford strong evidence of the sense which has been put upon the statute of Car. 2.

Cur. adv. vult.

On this day the judgment of the Court (present Rooke and Chambre, Justices,) was delivered by

HEATH, J.—The question is, Whether the Plaintiff in his declaration has well described the Defendant's benefice in respect of which he has sued him for non-residence? In all the counts in this declaration the benefice is stated to consist of one rectory. It is contended by the Defendant, that it consists of three rectories united together, and which notwithstanding their union still exist. The union of these parishes is by the statute 22 Car. 2, whereby it was enacted, that the parish church of St. Mary-le-Bow should be alone rebuilt and should be the parish church of the parishes so united. By section 68, it is provided, that the presentation shall be to that church only which is to be rebuilt. It appears in evidence that the Defendant was admitted to the parish church of St. Mary-le-Bow, with the churches of St. Pancras and Albhallows thereunto annexed. The Defendant's counsel have greatly relied on the terms of this institution and admission to prove their point. In my apprehension the description of the Defendant's benefice is substantially the same in the counts of the declaration as in the institution and admission. The word "annexed" is synonymous with united. In Rastall's Entries, fol. 522 (a), we [397] find these words, *Idem J. B. prætexit unionis annexationis incorporationis et consolidationis solus persona prædictæ integre ecclesiæ tunc exitit.* We must consider the operation of law on the union: true it is, that there are still three distinct patrons but there is one incumbent. By the union the patronage is preserved, but the incumbency of two of the benefices is destroyed; it is the incumbency and not the rectory which is the subject of the suit, and if that be well described the Plaintiff may maintain his action. What is said by Powell, J., in *Ld. Raym.* 196, is material, viz. that in case of united churches, there is but one advowson in right, and that every patron has the whole advowson in his turn. Consequently there is but one rector and one rectory: if these were three distinct rectories the incumbent could not hold them even with dispensation. It is material to consider the pleadings in the case of union. In 11 H. 6, 33, the law is laid down by Babbington, Ch. J. If a consolidation be made of two churches and an abbot hath an annuity out of the church consolidated to another, if the annuity be in arrear and the abbot brings his writ of annuity, he must name the parson of the church to which the church is consolidated. In the case of *Reynoldson v. Blake and The Bishop of London*, the Plaintiff brought *Quare impedit* for hindering him from presenting to the church of St. Andrew's Wardrobe in London only, and in his declaration he states the union of that church with the church of St. Anne, Blackfriars, and he claims to present as patron of St. Anne Blackfriars. The pleadings are in Levinz Entries, 141; and that was a union of a vicarage and a rectory, and the presentation though in right of the vicarage was only to the church. The presentations to these united churches have been the same as in the present instance, as appears by the case cited from 3 Wilson, 214. From these instances it may be inferred, that the presentation in case of union may be either way, and that this is a proper description. Much reliance has been had on the 68th section of the act, which reserves to the several parishes their distinct rights. Nothing can be inferred from thence in respect to the incumbency. It was a cautious proviso, perhaps necessary, because the act unites the parishes, whereas at common law the churches only could be united. The statute of 4 W. & M. relates only to churches united by the 17 Car. 2, as appears by the preamble.

Per Curiam. Rule discharged.

(a) Tit. *Quare Impedit*, pl. 6. In the edition of 1566 this entry is to be found fol. 479 b.

[398] COX AND OTHERS, Assignees of Emmott a Bankrupt, v. MORGAN.
April 29th, 1801.

Payment to a creditor under an arrest after a secret act of bankruptcy is protected by 19 G. 2, c. 32 (a).

This was an action for money had and received to the use of the Plaintiffs. The general issue was pleaded, and the cause came on to be tried before Lord Eldon, Ch. J., at the Guildhall Sittings in last Hilary Term, when a verdict was found for the Plaintiffs for 45l. 18s. 9d. subject to the opinion of the Court on the following case:—

The bankruptcy of John Emmott was proved, and the assignment to the Plaintiffs. The commission was dated the 14th August 1799. The act of bankruptcy was the lying in prison hereafter stated. Emmott was arrested at the suit of one Dixon on the 31st October 1798, and committed to the Fleet on that arrest on the 6th November. He remained in the Fleet on that account till the 16th February 1799, when he was discharged. Emmott had a partner named Bray who was abroad before he went to the Fleet; the partnership was indebted to Morgan the Defendant in the sum of 44l. 13s. 9d. on a bill of exchange accepted by Emmott and Bray, on the partnership account. The bill not being paid, Morgan proceeded by original against Emmott and Bray, for the purpose of outlawing Bray, on the 14th November 1798, and employed a sheriff's officer to arrest Emmott, who could not find him. An alias was taken out, and the sheriff's officer went to his house and was told he was in the country. He afterwards met with him at his house and arrested him at the suit of Morgan, on the 23d February 1799. He told the officer he was just returned from Portsmouth. Emmott immediately paid Morgan's attorney the 44l. 13s. 9d. and 1l. 5s. for interest, which was paid over to Morgan. Neither Morgan nor any one concerned for him personally knew that Emmott had been in the Fleet, had committed an act of bankruptcy, or that he was in insolvent circumstances.

The question for the opinion of the Court was, Whether the Plaintiffs were entitled to recover? If the Court should be of that opinion, the verdict to stand; if not, a verdict to be entered for the Defendant.

[399] Runnington Serjt., for the Plaintiffs. The question arising upon this case for the consideration of the Court is, Whether the payment to the Defendant of the 44l. 13s. 9d. is a payment protected by 19 Geo. 2, c. 32? That act provides, "that no creditor in respect of goods sold to the bankrupt or bills of exchange drawn, negotiated or accepted by the bankrupt in the usual and ordinary course of trade and dealing, shall be liable to refund to the assignees any money, which before the suing forth of the commission was really and bona fide, and in the usual and ordinary course of trade and dealing received by such person before notice of the bankruptcy or insolvency." It is contended, that the payment in this case was a payment within the terms of the act. It is admitted indeed, that the Defendant had no notice of the act of bankruptcy, but it remains to be considered whether this payment was in the usual and ordinary course of trade and dealing? It may be difficult perhaps to define the precise meaning of those words, but it is hardly possible to contend that a payment made in consequence of an arrest, is a payment in the usual and ordinary course of trade and dealing. Is it usual or ordinary for a merchant to refuse to pay his just debts unless compelled by law? The Court will rather confine the terms used in the act of parliament to a case in which the party paying has the free exercise of his discretion whether he shall pay or not. Indeed the very act of suing out a writ against a party puts an end to the usual and ordinary course of dealing. It is clear that unless the case come precisely within the terms of the act, the Court will not protect the payment: for in *Vernon v. Hall*, 2 T. R. 648, a payment by the drawee of a bill of exchange received from a third person for the sale of an estate, the drawee having become bankrupt without the knowledge of the holder, was held not to be protected, because the holder had given time to the drawee. The case *ex parte Congleton*, 3 Bro. Chan. Cas. 47, is to the same effect. It is true that previous to the case of *Vernon v. Hall* it was held in *Calvert v. Lingard*, sittings coram Lord Lough-

(a) Vide *Newton v. Chantler*, 7 East, 138. *Hovil v. Browning*, 7 East, 154. *Harwood v. Lomas*, 11 East, 127. *Southey v. Butler*, 3 B. and P. 237. *Bayley v. Schofield*, 1 M. and S. 338, 349.

borough, 1783, cited in 5 T. R. 200, and 2 H. Bl. 335, that payment under an arrest was within the statute. The same was also decided in *Holmes v. Wennington* (a), Trin. 30 Geo. 3, in the [400] Court of Exchequer. With respect to the first of those cases it appears to be only a *Nisi Prius* decision, and there is no report of [401] the case; and in the second a reason is given which does not seem sound, viz. that the party had used nothing but due diligence. But that reason is only applicable to cases

(a) *Holmes v. Wennington* (b). In the Exchequer, Trin. 30 Geo. 3.

This was an action brought to recover back money paid by a trader after a secret act of bankruptcy to his creditor, who had arrested him for the money; the debt having been contracted in the course of trade, the payment having been made a few days after the arrest and in consequence thereof, and whilst he was under the bankrupt confinement. The question at the trial was, whether this was a payment in the course of trade and protected by the statute 19 Geo. 2, c. 32, f. 1? Eyre, Chief Baron, on the trial was of opinion that the payment was protected by that statute.

Wood for the Plaintiff. Had it been meant that any *bonâ fide* payment should come within the statute, the statute would have so expressed it; but there must be more than a *bonâ fide* payment; the payment must be in the usual course of trade and dealing. Can it be said that a payment by a man under duress is a payment in the course of trade? The preamble of the statute is the best exposition of what is a payment in the course of trade; that shews what the statute means by such a payment. Payment under duress of imprisonment, as suffering himself to be arrested, to have executions against him, &c. is not in the usual course of trade; it is an interruption at least of his trade, if not a total stoppage of it. Both duress of imprisonment and duress of goods shew insolvency. The payment must not only be *bonâ fide*, but in the usual course of trade. It is not necessary he should be insolvent with respect to every body; arrest or execution either in body or goods preceeding payment shews insolvency to the party suing at least; and that the payment is not in the usual course of trade. Payment in the usual course of trade is when bills are duly paid and honoured without driving a party to arrest, on failure of payment. As to the case of *Vernon and others, assignees of Tyler v. Hankey*, 2 Term Rep. 113, there was a pretty strong notice of the act of bankruptcy. With respect to *Foster v. Allenson*, 2 Term Rep. 479, in that case no commission issued.

Manley on the same side. Payment, and in the usual and ordinary course of trade and dealing, are both requisite. *Vernon v. Hall*, 2 Term Rep. 648, goes to shew both requisite, because there the payment was *bonâ fide* and would have been good if in the course of trade, which the Court held it was not. In the case of *Calvert v. Lingard*, Lord Loughborough does not in summing up at all mention or advert to the usual course of trade and dealing. There is no decision since the act, that an arrest shall protect a payment subsequent to an act of bankruptcy; but it is clear that if followed up by a commission and assignment, it has relation to the bankruptcy, and avoids the payment and all mesne acts, 1 Salk. 111. The case of *Billon v. Hyde and Mitchell*, 1 Atk. 126, is decisive to shew that the relation avoids payment, judgment, executions, and all legal acts, though Lord Hardwicke afterwards held that it appeared in that case that the bills were really paid in the usual course of trade. The act of suing out the writ determined the usual course of trade and dealing between the parties; and it may be difficult to define accurately what course of trade was in the meaning of legislature unless such as subsists between merchant and merchant, viz. payment on the usual credit given. In the case where payment has been upon an arrest, the Court have pointedly laid hold of the circumstance that the payment was before the act of bankruptcy. It is singular they should lay hold of that, if after bankruptcy it would have been good.

EYRE, Chief Baron. Those cases only decide what shall impeach, not what shall protect the assignment, but do not determine how payment after the act of bankruptcy should be.

Manley. The Judges have often lamented that the Courts had not stuck more closely to the words of acts of parliament, particularly in the poor laws, and thought that if they had not brought cases within them by way of analogy they would thereby have avoided great confusion. Here the debt was contracted in the usual course of

(b) And see *Hovil v. Browning*, 7 East, 154, 160.

of payment before the act of bankruptcy, which always turn on the point of fraudulent preference; whereas in the case of a payment between the act of bankruptcy and the commission, it is not only necessary that it should be made *bonâ fide*, but that it should be made by the bankrupt in the course of the trade. The cases of *Bradley v. Clark*, 5 T. R. 197, and *Pinkerton v. Marshall*, 2 H. Bl. 334, clearly shew that the 19 Geo. 2, c. 32, must be confined to the cases therein expressed, and that any deviation from the usual course of payment in the way of trade will prevent it from attaching.

Lens, Serjt., *contra*. The circumstance of this payment having been made by compulsion brings the case more fully within the meaning of the statute than if it had been made voluntarily. The object of the statute was to protect all *bonâ fide* payments to creditors in respect of goods sold or bills drawn in the usual course of trade. Now the debt in question arose upon a bill of exchange drawn in the course of trade; and as the payment was obtained by compulsion it proves that the payment was [402] made *bonâ fide* and without collusion between the parties. If there be no secret understanding between the parties, the payment must be considered as made in the course of trade, for it certainly is not contrary to the course of trade for a creditor to enforce payment of his debt by such means as the law authorizes. As there have already been two decisions upon this precise point the Court will not now set the question afloat again. The case of *Calvert v. Lingard* was not a mere *nisi prius* determination; for the opinion of Lord Loughborough was afterwards confirmed by the whole Court of Common Pleas, as appears from the words of Lord Chief Baron Eyre in *Holmes v. Wennington*. This last case was much agitated in the Exchequer, and Mr. Baron Hotham, in giving his opinion, said, "Though it be difficult to draw

trade and dealing, but the payment was after an arrest, shall that protect him when the statute does not? Case of *Vernon and Hall* is exactly like this, except that the present was a compulsory payment.

EYRE, Chief Baron. I decided this at *Nisi Prius* with very great doubt—I thought that tying up the words "in the usual course of trade and dealing" too closely would be very mischievous to the public; but I found a difficulty in drawing a line to satisfy my own mind; I thought a payment on arrest within it, and I did not then know of the case in the Common Pleas. What a debt contracted in the usual course of trade and dealing is, is easy to be ascertained; but as to payment in the course of trade and dealing it is difficult to draw the line. Mr. Wood defines it to be a payment according to the terms of the contract: but it would be very mischievous to say that payments must be strictly according to the terms of the contract, or punctually made; for that would shake almost all the payment in the city. Suppose a merchant says, call next week, cash is low; and the creditor calls again and is paid, can any man doubt that it is a good payment? Suppose he calls two or three times? As to what is said, that an arrest shews insolvency, that is a circumstance in evidence from which a Jury may infer notice of it, but it is by no means decisive, and it must be something decisive to mark the line. If it be not evidence of insolvency, it is nothing but diligence to get his payment, and that ought not to defeat it. The other part of the act is more definite and more capable of being carried into execution. The inclination of my opinion without authorities was to have held it a good payment, and I should have so determined, though with difficulty in my own mind; but I am glad to be relieved from that difficulty by an authority in point. I allude to the case in Common Pleas, and on talking with the Judges of that Court, I find they are of that opinion. In the case of *Vernon and Hall* the doubt was whether the nature of the debt was not changed, having become a loan, and no longer a debt within the statute. I acquiesce in the determination of the Court of Common Pleas, arrests are now very frequent, not on the ground of insolvency, but of quickening payments, which are within the statute.

HOTHAM, Baron. I am satisfied with the opinion of the Lord Chief Baron: though it be difficult to draw the line, yet it is clear that the statute is a remedial law; it means to extend to payments made without improper motives on either side. I therefore think this payment is protected.

PERRYN and THOMPSON, Barons, were entirely of the same opinion.

Rule discharged without costs.

a line, yet it is clear that the statute is a remedial law, and means a payment without improper motive on either side."

Cockell, Serjt., *amicus curiæ*, said, that he recollected a case before Mr. Justice Buller where a party having committed an act of bankruptcy which was unknown to a creditor, the latter obtained payment of his debt by arrest, the assignees brought an action to recover the amount, and the learned Judge held that the payment was protected.

Cur. adv. vult.

On this day the learned Judges, not being unanimous, delivered their opinions *seriatim*.

CHAMBRE, J. This is an action for money had and received by the Defendants for the use of the Plaintiffs in their character of assignees of the bankrupt. The matter comes before the Court upon a special case, reserved on the trial of the cause before Lord Eldon at Guildhall, and the only question that has been argued (and as it seems to me the only question that can be made) is, whether the payment of the money for which the action is brought, and which was made by the bankrupt to the Defendant after an act of bankruptcy and under the circumstances stated in the case, is a payment protected by the statute 19 Geo. 2, c. 32, s. 1, or not? The circumstances under which the payment was made are these—that the bankrupt was arrested at the suit of a creditor on the 31st October 1798, was [403] committed to the Fleet the 6th November, and continued in prison under that arrest till the 16th February 1799, when he was discharged. He had a partner named Bray, who went abroad before the bankrupt went to the Fleet, and they became indebted to the Defendant by the acceptance of a bill of exchange on their partnership account. While the bankrupt was in prison, on the 14th November 1798, the Defendant sued out an original against the bankrupt and Bray, meaning to out-law Bray. The officer could not find the bankrupt to arrest him. An alias was sued out; the officer was told at his house he was out of town, but on the 23d February (7 days after his discharge) the officer met him and arrested him, and was told by him he was just returned from Portsmouth; upon that arrest he paid the debt to the present Defendant's attorney. The Defendant had no knowledge of his imprisonment, his bankruptcy, or insolvency. Under these circumstances I am of opinion, that the payment is not protected by the statute. I should have given this opinion with much more satisfaction to myself if it had been fortified by those of the rest of the Court; but I stand single in my opinion here, both my Brothers thinking differently from me upon the subject, and I am also opposed by the authority of a determination of the Court of Exchequer, which (though there are material circumstances in the present case which did not occur in that) is a case in point as to the general question of a payment under an arrest being protected by the statute. That decision too is strengthened by and in a considerable degree founded upon a determination of Lord Loughborough at *Nisi Prius*, which I learn from my Brother Heath was confirmed in this Court. I find from some notes I have procured of what was said by the Court at *Nisi Prius*, that a writ in that case had been sued out, but whether the party was arrested I do not know. I suppose he was. I am sensible of the weight of these authorities and of the respect that is due to them, though there are distinguishing circumstances in the present case, but if it was right to extend the act so far as is done in those cases I do not know what distinction is to be relied on. I feel myself therefore under the necessity of inquiring into the foundation of those decisions. I do it with the utmost distrust of my own judgment, but if I find no ambiguity in the act, and think (however erroneously) that the act has not been expounded but contradicted, I feel it my duty to adhere to the authority of the statute.

[404] Before the passing of this act I take the law to have been clearly settled, and so the act itself supposes, that when an act of bankruptcy had been committed, and a commission issued in consequence of it, the property of the bankrupt was by relation so vested in the assignees, that any disposition of it by the bankrupt after the act of bankruptcy was void as against the creditors, however fairly such disposition was made, and without any regard to its being a voluntary or compulsory payment. Payments to a bankrupt stand upon a very different footing; and with reason. Even after notice of the act of bankruptcy the payment may be good if made under legal compulsion, for an act of bankruptcy is no defence against the action of the person who commits it unless a commission is taken out against him, and it is not the fault

of the bankrupt's debtor if the delay of the creditors in suing out the commission deprives him of his defence; he ought not to increase the fund by paying his debt twice over. But compulsion against the bankrupt, however it may operate in protecting payment before the act of bankruptcy while the property is in the bankrupt himself, (and which it does by excluding the imputation of fraud), can have no effect in protecting payments after the act of bankruptcy. The bankrupt himself does not suffer by the compulsion, and the compelling creditor has only to refuse what he ought not to have taken, and come in for his share in common with the other creditors. The question therefore must turn upon the operation of the statute, and we are only to see whether the payment on which the present question arises is there described. The recital of the statute is not immaterial: it states the frequent commission of secret acts of bankruptcy unknown to creditors and others with whom the bankrupts have dealings in trade, and their continuing afterwards to appear publicly and carry on their trade and dealing by buying and selling, drawing, accepting, and negotiating bills, and paying and receiving money on account thereof in the usual way of trade, and in the same open and public manner as if they were solvent persons. It then recites the discouragement to trade and prejudice to credit, from permitting payments to be defeated in the cases and under the circumstances above mentioned, and enacts that no person who is or shall be really and bonâ fide a creditor of any bankrupt for or in respect of goods really and bonâ fide sold to such bankrupt, or for or in respect of any bill or bills of exchange really and bonâ fide drawn, negotiated or accepted by such bankrupt in the usual [405] and ordinary course of trade and dealing, shall be liable to refund or repay to the assignee or assignees of such bankrupt estate, any money which before the suing forth such commission was really and bonâ fide, and in the usual and ordinary course of trade and dealing received by such person of any such bankrupt before such time as the person receiving the same shall know, understand or have notice that he is become a bankrupt, and that he is in insolvent circumstances. The nature of the debt in the case before the Court is not denied to be such as the statute describes, but is the mode of payment such as the statute requires? The debt has been really paid. It is stated (and so we must take the fact to be, though I think the circumstances would have warranted a contrary conclusion) to have been paid without the Defendant's knowledge of bankruptcy or insolvency; but that is not all that the statute requires. It is further required, to be the usual and ordinary course of trade and dealing, and on those words the question, or at least my difficulty arises. I have endeavoured to obtain an account of the two authorities wherein a payment under an arrest has been held to be protected, and to my great disappointment I find little or no argument applied to the very important words I have last alluded to, but a good deal to a circumstance on which the statute is totally silent, namely, a compulsive payment, which was undoubtedly bad before the act. In the case at Nisi Prius the question is considered as a question of notice of insolvency, and what is presumptive evidence of such notice, or of collusive payments and preferences. It is said that a knowledge of the debtor's being poor or in failing circumstances would not vitiate the payment, and that compulsive payments were meant by the act to be protected. They are protected before the act of bankruptcy, but the Act of Parliament I think has no view whatever to compulsive payments either before or subsequent to the act of bankruptcy. The argument of the Court of Exchequer, though expressing great doubts on the subject, disposes of the language of the act on which the question arises in a way that would solve every difficulty in every case: it cuts the knot at once. It is said to be easy to ascertain what is a debt contracted in the course of trade, and therefore the decision in *Vernon and Hall* is approved of, but as to payments in the usual and ordinary course of trade and dealing, it is said to be difficult to draw the line. Then an inaccurate definition of such payments supposed to have been used in argu-[406]-ment by the counsel is controverted, and we hear no more of those words or of any construction of them, they are in effect expunged from the statute, and what follows amounts only to this, that the circumstance of an arrest can only be used as evidence to be left to a jury, of notice of insolvency, and that if not evidence of such notice it is nothing but diligence to get payment, a means to quicken the payment which ought not to defeat it, and that it is sufficient that there is no improper motive on either side. As to the difficulty of defining what are payments in the usual and ordinary course of trade and dealing, without feeling much of that

difficulty it may be sufficient for me to say, that it is not necessary in deciding one case upon an Act of Parliament to decide all the cases that may possibly happen, and that if in the case before us, we can say, that the payment was not in the usual and ordinary course of trade and dealing, we have no occasion to go further; I have no difficulty in saying, that I admit that diligence in procuring payment of a debt used in the common and ordinary way would not of itself defeat a payment; I have as little difficulty in saying, that it is no part of the purview of the act to afford particular protection to diligence or activity in recovering debts; on the contrary the intention is manifestly to protect only those who are deluded by specious appearances of solvency and credit; and though it be true that improper motives or knowledge of insolvency may vitiate payments otherwise good, yet purity of motives alone, without the concurrence of the other circumstances required by the statute will not give validity to such payments made after the act of bankruptcy. The intention of the act is not generally to authorize creditors to retain what they had received without knowledge of insolvency: it is to place creditors of a particular description, and under particular circumstances, in a better situation than the general mass of creditors. That being the object of the act, it was necessary in order to prevent litigation and the extension of the act to persons not intended to receive the benefit of this preference, to describe with precision the condition of those who were to have the preference; the legislature have done it with guarded attention, by using as definite and restrictive language as could well be found to answer that purpose. To prevent the effect of any ambiguity in the meaning of the word "usual" they add the word "ordinary." The payment must not only be in that course of trade and dealing which is [407] usual, but it must be that which is in the ordinary use. The propriety of confining the act to its declared objects is distinctly stated by Lord Kenyon, in the case of *Bradly v. Clarke*, 5 Term Rep. He says, "The Legislature have chosen to use particular words and to confine the remedy to particular cases. The statute only extends to two cases of which this is neither. Whether or not it would have been wise to have extended this provision to all cases I will not presume to determine, though I cannot refrain from observing, that had that been the case all the property of a bankrupt might be conveyed to one creditor to the exclusion of the rest. In determining on this Act of Parliament it is sufficient to say, that this case is not within the words, nor as far as I can collect, the intention of the act; though had it clearly and indisputably appeared to have come within the meaning of the act, I should have been inclined to have extended it to this case." The case of *Vernon and Hall* (if cases were necessary) appears to me a strong authority that the act ought not to be extended in construction. If it be said that that case applies only to the nature of the debt which was held to be turned into a loan, I answer that the words of that part of the clause which describes the nature of the debt as to the course of trade are exactly the same with those which relate to the mode of payment; the debt there having been also contracted as described in the act, the decision may properly refer to the mode of payment; but whether it does or not the case proves that the act ceases to operate when circumstances not referable to a trading are introduced. As a remedial act I am ready to give it every extension, by construction, that remedial acts are entitled to; but no principle applying to the construction of remedial acts authorises the extension of them contrary to the intention of the Legislature. It may also be remarked, that all the other bankrupt laws are remedial; that this particular act trenches upon the great leading principle of the bankrupt laws, that of securing the property for equal distribution, by giving a preference to a particular class of creditors; and therefore is not peculiarly entitled to have its operation extended by construction. It is time to resort to the facts of the case and see how far they answer the description contained in the act. When the bankrupt had been publicly and openly carrying on his business we nowhere learn, we have no act of trading stated, but the acceptance of the bill as a partner with another person. After that he is arrested for debt, goes to gaol [408] and lies there near four months. After that act of bankruptcy it is not in evidence that he ever appeared publicly and carried on his trade and dealing in the usual way of trade, and in the same open and public manner as if he was a solvent person, all which circumstances are by the preamble supposed to attach themselves to the situation of the bankrupt, whose payments were meant to be ratified by this act; on the contrary, he was arrested by the Defendant within a week after his discharge, having according to his own account gone off to Portsmouth in the meantime. Was the Defendant

deluded by any specious appearances of solvency at the time of the payment? He had sued out an original against the two partners very soon after the bankrupt went to prison. The other partner was gone out of the kingdom. The Defendant could not be found by the officer; an alias became necessary; he is met with accidentally, not having been found at his own house, and arrested; to deliver himself from that arrest he makes the payment. Can we say this is a payment made by a person carrying on his business as a solvent man, in an open and public manner, or which comes more directly to the enactment of the statute, Was this a payment in the usual and ordinary course of trade and dealing? Are sheriff's bailiffs the persons who transact the affairs of merchants and traders in the ordinary course of trade and dealing? If this will do where are we to stop? This is a case where a payment has been made under an arrest, but why stop there? Will not the argument go equally to protect payments after suing out execution? If indeed the sheriff seizes and sells the effects, that may not be considered as a payment by the party, but I can find no difference between the present case, and cases where the bankrupt pays the money to prevent the seizure, or to redeem the goods after seizure, or even to redeem his person after he is taken upon the *ca sa.*; and payments under all these circumstances we are desired to consider, as made under appearances of perfect solvency on the part of the bankrupt, and in the ordinary course of trade. I feel the weight of the authorities against the opinion I am delivering, and I am fully aware of the propriety of adhering to former decisions, and the mischief of lightly departing from them, but I am in some degree relieved from their pressure by these considerations, that the attainment of certainty is the chief reason for submitting to the authority of such determinations as are not perfectly satisfactory in respect of the arguments on which they were founded, and that in my view of [409] the case before us, certainty will be better attained by bringing back our attention to the language and meaning of the act of parliament which is to be the rule of our conduct, than by following the determinations; to what uncertainty they lead we have an instance in the late attempt in the Court of King's Bench to bring payments to carriers for the carriage of goods within the protection of the statute, which I can only attribute to the great latitude of construction used in the former cases. On these grounds I feel myself bound to give my opinion, that the payment in question is not supported by 19 Geo. 2, and that the plaintiffs, the assignees, are entitled to recover.

ROOKE, J. In this case, a bill drawn *bonâ fide* and in the ordinary course of trade has been paid after an act of bankruptcy, immediately upon the bankrupt's being arrested, and neither the creditor nor any one concerned for him knew that the bankrupt had committed an act of bankruptcy or was in insolvent circumstances. The question is, whether this payment being immediately upon an arrest is a payment in the ordinary course of dealing? or whether being a payment by legal compulsion, it is not out of such ordinary course? In deciding this question I think I ought to look to the effect of using legal diligence in other cases respecting bankruptcy, and to see in what light courts of law have considered it. The statute 1 Jac. 1, c. 15, s. 14, provides "that no debtor of a bankrupt be hereby endangered for the payment of his debt truly and *bonâ fide* to any bankrupt before such time as he shall understand or know that he is become bankrupt." The strict construction of this statute would be, that if he did understand or know it, his payment should be endangered: but Courts of law have held, that if a creditor has notice of a bankruptcy and pays under legal coercion, he shall be protected. See 3 Keble, 231. Freeman, 349, S. C. 2 Term Rep. 479. Here then a payment by legal compulsion is supported, even against the obvious construction of the statute, and hence I conclude, that in cases of bankruptcy payments by compulsion of law are favoured and protected. The words of the statute 19 Geo. 2 are very different from those of 1 Jac. 1; but they do not expressly avoid payment by legal coercion, nor exclude them from protection: and if excluded, they must be excluded by implication only: and such implication if applied to the whole clause on which this question arises will go a great way indeed to invalidate *bonâ fide* payments to honest creditors. The statute 19 Geo. 2, so far as respects bills, requires that [410] they be drawn, negotiated, or accepted really and *bonâ fide*, and in the usual and ordinary course of trade and dealing. Now if an arrest so far changes the ordinary course of trade and dealing as to affect the payment of a bill, it will equally affect the drawing, the negotiating, or the accepting it. The consequence will be, that if a debtor having committed a secret act of bankruptcy is arrested, and gives or

accepts a bill payable at a future day, and actually pays it, and then a commission issues, the assignees may recover back the money. This will be a very dangerous construction, and will render all transactions under arrest very precarious. It has been suggested that payment under arrest is not to be favoured, because the arrest is a circumstance which should raise a suspicion of insolvency. If so, by the same reasoning, payment under a threat of arrest will be equally suspicious; for whether a man pays before the bailiff arrests him or after, if he pays under the terror of a gaol he pays under compulsion; and the compulsion in either case may with equal reason raise a suspicion of insolvency. If a threat to arrest does not alter the nature of a payment and take it out of the ordinary course of dealing (and it has not been contended in argument that it does), it will be difficult to assign any sound reason why an actual arrest should do so. There are stages in the proceedings between the threat and the actual arrest which are as much out of the ordinary course of dealing as the arrest itself; and what line shall we draw by our discretionary construction where the Legislature has drawn none? Shall we enquire, Is the writ purchased? Is it delivered to the bailiff? Is the bailiff in the house? Has he seized the debtor? or, Is he only in the act of doing it? When is it that the ordinary course ceases and the extraordinary begins? As the words "usual and ordinary course of trade and dealing" do not necessarily exclude transactions either by menace or by compulsion of legal process, I am not disposed to extend them to either case; they are general words, and they may be intended to apply to the case of undue preference; for a man may be disposed to pay a debt really and bonâ fide due from a desire to favour a particular creditor, and may go out of the ordinary course of trade and dealing to do so. Payments under legal compulsion having been favourably considered by our courts in the construction of 1 Jac. 1, I think they ought to be as favourably considered in the construction of 19 Geo. 2, which is in *pari materiâ*. Legal coercion is a course which the law allows, and surely if we attend to the literal construction of the statute, it is neither unusual nor extraordinary, nor out of the ordinary course of dealing for a creditor to be driven to arrest his debtor, or to use legal diligence in order to procure payment. The taking out legal process does not depend so much on the real credit of the debtor as on the patience or impatience of the creditor. If a creditor is obliged to call three or four times on a debtor before he can obtain payment, it may awaken suspicion. If a patient creditor does this and receives payment, he is protected. Shall we say that if a harsh creditor calls once, and then arrests and is paid, he shall refund? Shall we consider his severity as a proof of his debtor's insolvency? The statute has given one positive criterion, viz. knowledge of the bankruptcy or insolvency; and has also required that the transaction shall be in the ordinary course of trade and dealing; but as it has not defined what that ordinary course must be, the courts of law must, as cases arise, declare what is within the ordinary course and what is not. I have now given my reason why, upon general principles, I think that arrest or legal diligence is not within the restriction of the statute; but if it were a doubtful point how the statute should be construed, I must consider myself as bound by the construction it has already received in two Courts in Westminster-hall. The case of *The Assignees of Jones v. Lingard* was tried before Lord Loughborough, and afterwards was heard in this Court on a motion for a new trial. There the creditor brought an officer with the writ into the shop, and then the debt was paid, and the payment was held to be good. The case of *Holmes v. Wernington* was decided on solemn argument in the Court of Exchequer. These cases have been cited in the Court of King's Bench, in the case of *Bradley v. Clarke*, Pasch. 1793, 5 Term Rep. 200, and no doubt was hinted in that court as to the propriety of the decisions: yet Lord Kenyon particularly notes how right it is to adhere to the words of the statute. We are also informed, that the late Mr. Justice Buller ruled the same point on the Northern Circuit, and that no application was made for a new trial. For these reasons I think the verdict should be entered for the Defendant.

HEATH, J. The question is, whether a payment to a tradesman who has committed a secret act of bankruptcy, to a creditor who has arrested him, and who has no knowledge of the act of bankruptcy or of the insolvency of his debtor, be good within the statute of 19 Geo. 2?

[412] Before that statute, it was the policy of the bankrupt laws in all cases to deprive the bankrupt, by relation to his act of bankruptcy, of the power of disposing of his effects. In order to avoid the inconveniences arising from too rigid an observance

of this principle, the act in question was made. It has always been considered as a remedial statute, and as such is entitled to a liberal construction. In order to give validity to the payment of a bill of exchange, it must be drawn and the money received in the ordinary course of trade. In my apprehension this bill had both requisites. Of the consideration of the bill there is no question. The bill was due before it was paid, and it was not officiously paid by the bankrupt. The objection is, that the payment was made under the terror of an arrest. If the bill had been paid before it became due, or if the bankrupt had solicited the Defendant to receive the money, those circumstances would have vitiated the transaction, and would have brought the case within the statute. It is objected that the payment is under an arrest. If this were to be the ground of the decision it would introduce great uncertainty. For if an arrest will vitiate a payment, why not a menace? and if a menace, why not a promise of some collateral advantage? There are two principles on which I shall found my judgment. The first is, the general policy of the law, that the using of legal diligence is always favoured and shall never turn to the disadvantage of the creditor. The maxim *vigilantibus et non dormientibus succurrunt jura* is one of those that we learn on our earliest attendance in Westminster Hall. The second principle is, that this statute shall receive a construction agreeable to the general policy of the bankrupt laws, namely, that it shall not be in the power of the bankrupt to dispose of his effects after his bankruptcy in such a way as to give a preference to a favourite creditor. Now if payment under an arrest, though otherwise in a due course of trade, were to be held bad, the consequence might be, that if in the same day, or at the same instant, two creditors should apply for payment of their respective demands, the bankrupt might make a good voluntary payment to one creditor, and refuse payment to the other till there had been some menace or actual arrest made to vitiate the payment. I can see no inconvenience from this construction. If it be said, that the creditors under an arrest might sweep away all the effects of the bankrupt; so may the favoured creditor under a voluntary payment: and the latter mischief is the most to be apprehended. Therefore I am of opinion, as well upon the general policy of [413] the law that favours the legal diligence of creditors, as on the particular policy of the bankrupt laws, that this is a good payment and protected by the statute of 19 Geo. 2. If the case were doubtful, the decisions ought to put an end to the controversy. I allude to the cases of *Calvert and Lingard* in this court, and of *Holmes v. Wennington*. I cannot pass over in silence the opinion and decision of the late Mr. Justice Buller, whose judgment will always have the greatest weight with me. The question is whether this be a doubtful case? A case may not be the less doubtful because I entertain no doubt on the subject; but that is doubtful concerning which learned men differ. For these reasons I am of opinion, that the Plaintiff is not entitled to recover, and that a verdict should be entered for the Defendant.

Verdict to be entered for the Defendant.

(IN THE EXCHEQUER CHAMBER.)

HILL GENT. ONE, &c. v. HALFORD AND ANOTHER; in Error. April 29th, 1801.

A note promising to pay "on the sale or produce, immediately when sold, of the White Hart, St. Alban's, Herts, and the goods, &c. value received," cannot be declared upon as a promissory note within the statute, though it be averred, that before the actions commenced the White Hart and the goods were sold (a).

Error from a judgment of the Court of King's Bench in an action by the payee against the maker of a promissory note. The first count of the declaration stated that, "the Plaintiff in error made and signed his certain note in writing, commonly called a promissory note bearing date &c. and thereby promised to pay to the Defendants in error by the names and description of, &c. the sum of 190l. on the sale and produce, immediately when sold, of the White Hart, St. Alban's, Herts, and the goods, &c. (meaning a certain messuage or dwelling-house called the White Hart,

(a) Vide *Blankenhagen v. Blundell*, 2 B. & A. 417.

situate at St. Alban's, in the county of Herts, and certain goods being therein) value received, and then and there delivered the said note to the Defendants in error;" after alleging the liability of the Plaintiff in error to pay, and his promise as usual, the declaration averred, "that afterwards and before the exhibition of the bill of them the Defendants in error, to wit, on, &c. at, &c. the said messuage or dwelling-house called the White Hart, and the goods in the said note specified were sold, whereby the said sum of money [414] in the said note specified became and was forthwith and immediately due and payable according to the form and effect of the said note, whereof the Plaintiff in error then and there had notice." There were other special counts, and also the common money counts and conclusion. On this declaration judgment having gone by default, a writ of inquiry was executed, and the Defendants in error recovered general damages.

The causes now assigned for error were, "that by the record aforesaid it appears, that damages have been assessed for and adjudged to the Defendants in error, upon the whole of their said declaration generally; whereas it appears in and by the record aforesaid, that the first count of the said declaration was and is insufficient in law, and that no damages could or ought by law to have been assessed or adjudged to the said Defendants in error in respect thereof, or of the supposed promise and undertaking therein mentioned."

Lawes for the Plaintiffs in error contended, that the note on which the first count of the declaration was found could not be sustained as a promissory note, inasmuch as the payment thereof was made to depend upon a contingency which might never happen, viz. the sale of the White Hart Inn, the title to which might be so bad, that no purchaser would be found. He cited *Dawkes v. Lord Deloraine*, 2 Bl. 782, 3 Wils. 207, S. C. and *Carlos v. Fancourt*, 5 Term Rep. 482.

Wigley contra. In those cases in which it has been discussed whether a note payable upon a contingency were a promissory note within the statute, the question has principally turned upon the point whether the note in question were negotiable or not; the necessity of which may perhaps be doubtful. With respect to *Carlos v. Fancourt* it appears, that in that case there were other objections to the Plaintiff's recovery; for though the note was made payable "out of the Defendant's money which should arise from his reversion of 43l. when sold," it was not, as in this case, averred that the reversion had been sold; and that circumstance was observed upon by Mr. Justice Grose in his judgment. If ever there was a note depending upon a contingency, it was that which in the case of *Andrews v. Franklin*, 1 Str. 24, was held to be a good note. There the contingency was, after a certain ship should be paid off; now if it were a private ship no wages could have been earned unless the ship arrived; and if it were a public ship the wages might have been lost by desertion. In *Evans v. Underwood*, 1 Wils. 262, [415] a note payable upon the like contingency to the former was held good: and in *Julian v. Shobrook*, 2 Wils. 9, the Defendant having accepted a bill payable when in cash for the cargo of the ship "Thetis" was held liable on the bill notwithstanding a motion in arrest of judgment on the ground of its being a conditional acceptance. Now if there be any similarity between the situation of parties to bills of exchange and promissory notes, it is between the situation of the acceptor of a bill of exchange and the maker of a promissory note. With respect to *Dawkes v. Lord Deloraine*, that was the case of a bill of exchange payable out of a particular fund, whereas the note in the present case is not payable out of a particular fund, but only at a particular time, which time is alleged in the declaration to have arrived. Supposing however, that this note is not negotiable, yet it seems from the words of 3 & 4 Ann. c. 9, s. 1, that an action may be maintained upon it, for the former part of the section enacts, that where promissory notes are made payable to any person or persons, his or their order, or unto bearer, the sums mentioned in such notes shall be payable to such person or persons, without any reference to their negotiability; but the ensuing part of the same section only makes them assignable or indorsable over when drawn to any person or persons, his, her, or their order. If therefore negotiability be of the essence of a note, and the words of the statute are to be construed strictly, no man can declare upon a note which is not made payable to order. But it has been decided in *Burchell v. Slocock*, 2 Ld. Raym. 1545, that a promissory note payable to A. B., without adding either order or bearer, is a good note within the statute, and that case has since been recognized in *Smith v. Kendall*, 6 Term Rep. 123. In this case the note in question was drawn for value received on

a promise to pay when the premises at St. Alban's should be sold, and there is an averment in the declaration that the premises have been sold.

The Court (absente Lord Eldon, Ch. J.) were clearly of opinion, that the note in question could not be declared upon as a promissory note within the statute.

Judgment reversed.

[416] SALKELD GENT. ONE, &C. v. LANDS. May 4th, 1801.

If a Defendant being arrested upon process in K. B. give a warrant of attorney to confess judgment; and be afterwards holden to bail in C. B. in an action upon that judgment, the Court will discharge him upon a common appearance.

The Defendant in this case having been arrested by process out of the King's Bench, gave a warrant of attorney to confess judgment; on that judgment the present action was commenced, and the Defendant holden to bail. A rule Nisi having been obtained for discharging him on entering a common appearance,

Marshall, Serjt., shewed cause and contended, that the Defendant was well holden to bail, inasmuch as no bail had ever been given on the former arrest, and therefore the rule that bail could not be taken in infinitum did not apply here. He cited *Kendall v. Carey*, 2 Bl. 768, where a Defendant having given bail in error upon a judgment in the King's Bench, and afterwards holden to bail in this court in an action of debt upon the same judgment, this Court refused to discharge him, Gould, J., saying, "the reason of this practice is because there has never been bail given in this court."

Cockell, Serjt. contra, insisted, that this was within the rule that no man should be twice holden to bail for the same cause of action, and that the custody was the same as in the former arrest.

The Court (consisting of Heath, Rooke, and Chambre, Js.,) were of opinion, that the giving a warrant of attorney to confess judgment was tantamount to giving bail in the first action, and that the Defendant in this case, if held to bail again, would suffer precisely the same vexation as in the common cases to which the rule was allowed to extend.

Rule absolute.

ROBINSON v. DUNMORE. May 4th, 1801.

[Distinguished, *Bergheim v. Great Eastern Railway Company*, 1878, 3 C. P. D. 226.]

If A. send goods by B. who says "I will warrant they shall go safe," B. is liable for any damage sustained by the goods notwithstanding A. send one of his own servants in B.'s cart to look after them.

Assumpsit. The declaration stated, that in consideration that the Plaintiff, at the special instance and request of the Defendant, would deliver to the Defendant divers goods and chattels (specifying them) to be taken care of, and safely and securely carried and conveyed by the Defendant in and by a certain cart of Defendant from A. to B. and there, to wit, at B., to be safely and securely delivered to one J. S. for certain hire and reward to the [417] Defendant in that behalf, the Defendant undertook and promised to take care of the said goods and chattels, and safely and securely to carry and convey the same in and by his said cart from A. to B. and there, to wit at B. safely and securely to deliver the same to the said J. S.; that the Plaintiff did afterwards deliver the said goods and chattels to the Defendant, to be carried, conveyed, and delivered as aforesaid. And that although the Defendant had and received the said goods and chattels for the purpose aforesaid, yet he did not take care of the said goods and chattels, or safely and securely carry or convey the same in and by his said cart or otherwise from A. to B., nor there, to wit, at B., safely and securely deliver the same to the said J. S., but on the contrary so carelessly conducted himself in and about the carriage and conveyance of the said goods and chattels, that a great part of them, to wit, &c. through his negligence were wetted and damaged.

The Defendant pleaded Non assumpsit.

The cause coming on to be tried before Lord Eldon, Ch. J., at the Westminster Sittings after last Hilary Term, it appeared in evidence, that the Plaintiff, who was

an upholsterer, having occasion to send some furniture into the country, agreed with one Groves a carman, to take the same for ten guineas, exclusive of tolls; that Groves thinking the distance too great, offered the Defendant, who also kept a cart and horse, the refusal of the job, who agreed to undertake it, and gave Groves half-a-guinea by way of gratuity; that the Plaintiff having acceded to the Defendant's offer to go instead of Groves, the Defendant brought his cart to the Plaintiff's house, where the goods were loaded in the presence of the Plaintiff himself, and with the assistance of two of the Plaintiff's servants; that the Plaintiff having observed that the tarpaulin which the Defendant had brought for the purpose of covering the cart was too small, the Defendant said, "I have plenty of sacks, and I will warrant the goods shall go safe." On account of the Defendant being a stranger to the Plaintiff, the latter sent one of his own porters with the cart who would otherwise have gone by the stage; that this porter in the course of the journey paid a person for watching the goods one night; and that the goods in the course of the journey were damaged by rain. A verdict was found for the Plaintiff under His Lordship's direction, with liberty for the Defendant to move that the verdict might be set aside and a nonsuit entered.

[418] Accordingly Williams, Serjt., having obtained a rule Nisi for that purpose, was this day called upon by the Court to support the rule. It does not appear from the evidence that the Defendant ever had such possession of the Plaintiff's goods as to render him liable in the character of a common carrier. On the contrary it is clear from the Plaintiff having sent his porter to accompany the cart, that he never intended to relinquish his control over the goods; and the circumstances of the loading having been made at his house and under his inspection, and of the porter having paid for watching them during the journey, strongly corroborate that idea. In this case there was no bailment: the Defendant could neither have maintained trespass or trover. It was a mere contract between the Plaintiff and Defendant, that the former should hire and the latter should let a cart and horse for the conveyance of the Plaintiff's goods. The case strongly resembles that of *The East India Company v. Pullen*, 1 Str. 690, where the Company having brought an action against a lighterman, it appeared, that as soon as the goods were put into the lighter, an officer of the company went on board, and put the company's locks on the hatches: and Lord Raymond, Ch. J., held that the goods were not to be considered as ever having been in the possession of the lighterman, but in the possession of the Company's servant who had hired the lighter to use himself. There are many cases in which persons having a much greater control over goods than the Defendant had, are yet not considered as having the possession: such are the cases of a butler who hath the charge of his master's plate, and the shepherd who hath the charge of his master's sheep, 1 H. P. C. 506, c. 43. It is true that in the present case the Defendant made use of the expression, that he would warrant that the goods should go safe. But under all the circumstances, it may be argued, that it was not his intention by that expression to do any thing more than enforce his own opinion. Admitting, however, that the Jury have decided that point against the Defendant, yet no advantage can be taken of the warranty in the present action, since the averment that the goods were delivered to the Defendant has not been substantially proved.

HEATH, J. (stopping Vaughan, Serjt., for the Plaintiff).—The Defendant in this case is not charged as a common carrier: he is charged on a special undertaking; and the Jury have found on good grounds that the undertaking stated in the declaration was made by the Defendant. They have decided [419] upon considering the whole transaction, that the words used by the Defendant amounted to a warranty; and we cannot say that they have done wrong. It is quite immaterial to this case whether the Defendant had a special property, or any property whatever in the goods; or whether he could have maintained an action of trespass or trover. He must have had possession of them for the purpose of carrying his contract into effect, which he could not have done without such possession.

ROOKE, J. This is not the case of a common carrier, for the Defendant has specially undertaken to carry the goods safely.

CHAMBRE, J. This is a very clear case. The Defendant is not a common carrier by trade, but has put himself into the situation of a common carrier by his particular warranty. As to possession, that seems clearly proved by the circumstances of the case; the Defendant attends with his horse and cart at the Plaintiff's house, where the goods are delivered to him and put into the cart by the Plaintiff's servants. This

is a complete possession. How is this affected by the presence of the Plaintiff's servant? It has been determined, that if a man travel in a stage coach and take his portmanteau with him, though he has his eye upon the portmanteau yet the carrier is not absolved from his responsibility, but will be liable if the portmanteau be lost (a)¹. In this case the Plaintiff for greater caution sends his servant with the goods, who pays for watching them because he apprehends danger of their being stolen. So the man who travels in a stage has some care of his own property since it is more for his interest that the property should not be lost than that he should have an action against the carrier. This case bears no resemblance to that cited from *Strange*, for there the decision proceeded on the usage of the East India Company, who never intrust the lightermen with their goods, but give the whole charge of the property to one of their own officers who is called a guardian. The evidence of the warranty is perfectly clear, for on the Plaintiff's making some objection to the smallness of the tarpaulin, the Defendant, in order to remove that difficulty, informed him that he had plenty of sacks to cover the goods, and undertook that they should be carried safe. It appears to me, that the verdict is perfectly right, and that the Jury could not have done otherwise than they have done.

Postea to the Plaintiff.

[420] BOLT v. MILLER. May 5th, 1801.

An affidavit to hold to bail, in which a tender in Bank-notes is negatived by the Plaintiff's clerk alone then resident in London, is insufficient if the Plaintiff be also resident in London; though the debt arose upon a bill transaction, of which the clerk had the sole management. If an affidavit to hold to bail be made by a person *prima facie* incompetent to make it; quære, whether circumstances proving him to be competent, can be shewn by affidavit for cause against a rule for discharging the Defendant on a common appearance (a)².

This was a rule calling on the Plaintiff to shew cause why the Defendant should not be discharged out of custody, on the ground of the affidavit of debt having been sworn by a clerk of the Plaintiff's, and of his having taken upon himself to negative any tender in Bank-notes, as well as to swear to the debt.

In shewing cause against this rule, Best, Serjt., produced affidavits of the Plaintiff and of his clerk, to shew that the debt in question arose upon a bill transaction, which had been completely conducted by the clerk, and that the Plaintiff himself, though living in London, knew nothing of the business. He also referred to *Chatterly v. Finck*, ante, p. 390, and also to *The Mayor of London v. Dias*, 1 East, 237 (b), where an affidavit of debt made by "James Byfield clerk to R. C., Esq. chamberlain of the city of London," negativing the tender in Bank-notes was held sufficient.

But The Court (consisting of Heath, Rooke, and Chambre, Js.) were of opinion, that though the debt might be better sworn to by the clerk than the Plaintiff, still they should both have joined in negativing the tender in Bank-notes as they were both in London. They also seemed to doubt whether admitting affidavits explanatory of the reasons why the clerk made the affidavit of debt, was not trenching on the rule laid down that no supplemental affidavit ought to be received to cure defects in affidavits under the Bank Act.

Rule absolute (c).

(a)¹ So "it is no excuse for an innkeeper to say that he delivered the key of the chamber door to the guest in which he is lodged, and that he left the chamber door open; but he ought to keep the goods and chattels of his guests in safety; and therewith agree 22 H. 6, 21. 11 H. 4, 45. 42 Ed. 3, 11." *Calje's case*, 8 Co. 33.

(a)² And see *Lawson v. M'Donald*, post, 590.

(b) See also *Knight v. Keyte*, 1 East, 415.

(c) See *Smith v. Tyson*, ante, p. 389, and *Stacy v. Federici*, ante, 390.

POWELL v. FULLERTON AND POWELL. May 7th, 1801.

A writ in debt may be abated in part and stand good for the remainder. If a plea in abatement contain matter which goes in part abatement of the writ only, but conclude with a prayer that the whole writ may be abated, the Court may abate so much of the writ as the matter pleaded applies to (a).

Debt for 5000l. The declaration consisted of five counts; the 1st and 2d were upon bond; the 3d for money borrowed; the 4th on an account stated, and the 5th for interest.

[421] The Defendant Fullerton pleaded to the 1st and 2d counts of the declaration *Non est factum*, and put himself upon the country, and then proceeded thus, "and as to the writ of the Plaintiff and the declaration founded thereon as to the 3d, 4th, and 5th counts, the Defendant prays judgment of the said writ and the said declaration as to the said 3d, 4th, and last counts, and that the said writ and declaration as to those counts may be quashed, because he saith that the said several supposed debts or sums of money in said 3d, 4th, and last counts respectively mentioned if any such debts or sums of money were accrued or were due and owing unto the Plaintiff, were and each and every of them were and was due and owing from the Defendants jointly and together with one Robert Dyde unto the Plaintiff and not from the Defendants only, and which said Robert Dyde is still living, to wit at Westminster aforesaid in the said county, and this the Defendant Fullerton is ready to verify, wherefore inasmuch as said Robert Dyde is not named in the said writ and declaration the Defendant Fullerton prays judgment of the said writ and the said declaration as to the 3d, 4th, and last counts thereof, and that the said writ and said declaration thereon founded as to the said last-mentioned counts may be quashed."

To this plea, to the three last counts, the Plaintiff demurred "because she saith that the said plea of the Defendant Fullerton and the matters therein contained, in manner and form as the same are above pleaded and set forth, are insufficient in law to quash the said writ and the said declaration thereon founded as to the said last-mentioned counts, or to excuse the Defendant Fullerton from answering the Plaintiff in respect of those counts, nor is the Plaintiff under any necessity nor in any wise bound by the law of the land to answer the said plea. And this," &c.

The Defendants joined in demurrer.

Best, Serjt., in support of the demurrer. The writ in debt being a general writ cannot be abated in part; now the plea in abatement pleaded by Fullerton goes only to the three last counts of the declaration, and at any rate is bad, because it prays judgment of the whole writ. Where by the writ two distinct things are demanded, it may be abated in part and stand good for the remainder; but in this case the single demand contained in the writ is for 5000l. It might be different indeed if the Plaintiff on his own shewing appeared to have no cause of action for more than a part, but here the matter relied on by Fullerton, by way of answer to part of the demand contained in the Plaintiff's de-[422]claration, is pleaded by Fullerton himself. In *Weeks v. Peach*, 1 Salk. 179, it is said, "If a plea begin with an answer to the whole, but in truth the matter pleaded is only an answer to part, the whole plea is naught and the Plaintiff may demur." Now in this case the plea begins with an answer to the whole writ, whereas the matter pleaded is only an answer to part of the writ.

Onslow, Serjt. contra. There is a case 1 Hen. 5, fol. 4 b. pl. 5, which is an express authority to shew that a writ in debt may be abated in part and stand good for the remainder. That was a writ in debt in which the Plaintiff demanded parcel on obligation, and parcel on simple contract, and there was a variance between the Defendant's name in the writ and in the obligation; for this cause the writ was abated as to the obligation, but the Plaintiff prayed that the Defendant might answer as to the simple contract; upon which follows this observation in the report "quod nota that the writ in debt may abate in part and stand good in part." Another strong authority to shew that the writ may be abated in part is *Godfrey's case*, 11 Co. 45 b. and the cases there cited. Had the Defendant in this case prayed that the Declaration only might be quashed, the answer would have been "plead to the writ." In none of the entries is there any precedent of a plea that others were joint contractors with the

(a) Vide *Hawkins v. Ramsbottom*, in *Error*, 6 Taunt. 179.

party sued, praying that the declaration only may be quashed, though there are several praying that the writ only may be quashed. Clift. Ent. 4, pl. 6, p. 7, pl. 17. In this plea the Defendant Fullerton only prays judgment of the writ, and the declaration as to the 3d, 4th, and last counts; in that respect following the rules prescribed by the Court of King's Bench, in *Herries v. Jamieson*, 5 Term Rep. 553, and not as in that case pleading to the whole declaration matter which only answers part of the declaration.

Cur. adv. vult.

HEATH, J. (after stating the pleadings). It was contended in support of this demurrer, that the plea demands that the whole writ shall be abated, whereas the matter pleaded only applies to a part of the writ. The case of *Herries v. Jamieson* was cited. But there the plea went in abatement of the writ only, and part of the declaration was not answered; and for that reason the demurrer was allowed. The first question is, Whether judgment of the whole writ is demanded in this plea? And we are unanimously of opinion that it is so demanded. Then next it comes to be considered, Whether a general writ of debt is divisible, [423] so that it may be abated in part and remain good for the residue? The case in the Year Books 1 H. 5, 4 b. is decisive of that point; there it was actually divided. The principle is equally clear. A joint tenancy of parcel shall not abate the whole writ, though the demand be of a thing entire, as of a manor. *Doctrina placitandi*, fo. 7. The next question, concerning which we had the greatest difficulty, is, Whether the party having demanded judgment that the whole writ should be abated, the Court can only abate it in part? On looking into Rastall I find several entries where the prayer has been for the abatement of the whole writ, and the judgment of the Court has been that the writ shall abate in part only; and I can find no instance in those entries of a prayer for the partial abatement of the writ (*a*). The entries alluded to are fo. 108 b. 109 a. 233 (*b*). There are two other entries fo. 126 (*c*) where the prayer is general for the abatement of the writ, and the cause is applicable to one only of several Defendants, but there the parties join issue on the fact. On the part of the Plaintiff the case of *Weeks v. Peach*, Salk. 179, has been cited, and the dictum of Lord Holt relied on, that where a plea begins with an answer to the whole, but in truth the matter pleaded is only an answer to part of the declaration, the whole plea is naught, and the Plaintiff may demur. The plain sense of which I take to be, that the party in not answering the whole of his adversary's declaration, but leaving some part unanswered, makes a discontinuance. Here the Defendant has answered every material part of the writ and declaration, by pleading to some of the counts and demanding judgment of the residue and of the writ. It follows that if the demand or petition of a plea be too large the Court may abridge it, nam omne majus continet in se minus; and he who demands judgment of the whole writ demands judgment of every part of it. We are therefore of opinion on these authorities that the Court may and ought to moderate the prayer of the Defendant, and the judgment must be that so much of the said writ as regards the 3d, 4th, and last counts of the Plaintiff's declaration, and also the 3d, 4th, and last counts of the Plaintiff's declaration be severally quashed, and that the Plaintiff at his peril may prosecute his suit for the residue.

[424] BRIGDEN v. PARKES AND OTHERS, Executors. May 9th, 1801.

The three first counts of a declaration in assumpsit against executors, stated promises made by the testator, the 4th was for money had and received by the Defendants "as such executors as aforesaid," stating a promise to pay by them "executors as aforesaid;" and the last was upon an account stated by the Defendants, "executors

(*a*) In Rastall's Entr. fo. 256 a. ed. 1566. Entre Brevis Assise, pl. 7, where the Tenants in a writ of entry plead Non-tenure of part of the premises in abatement, the plea concludes, Unde quoad tertiam partem illam petunt judicium de brevi, &c.

(*b*) Tit. Briefe mort. pl. 3. Entre Brevis Briefe, pl. 2, fo. 107 b. 108 a. 259 a. ed. 1566.

(*c*) Tit. Conspiracy count, pl. 5, fo. 124 b. ed. 1566.

as aforesaid," and stating the promise to pay in the same manner. Held bad on general demurrer (a)¹.

Assumpsit. The two first counts of the declaration stated, that in consideration that the Plaintiff had delivered to the testator in his life-time certain hops to be sold, the testator promised to account for them when requested. The 3d count was for money had and received by the testator in his life-time, to the use of the Plaintiff, which the testator promised to pay. The 4th alleged that the Defendants were indebted for money had and received by them "as such executors as aforesaid," to the use of the Plaintiff, and "being so indebted the Defendants executors as aforesaid" promised to pay the same. The last count stated, that the Defendants "executors as aforesaid" accounted with the Plaintiff concerning divers sums of money of the Plaintiff due from the Defendants "executors as aforesaid" and upon that accounting the Defendants "executors as aforesaid" were found indebted to the Plaintiff, and in consideration thereof the Defendants "executors as aforesaid" promised to pay. To this declaration there was a general demurrer.

Bayley, Serjt., in support of the demurrer contended, that if a Plaintiff in the same action seek to recover several demands, some of which accrue from the Defendant in his own right, and others in right of another, it is the subject of general demurrer, may be assigned for error, and is ground for arresting the judgment; that in the present case the causes of action stated in the 4th and last counts of the declaration appeared to have arisen after the death of the testator, and that the Defendant therefore was liable in respect of those causes of action in his own right, and was subject to a judgment de bonis propriis, whereas he was only liable in the right of his testator in respect of the causes of action contained in the three first counts, and no other judgment could be obtained against him than a judgment de bonis testatoris. He cited *Jennings v. Newman*, 4 Term Rep. 347, and *Rose v. Bowler*, 1 H. Bl. 108, as in point. He also urged that even supposing the causes of action contained in the 4th and last counts, to be capable of being joined with those stated in the three first, yet that it was not sufficiently stated in the 4th and last counts, that the causes of action arose against the Defendants as executors, the promise in the 4th count being stated to have been made by the Defendants executors as aforesaid, not by the Defendants as such executors as aforesaid; [425] and in the last count both the accounting and the promise being stated in the same manner.

Shepherd, Serjt. contra, observed, that if the Defendants were liable as executors upon the causes of action stated in the 4th and last counts it could not make any difference whether it were stated that they executors as aforesaid or as such executors as aforesaid were liable. He admitted however that upon the fourth count they must be considered as liable in their own right, though according to the authority of *Seear v. Atkinson*, 1 H. Bl. 102, they might be liable as executors upon the account stated. But he urged that the misjoinder of these several causes of action was only matter of special demurrer and ought therefore to have been specially assigned for cause: for that on a general demurrer if there be any one good count the Plaintiff is entitled to take his judgment upon that count.

But the Court were of opinion that it was matter of general demurrer; that it might be alleged in arrest of judgment, or assigned for error.

Leave was given to amend on payment of costs.

BURGESS v. FREELOVE. May 9th, 1801.

Trespass for assault and false imprisonment may be laid diversis diebus et vicibus (a)².

Trespass for assault and false imprisonment. The declaration consisted of three counts, the 1st of which alleged, that the Defendant "on the 28th day of February 1800, and on divers other days and times between that day and the day of suing forth of the original writ at, &c. assaulted the Plaintiff and beat, &c., and there at and on those several days and times without any reasonable or probable cause whatsoever

(a)¹ Vide *Ord v. Fenwick*, 3 East, 104. *Henshall v. Roberts*, 5 East, 150. *Powell v. Graham*, 7 Taunt. 580. *Dowse v. Coye*, 3 Bing. 20.

(a)² Vide *English v. Purser*, 6 East, 395.

imprisoned him, &c. and caused him to be imprisoned for a long space of time to wit for the space of 48 hours at and on those and each and every of those times without the leave, &c.;" the 2d and 3d counts alleged that "on the day and year aforesaid and on divers other days and times, &c." the Defendant assaulted the Plaintiff.

The Defendant demurred specially and assigned for causes, "that the said Plaintiff hath in and by the said 1st count of the said declaration alleged that the said Defendant on the 28th of July 1800 and on divers other days and times between that day and the day of suing forth of the said original writ of the said [426] Plaintiff in this behalf assaulted the said Plaintiff and beat bruised wounded and ill-treated him and at and on those several days and times imprisoned him the said Plaintiff and caused and procured him to be imprisoned and detained him in prison and caused and procured him to be kept and detained in prison for a long space of time at and on each and every of those times, whereas the said Plaintiff in the said first count of the said declaration ought to have stated and alleged that the said Defendant on some one certain determined day only and not on more than one day nor as aforesaid assaulted the said Plaintiff and beat and bruised wounded and ill treated him, and on that one certain and determined day only and not on more than one day nor as aforesaid imprisoned him the said Plaintiff and caused and procured him to be imprisoned and kept and detained him in prison for a long space of time and also for that the said Plaintiff hath not in or by the said first count of the said declaration stated or alleged that the said several trespasses therein mentioned or any of them were committed on one certain day only as he ought to have done, but on the contrary thereof hath stated and alleged that those trespasses were committed on divers days and times. And also for that the said Plaintiff hath laid and charged the said several trespasses in the said first count of the declaration mentioned under a continuando whereas the same and every of them ought to have been laid and charged to have been committed on one certain fixed and determinate day only and not under a continuando. And also for that it does not in or by the said first count of the said declaration appear with certainty or precision that all or any of the said several trespasses therein supposed to have been committed by the said Defendant were committed on the said 28th day of July in the said first count mentioned only or on any other certain day only but that those trespasses were severally committed on divers days and times. And also for that the said first count of the said declaration comprises and includes divers distinct and separate causes of action which ought not and by law cannot be included in one and the same count. And also for that the said 1st count of the said declaration is in divers and very many other respects informal" &c. To the 2d and 3d counts the causes assigned were the same, only introducing them as to each count thus "for that the said Plaintiff hath in and by the said count alleged that the said Defendant on the day and year in that count mentioned and on divers other days and times" &c. The Plaintiff joined in demurrer.

[427] Best, Serjt., in support of the demurrer cited *Michell v. Neale et Ur. Cowp.* 828, as being precisely in point, and to an observation from the Court, that the cases cited in support of the demurrer in *Michell v. Neale* were against it, he answered, that in those cases the objection had not been taken on special demurrer. He also urged that it was impossible for the Defendant to plead to an assault laid as in the present case.

Shepherd, Serjt. contra, observed, that the case of *Michell v. Neale* was decided on a misunderstanding of the difference between laying an assault *diversis diebus et vicibus*, and with a continuando.

The Court (consisting of Heath, Roke and Chambre, Justices) were of opinion that the case of *Michell v. Neale* could not be deemed a sound authority, and referred to *Monkton v. Ashley*, 6 Mod. 38, Salk. 638, where Holt, Ch. J., and Powell, J., take the difference between a continuando and *diversis diebus et vicibus*, and shew that no inconvenience can arise to the Defendant from either mode of laying the assault, since evidence can only be given of a single act (a).

The Court gave the Defendant leave to withdraw his demurrer on payment of costs.

(a) See also on this subject the note to *The Earl of Manchester v. Tale*, 1 Saund. 24, by Mr. Serjt. Williams.

GRAY, Executor, v. PINDAR. May 11th, 1801.

Assumpsit on a note payable by instalments; plea in bar as to the said several causes of action except the last instalment that "the said several causes of action did not nor did any of them accrue within six years." Held on special demurrer that though some of the instalments might be barred and others not, yet the introduction to the plea and the body of it were inconsistent.

Assumpsit. The first count of the declaration was on a promissory note dated the 18th September 1783, whereby the Defendant promised to pay to the Plaintiff's testator, or his order, the sum of 80l. in manner following, viz. the sum of 5l. upon the 5th of April then next, the sum of other 5l. on the 10th of April 1784, and the like sum of 5l. half-yearly until the said sum of 80l. was fully paid and satisfied.

The second count was for interest, and there were other counts for money paid, lent, had and received, and on an account stated.

The Defendant pleaded 1st, Non assumpsit. 2dly, As to the said several causes of action in the said declaration mentioned, except as to the damages sustained by the Plaintiff as such [428] executor as aforesaid by reason of the last half-yearly payment of 5l. in the said first count of the said declaration mentioned, the Defendant by leave &c. says actionem non, because he says, that the said several causes of action in the said declaration mentioned did not, nor did any of them accrue to the Plaintiff at any time within six years next before the day of suing out the original writ of the Plaintiff, And this &c. Wherefore, &c.

To this second plea the Plaintiff demurred specially, and assigned for causes, "that the introductory part of the said plea of the said Defendant by him lastly above pleaded in bar is inconsistent with and contradictory to the allegation of the said plea in this that the said plea purporting to be pleaded in bar to part only of the said several causes of action in the said declaration mentioned contains matter alleged and pleaded in bar to all of those said several causes of action; and in this that the introductory part of the said plea admits that the said John Gray as such executor as aforesaid hath sustained damage by reason of the non-payment of the last half-yearly payment of 5l. in the first count of the said declaration mentioned yet the matter alleged in the said plea is pleaded therein in bar to all the said several causes of action in the said declaration mentioned. And also that the said cause of action of the said Plaintiff in the said first count of the said declaration mentioned arises upon a promissory-note to pay the entire sum of 80l. in that count mentioned and a promise and undertaking of the said Defendant to pay that precise and specific sum, and that the said Defendant in and by his said last mentioned plea admits that the said cause of action in the said first count of the said declaration mentioned did accrue to the said Plaintiff within six years next before the day of the suing out of the said original writ of the said Plaintiff. And also that the said last-mentioned plea is in various other respects insufficient, informal, vague and uncertain," &c.

Heywood, Serjt. in support of the demurrer. The contract stated in the first count of the declaration being an entire contract to pay 80l. no action could be maintained upon the note until all the instalments were due, and consequently as the plea admits that the statute of limitations had not run against the last instalment, it cannot bar the Plaintiff from recovering the rest. In *Hunt v. Sone*, Cro. Eliz. 118, which was assumpsit for the occupation of lands from such a day for five years under a promise to pay 20l. for every year at two feasts, with an averment [429] that the Defendant had occupied the land for a year and a half, the Court held that if the promise had been that the Defendant should enjoy the land for five years, and in consideration thereof should pay 100l. in five years, viz. 20l. per annum, the action would not lie for a part till all the term was expired. So in *Francam v. Foster*, Skinn. 326, Holt, Ch. J., said, "If a man agrees to pay such a sum at three several days, here he may not declare for this sum until the days are past." [But the Court said, that it had been expressly decided of late years that an action of assumpsit may be maintained for each separate instalment of a debt arising upon simple contract; though no action of debt can be maintained until all the instalments are due (a).] Admitting however, that the Plaintiff might at his election have

(a) *Rudder v. Price*, 1 H. Bl. 547.

maintained an action on each instalment, yet he has a right to consider the whole sum as one entire debt, and having done so in this case, it was not competent to the Defendant to sever it. But at all events this plea is informally pleaded; for the introductory part of the plea professes to answer only a part of the declaration, whereas the body of it gives an answer to the whole. The Defendant in the former part admits that the statute of limitations does not extend to the last instalment, and yet in the latter part he states that the said several causes of action in the declaration mentioned did not, nor did any of them accrue within six years. This is an inconsistency on the face of the plea.

Bayley, Serjt., contra. The Defendant by the introductory part of his plea has confined his answer to part only of the declaration, and notwithstanding the subsequent matter which amounts to an answer to the whole declaration, the Plaintiff is entitled to judgment upon that part to which the introduction does not apply. But it does not follow, because the Defendant has introduced matter into his plea which would have afforded an answer to the whole declaration if the introduction had been equally extensive, that he shall therefore be restrained from availing himself of so much of the matter pleaded as the introduction warrants. The introduction professes to answer all the causes of action in the declaration except the last instalment; the subsequent matter answers all the causes of action: it is clear therefore that it answers all those which are contained in the introduction, and if it answer any thing more that [430] ought not to prejudice the Defendant. It is said in *Woodward v. Robinson*, 1 Str. 303, that if a plea be pleaded as an answer to part, though in law it is an answer to the whole, it is a discontinuance; but it is not said that the plea is bad (a)¹. In the present case there can be no discontinuance since the first plea is pleaded as an answer to the whole declaration.

The Court held the plea inconsistent: but as the cause had already been tried and a verdict found for the Defendant on the general issue they gave him leave to amend without payment of costs.

HURRY AND OTHERS v. THE ROYAL EXCHANGE ASSURANCE COMPANY.

May 11th, 1801.

[See *Lane v. Nixon*, 1866, L. R. 1 C. P. 420.]

Insurance on goods from A. to B. "until they should be there discharged and safely landed;" on their arrival at B. the merchant to whom the goods belonged, employed and paid a public lighter to land them, and the goods being damaged in the lighter without negligence, the underwriters were held liable for the loss (a)².

This was an action on a policy of assurance on ship and goods from Petersburg to London, including the risk of boats to Cronstadt beginning the adventure on the said goods and merchandizes from and immediately following the loading thereof on board the said boats at Petersburg, and on the ship at Cronstadt; to continue upon the ship until she should be arrived at London, and had there moored at anchor twenty-four hours in good safety, and upon the goods and merchandizes until they should be there discharged and safely landed.

The cause was tried before Lord Eldon, Ch. J., at the Guildhall Sittings after last Hilary Term, when it appeared that the ship and cargo (consisting of hemp) arrived in safety in the river Thames; that the Plaintiffs being the consignees of the goods, by their broker employed and paid a lighterman belonging to one of the public lighters entered at Waterman's Hall to land the hemp; that the hemp was damaged on board the lighter, but without any negligence imputable to the lighterman; that it is the constant practice for merchants in the Russian trade to land their goods by means of lighters, and that there are no other lighters now in use among the merchants but the public lighters. A verdict was found for [431] the Plaintiffs with liberty to the Defendants to move to have a nonsuit entered on the ground of the insurance being

(a)¹ If a plea be pleaded as an answer to the whole, and the matter pleaded be only an answer to part, the whole plea is bad and the Plaintiff may demur. *Weeks v. Peach*, 1 Salk. 179.

(a)² Vide *Matthie v. Potts*, 3 B. & P. 23. *Strong v. Natally*, 1 N. R. 16.

discharged by the delivery of the hemp to the lighters employed and paid by the consignees of the cargo.

Accordingly a rule Nisi having been obtained on a former day,

Shepherd, Heywood, and Bayley, Serjts., now shewed cause. The question is, Whether the damage which the goods sustained on board the lighter be one of the risks insured against by this policy? It must be admitted that if the loss had happened on board one of the ship's boats the underwriters would have been liable; it is not therefore necessary that the loss should happen on board the ship itself, but it is sufficient if it happen in the ordinary course of conveying the goods on shore. In the case of *Pelly v. The Royal Exchange Assurance Company*, 1 Bur. 341, the goods having been placed in a warehouse built on a sand-bank in the river of Canton in China, while the ship was repairing, were destroyed by fire; yet as that unloading of the goods appeared to have been in the ordinary course of the voyage, the Court held the underwriters liable; and Lord Mansfield there cited a case of *Tierney v. Etherington* before Lee, Ch. J., where it was ruled that a loss happening on board a store-ship at Gibraltar was covered by a policy containing an agreement, that upon the arrival of the ship at Gibraltar the goods might be unloaded and re-shipped in one or more British ship or ships for England or Holland. The expressions of Lee, Ch. J., were "the construction shall be according to the course of trade in this place, and this appears to be the usual mode of unloading and re-shipping in this place, viz. that when there is no British ship there, then the goods are kept in shore ships." Indeed the Court will attach that meaning to the words "safely landed," which the course of trade puts upon them; and Lord Mansfield in 1 Bur. 348, says, "when goods are insured till landed without express words, the insurance extends to the boat, the usual method of landing goods out of a ship upon the shore." It is true that the case of *Sparrow v. Carruthers*, 2 Str. 1236, seems to be an authority in the Defendant's favour, since it was there holden that the owner of the goods by landing them in his lighter discharged the underwriters. But with respect to that case it may be observed that it was only a Nisi Prius decision, that the doctrine of Lee, Ch. J., in *Tierney v. Etherington* is inconsistent with that laid down by him in *Sparrow v. Carruthers*, that it is contradicted by a case of *Langlois v. Brant*, before Willes, Ch. J., and that even supposing it to be good law, still it is not an authority in the present case, since as the lighter there belonged to the owner of the goods he might be considered as having taken them into his own custody, whereas the lighter in the present case was a public lighter employed in the usual course of trade. This distinction is expressly recognized by Buller, J., in the case of *Rucker v. The London Assurance Company* (a).

(a) *Rucker v. London Assurance Company*. At Guildhall, Tuesday, 8th June, 1784.
Coram Buller, J.

This was an action on a policy of insurance on the "Eliza-Sophia," at and from Grenada to London, on the ship until moored twenty-four hours, and on goods until safe discharged and landed, and the declaration stated, that before the goods, viz. hogsheads of sugar, were safely discharged and landed, they by the perils of the river Thames and the waters thereof were washed away and lost.

The several wharfs between London Bridge and the Tower are called Free Quays, at which only foreign produce liable to pay duties can be landed. The owners of most of these quays entered into a partnership, which was to expire at Lady-day then next; and not only did the business of wharfingers, but of lightermen, employing their own lighters in discharging such vessels as were to land goods at their wharfs. The owners of some of the wharfs, not of the company, have also their own lighters, while the owners of others are not possessed of lighters of their own, but employ public lightermen. When a ship arrives in the river, the first thing that is done is to quay the ship. When a ship is quayed at a wharf belonging to one of the company, the company provides lighters and does all that is necessary for landing: when at a wharf not belonging to any of the company, the owners provide lighters, &c. All the wharfs do not keep lighters or employ the company, but employ persons having lighters but no wharf, as Drinkall, the person who was employed here by the Plaintiffs. It is not usual for merchants to employ lightermen, they usually leave it to the wharfinger, but Hibbert's house (and that only) generally employs one lighterman.

The Plaintiff applied to the agent for the company of wharfingers to land the sugars in question, but they not being able to undertake the business, and the Plaintiff

[433] Lens and Best, Serjts., in support of the rule. The principle of law laid

fearing the ship might be kept on demurrage, one Drinkall, who followed the business of a lighterman, was applied to by him with consent of the company. Drinkall's usual business was to work out rums, and he has been often employed by the company, and on this occasion was, when applied to, employed by them in working out the ship "Experiment," but as a favour he left her, to work out the sugars. Drinkall was a public lighterman for hire, and his lighter was numbered at Waterman's Hall, without which no lighter could be allowed to work. On the 30th September, fifty-seven hogsheads of sugar were put on board his lighter, and there were two men on board (which are the usual number for a lighter), and the second mate of the ship; as she was proceeding to the shore she struck upon the anchor of a ship, and sunk through an unavoidable accident, without any imputation of neglect in any body on board. The sugars were of course much damaged, and this action was brought to recover an average loss of ——— per cent.

Bearcroft for the Defendants contended, that strictly speaking, the policy extended till the goods were landed by the ship's boats, but that the custom of trade had for convenience substituted something else, viz. lighters. The custom here had not been complied with: for there was an important difference in the merchant taking upon himself to employ lightermen; this was not the course of trade, and the Defendants were thereby completely discharged from the subsequent loss. A merchant may give up the custom, and the Plaintiff has done it here. In the common course of trade he could not have got discharged under a week. "Then," says he, "I dismiss every advantage from the custom, I discharge the underwriters for my own reasons and my own benefit." The freight is due (and it is only due when the voyage is ended) when the goods are delivered to his lighter. If the Plaintiff's own lighter had been sent, it would not have been in the course of trade, and this is in effect the same thing.

Buller, J., told the Jury that the decision of this cause depended on the usage, but the fact of the usage once established, the question, whether the underwriter is liable or not was matter of law. But it belonged to the Jury to say whether what had been done here was or was not in the usual course of trade. There is no distinction between a public or private wharf, for a ship may go to either, and underwriters are equally liable at both. If she goes to a private wharf the public lightermen are not employed, so that there are cases in which the underwriters would be liable when the Company is not employed. It is merely a voluntary society, and these lighters are not on a different footing in any respect from the rest of the lighters. If then that is not the line, what is? The line is between lighters which are public, and lighters which are the property of the merchants, and work only for them. The public lighters have a stamp of authenticity, they are entered at Waterman's Hall, as Drinkall's was, and have a public credit. The case in *Strange (Sparrow v. Carruthers)* does not interfere. If a merchant will not send public lighters entered at Waterman's Hall, it shall be a delivery to the merchant when the goods are put on board his lighter; but not if he sends lightermen appointed by the Waterman's Company, and who are public officers. In the case in *Strange* the lighter is said to be the property of the Plaintiffs, and one expression of the Chief Justice is, that it would have been otherwise had the goods been sent by the ship's boat, i.e. the lighter of the ship employed to discharge her, for it could not be the ship's boat, literally speaking, because it would be impossible it could discharge a whole cargo.

If the Jury were of this opinion, he directed them to find for the Plaintiff.

Verdict for the Plaintiff.

Mr. J. Buller, before the opening of Plaintiff's case was finished, asked if the point in the cause had not been decided several times since he attended Guildhall?

Bearcroft, for the Defendants, mentioned *Sparrow and Carruthers* as in point.

BULLER, J. This has been determined some way or other, and I think differently in two cases. If the lighter does not belong to a public Company, but to the master of the goods himself, the underwriters are not liable, but if the lighterman is a public officer, they are liable.

Lee, for the Plaintiff, cited from his own notes the case of *Langloie and Brant* before Lord C. J. Willes, which was a much stronger case than *Sparrow v. Carruthers*. The policy was from Jamaica to ——— and till landed. The consignee sent his own lighter, and negligence was proved, and a special Jury found against the underwriters.

down in *Sparrow v. Carruthers* must now prevail. It seems to be settled that if the goods are received out of the ship in private lighters the underwriters are discharged. Now the only ground upon which this position can be supported is, that the possession of the goods has been altered, and the owner has taken them into his own custody. If this be the principle, it can make no difference whether the lighter be public or private: for the person who hires a public lighter for the conveyance of his own goods, makes that lighter as much his own *pro hac vice* as a private lighter, and the goods while [434] on board are completely in his own custody. This case therefore does not depend upon the question whether the goods have been taken out of the usual course of the voyage, but whether the Plaintiff has not received them into his own custody before they were actually landed, and thereby discharged the underwriters from the remainder of the risk. Undoubtedly if the lighter employed in this case had been employed by the ship owner, the delivery of the goods would not have been complete until they were safely landed: but if the merchant find it inconvenient to wait for the delivery of the goods by the ship owner, but chooses to receive them into a lighter, whether public or private, he by that act puts an end to the voyage. Neither in *Pelly v. The Royal Exchange Assurance Company*, nor in *Tierney v. Etherington*, could it be said that the goods had been delivered into the possession of the owners, since the loss in both cases happened in the middle of the voyage. With respect to the opinion of Mr. J. Buller in *Rucker v. The London Assurance Company*, it is to be observed that the learned judge lays great stress on the circumstance of the lighter having been entered at Waterman's Hall, and considers the lighterman as a public officer, whereas that circumstance gives no publicity of character to the lighter, but only makes the owner amenable to the regulations of the Company for misconduct in the river, who is no more a public officer than a hackney coachman. As to the note which has been referred to of *Langlois v. Brant*, it is not entitled to any credit, since it is there said that negligence was proved, and yet that the underwriters were held liable.

HEATH, J. The question in this case is, whether the goods insured have been safely landed within the true intent and meaning of those words in the policy, for to every part of the policy we must give complete effect. Now if we were to hold that the insurers were discharged by the delivery of the goods to the lighter, we should defeat the words "safely landed," and render them altogether nugatory. It is admitted that the business of unloading the Russian ships is carried on by public lighters, and that no private lighters are ever employed by the merchants. Now if that be so, what effect is to be given to the words "until the goods are safely landed," if they do not extend to the goods when on board the public lighter, for in no other manner can they be safely landed. It is true that the [435] master and owners of the ship were discharged when the goods were put on board the lighter; but freight and insurances are not commensurate; the latter is far more extensive than the former. The insurance commences before the freight, for it commences when the goods are put on board the boats at Petersburg, and it also continues longer than the freight, for it does not determine until the goods are safely landed. There is no pretence for saying, that if the freighter of the goods had made use of his own boats in putting the goods on board at Cronstadt the insurers would have been thereby discharged. It has been argued, however, that whenever the custody of the goods is changed, the insurance is at an end: but that argument is founded on the notion of freight and insurance being co-extensive. With respect to the case of *Sparrow v. Carruthers*, I think it ought not to be extended; it was only a *Nisi Prius* decision; it has been cited several times, but never recognised, and whenever it has been cited great pains have been taken to distinguish it from the cases before the Court, though perhaps not always with success. I do not mean however to quarrel with that decision; a case precisely similar is not likely to arise again, since it is not customary for the owners of goods to send their own lighters, but always to employ public lighters.

ROOKE, J. I am of the same opinion. The words of this policy are, that the underwriters shall continue liable until the goods are safely landed; now I think it is going too far to say, that when the goods are put on board the lighter they are safely landed. I cannot agree that this case depends on the question, who employs the lighter? It appears to me to depend upon the question, what the lighter is? For whether the lighter be employed by the owner of the goods or the owner of the ship, the landing of the goods is equally dangerous, and the risk of the underwriters the same. The criterion seems to be, whether it is a public lighter, publicly registered,

and in short, that sort of lighter which is equally known to the underwriters and the owner of the goods. It is certainly much for the benefit of the underwriters that this construction should prevail: since it is desirable for him that the merchant should as much as possible facilitate the landing of the goods; for the sooner they are landed, the sooner the risk of the underwriters determines. If the body of underwriters were bound to elect whether these [436] large Russian ships should be unloaded by means of these lighters employed by the persons interested in the goods on board, or whether the unloading should be left to the sole management of a foreign captain, who probably knows very little about the nature of public or private lighters, and who must necessarily be much longer about it, I think they would not hesitate to choose the former method as most safe. With respect to the case of *Sparrow v. Carruthers*, Mr. Justice Buller has expressly taken the distinction between public and private lighters, which differs that case from the present.

CHAMBRE, J. This is a case of considerable consequence in respect of the sum which depends upon it, but of still more in respect of the general question which it involves; and if I entertained any doubts upon the subject, I should wish to take time before I delivered an opinion; but having none, I think the sooner we come to a decision the better. The argument for the underwriters rests entirely on the case of *Sparrow v. Carruthers*. I do not wish to shake the authority of that case, nor indeed is it necessary so to do; but I cannot but observe that if the decision had been otherwise I should have been better satisfied. The case before Mr. Justice Buller has more weight with me: and particularly so, because the parties acquiesced in his determination, notwithstanding they would have been armed with the authority of *Sparrow v. Carruthers* had they been inclined to bring the case before the Court. The only strong ground upon which the case of *Sparrow v. Carruthers* can be supported (if indeed it can be supported at all) is, that the owner of the goods completely accepted them, and discharged the ship owner from any further concern in them. In this case I rely on the words of the policy and the known and settled usage of trade. What can the words "until safely landed" refer to? It is admitted that it is impossible for these large vessels to come up to the wharfs in order to deliver their goods; that the merchants have no lighters of their own, and that the ship's boats are inadequate to the purpose. In all cases, therefore, the goods must be delivered by the public lighters, and we must take the underwriters to be cognizant of the usage of the trade which they insure. I do not lay much stress on the notion of these lightermen being public officers: there are many trades which are under certain regulations, such as porters, carmen, and hackney coachmen, and yet they are not public offi-[437]-cers; but I rely on the constant usage of trade, and on the words of the policy.

Per Curiam. Postea to the Plaintiffs.

STEEL v. ALLAN (a). May 12th, 1801.

The Court will not compel security for costs in error on the ground of the Plaintiff in error being a lunatic.

This was a rule calling on the Defendant or his attorney to shew cause why security should not be given by one of them for the costs of a writ of error on the judgment in this cause, otherwise the Plaintiff to be at liberty to proceed in the action and on the recognizance of bail, notwithstanding the allowance of the writ of error. To obtain this rule an affidavit had been produced, stating all the proceedings in the action, and alleging the belief of the Plaintiff's attorneys, that there was no cause of error, the Defendant's attorneys having agreed not to assign the want of an original as cause of error, and deposing that since the commencement of the action a commission in the nature of a writ de lunaticis inquirendo had issued, under which the Defendant had been found a lunatic and a committee had been appointed.

Cockell, Serjt., now shewed cause on the ground of this application being perfectly new in practice, and not supported by any principle.

Clayton, Serjt., in support of the rule argued, that the estate of the lunatic would

not be liable, being under the control of the crown, and therefore the Plaintiff would be harassed without any prospect of being repaid the costs of the writ of error to which the recognizance of bail does not extend (b).

But The Court refused to accede to the application.

Rule discharged.

[438] BROMLEY v. COXWELL. May 13th, 1801.

A. entrusted B. with goods to sell in India, agreeing to take back from B. what he should not be able to sell, and allowing him what he should obtain beyond a certain price, with liberty to sell them for what he could get if he could not obtain that price; B. not being able to sell the goods in India himself, left them with an agent to be disposed of by him, directing the agent to remit the money to himself in England. Held that A. could not maintain trover against B. for the goods (a).

Trover for some prints. The cause was tried before Lord Eldon, Ch. J., at the Westminster Sittings after last Hilary Term, when the following facts appeared in evidence:

The Plaintiff being a printseller, and the Defendant a mate of an East Indiaman, in February 1799 the latter was entrusted by the former with some prints to be disposed of in India under the following agreement. "William Bromley agrees to send out by James Coxwell one hundred engravings from his plate of His Majesty on horseback under these conditions, that provided James Coxwell can dispose of any one or all of them at above one guinea each, he the said James Coxwell is to be accountable to William Bromley on his return to England, for as many as he may dispose of at one guinea each; and William Bromley agrees to take all or as many as may be returned by the said James Coxwell, provided he the said James Coxwell cannot sell them in India or at any other port he may touch at, without expecting any sum from James Coxwell, or making any charge; and William Bromley further agrees to and authorizes James Coxwell to sell them for whatever they may fetch, if not more than one guinea may be offered for them separately." The Defendant on his arrival at Calcutta not being able to obtain more than three shillings and five pence per print, at which sum he sold one only, carried the remainder to Madras, and there endeavoured to sell them, but with no better success, whereupon, judging for the best, he left the residue in the hands of an agent at Madras to be disposed of by him, directing the agent to remit the money to him in England, at the Jerusalem Coffee-house, London. On his arrival in England, he said to a third person, "I have taken upon myself to leave the prints in India, and I hope Mr. Bromley will approve of what I have done."

The Jury found a verdict for the Plaintiff, subject to the opinion of the Court, whether under the above circumstances trover could be maintained?

A rule having been obtained for setting aside the verdict, Best and Onslow, Serjts., now shewed cause and contended, that it was a general principle of law, that wherever a person takes upon himself to dispose of the goods of another without an authority so [439] to do, it amounts to a conversion; and that the words "to his own use," though necessary to be inserted in averring the conversion, have always received a liberal construction; that it made no difference that the goods in this case were originally bailed to the Defendant, for that the Defendant, by disposing of them in a manner unauthorized by the agreement, had determined the bailment, and become guilty of a conversion. They cited *Wilson v. Chambers*, Cro. Car. 262, where the Court said, "denying to deliver upon request is a conversion;" and *Waldgrave v. Ogden*, 1 Leon. 224, Cro. Eliz. 219, S. C. where Walmesley, J., said, "If a man find my garments and suffereth them to be eaten with moths by the negligent keeping of them, no action lieth; but if he weareth my garments it is otherwise, for the wearing is a conversion." They urged that the Plaintiff was clearly entitled to some action; that had the injury arisen from a mere non-feasance on the part of the Defendant, the proper remedy would have been an action on the case, but that the positive act of the

(b) By this must be meant the recognizance of bail in the Court below, for if it had been a case in which bail in error could have been taken, it would have been otherwise.

(a) Vide *Bailey v. Gouldsmith*, Peake's Cas. 56. *Cockran v. Irlam*, 2 M. and S. 301.

Defendant in delivering the prints to his agent in India without any authority so to do was sufficient to support an action of trover. *Anon.* 2 Salk. 655, *Syeds v. Hay*, 4 Term Rep. 260, where Buller, J. said, "If one man who is entrusted with the goods of another put them into the hands of a third person contrary to orders, it is a conversion;" and *Youl v. Hardbottle*, Peake's N. P. Cas. 49, where Lord Kenyon said, "I agree that when a carrier loses goods by accident, trover will not lie against him, but when he delivers them to a third person and is an actor, though under a mistake, this species of action may be maintained."

Shepherd, Serjt., contra, was stopped by the Court.

HEATH, J.—I am not clear that in the present case there was any breach of the agreement. The Defendant does not agree to bring the prints home; he was authorized to sell them for what they might fetch, if not more than one guinea should be offered for them separately: and under this part of the agreement I do not see why he was not at liberty to leave them with an agent to be sold. The conduct of the Defendant, however, cannot amount to a conversion in any point of view. It is agreed that mere negligence is not sufficient; now the conduct of the Defendant in not selling the prints in India was a mere non-feasance. To support an action of trover there must be a positive tortious act.

[440] ROOKE, J.—In this case there was no agreement to bring the prints home. The Defendant left them in India judging for the best; and though he ordered the money to be remitted to himself, it is clear that this was done with no other view than to facilitate the payment of it to the Plaintiff. At all events it does not appear to me that there was any conversion.

CHAMBRE, J.—It is not necessary to decide whether any action at all could be maintained under the circumstances of this case; but the strong inclination of my opinion is, that none could be maintained. The Defendant agrees to send some prints to India, and if they are sold for more than one guinea each, the Defendant is only to account for them at that sum. Then the Plaintiff agrees to take all which shall be returned without any charge to the Defendant: none are returned. The agreement concludes with a general authority, in case the prints do not sell for a guinea each, to sell them for whatever they may fetch. The Defendant not being able to sell them at a guinea, leaves them with an agent to be sold to the best advantage. It does not appear that any have been sold. No act has been done. The agreement does not express the Defendant shall sell the goods himself; it seems therefore that the delivery to his agent was within the terms of the agreement.

Per Curiam. Rule absolute for entering a nonsuit.

PERKINS, Administrator, v. PETTIT AND YALE. May 13th, 1801.

If a Defendant in error (the Plaintiff in the action) upon judgment being affirmed take in execution the body of the Plaintiff in error for the debt, damages and costs in error, he does not thereby discharge the bail in error; but may sue them upon their recognizance.

Scire facias on a recognizance of bail in error. The Defendants pleaded 1st, Nul tiel record of the recognizance. 2dly, Nul tiel record of the writ of Scire facias and return. 3dly, Executionem non "because they say that to the said supposed recognizance a certain condition was underwritten, which condition (reciting that the Plaintiff had lately in His Majesty's Court of Common Bench at Westminster before Sir James Eyre Knight and his Brethren Justices of the said Court by the consideration and judgment of the said Court recovered against Jane Howes a certain debt of 360l. and also 27l. 3s. 6d. for his damages which he had sustained by occasion of the detaining that debt whereof the said Jane Howes had been convicted, and that the said Jane had sued [441] out of His Majesty's Court of Chancery at Westminster on the said judgment His Majesty's writ of error tested the 19th day of May in the 38th year of his reign directed to Sir James Eyre Knight Chief Justice of His Majesty's Court of the Bench aforesaid) was, that if the said Jane Howes should by herself or her sufficient security prosecute the said writ of error with effect and also should satisfy and pay unto the said Plaintiff (if the said judgment should be affirmed or the said writ of error should be discontinued in her default or she should be non-suited therein) the debt and damages aforesaid then already adjudged upon the said

judgment and all costs and damages to be also awarded for the delay of execution of the said judgment by means of the said writ of error, then that recognizance should be void and of no effect or else should remain in full force and virtue as by the said condition of the said recognizance remaining of record in the said Court of our said Lord the King of the Bench may more fully appear. And the said Defendants further say that afterwards to wit in Michaelmas Term in the 39th year of the reign of our Lord the King the said judgment was in all things affirmed by the Court of our Lord the King before the King himself the same Court then and still being at Westminster aforesaid in the said county of Middlesex and by the same Court a large sum of money to wit the sum of 16l. 10s. was adjudged to the said John according to the form of the statute in such case made and provided for his damages costs and charges which he had by occasion of the delay of the execution aforesaid by the pretence of the prosecution of the said writ of error as by record of the said Judgment of Affirmance still remaining in the same Court at Westminster aforesaid may more fully appear. And the said Plaintiff afterwards and before the suing forth of the said supposed writs of Scire facias or either of them to wit on &c. at &c. sued and prosecuted out of the said Court of our Lord the King before the King himself the same Court then and still being at Westminster aforesaid on the said judgment of affirmance a certain writ of our Lord the King of Capias ad satisfaciendum against the said Jane Howes directed to the Sheriff of Middlesex whereby the said Sheriff was commanded that he should take the said Jane if she should be found in his bailiwick and her safely keep so that he might have her body before our said Lord the King on the morrow of All Souls then next following wheresoever he should then be in England to satisfy the said John as well as the said debt of [442] 360l. as also the said 27l. 3s. 6d. for his damages which he had sustained by occasion of the detaining that debt and also the said 16l. 10s. for his damages costs and charges which he had by occasion of the delay of the execution of the judgment aforesaid by the pretence of the prosecution of the said writ of error brought by the said Jane against the said Plaintiff and upon the premises aforesaid, which writ after the issuing and before the return thereof to wit on &c. at &c. was duly delivered to Charles Price Esquire and Peter Mellish Esquire then being Sheriff of the same County to be executed in due form of law and the said Sheriff by virtue of the said writ afterwards and before the return thereof and before the suing out of the said writ of Scire facias or either of them to wit on &c. at &c. took and arrested the said Jane by her body and had and detained her in his custody in execution at the suit of the said Plaintiff for the cause aforesaid for a long space of time to wit from that time until the suing forth of the said supposed writs of Scire facias and from thenceforth hitherto. And this &c. wherefore" &c.

Issue was joined on the two first pleas: and a general demurrer put in to the last.

Marshall, Serjt., was to have argued in support of the demurrer; but Shepherd, Serjt., being called upon by the Court to support the plea, said that he meant to contend that the condition of the recognizance was satisfied by the Plaintiff in error being taken in execution for the original debt and costs together with the costs of the writ of error; and mentioned the cases of *Tigers v. Aldrich*, 4 Burr. 2482, and *Clarke v. Clement*, 6 Term Rep. 525 (a).

But the Court (consisting of Heath, Rooke, and Chambre, Js.) were clearly of opinion that it was not an arguable point.

Judgment for the Plaintiff (b).

[443] DIXON v. DIXON. May 16th, 1801.

A recognizance entered into by the bail in error without the principal, is good. If on a bond-debt double the sum secured by the bond be the sum for which the bail

(a) See also *Jaques v. Whitby*, 1 Term Rep. 557, and *Tanner v. Hague*, 7 Term Rep. 420.

(b) So bail in error cannot be relieved if the principal become bankrupt pending the writ of error. *Southcote v. Braithwaite*, 1 Term Rep. 624.

bind themselves in the recognizance in error, it is sufficient; though a further sum be due for interest and costs and nominal damages have been recovered.

This was an action of debt on a bond for 4000l. conditioned for the payment of 2000l. A verdict having been found for the Plaintiff with one shilling damages for the detention of the debt, judgment was entered up for 4019l. 11s. 0d. being the amount of the penalty with the addition of 1s. damages and 19l. 10s. costs. Upon this judgment the Defendant brought a writ of error, and a recognizance was entered into by two persons as his sureties binding each of them in the sum of 4000l. Notwithstanding this writ of error the Plaintiff sued out a *Fieri facias* indorsed to levy 2119l. 11s. being the amount of the sum mentioned in the condition together with the damages and costs added to 100l. due by way of interest.

A rule nisi having been obtained for setting aside this execution on the ground of its having issued pending a writ of error,

Best and Praed, Serjts., now shewed cause and objected to the recognizance upon two grounds, first, because the Defendant himself had not entered into it together with his sureties; secondly, because it was not taken in a proper sum. They relied upon the words of the statute 3 Jac. 1, c. 8, which provides that no execution shall be stayed upon any writ of error for the reversing of any judgment given upon any obligation with condition for the payment of money only "unless such person or persons in whose names such writ of error shall be brought with two sufficient sureties such as the Court shall allow of shall first before such stay made be bound unto the party for whom any such judgment shall be given by recognizance in double the sum adjudged to be recovered by such former judgment to prosecute the said writ of error with effect, and also to satisfy and pay the debts damages and costs adjudged upon the former judgment and all costs and damages to be awarded for the same delaying of execution." With respect to the first point they contended that as the words of the statute were positive that the Plaintiff in error shall enter into the recognizance with two sureties, no length of practice to the contrary would authorize the Court to consider those words satisfied by a recognizance entered into by two sureties without the Plaintiff in error; and that the cases of *Barnes v. Bulwer*, Carth. 121, *Goodtitle v. Bennington*, Barnes, 75, and *Lushington v. Doe*, Barnes, 78, where recognizances entered into by sureties only, were held sufficient were all cases of eject-[444]-ment, which do not depend on the statute of Jac. 1, but on 16 and 17 Car. 2, c. 8, s. 3, which is differently worded from the former statute as it only requires the Plaintiff in Error to be bound without specifying whether with or without sureties. On the second point they urged that as the statute requires that the parties to the recognizance shall be bound in double the sum adjudged, the recognizance in this case ought to have been taken in double the sum of 4019l. 10s., and they referred to a manuscript note (u) of one of the officers of the Court; or that even supposing according to the case of *Moor v. Lynch*, 1 Wils. 213, it was sufficient to take the recognizance in double the debt really due, still the interest ought to have been added to the sum mentioned in the condition, which then would amount to 2100l.

Shepherd and Bayley, Serjts., contrà, as to both points relied on the invariable practice of the Court as well as on the cases referred to by the other side, which they insisted must govern the present.

The Court (consisting of Heath, Rooke, and Chambre, Js.) were of opinion that as the practice had so long prevailed without objection, it was now too late to overturn it; and that with respect to the 1st point they might without doing much violence to the statute construe the words with sureties to mean by sureties.

Rule absolute.

(a) *Anon.* May 8th, 1796. Action on bond for money payable by instalments; judgment obtained and a writ of error brought thereon; bail in error was only put in for double the sum due, whereupon an application was made to set aside the execution which had issued notwithstanding the writ of error and bail put in, merely because the bail were not bound in double the penalty of the bond.—*Per Curiam*, There having been a failure of payment of the instalments the judgment is regular for the whole penalty and under the statute 3 Jac. 1, c. 8, the bail in error should have been for double the penalty, and this application would have been more proper had it been to stay all proceedings on payment of the instalments due and all the costs.

SOILLEUX v. HERBST (a)¹. May 16th, 1801.

If a bond of submission to arbitration between the trustee of a wife and her husband recite that a suit for separation has been instituted between the husband and wife in the Commons, and that in order to put an end to any contest about the terms of the separation it has been agreed that all matters should be referred to J. S. and either of the parties should be "at liberty to apply to the Court" to make the "award a rule of Court," such submission may be made a rule of the Court of Common Pleas under the 9 & 10 W. 3.

This was a rule obtained by Marshall, Serjt., calling on the obligor in a bond of submission to arbitration, to shew cause why the submission should not be made a rule of Court.

[445] Herbst the obligor was trustee for the wife of Soilleux the obligee. The bond recited that Mary Soilleux wife of John Soilleux, had lately instituted her suit and complaint in the Ecclesiastical Court at Doctors' Commons, for a separation and divorce a mensâ et thoro, and in order to prevent further contest, controversy, litigation, and disputes whatsoever, as well touching the terms on which such divorce should be had, as also to terminate and put a final end and determination to the said suit, and to any doubt, question, contest, and dispute, which might arise in respect of the children of the said marriage, it had been proposed by the said John Soilleux, and agreed to by the said Mary Soilleux, that the terms of such separation, and all matters in contest and dispute between them should be left to the consideration, judgment, arbitration, final determination, and award of J. S. W. &c., and it was agreed, that either of the said parties submitting should be at liberty to apply to the Court for making the said award a rule of Court. The bond was conditioned for the performance of the award by the said Mary Soilleux.

Lens, Serjt., shewed cause and objected, 1st, that in the recital of the bond it was not specified to what Court the application should be made, and that from the expression "the Court," it could not be understood to be the intention of the parties that the application should be made to this Court. 2dly, That the agreement being, that either of the parties might apply to have the award made a rule of Court, would not authorize them to apply to have the submission made a rule of Court; for which he cited *Harrison v. Gundry*, 2 Str. 1178, as in point (a)²; 3dly, that as the matter of dispute between the parties was only the subject of a suit in the Ecclesiastical Court, the statute of 9 and 10 W. 3, c. 15, gave no authority to this Court to make the bond of submission a rule of Court, the statute being expressly confined to "controversies, suits, and quarrels, for which there is no other remedy but by personal action or suit in equity."

The Court (consisting of Heath, Rooke, and Chambre, Js.) overruled all the objections, and observed as to the first, that by the words of the statute, the parties are at liberty to make the submission "a rule of any of His Majesty's Courts of record, which they shall choose," and therefore the words [446] used in the bond were sufficient. As to the second objection they were of opinion, that the case of *Gundry v. Harrison* was entitled to very little credit, and as to the 3d, that the obligor being trustee for the wife of the obligee, many causes of action at law, and many suits in equity, might arise out of the disputes stated in the recital of the bond.

Rule absolute.

MOODY, Assignee of the Sheriff, v. PHEASANT. May 18th, 1801.

Final judgment may be entered upon a bail-bond without executing a writ of inquiry (a)³.

Bayley, Serjt., applied to the Court for leave to enter up final judgment upon a

(a)¹ All the Affidavits were by mistake entitled in this manner, though no cause was pending in the Court.

(a)² Vide also *Anon.* 2 Barnard, 163. Runnington, Serjt., amicus curiæ, said, the case of *Gundry v. Harrison* had been often overruled.

(a)³ Vide *Middleton v. Bryan*, 3 M. and S. 155.

bail-bond, without executing a writ of inquiry, observing that although the practice had been otherwise, the Court of King's Bench had of late decided, that a writ of inquiry was unnecessary in such cases.

The Court (consisting of Heath, Rooke, and Chambre, Js.) being of the same opinion, gave leave to enter up final judgment accordingly.

BELL v. DA COSTA. May 18th, 1801.

A Defendant who is under terms to plead issuably is not at liberty to take advantage of any objections upon special demurrer, of which he could not have availed himself upon a general demurrer. Plaintiff declared against the Defendant as acceptor of a bill of exchange, payable to certain persons using the firm of Messrs. M'Brair, Watson, and Co. Defendant pleaded, that the said Messrs. M'Brair, Watson, and Co. had accepted satisfaction. Plaintiff replied, that the said person so as aforesaid, using the firm of Messrs. M'Brair and Co. (leaving out the name of Watson), did not accept satisfaction, and concluded to the country. Semb. that this variance could only be taken advantage of on special demurrer (a)¹.

Assumpsit on a bill of exchange against the acceptor. The declaration described the bill to be payable to certain persons using the firm of Messrs. M'Brair, Watson, and Co., and averred, that the said person so using the firm of Messrs. M'Brair, Watson, and Co. as aforesaid, indorsed it to the Plaintiff. Plea, that before the indorsement, the said Messrs. M'Brair, Watson, and Co. took and accepted two other bills in full satisfaction. The Plaintiff replied, that the said persons so as aforesaid using the firm of Messrs. M'Brair and Co. did not accept the said bills in satisfaction, &c. concluded to the country, and added the similiter. The Defendant struck out the similiter, and put in a special demurrer, [447] assigning for causes, that the Defendant in his plea had averred, that the said Messrs. M'Brair, Watson, and Co. had taken and accepted bills of exchange, and that the Plaintiff in his replication alleged, that the said persons so as aforesaid using the firm of Messrs. M'Brair and Co. did not take and accept them, that the Plaintiff had not tendered any averment on which issue could be taken by the Defendant without departure from his plea, and that the Plaintiff had attempted to put in issue a subject-matter foreign to the Defendant's plea.

A rule having been obtained calling upon the Defendant to shew cause why the Plaintiff should not be at liberty to proceed to the trial of the issue, notwithstanding the demurrer put in by the Defendant, on the ground of the latter having been under terms to plead issuably, rejoin gratis, and take short notice of trial,

Best, Serjt., shewed cause and contended, that the terms imposed did not oblige the Defendant to waive any good ground of demurrer, but only not to demur for delay, and cited the case of *Dewey v. Sopp*, 2 Str. 1185.

Shepherd and Bayley, Serjts., contra, cited *Berry v. Anderson*, 7 Term Rep. 530 (a)² where a special demurrer was held not to be an issuable plea, as not going to the merits, and the party demurring was compelled to strike out the special causes of demurrer.

The Court (consisting of Heath, Rooke, and Chambre, Js.) said the true question in these cases was, whether the objections were such as might be relied on upon a general demurrer, and accordingly made the rule absolute without payment of costs, at the same time giving the Plaintiff leave to amend without payment of costs.

WATERHOUSE v. SKINNER. May 18th, 1801.

If A. agree to buy of B. and B. to sell to A. goods at a certain price, to be delivered between such a day and such a day; and B. fail to deliver the goods within the time, it is sufficient for A. in declaring upon the contract to aver that he was during all the time, and still is ready and willing to receive and pay for the goods; without making any allegation of an actual tender and refusal (a)³.

Assumpsit. The declaration stated that the Plaintiff, at the instance and request

(a)¹ *S. P. Blick v. Dymoke*, 1 Bing. 379: and see *Langford v. Waghorn*, 7 Price, 670.

(a)² See also the cases there cited in notis.

(a)³ Vide *Martin v. Smith*, 6 East, 555, 561.

of the Defendant, bargained with the Defendant to buy of him, and the Defendant agreed to sell to the Plaintiff a quantity of oats at the price of 21 shillings per quarter, to be delivered any time between Michaelmas day [448] 1799, and Lady-day 1800: and in consideration thereof the Plaintiff undertook to accept and receive the oats, and pay for them at the above-mentioned price, and the Defendant undertook to deliver them some time between the above-mentioned days, "and although the said Defendant afterwards, to wit, on, &c. at, &c. did in part performance of his said promise deliver to the Plaintiff a part, to wit, five quarters of the said oats, and although the time for the delivery of the residue of the said oats to the said Plaintiff according to the Defendant's promise aforesaid is long since elapsed, and the Plaintiff was for and during all that time, and still is ready and willing to accept and receive the residue of the said oats, and to pay for the same at the rate or price aforesaid, to wit, at," &c. Yet Defendant not regarding, &c. had not delivered, &c. but had refused, &c. The Defendant pleaded Non assumpsit, and a verdict having been found for the Plaintiff, a rule Nisi was obtained in Michaelmas Term last, calling upon him to shew cause why judgment should not be arrested, because it was not averred in the declaration, that he had performed his part of the contract by tendering the price of the corn.

Shepherd and Best, Serjts., shewed cause; and distinguished this case from that of *Morton v. Lamb*, 7 Term Rep. 125, by observing, that in that case there was no averment of the Plaintiff's readiness to receive and pay for the corn; which is all that is necessary to support the action, as appears from the words of Lord Kenyon in *Morton v. Lamb*, that "where two concurrent acts are to be done, the party who sues the other for non-performance must aver, that he has performed, or was ready to perform his part of the contract."

Marshall, Serjt., in support of the rule contended, that the meaning of the contract was, that the money should be paid on the delivery of the corn; that the payment and delivery therefore were concurrent acts, and consequently that neither party could maintain an action against the other without averring performance on his part, or a tender and refusal; that the averment in this declaration of the Plaintiff's readiness to pay was introduced in order to avoid the necessity of proving an actual tender, without which the Plaintiff was not entitled to maintain his action. He cited *Cullonel v. Briggs*, 1 Salk. 112, and *Pordage v. Cole*, 1 Saund. 320 (a).

Cur. adv. vult.

[449] On this day the opinion of the Court (present Rooke and Chambre, Js.,) was delivered by

HEATH, J. The only doubt which we entertained on this case arose from the decision of the Court of King's Bench in *Morton v. Lamb*. But that decision has been explained by the subsequent case of *Rawson v. Johnson*, 1 East, 203, where in a declaration on a contract similar to the present an averment of the Plaintiff's readiness and willingness to pay for the article to be delivered by the Defendant, without any allegation of an actual tender of the money, was held sufficient. With the determination of this last case we are perfectly satisfied, and therefore think, that the judgment ought not to be arrested.

Per Curiam. Rule discharged.

End of Easter Term.

Shortly after the close of the term, Lord Eldon, who had continued to hold the office of Lord Chief Justice of this Court, together with that of Lord High Chancellor, and had occasionally presided here in order to make his Report on motions for new trials, where the causes had been tried before him, resigned the former situation.

The Right Honourable Sir Richard Pepper Arden, Knight (having resigned the situation of Master of the Rolls) was appointed to succeed him, and was created a Peer by the title of Baron Alvanley of Alvanley in the county palatine of Chester.

Sir William Grant, Knight, succeeded Lord Alvanley as Master of the Rolls, and was sworn of his Majesty's Most Honourable Privy Council.

In Hilary Term last William Mackworth Praed, of Lincoln's Inn, Esquire, was called to the degree of Serjeant at Law. His motto was "fœderis æquas dicamus leges."

(a) See the edition of Saunders by Mr. Serjt. Williams, where in note 4 to the above case the learning upon the subject is very fully collected and commented upon.

[451] CASES ARGUED AND DETERMINED IN THE COURTS OF COMMON PLEAS AND EXCHEQUER CHAMBER, AND IN THE HOUSE OF LORDS; IN TRINITY TERM, IN THE FORTY-FIRST YEAR OF THE REIGN OF GEORGE III.

PARRY v. FRAME. June 8th, 1801.

A. having agreed to purchase of B. the remainder of a term, the latter delivered to him the lease, in order that he might get an assignment made out; A. then obtained an enlargement of the term from the original landlord, and refused to accept an assignment or pay the full price agreed on, because B.'s under-tenant had removed some fixtures. Held that B. might insist on A. accepting the assignment, and after demand and refusal of the lease might maintain trover for it.

Trover for an indenture of lease.

The Defendant having agreed to purchase of the Plaintiff for 75l. the remainder of a term of twenty years in a house, whereof eight years were unexpired, the latter delivered up to him the indenture of lease for the purpose of enabling him to get an assignment made out, and also the key of the house. After this the Defendant having made a bargain with the original landlord for an enlargement of the term, and having some dispute with the Plaintiff respecting certain fixtures which the Plaintiff's under-tenant had taken off the premises, refused to pay the full price agreed upon, claiming to make a deduction for the articles taken away; and also declined to accept an assignment of the term from the Plaintiff, alleging that it was rendered unnecessary by his subsequent bargain with the original landlord. Upon this the Plaintiff required that the lease should be returned, which was refused: but no demand was ever made of the purchase-money. It appearing at the trial [452] before Chambre, J., at the Sittings after last Easter Term, that the Defendant at the time of the agreement being entered into with the Plaintiff was aware that the undertenant was to take away the fixtures in dispute, but that the Plaintiff had also taken away some articles to which he had no right; the Jury deducted the amount of the latter articles from the price agreed upon, and found a verdict for 73l. 19s.

Clayton, Serjt., now moved for a Rule, calling on the Plaintiff to shew cause why a nonsuit should not be entered, contending, that under the circumstances of this case trover was not maintainable, for that the Defendant had an interest in the lease, and a lien upon it; that although a legal assignment of the lease had not actually been made, yet that a court of equity would have enforced the Defendant's title to it by compelling a specific performance of the agreement between the parties; that the Defendant therefore having an equitable title to the lease, could not be guilty of a conversion by retaining it; and that the two circumstances which are necessary to support an action of trover did not concur in this Plaintiff, namely, the right of property and the right of possession. He cited *Gordon v. Harper*, 7 Term Rep. 9.

But the Court was of opinion, that although the Defendant on payment of the purchase money and taking an assignment would be entitled to retain possession of the indenture of lease, yet that the Plaintiff had a right to insist upon an assignment being made out with covenants to protect himself, and that therefore, as the Defendant had refused to accept an assignment or return the lease, the action of trover was maintainable.

Clayton took nothing by his motion.

WADDINGTON AND OTHERS v. BRISTOW AND OTHERS, Executors of Simmons.
June 9th, 1801.

Discussed, *Evans v. Roberts*, 1826, 5 B. & C. 834. Questioned, *Rodwell v. Phillips*, 1842, 9 Mee. & W. 503.]

A written agreement for the sale of all the hops which shall be grown upon a certain number of acres of land, to be delivered in pockets at a certain place, cannot be given in evidence unless stamped with an agreement stamp: such an agreement

not being within the exception in the 23 Geo. 3, c. 58, s. 4, respecting agreements for the sale of goods, wares, and merchandizes (a).

Assumpsit. The declaration stated that the testator in his life-time was possessed of twenty-two acres of land, situate, &c. on which said land certain hops were then growing, and that the said testator being so possessed thereof, the Plaintiffs bargained [453] for and agreed to buy of the said testator, and the said testator agreed to sell to the said Plaintiffs all the hops then growing on the said land at the rate of 10l. per hundred-weight, to be therefore paid by the Plaintiffs to the said testator, and to be delivered in pockets by the said testator to the Plaintiffs at W. in the county of Kent, and in consideration thereof and also in consideration that the Plaintiffs had undertaken to accept and pay for the hops at the rate aforesaid, the testator undertook to deliver the hops to the Plaintiffs at the place and in the manner aforesaid in a reasonable time next after the same should be pulled and gathered; that the hops were afterwards pulled and gathered and amounted to two hundred-weight, and that although a reasonable time had elapsed and the Plaintiffs were willing to receive them, yet that neither the testator nor the Defendants had delivered them. There was a second count only varying from the first by stating, that the testator agreed to sell to the Plaintiffs all the hops then growing on twenty-two acres of land of the testator, without saying where the land was situate. The Defendants pleaded the general issue.

This cause was tried before Hotham, Baron, at the Maidstone Spring Assizes, when the following agreement was produced on the part of the Plaintiffs: "Agreed this 13th of November 1799 to give the undermentioned gentlemen at the rate of 10l. per 100 weight, for the quantities of hops as attached to their respective names, to be in pockets and delivered at Whitstable.

(Signed) HENRY SIMMONS.
WM. FRANCIS, &c. &c.

(Here followed several other
signatures.)

WM. FRANCIS, all his growth
about 23 acres.

HENRY SIMMONS, do. 22.
(Here followed several names
with their respective quantities.)

(Signed) SAM. FERRAND, WADDINGTON, AND CO."

It was proved that it was customary in Kent for purchasers of hops to enter into agreements while the hops are growing for the delivery at a future time, and that when no particular time is specified in such agreements for the delivery, it is understood to be within a reasonable time after the hops are picked and dried. On the production of the above agreement it was objected that it could not be received in evidence inasmuch as it was not stamped, and the learned Judge being of that opinion, the Plaintiffs were nonsuited.

[454] A rule nisi for setting aside the nonsuit having been obtained in the course of last term,

Runnington, Serjt., was proceeding on this day to shew cause, contending that the agreement in question fell within the words of the 23 Geo. 3, c. 58, s. 1, which imposes a duty upon every piece of paper upon which any agreement shall be written, whether the same shall be only the evidence of the contract, or obligatory upon the parties from being a written instrument, and that it did not fall within the exception in the 4th section of the same act respecting agreements made for or relating to the sale of any goods, wares, or merchandizes; when the other side was called upon by the Court to support the rule.

Accordingly, Shepherd, Serjt., argued that the agreement in question fell within the exception in the 4th section of the act; for that although the quantity of hops to be delivered was measured by the number of acres in the possession of the Defendant's testator, yet that the hops at the time of the delivery were to be in the condition of goods, wares, and merchandizes; that this case was not like an agreement for the sale of corn standing on the ground where the purchaser is to reap the corn, since the

(a) Vide *Skrine v. Elmore*, 2 Campb. 407. *Ingram v. Lea*, id. 521. *Crosby v. Wadsworth*, 6 East, 602. *Boydell v. Drummond*, 11 East, 142. *Parker v. Staniland*, 11 East, 362. *Emmerson v. Heelis*, 2 Taunt. 38.

subject-matter of the contract in that case cannot be considered as goods, wares, and merchandizes, at the time when it comes into the possession of the purchaser, whereas in the present instance it would have been a breach of the contract, if the seller had omitted to deliver them in the condition of goods, wares, and merchandizes, that is, gathered, dried, and pocketed; that the circumstance of the agreement being made before the goods were in esse, could not take it out of the exception, for that if such were its effect, every agreement to deliver any article of what kind soever at a future time, where the article is not in existence at the time of the contract, must also be deemed not within the exceptions; as if a wine-merchant should undertake to deliver a certain quantity of wine in the ensuing year of the vintage of the current year.

LORD ALVANLEY, Ch. J.—By this contract the Defendant's testator undertook to sell to the Plaintiffs the whole produce of twenty-two acres in his possession, and if he had sold one bushel to any other person he would have been liable to an action. He agreed to sell the whole produce of the land in a certain state: the first term of the agreement is, that he will sell the whole produce of the land, and the second, that it shall be in a certain state at the time of delivery. It is [455] therefore an agreement for the sale of goods, wares, and merchandize, and something more. I think the agreement is not within the exception of the statute.

HEATH, J.—It appears to me that the subject-matter of this agreement must be taken with reference to the time at which the contract was made. Now at that time the hops did not exist in the state of goods, wares, and merchandize.

ROOKE, J.—The object of the Legislature in introducing the exception of the 4th section was to prevent the duty which had been imposed by the 1st section upon all agreements generally from impeding ordinary commercial transactions. But the subject of the present agreement is a speculative bargain relative to things not in esse at the time when the contract was made. It does not appear to me therefore to fall within the meaning of the exception.

CHAMBRE, J.—There is a little ambiguity in the terms of this agreement, but that has been cleared up by the parol testimony. Indeed the declaration puts the matter beyond all doubt, for it states the contract to be for the specific produce of twenty-two acres of land alleged to be in the possession of the vendor. Now the statute only exempts contracts for the sale of goods, wares, and merchandizes. But this contract gives the vendee an interest in the whole produce of that part of the vendor's farm, which consists of hop-grounds. If the vendor had grubbed up the hops, or had refused to gather or dry them, it would have been a breach of the contract. Though I admit that a contract for the sale of so many hops as twenty-two acres might produce, to be delivered at a distant day, might fall within the exemption of the act, notwithstanding the hops were not in the state of goods, wares, and merchandizes, at the time of the contract made, yet I cannot think the present agreement within that exemption, since it gives an interest to the vendee in the produce of the vendor's land.

Rule discharged.

EX PARTE MOTLEY ET UXOR. June 11th, 1801.

The Court refused to amend a fine, passed two years back, by altering the surnames of the Deforcians, though it was sworn that a wrong name had been inserted by mistake.

Williams, Serjt., applied to the Court to amend a fine by altering the surnames of the Deforcians in the writs of covenant and dedimus potestatem, and in the præcipe and [456] concord acknowledged by them, and at the several offices through which they had passed, from Wood to Motley; and that the chirographer should be ordered to deliver up such writs, &c. for the above purpose. He made this application upon an affidavit of the attorney who was employed to pass the fine in the year 1798, and of the Deforcians themselves, the former of whom stated, that at the time he was employed to pass the fine, and through the whole of the transaction, he understood the names of the Deforcians to be Wood, and accordingly inserted that name instead of Motley, which he now found to be their real names, in the writ of covenant, and that they being illiterate persons only put their mark, and did not discover the mistake; and the Deforcians stated that the fine was read over to them, and they

understood it, but did not discover the mistake which had been made with respect to their names.

LORD ALVANLEY, Ch. J.—This is an application to amend a fine, by inserting the names of Motley and wife instead of Wood and wife. It is not sworn that the parties at the time the fine was passed were as well known by one name as the other, or even that they were known by the name of Wood at all; and we are desired to make the amendment without any reason given why one name was put for the other. The consequences of such an amendment must be obvious to everybody. Suppose an ejectment brought, and a search made for a fine and none found; and then when the parties come to a trial a fine is produced which escaped the search, because the name has been changed. These amendments ought not to be made, except in cases where the alteration is of such a nature as that no one can be misled by it. Indeed I will go further and say, that if the Court of Common Pleas had allowed such an amendment as is now applied for, I, as Master of the Rolls, would not have granted a new writ of covenant.

The other Judges concurring,

Williams took nothing by his motion (a)¹.

[457] MILLS AND OTHERS v. BALL. June 12th, 1801.

A. living at N. in Devonshire, ordered goods of B. in London, who sent them by ship via Exeter, consigned to A. and advised him thereof. On their arrival at Exeter they were delivered to C. a wharfinger who received them on A.'s account, and paid the freight and charges; after their arrival A. wrote to B. informing that in consequence of his affairs being deranged he should not take the goods, and telling him that they were at Exeter; at this time A. had committed an act of bankruptcy, upon which he was afterwards declared a bankrupt. B. applied to C. for the goods, and tendered him the freight and charges due; upon which C. promised not to deliver them out of his custody, but afterwards did deliver them to the assignees of A. though indemnified by B. Held 1st, that B. had a right to stop the goods in the hands of C.; and 2dly, that he might maintain trover for them against C.(a)².

This was an action of trover for one cask of madder and one chest of indigo; to which the Defendant pleaded the general issue. The cause came on to be tried before Lord Eldon, Ch. J., at the Sittings at Guildhall after last Hilary Term, when a verdict was entered for the Plaintiffs with 111l. 7s. 3d. damages, and 40s. costs, subject to the opinion of this Court upon the following case: Josias Gard a trader of North Tawton, in the county of Devon, about twenty-five miles from Exeter, on the 4th of July 1799, by letter to the Plaintiffs, who were dry-salters in London, ordered the goods which were the subject of this action to be sent to him. The Plaintiffs accordingly on the 6th of July 1799 sent the goods which were of the value of 111l. 7s. 3d. by the ship "Lively," consigned to Gard, and sent a letter of advice to him inclosing the invoice, dated the 6th of July 1799, which letter Gard received in course; and the goods on their arrival at Exeter were delivered to the Defendant, who was a wharfinger there, and received them on Gard's account, and paid the freight and charges with which he debited Gard, and if any accident had happened to the goods before the receipt of the following letter, the Plaintiffs would have called on Gard for payment. On the 16th September 1799, soon after their arrival, Gard wrote the following letter to the Plaintiffs Messrs. Smith, Mills, Berkett, and Co. "Northtawton, 16th September 1799. Sirs,—As some disagreeable matters have recently taken place in my concerns, I have thought proper to leave the madder and East India indigo which I lately gave you an order for on your account. It is arrived safe at Exeter, so you will please to sell the same to any of your correspondents there, as I would wish to do by you as I would wish to have done by myself. I am very truly, Sirs, your obedient servant, Josias Gard.

(a)¹ Vide *Cross v. Pead*, ante, vol. i. p. 137, and the cases there cited: also *Pearson v. Pearson*, 1 H. Bl. 73. *Wynne v. Wynne*, 7 Mod. 492, 506. *Wheeler v. Hill*, post, Mich. T. Nov. 24. *Dowse v. Lloyd*, post, Mich. T. Nov. 26, and *Milbanke v. Jolliffe*, cited *ibid.* in notis.

(a)² And see *Openheim v. Russell*, 3 B. & P. 42. *Goss v. Smith*, 1 Campb. 284. *Bathlinck v. Inglis*, 3 East, 381, 389.

The goods are at the wharfingers' office, marked 'Lively,' R. Mather." In consequence of this letter the Plaintiffs wrote to their agent at Exeter to stop the goods in possession of the Defendant, and on the 20th of September the Plaintiffs' agent went to the Defendant, in whose warehouse the goods then were, and tended him [458] his freight and charges and demanded the goods on the behalf of the Plaintiffs. The Defendant said (as the fact was) that some of Gard's creditors had been there before to demand them, but he had refused to deliver them, hearing that Gard had stopped payment. He then promised not to deliver them out of his custody till he was certain of a safe delivery. On the 2d of October the demand was repeated by the Plaintiffs' agent and a bond of indemnity left with the Defendant to indemnify him against any claim that might be made from any other person. On the 23d of September a commission of bankrupt issued against Gard, who was subject to the bankrupt laws, indebted to the petitioning creditors in a sum sufficient to support the commission, and had committed an act of bankruptcy on the 8th of September 1799. On the 1st of October 1799 he was duly declared a bankrupt, and on the 19th of October 1799, assignees of his effects and estate were duly chosen, and an assignment executed. On the 3d of November the Defendant delivered the goods to the assignees, who sold them for 103l. 7s.; the charges amounted to 3l. 19s. The questions for the opinion of the Court were, whether the Plaintiffs were entitled to recover? and if they were, what damages? whether 111l. 7s. 3d. or 103l. 7s., or 99l. 17s.? If the Court should be of opinion with the Plaintiffs, the verdict to stand for such sum as they should direct; if for the Defendant a nonsuit to be entered.

Best, Serjt., for the Plaintiffs. The question is, whether the Plaintiffs under the circumstances of this case were entitled to stop the goods in transitu? The general rule is, that where the vendee becomes insolvent the vendor has a right to stop the goods at any time before they come into the actual possession of the vendee. In *Lickbarrow v. Mason*, 2 Term Rep. 71, Mr. Justice Ashburst says, "where the delivery is to be at a distant place, as between the vendor and vendee, the contract is ambulatory till delivery, and therefore in case of the insolvency of the vendee in the mean time, the vendor may stop the goods in transitu." Now at the time when these goods were demanded by the Plaintiffs, they had not arrived at their journey's end; for they had only reached Exeter, and were to be carried on from thence, and delivered to the vendee at North Tawton. The case of *Holgson v. Loy*, 7 Term Rep. 440, is a decided authority in the Plaintiffs' favour. Indeed that case is much stronger than the present, since the initials of the vendee had been marked upon the articles in dispute previous to [459] the stoppage in transitu, and they were delivered to a carrier nominated by the vendee: neither of which circumstances occurs in this case. So in the case of *Stokes v. La Riviere*, cited 3 Term Rep. 466, and 7 Term Rep. 443, the goods were sent by the particular conveyance appointed by the consignee: and in *Hunter v. Beal*, cited 3 Term Rep. 466, the goods in question were sent to the Defendant, who was an inn-keeper, directed to the consignees, and while in his hands he received directions from the consignees to ship them, and was only prevented from so doing because he arrived too late at the quay with the goods; yet in both these cases the consignees were held entitled to stop the goods in transitu. And in *Hunt v. Ward*, cited 3 Term Rep. 467, where goods were sent by order of the vendor to a packer, the packer was considered as a middle man, and the vendor was held to have a right to stop the goods. If the Court should be of opinion that the Plaintiffs are entitled to succeed, the only remaining question will be, what damages the Plaintiffs shall recover? Whether 111l. 7s. 3d. the value of the goods, 103l. 7s. the sum for which they were sold, or 99l. 17s. the sum for which they sold after deducting the charges?

Here the Court expressed themselves clearly of opinion that the Plaintiffs were only entitled to the smaller sum.

Shepherd, Serjt. contra. The letter of the 16th of September 1799, being written to the Plaintiffs by the bankrupt after the act of bankruptcy, can have no effect in the case, as it cannot operate to rescind the contract. *Barnes v. Freeland*, 6 Term Rep. 80, *Smith v. Field*, 5 Term Rep. 402, in which latter case the Court, referring to a case of *Salte v. Field*, 5 Term Rep. 211, take the distinction that though before the act of bankruptcy the vendee may rescind the contract, yet that after that time he cannot. The principal questions therefore in this case are, whether the claim made amounted to a stoppage, and whether at the time they were claimed they were still in transitu? It is true that the doctrine laid down by Lord Hardwicke in *Snee v. Prescott*, 1 Atk.

250, "that a consignor may get the goods back again by any means, provided he does not steal them," is very strong. But in that case as well as in all the cases since, in which that doctrine has been recognized, the goods have been actually seized by the consignor before they have come into the possession of the consignee; whereas in this case the vendor was not able to get them out of the wharfinger's hands into his own possession, and is now claiming to have a right of action against the wharfinger for not delivering them. Had the wharfinger delivered the goods to the Plaintiffs on their demand, perhaps they would have been entitled to retain them; but Lord Eldon, when this cause was tried, seemed to entertain some doubt as to their right to sue the wharfinger. Though if the Plaintiffs had put their mark upon the goods while in the warehouse of the wharfinger, or if the wharfinger had agreed to hold them for the Plaintiffs, such circumstances might have amounted to a stoppage; still it may be very questionable whether a mere notice to the wharfinger of a right to the goods is tantamount to a stoppage. In considering whether the goods were in transitu at the time the notice was delivered to the wharfinger, it may be observed that in all the cases on this subject expressions have been used which must be deemed figurative; such as that the goods must have come to the "corporal touch" of the consignee, which Lord Kenyon in *Ellis v. Hunt*, 3 Term Rep. 468, allows to be a figurative expression, and that they must have come "to their journey's end," which if strictly true would do away the authority of *Ellis v. Hunt*. Now here the wharfinger must be deemed the agent of the bankrupt, since he received the goods on his account and debited him with the freight and charges.

LORD ALVANLEY, Ch. J. The case before the Court is shortly this. Gard being a trader at North Tawton, gives orders to the Plaintiffs to send the goods in question to him from London, but does not direct that they should be sent by any particular ship; his orders were, that they should be sent to Exeter to be forwarded to him at North Tawton. They were accordingly shipped, arrived at Exeter, and were put into the hands of a wharfinger to be forwarded to their journey's end. In the books of the wharfinger they were put to the account of Gard as the person to whom they were directed, and he was considered as the wharfinger's pay-master. In this state of things the letter of the 16th September was received by the Plaintiffs, the meaning of which I take to be this; the vendee says, "my situation is such that I will not receive the goods, and you may take them back again if you think proper." The Plaintiffs immediately on the receipt of this letter sent to the wharfinger and forbade him to deliver them according to the direction. The wharfinger promised not to deliver them till he could do so with safety, notwithstanding which he afterwards delivered [461] them to the assignees of Gard. The question is, whether the goods in the hands of the wharfinger were in such a situation that the vendors could stop them. The cases cited for the Plaintiffs have established that where there is a contract for the sale of goods, and a delivery has been made to a middle man, who is merely the vehicle between the buyer and seller, the latter, in case of the insolvency of the former, may stop them at any time before they have arrived in such a state as to be in the actual or constructive possession of the buyer. The only question is, whether these goods are to be considered as having been in the hands of a middle man, or as having been taken in the possession of the person for whom they were ultimately intended? If in the course of the conveyance of the goods from the vendor to the vendee, the latter be allowed to exercise any act of ownership over them, he thereby reduces the goods into possession, and puts an end to the vendor's right to stop them. So, though it has been said that the right of stoppage continues until the goods have arrived at their journey's end, yet if the vendee meet them upon the road and take them into his own possession, the goods will then have arrived at their journey's end with reference to the right of stoppage (a). I am of opinion that the wharfinger in this case not having been particu-

(a) But in a case of *Holst v. Pownall and another*, 1 Esp. N. P. Cas. 240, where a cargo consigned to a person at Liverpool was on the arrival of the ship there taken possession of by the assignees of the consignee, who had become bankrupt; and the ship was afterwards obliged to perform quarantine, and during that quarantine was claimed by the consignor, Lord Kenyon is reported to have ruled that the consignor had a right to the goods, saying that "in order to give the consignee a right to claim by virtue of possession, it should be a possession obtained by the consignees on the completion of the voyage; that the case put by the Defendant's counsel, that the

larly employed by the vendee, is to be considered as a middle man. And it has almost been admitted in the argument, that if the Plaintiffs could have got the goods into their possession, they would have had a right to keep them. But then another question arises, viz. admitting that the Plaintiffs would have had a right to retain the goods had they got them into their own [462] possession, whether they have any right of action to recover them out of the hands of the middle man? I am very far from wishing that it should be understood that an action may be brought by the person entitled to stop the goods against any carrier who, after notice to retain the goods, delivers them to the person to whom they were originally consigned: such a rule would be highly oppressive to carriers. A carrier knows nothing of the vendor. In the case of a conveyance by ship, the master signs a bill of lading by which he engages to deliver the goods to the consignee or his order: and if he deliver them accordingly, it can hardly be supposed that he thereby subjects himself to an action, because the vendor has a right to stop the goods in transitu (*a*). In the present case, however, full notice was given to the wharfinger by the consignor, and no demand was made on the part of the original consignee. The consignor by letter demanded possession; and the wharfinger admitted himself to be in the nature of a stakeholder bound to deliver according to the right. Without determining, therefore, whether the wharfinger would have been liable without notice, or even after notice, supposing no undertaking to have been made by him, I think it clear that the Defendant in this case having undertaken "not to deliver the goods out of his custody till he was certain of a safe delivery," is answerable to the Plaintiff.

HEATH, J. I am of the same opinion. The general rule of law is admitted on all hands. The only point in this case depends upon the application of that rule to the facts. The question therefore is, whether these goods in point of fact were stopped in transitu? Here there certainly was no corporal touch; but that took place which was equivalent to it. The Plaintiffs gave notice to the wharfinger and demanded the goods as their property: and the wharfinger undertook not to deliver them till he was certain of a safe delivery. It is unnecessary therefore to consider whether without such undertaking the Defendant would have been liable. Whenever that case occurs it will receive due consideration from the Court. In this case doubts have arisen with some of the Court respecting the effect of the letter of the 16th of September. It appears to me however that it will not vary the Plaintiffs' right. In [463] *Berwick v. Atkyn*, 1 Str. 165, the refusal by the bankrupt to receive the property seems to have been considered meritorious. So I think that the conduct of the bankrupt in this case was commendable.

ROOKE, J. In this case there is no dispute respecting the rule of law. The only difficulty arises upon the application of the facts to the law. It is agreed that a contract once completely executed cannot be rescinded. If therefore the goods had got into the hands of the consignee, there is no doubt that he would have been precluded from giving a preference to any one. But while the goods are in transitu they may be stopped. Then can there be any doubt whether these goods were in transitu or not? The consignees did nothing to take possession of the goods while they remained with the wharfinger before the Plaintiffs made their claim. That claim was made in consequence of information (which appears to me to have been very proper) that circumstances had arisen in the affairs of the consignees which made it improper

consignee had a right to go out to sea to meet the ship could not be supported, as it might go the length of saying that the consignee might meet the vessel coming out of the port from whence she had been consigned, and that that should divest the property out of the consignor, and vest it in himself; which was a position not to be supported, as there would then be no possibility of any stoppage in transitu at all." It is added in the report, that the Court of King's Bench, on a motion for a new trial, confirmed the opinion delivered by Lord Kenyon at Nisi Prius.—Quære, whether there be any distinction between carriage by sea and carriage by land upon this point: for it may be observed that in the former case the master, by signing the bill of lading, agrees with the consignor to deliver the goods at the destined port; whereas in the latter no such express agreement is entered into between the vendor and the carrier.

(*a*) In *Fearon v. Bowers*, 1 H. Bl. 364, in notis, it was held by Lee, Ch. J., that where several bills of lading are indorsed to different persons, the captain is discharged by a delivery to either of the consignees.

for them to receive the goods. In what manner that information was obtained can make no difference in the case. The honesty of the consignees ought not to prejudice the Plaintiffs' right. If indeed the consignees after getting the goods into their hands had given them up, the case would have been very different: but here the information was given while the goods were in transitu. I do not meddle with the question how far an action might be maintained against a carrier upon a bare notice not to deliver; but I do not say that such an action might not be maintained.

CHAMBERE, J. The 1st question is, whether these goods were in transitu at the time they were claimed by the Plaintiffs? The goods were directed to be sent to North Tawton, where the bankrupt lived, and having been carried as far as they could go by water, they were delivered to a wharfinger to be forwarded to the bankrupt. While they were with the wharfinger the demand was made, no act having been done to shorten the journey. We cannot, therefore, without overturning all the cases, say the goods were not in transitu. The second objection is, that in order to entitle the Plaintiffs to this action, they should have been taken actual possession of by the Plaintiffs, either by corporal touch, or something equivalent thereto. The first delivery to the carrier vests the property in the vendee, but the property so vested is a defeasible property, and may be defeated by the insolvency of the vendee. When therefore the vendor, having notice of such insolvency, makes a demand upon the person in whose custody the goods are, he thereby defeats the contract. If this were not the case, the carrier would have it in his power to decide between the vendor and the assignees of the bankrupt. In the present case there can be no doubt of a conversion having taken place. Cases of difficulty may indeed arise; as, if a carrier upon reasonable doubt should refuse to deliver up the goods without further authority, or until the circumstances of the case are ascertained (*a*): for a demand and refusal do not always constitute a conversion (*b*); there are many cases to the contrary. But here there was an actual conversion, the Defendant having delivered the goods contrary to his own undertaking. There is another point however upon which I have entertained some doubt. The vendor did not get possession of these goods by his own diligence and care, or in consequence of casual information; but through the intervention of the bankrupt himself eight days after the act of bankruptcy committed. That circumstance raised some doubt in my mind; since it appeared that the bankrupt had thereby given a preference to the Plaintiffs over the rest of his creditors. But still upon the whole I am inclined to agree with the rest of the Court. I am not fond of multiplying small distinctions, and think that too many have been already taken: and the general inconvenience will not be very great, since many cases of this kind are not likely to arise. It seems indeed that there will be a certain degree of discretion vested in the bankrupt, since he will be empowered to accept goods which are coming to him from one consignee, and to give notice to another consignee to stop them in transitu. But as no fraud appears to have been committed on the part of the Plaintiffs in this case, I am inclined on this point, as well as the others, though not without some doubt, to concur with the rest of the Court.

Per Curiam. Let the verdict be entered for the Plaintiffs for 99l. 17s.

[465] GOVETT v. JOHNSON AND ANOTHER. June 17th, 1801.

When two only of three joint contractors are sued, the Court will not stay proceedings upon the bail-bond, unless the Defendants will undertake not to plead in abatement.

Lens and Bayley, Serjts., were to have shewn cause against staying proceedings

(*a*) If a person finds my goods and I demand them, and he answers that he knows not whether I am the true owner or not, and therefore refuses to deliver them, this is not to be deemed a conversion to his own use, as he keeps them for the owner. Dict. Per Coke, Ch. J. 2 Bulstr. 312. The same doctrine is laid down by Lord Kenyon, in *Solomon v. Davies*, 1 Esp. N. P. Cas. 83. But in this case it was clear that the demand was made by a third person, not by, but on the behalf of the owner.

(*b*) Dict. Per Lord Mansfield, 3 Burr. 1243. And indeed if demand and refusal only be found upon a special verdict, it shall not be adjudged a conversion, 10 Co. 57, Hob. 187, 2 Mod. 245. See also *Ross v. Johnson*, 5 Burr. 2827, and *Syeds v. Hay*, 4 Term Rep. 260.

upon the bail-bond in this case on the usual terms, but said they should content themselves with insisting against the Defendants being allowed to plead in abatement that two only out of three joint-contractors were sued; and to shew that they ought to be restrained from so pleading, they cited 2 Salk. 519, *Anon.* as directly in point.

Best and Onslow, Serjts., contended, that the plea that other joint-contractors were not sued was not a mere dilatory plea, and therefore the Court would not impose such a restriction as the Plaintiff required.

But The Court said they thought it a very reasonable restriction, and that they would not stay the proceedings on the bail-bond to give the Defendants an opportunity of pleading in abatement.

Rule absolute, on the Defendants undertaking not to plead in abatement.

LEES v. WARLTERS. June 18th, 1801.

The Defendant in replevin having averred in his cognizance that the Plaintiff held the land under "a certain demise to him the said J. L. (the Plaintiff) theretofore made," Plaintiff pleaded in bar that he did not hold under a demise in manner and form. Upon this, Defendant obtained an order to amend by striking out the words "to him the said J. L." with liberty to the Plaintiff to plead *de novo*, and that in case the Plaintiff should plead new matter, the Defendant should pay all the costs of the amendment. The Defendant having amended accordingly, the Plaintiff demurred specially, and assigned for cause that it did not appear to whom the demise was made. Held that the demurrer was not new matter.

Replevin. The Defendant made cognizance as bailiff to J. L. for rent-arrear, and in his several cognizances stated that the Plaintiff held the land "under a certain demise to him the said John Lees theretofore made." The Plaintiff pleaded in bar, that he did not hold the land under a demise to him, made in manner and form, &c. After this the Defendant obtained a judge's order "that he should be at liberty to amend the cognizances, by striking out in each cognizance the words 'to him the said John Lees,' and that Plaintiff should also be at liberty to plead *de novo*; and in case the Plaintiff should plead new matter, the Defendant should pay the costs of the amendment to be taxed by the Prothonotary: but if the Plaintiff should not plead new matter, the Defendant should pay such costs only as should be occasioned by making the cause a remanet, and passing the record." The cognizances having [466] been amended according to the order, the Plaintiff demurred, specially, assigning for cause that it did not appear to whom the demise was made (*a*)¹.

The Prothonotary considering the special demurrer as new matter, allowed all the costs of the amendment; upon which a rule was obtained by Bayley, Serjt., calling on the Plaintiff to shew cause why the Prothonotary should not be directed to review his taxation.

Against which rule Best, Serjt., now shewed cause, and contended, that the demurrer arose entirely out of the alteration in the cognizances, and stated that it had always been the practice in the Prothonotary's office to consider such a demurrer as new matter; in which he was confirmed by the Prothonotary himself.

But The Court were of opinion that this special demurrer ought not to be considered as new matter within the meaning of the order, and directed the Prothonotary to review his taxation.

Rule absolute.

HOWELL v. COLEMAN. June 18th, 1801.

The Court will not set aside proceedings and order the bail-bond to be delivered up, because a Defendant has been arrested on a special *capias* in which as well as in the affidavit to hold to bail, the initials only of his Christian name were inserted (*a*)².

Bayley, Serjt., moved for a rule to shew cause why all proceedings in this case

(*a*)¹ Vid. the Stat. 11 Geo. 2, c. 19, s. 2, which empowers Defendants in replevin to avow or make cognizance generally without setting out the title of the lessor.

(*a*)² But see *Reynolds v. Hankin*, 4 B. and A. 536.

should not be set aside for irregularity, and the bail-bond be delivered up to be cancelled.

It appeared that the Defendant had been arrested upon a special *capias*, in which he was named W. G. Coleman, without stating either of the Christian names at length, and that the affidavit to hold to bail described him in the same manner.

The Court observed that the Defendant had not been arrested by a wrong name, and thought the objection immaterial.

Bayley took nothing by his motion.

[467] TAPPENDEN AND OTHERS, Assignees of Bray, v. RANDALL.
June 19th, 1801.

[Referred to, *Hermann v. Charlesworth*, [1905] 2 K. B. 132.]

A. in consideration of 200*l.* paid by B. gave a bond for the payment of an annuity to the latter of 100 guineas until the hop-duties should amount to a certain sum. Before this event had taken place A. brought an action to recover back the 200*l.* of B. Held that the action was maintainable (a).

This cause came on to be tried before Lord Alvanley, Ch. J., at the second Sittings in this Term, when a verdict was found for the Plaintiffs, damages 216*l.* costs 10*l.* subject to the opinion of the Court on the following case :

The declaration stated, that the Defendant, before the bankruptcy of Bray, was indebted to Bray in 300*l.* for money lent, and 300*l.* for money paid, and that he was indebted to the Plaintiffs after the bankruptcy in 300*l.* as well for money before Bray became a bankrupt received to Bray's use, as for money after the bankruptcy received to the use of the assignees, and upon an account stated with the Plaintiffs as assignees.

Bray duly became a bankrupt, and a commission was issued against him, under which the Plaintiffs were declared his assignees. On the 12th of November 1800, previous to any act of bankruptcy, in consideration of 210*l.* then paid by Bray to the Defendant, the Defendant entered into a bond in the penal sum of 999*l.* with a condition as follows: "Whereas the said William Randall hath, in consideration of two hundred and ten pounds to him paid by the said John Bray, at the time of the sealing and delivery of the above-written bond or obligation, contracted and agreed to pay unto the said John Bray or his assigns on the first day of May in every year, one annuity or clear yearly sum of one hundred and five pounds until he the said William Randall, his heirs, executors, or administrators, can prove by evidence, or otherwise to abide by the report of three eminent hop-merchants, who shall make it appear to the satisfaction of the said John Bray, his executors, administrators, and assigns, that the revenue received by Government by reason of the duties now assessed by Parliament upon hops grown in Great Britain, shall in the present or any one year hereafter amount to a full and clear revenue or sum of two hundred thousand pounds, such duties to be taken according to those at present imposed by Parliament, and not to be affected by any subsequent alteration whatever; and for securing the due payment of the said annuity of one hundred and five pounds until such event, the said William Randall hath [468] entered into the above-written bond or obligation: Now therefore the condition of the above-written bond or obligation is such, that if the said William Randall, his heirs, executors, administrators, or assigns, shall and do from the day of the date of the above bond, well and truly pay, or cause to be paid unto the said John Bray or his assigns, one annuity or clear yearly sum of one hundred and five pounds of lawful money of Great Britain on the first day of May in each and every year, without any deduction or abatement whatsoever, until the said William Randall, his heirs, executors, or administrators shall prove by evidence, or otherwise abide by the report of three eminent hop-merchants, who shall make it appear to the satisfaction of the said John Bray, or his assigns, that the revenue received by Government by reason of the duties now assessed by Parliament upon hops shall in the present or any one year hereafter amount to a full and clear revenue or sum of two

(a) And see *De Havilland v. Bowerbank*, 1 Campb. 50. *Walker v. Constable*, 1 B. & P. 306. *Mountford v. Willis*, ante, 337. *Aubert v. Walsh*, 3 Taunt. 277. *Smith v. Bickmore*, 4 Taunt. 476.

hundred thousand pounds, such duties to be taken according to those at the present time imposed by Parliament, and not to be affected by any subsequent alteration therein; and shall and do make the first payment of the said annuity of one hundred and five pounds on the first day of May in the year of our Lord 1802, then and in such case or cases the above-written bond or obligation should be void and of none effect, otherwise it shall be and remain in full force and virtue.

WM. RANDALL (Seal).

"Sealed and delivered (being first legally stamped, and several obliterations and interlineations being made) in presence of
John Broad.
Wm. Mann.

"Received at the time of the sealing and delivery of the within-written bond or obligation of and from the within-named John Bray the sum of two hundred and ten pounds (being the consideration paid for the annuity within secured), by me. Signed in the presence of } £210.
John Broad, Wm. Mann.

WM. RANDALL."

Before the bringing of this action the Plaintiffs applied to the Defendant, stating that they considered the bond to be illegal, [469] and demanding the return of the 210l. and interest, which was refused.

If the Court should be of opinion that the Plaintiffs were entitled to recover back the said sum of 210l. with interest thereon, then the verdict to stand. If the Court should be of opinion that the Plaintiffs were entitled to recover back the said sum of 210l. but were not entitled to interest thereon, then the verdict to be entered for 210l. damages and 40s. costs. If the Court should be of opinion that the Plaintiffs were entitled to recover nothing, a nonsuit to be entered.

Bayley, Serjt. for the Plaintiffs. The Plaintiffs' right to recover in this action results from two points, which are both clearly in their favour, viz. 1st, That the bond stated in the case, and upon which the money was advanced is void; and, 2dly, that this action is brought before the event has happened, which the parties had in contemplation at the time of entering into the contract. 1st, That the bond is void, most clearly appears from *Atherfold v. Beard*, 2 Term Rep. 610, and *Shirley v. Sankey*, ante, 130. [This was admitted on the other side.] 2dly, The money advanced by the bankrupt was not advanced on a contract which was either *malum prohibitum* or *malum in se*, but merely money advanced on a consideration which has failed, the bond given to secure its repayment not being such as can be enforced at law. In *Cotton v. Thurland*, 5 Term Rep. 405, which was an action to recover a deposit from a stake-holder on a wager respecting the event of a boxing match, it was admitted that as long as the contract is executory, money so paid may be recovered back; and though that case was decided on the ground of the action being brought against the stake-holder, who not having paid it over was justified in refusing to return it, yet Lord Kenyon alludes to the distinction between contracts executory and executed when he says, "this is not like the case of a policy of insurance, where the risk having been run the party has attempted to regain his money again." Indeed, in *Lowry v. Bourdieu*, Doug., 468, where the insured in an illegal policy attempted to recover back the premium after the risk had been run, Buller, J., says, "there is a sound distinction between contracts executed and executory, and if an action is brought to rescind a contract you must do it while the contract continues executory; and observes that if the action had been commenced before the risk was over, the Plaintiff might have had a ground [470] for his demand. With respect to the late case of *Fandryck v. Hewitt*, 1 East, 96, where it was held that the premium paid on an insurance to cover enemy's property could not be recovered back, there the risk had been run before the action was brought, and the act of insuring enemy's property was an offence against the policy of the state. Indeed in *Lacassade v. White*, 7 Term Rep. 535, money paid on an illegal wager was recovered back after the event upon which the wager proceeded had turned out against the Plaintiff, the Court holding it more consonant to sound policy to permit money paid on an illegal consideration to be recovered back by the party paying it, than by denying the remedy to give effect to the illegal contract.

Best, Serjt. for the Defendant. It is perfectly clear that where money has been

advanced without any consideration it may be recovered back, but if advanced on a consideration which fails because the contract is illegal, then the rule applies in *pari delicto potior est conditio possidentis*. The only case in which this rule has ever been impeached at all is *Lacausade v. White*, and that decision was treated by the Court in *Vandyck v. Hewitt* as not quite sound, *Le Blanc, J.*, saying it had since been "very much canvassed in *Howson v. Hancock* (8 Term Rep. 575), where it was considered that money deposited on an illegal wager and paid over to the winner could not be recovered from him." If the contract in the present case be a legal one, the bond is not void but the Plaintiff will have the benefit of the consideration he has advanced when his time comes to demand payment of the annuity; if it be not legal the rule of *potior est conditio possidentis* applies. It is not necessary that the contract should be immoral, it is sufficient if it be illegal; and indeed in *Howson v. Hancock*, Lord Kenyon so treats it when he says, "here the money was not paid on an immoral, though an illegal consideration," (*viz.* a wager on a horse-race,) and yet the Plaintiff was not permitted to recover.

LORD ALVANLEY, Ch. J. Without taking time to look into all the cases which have been cited, it does appear to me to be clear that the Plaintiff in this case is entitled to recover back the money which he has advanced. In the present transaction there was no moral turpitude whatsoever: and though it has sometimes been held that where there is moral turpitude in the contract, the Court will not allow the party who has advanced [471] money on such a contract to recover it back; yet no argument of that sort can be urged in the present case. The simple statement of this case is, that after the money had been paid, but before the time had arrived at which the event in contemplation of the parties contracting was to take place, it was found out that the contract was illegal; and therefore the money paid was demanded back again. There is hardly any case of this sort in which the distinction between immoral and illegal transactions has not been taken. I do think that there is a material distinction between wagers which are not recoverable on account of some inconvenience which the public may sustain by the open discussion of the questions to which they give rise, and those which are in themselves immoral. In the present case one party has paid money without any consideration and is therefore entitled to recover it back from the party to whom he paid it.

HEATH, J. I am of the same opinion. It seems to me that the distinction adopted by Mr. Justice Buller between contracts executory and executed, if taken with those modifications which he would necessarily have applied to it, is a sound distinction. Undoubtedly there may be cases where the contract may be of a nature too grossly immoral for the Court to enter into any discussion of it; as where one man has paid money by way of hire to another to murder a third person. But where nothing of that kind occurs I think there ought to be a *locus pœnitentiæ*, and that a party should not be compelled against his will to adhere to the contract.

ROOKE, J. This is an action brought by assignees to recover back money paid by way of consideration for a bond which clearly could not be put in force, and I think this action may well be supported. There is nothing criminal in the contract which was entered into between these parties; nor has that contract been executed; nor indeed is this a case where money which has been paid over by a stake-holder is sought to be recovered. I therefore see no reason to prevent the present Plaintiffs from recovering: and I wish it to be understood that I fully accede to the doctrine laid down by Mr. Justice Buller respecting contracts executory and executed. If in this case any money had been paid upon the bond I should have felt great difficulty respecting the right of the Plaintiffs to recover.

CHAMBRE, J. Undoubtedly there is a great deal of refinement in the discussion which arises out of this species of action: but [472] still I think that the nature of this contract is not such as to prevent the Plaintiff from recovering the money which he has advanced without consideration. The contract which the parties entered into is not prohibited by any declaration of any positive law upon the subject, nor is it *malum in se*: but it is a contract which cannot be put in force merely because it is inconvenient that the merits of the question should be publicly discussed. Indeed, supposing the parties able to refer to some published documents respecting the amount of the duties, all objections to the wager would cease. Before the contract was in any way executed, it being found that the aid of the law could not be had to enforce the bond, application was made to the Defendant to pay back the money which had been advanced, and the

Defendants having refused to pay it, I think the Plaintiffs are entitled to recover in this action.

Postea to the Plaintiffs.

It was then suggested to the Court that it would be necessary for them to give an opinion respecting the amount which the Plaintiffs were entitled to recover; upon which the Court observed that in an action for money had and received, nothing but the net sum advanced without interest could be recovered (a)¹, and that the verdict must therefore be entered for the lesser sum.

BAGOTT v. ORR. June 20th, 1801.

[Distinguished, *Blundell v. Catterall*, 1821, 5 B. & Ald. 307. Referred to, *Saltash Corporation v. Goodman*, 1881-82, 7 Q. B. D. 116; 7 App. Cas. 633. Discussed, *Brinchman v. Matley*, [1904] 2 Ch. 327.]

Primâ facie every subject has a right to take fish found upon the sea-shore between high and low water-mark; but such general right may be abridged by the existence of an exclusive right in some individual. Quære. If there be a primâ facie right in the subject to take fish-shells found on the sea-shore between high and low water mark (a)²?

Trespass. The 1st count was for breaking and entering the Plaintiff's closes, called the Foot-Muscle-Skear, the Great-Out-Muscle-Skear, and the Sea-Shore, in the parish of Keysham, and Plaintiff's shell-fish and shells there finding, catching, taking, and carrying away and converting and disposing thereof to Defendant's own use. The 2d count was for breaking and entering the same closes, and with Defendant's feet and the feet of his servants in walking, treading up, trampling upon, subverting and spoiling Plaintiff's soil, earth, and sand, and with the feet of cattle and with [473] the wheels of carriages and the keels of boats treading up, trampling, &c. and Plaintiff's shell-fish and shells, breaking, crushing, and destroying, and with spades, shovels, mattocks, pickaxes and other instruments, digging and making holes and pits, and turning up, &c. Plaintiff's earth, soil, and sand, and digging up, raising up, and getting up divers large quantities of Plaintiff's shell-fish and shells, and carrying away the same and converting and disposing thereof to Defendant's own use. There were several other counts for breaking and entering Plaintiff's several fishery and his free fishery, on which issues in fact were joined.

The Defendant pleaded, 1st, the general issue. 2dly, As to the trespasses mentioned in the two first counts that the closes therein severally mentioned were the same, "and that the said closes in which, &c. at the said several times when, &c. were and still are and from time immemorial have been part and parcel of a certain arm of the sea, in which every subject of this realm at the said several times when, &c. of right had, and of right ought to have had and now hath, and of right ought to have the liberty and privilege of fishing and catching, digging for, raising, getting, taking and carrying away shell-fish and shells there, therefore Defendant being a subject of this realm at the said several times when, &c. entered into the said closes in which, &c. so being part and parcel of the said arm of the sea to fish therein and to catch, dig for, raise, get, take, and carry away the shell-fish and shells there, and did then and there fish, and caught, took, and carried away the said shell-fish and shells in the first count mentioned, and also dug up, raised up, and got up, took and carried away the said other shell-fish and shells in the second count lastly mentioned, as it was lawful for him to do, and for the digging up and carrying away of the said shell-fish, he entered the said closes in which, &c. by himself and with other persons, and with the said cattle, carts, waggons, and other carriages, and the said boats, lighters, and other vessels, the same being reasonable, proper, and necessary in that behalf, and in so doing he necessarily and unavoidably with his feet and the feet of those other persons in walking a little trod up, trampled upon, subverted and spoiled the

(a)¹ Vide *Moses v. Macferlan*, 2 Burr. 1005, and *Walker v. Constable*, ante, vol. i. p. 306. *Marshall v. Poole*, 13 East, 98. *Slack v. Lowell*, 3 Taunt. 157.

(a)² Vide *Rogers v. Allen*, 1 Campb. 309, 312. *Marshall v. Poole*, 13 East, 98, *Blundell v. Catterall*, 5 B. & A. 268,

soil, earth, and sand in the second count mentioned, and with the feet of the said cattle, and with the wheels of the said carts, waggons, and other carriages, and with the keels of the said boats, lighters, and other vessels a little trod up, trampled upon, tore [474] up, and subverted and spoiled other the soil of Plaintiff's last-mentioned closes, and the said shell-fish and shells in the second count first mentioned necessarily and unavoidably a little broke, crushed, and destroyed, and with the said spades, shovels, mattocks, pickaxes, and other instruments, the same being useful, proper, and necessary in that behalf, and in digging up, raising, and getting the said shell-fish and shells in the second count lastly mentioned, necessarily and unavoidably dug and made the said holes and pits in Plaintiff's said closes, and necessarily and unavoidably with the spades, shovels, mattocks, pickaxes, and other instruments dug up, turned up, subverted, and spoiled a little of the earth, soil, and sand in the said closes, doing as little damage on that occasion as he could, which are the same, &c. whereof, &c. And this, &c. wherefore, &c.

Upon this the Plaintiff new assigned, alleging that Defendant on the days in the first count mentioned broke and entered Plaintiff's closes in the first count mentioned, "being certain closes lying within the flux and reflux of the tides of the sea in Plaintiff's manor of Keysham, and the said shell-fish and shells there then found, caught, took, and carried away and converted and disposed thereof to his own use, when the same closes in which, &c. were left dry and were not covered with water." And also that Defendant on the days and in the manner in the second count mentioned broke and entered Plaintiff's closes, "being certain closes lying within the flux and reflux of the tides of the sea within Plaintiff's said manor of Keysham, and with his feet, &c. trod up, &c. the said earth, soil, and sand, in the second count mentioned, and with the feet of the said cattle in that count mentioned, and with the wheels of the said carts, &c. and with the keels of the said boats, &c. trod up the said other soil in Plaintiff's last-mentioned closes in the said second count mentioned, and Plaintiff's said other shell-fish and shells in the second count mentioned, broke, crushed, &c. and with spades, &c. dug and made holes, &c. and raised up and got up the said shell-fish and shells, &c. and took and carried away the same, and converted and disposed thereof, &c. when the last-mentioned closes in which, &c. were left dry and were not covered with water, as Plaintiff hath in the first and second counts of the said declaration complained against him, which several trespasses so above new assigned are other and different trespasses, &c. Wherefore, &c."

[475] To the new assignment the Defendant pleaded, 1st, the general issue; 2dly, "that the said closes first above newly assigned, and the several closes secondly above newly assigned are, and at the said several times, &c. were the same closes and not other or different closes, and are and at those times when, &c. were certain rocks and sands of the sea, lying within the flux and reflux of the tides of the sea; and that the said shell-fish and shells in the said closes in which, &c. were certain shell-fish and fish-shells, which at the said several times when, &c. were in and upon the said rocks and sands of the sea, and which but a little before the said times when, &c. were by the ebbing of the tides of the sea left there in and upon the said closes in which, &c.; and that in the said closes in the said declaration mentioned, every subject of this realm at the said several times when, &c. of right had and of right ought to have had, and now hath and of right ought to have the liberty and privilege of getting, taking, and carrying away the shell-fish and fish-shells left by the said ebbing of the tides of the sea in and upon the said closes, in which, &c. wherefore the Defendant being a subject of this realm at the said several times when, &c. entered into the said closes in which, &c. to get, take, and carry away the shell-fish and fish-shells left by the ebbing of the tides of the sea in and upon the said closes in which, &c. and then and there got, took, and carried away the said shell fish and shells in the said first count mentioned, and also got, and for that purpose with spades, shovels, mattocks, pickaxes, and other instruments necessarily dug up and raised up, and took and carried away the other shell-fish and shells in the second count lastly mentioned; and for the getting, taking, and carrying away of the said shell-fish and shells, the Defendant at the said times when, &c. entered the said closes in which, &c. as it was lawful for him to do by himself and with other persons, and with the said cattle, carts, waggons, and other carriages, and the said boats, lighters, and other vessels, the same being reasonable and proper and necessary in that behalf, and in so doing he necessarily and unavoidably with his feet and the feet of those

other persons in walking, a little trod up, trampled, subverted, and spoiled the soil, earth, and sand in the said second count mentioned, and with the feet of the cattle, and with the wheels of the said carts, waggons, and other carriages, and with the keels of the said boats, lighters, and other vessels, a little trod up, trampled upon, tore up, subverted, and spoiled other the said soil of the said last-[476]-mentioned closes of the Plaintiff, and the shell-fish and shells in the second count first mentioned, necessarily and unavoidably a little broke, crushed, and destroyed, and with the said spades, shovels, mattocks, pickaxes, and other instruments, the same being useful, proper, and necessary in that behalf, in digging up, raising, and getting the said shell-fish and shells in the said second count lastly mentioned, necessarily and unavoidably dug and made the said holes and pits in Plaintiff's said closes, and necessarily and unavoidably with the said spades, shovels, mattocks, pickaxes, and other instruments dug up, turned up, subverted, and spoiled a little of the said earth, soil, and sand in the said closes, as it was lawful for him to do for the causes aforesaid, doing as little damage on that occasion as he could, which are the same, &c. whereof, &c. And this, &c. wherefore, &c."

To this plea there was a replication, traversing the right of every subject to take shell-fish and shells, and a special demurrer thereto, because it traversed matter of law; but the Court seeming to think that the replication was clearly bad, it was abandoned by the Plaintiff's Counsel, who relied upon objections to the plea.

Marshall, Serjt. in support of the plea. The question is, whether every subject of the realm has a right to take the shell-fish and shells which are left upon the sea-shore by the ebbing of the tides. The right of fishing in the sea is acknowledged by all nations; it is universal, and part of the law of nations. Grotius de Jure Bel. ac. Pac. lib. 2, c. 2, s. 3. And according to Grotius no person can have any property either in the main sea, or in the principal arms of the sea; neither can a man have any property in the shores and sands of the sea: these are all incapable of improvement, and never can be exhausted by the only uses to which they can be applied, namely, those of supplying fish and sand. Bracton (lib. 1, c. 12, fo. 7 b.) adopting the doctrine of the civil laws, says, "Naturali vero jure communia sunt omnia hæc, aqua profluens, aer, et mare, et littora maris, quasi maris accessoria; nemo enim ad littus maris accedere prohibetur dum tamen a villis et ædificiis absteineat: quia littora sunt de jure gentium communia sicut et mare." And he adds, "Publica vero sunt omnia flumina et portus; ideoque jus piscandi omnibus commune est in portu et in fluminibus; riparum etiam usus publicus est de jure gentium sicut ipsius fluminis." So Sir Matthew Hale in his Treatise de Jure Maris, part 1, cap. 4. Hargrave's Law Tracts, p. 10, 11, observes, "In the sea the King of Eng-[477]-land hath a double right, namely, a right of jurisdiction, which he ordinarily exerciseth by his admiral, and a right of propriety or ownership. The King's right of propriety or ownership in the sea is evidenced principally in these things that follow: 1st, The right of fishing in this sea and the creeks and arms thereof is originally lodged in the Crown, as the right of depasturing is originally lodged in the owner of the waste whereof he is lord, or as the right of fishing belongs to him that is the owner of a private or inland river. But though the king is the owner of this great waste, and in consequent of his property hath the primary right of fishing in the sea, and the creeks and arms thereof, yet the common people of England have regularly a liberty of fishing in the sea, or creeks or arms thereof as a public common of piscary; and may not without injury to their right be restrained of it unless in such places, creeks, or navigable rivers where either the king or some particular subject hath gained a propriety exclusive of that common liberty." In the same treatise, p. 12, it is said, "that de jure communi between the high water and low water-mark, doth primâ facie belong to the king; Constable's case, 5 Co. 107, and Dyer, 326 b.; although it is true that such shore may be and commonly is parcel of the manor adjacent; and so may belong to a subject, yet primâ facie it is the king's." From Constable's case, 5 Co. 107, 2 Rol. Abr. 170, it appears that the shore may belong to the subject either in gross or as parcel of his manor: but merely being the manor of a particular person is not sufficient to exclude those who have a right to fish there. One may have a manor and another the right of fishing in the water; but if a man would claim a right of fishing in the water of another, the proof of the right lies upon him. In Warren v. Matthews, 6 Mod. 73. 1 Salk. 357, S. C. Holt, Ch. J., says, "Every subject of common right may fish with lawful nets in a navigable river as well as in the sea; and the king's grant cannot bar

him thereof." So in 1 Mod. 105, *Lord Fitzwalter's case*, Hale, Ch. J., says, "In case of a river that flows and reflows, and is an arm of the sea, there *primâ facie* it is common to all: and if any one will appropriate a privilege to himself the proof lieth on his side; for in case of an action of trespass for fishing there, it is a good justification to say that the locus in quo est brachium maris in quo unisquisque subjectus Domini Regis habet et habere debet liberam piscariam. The soil of the river Thames is in the King, and the Lord Mayor is conservator of the river, but it is common to all fisher-[478]-men, and therefore there is no contradiction in the soil being in one and the right of fishing in the river common to all fishermen." Again in *Ward v. Cresswell*, Willes' Rep. 265. 16 Vin. Abr. 354, tit. Piscary, B., S. C. the Court held that all the subjects of England of common right might fish in the sea, it being for the good of the commonwealth, and for the sustenance of all the people of the realm; and that therefore a prescription for it as appurtenant to a particular township was void, and as absurd as a prescription would be for travelling the king's highway, or for the use of the air as appurtenant to a particular estate. The statute 7 Jac. 1, c. 18, after stating in the preamble that divers persons having lands adjoining to the sea-coast in the counties of Devon and Cornwall, had of late interrupted the bargemen and such others as had used at their free wills and pleasures to fetch sea-sand and take the same under the full sea-mark, as they had theretofore used to do, enacts that all persons in the said counties should be at liberty to take sea-sand at all places under the full sea-mark. That statute was in fact a full recognition of the right of the subject to use the shore of the sea in every way in which it could be serviceable to him. It proves that his right is not confined to the privilege of taking shell-fish left on the shore by the ebbing of the tides, but that he may also take the fish-shells and even the sand of the shore.

Best, Serjt. contrâ. Admitting the general right of the subject to take the fish of the sea, still in this case that general right is circumscribed by the circumstance of the place in which these shell-fish and fish-shells were taken being part of the manor of Keysham. Unless therefore the Defendant set up a right of common on the soil, he cannot support the easement which he claims. *Primâ facie* the shores of the sea belong to the king, and he may grant any part of them to a subject either reserving or not, as he pleases, a general right of fishery to all his subjects. The Plaintiff ought not to be called upon to prescribe for a right of fishery over that which is admitted to be his own, for when once it is established that the locus in quo belongs to the Plaintiff, it must be presumed to be exclusively his, unless some inconsistent right is set up by the Defendant. The common law-right of the subject to go upon the shores of the sea between high and low water-mark only applies to cases where no exclusive right is vested in any individual. Now it appears from the passage cited from Hale's Treatise, Hargrave's Tracts, p. 12, that an exclusive right to the shore may belong to a subject, though *primâ facie* it is in [479] the king. Indeed in pages 26 and 27 of the same tract, Sir Mathew Hale speaking of the sea-shore says, "It may not only belong to a subject in gross, which possibly may suppose a grant before time of memory, but it may be parcel of a manor," and proceeds to mention the several ways by which such a right may be evidenced. To the same effect is Com. Digest. tit. Navigation A. and the case of *The Abbot of Ramsay*, Dyer, 326 b.; and the same is admitted by Lord Mansfield in the case of *Carter v. Murcol*, 4 Burr. 2164. Although, however, the common law-right of the subject should be established to take sea-fish, yet it by no means follows that the subject has a right to take the shells which are thrown upon the sea-shore. It is well known that in many parts of England much of the various matter which is deposited upon the shore by the sea, belongs to the owners of the adjacent soil, and is disposed of by them to very great advantage. The statute 7 Jac. 1, which has been cited in support of the right of the subject to take whatever is found between high and low water-mark, seems to afford a contrary inference; for it is to be observed that it is an enacting and not a declaratory law, and that a peculiar privilege is thereby granted to the men of Devon and Cornwall, which peculiar privilege it would have been absurd to grant, if all the people of England had been entitled thereto by common law.

The Court were of opinion that if the Plaintiff had it in his power to abridge the common law-right of the subject to take sea-fish, he should have replied that matter specially, and that not having done so, the Plaintiff must succeed upon his plea as far as related to the taking of the fish; but observed that as no authority had been cited

to support his claim to take shells, they should pause before they established a general right of that kind. They therefore offered to allow the Defendant to amend his plea without costs, by striking out his claim to the fish-shells, and shaping his justification in such way as he should be advised. Which offer was accordingly accepted (a).

[480] ABERCROMBIE v. PARKHURST. June 20th, 1801.

Replevin of cattle taken in A. The Defendant avowed the taking in A. under a demise of certain premises of which B. was parcel, and because the cattle were damage-feasant in B. he took them and drove them through A. in his way to the pound; and upon general demurrer the avowry was held to be well pleaded.

Replevin of cattle taken in the parish of Thames Ditton, in the county of Surry, in a certain place there called Claygate.

The Defendant avowed the taking of the said cattle in the said declaration mentioned, in the said place in which, &c.: and justly, &c. under a demise from the person seised in fee of certain premises, "whereof a certain close called Helmens, otherwise Hellins, was and from thence hitherto hath been, and still is part and parcel;" into which he entered and took possession: "and being so thereof possessed, because the said cattle in the said declaration mentioned at the said time when, &c. were in the said close called Helmens, otherwise Hellins parcel, &c. feeding and depasturing upon the grass and herbage of the Defendant there then growing, and otherwise doing damage there to the said Defendant, he the said Defendant well avows the taking of the said cattle in the said declaration mentioned, in the said close called Helmens, otherwise Hellins parcel, &c. as and for a distress for the said damage so done and doing by the said cattle there, and driving the said cattle in the said declaration mentioned from the said close called Helmens, otherwise Hellins, parcel, &c. in and along the said place in the said declaration mentioned, in which, &c. in order to impound the same as he lawfully might for the cause aforesaid; and justly, &c. and this, &c. wherefore, &c." praying a return of the cattle.

To this there was a general demurrer and joinder.

Shepherd, Serjt., in support of the demurrer. The objection to the avowry is that the declaration having stated that the cattle were taken in a certain place called Claygate, the Defendant first avows that he did so take them, and then states that he took them in a place called Helmens, otherwise Hellins, and drove them in and along the place in the declaration mentioned, in order to impound them. Now these latter facts he should have first stated, and then have traversed that he took the cattle at the place in the declaration mentioned; instead of which, according to the form of this avowry, he states that which is inconsistent, namely, first that he took them at Claygate, and then that he took them elsewhere. In *Johnson v. Wollyer*, 1 Str. 507, it is laid down by Pratt, Chief Jus. [481]-tice, that where the party avows at a different place in order to have a return he must traverse the place in the count, because his avowry is inconsistent with it. Indeed the form in which the Defendant should have avowed appears in *Foot's case*, 1 Salk. 93, wherein replevin for taking a horse in quodam loco vocat' the common marsh, the Defendant pleaded that he took it in quodam loco vocat' the plot, absque hoc, that he took it in quodam loco vocat' the common marsh; and then pro retorno habendo went on to make consuance for rent arrear: the Plaintiff having pleaded in bar to the consuance, and traversed the seisin of the person under whom the rent was claimed, the Defendant demurred and had judgment, the Court saying that the Plaintiff had no right to traverse the matter of the consuance, and held it a discontinuance. Now in this case it is material to the Plaintiff to take an issue upon the cause of the taking, and yet in the way in which the avowry is pleaded he would be precluded from so doing: for if he had denied the seisin, or the cattle being in Helmens, otherwise Hellins, it would according to the case in *Salkeld* have been a discontinuance.

Best, Serjt. contrà, was stopped by the Court.

LORD ALVANLEY, Ch. J. Upon principles of common sense this seems to be an avowry very well pleaded. The Defendant has avowed that which was the truth of the case, namely, that though he had the cattle during part of the time in the close

(a) See Bro. Customs, pl. 46, cites 18 Ed. 4, 18, 19. Vin. Ab. Trespass, p. 476.

called Claygate, yet that he originally took them in another close called Helmens, otherwise Hellins.

HEATH, J. It seems to me that the case cited from Salkeld has no application to the present. There the only question related to the place where the cattle were taken, whereas here the dispute between the parties turns upon the cause of taking the cattle.

ROOKE, J. The declaration in this case appears to me to have been framed with a view to draw the Defendant into a difficulty. If so, it has failed, for the avowry seems to me to be well pleaded.

CHAMBRE, J. When the cattle of one man are taken by another, it is not very easy for the former to ascertain in what place they were taken, and therefore he is allowed to allege that they were taken in whatever place he finds the other in possession of them. Now here the declaration having alleged a taking in the close called Claygate, the avowry also sets forth a taking in Claygate, but shews what kind of a taking that was. With respect to the case in Salkeld, there was no taking at all in the place [482] laid in the declaration, and when the Defendant had pleaded in abatement to the place, and put in a formal consuance *pro retorno habendo*, it is most clear that the Plaintiff had no right to traverse the matter of the consuance. But in this case the Plaintiff was at liberty to traverse any part of the avowry which he might think proper.

Shepherd then applied to the Court for leave to amend ;

But the Court being of opinion that the demurrer was frivolous, refused his application, and gave

Judgment for the avowant (a)¹.

HENRY SMITH v. SAMUEL WHALLEY AND THOMAS ALLPORT. June 23d, 1801.

An agreement between parties to a suit in Chancery binding themselves, their executors, and administrators, made an order of that Court and acted upon therein as such, may be the ground of an *assumpsit* at law (a)².

Assumpsit on a special agreement. The cause coming on to be tried at the Sittings after Easter Term before Lord Alvanley, Ch. J., a verdict was found for the Plaintiff for 754l. 3s. 8d. subject to the opinion of this Court upon a case which stated in substance as follows :

A cause being depending in the Court of Chancery, in which John Doyley was Plaintiff, and Henry Smith (the present Plaintiff), John Dunkin and Edward Glover, Defendants, an agreement was entered into between the Plaintiff and Defendants, entitled as follows: "In Chancery. Between John Doyley Plaintiff, Henry Smith, John Dunkin, and Edward Glover, Defendants." The agreement recited an order of the Chancellor for the payment of certain sums of money lodged in the Bank to the credit of the cause, and that one Charles Harrison, former solicitor in the cause (since become a bankrupt) should deliver his bill of fees, and that it should be referred to a Master to tax the same, till which time payment should be reserved; and further reciting, that a bill had been delivered, whereby there appeared to be a balance of 1601l. 5s. due from the said Henry Smith to Samuel Whalley and Thomas Allport, assignees of the said Charles Harrison, subject to taxation not then made; and further reciting, that a further sum had lately been paid into the Bank to the credit of the cause, for which the said [483] Henry Smith had applied to the Court; and that the matter was adjourned until it could be ascertained what the said Charles Harrison had received on account of his fees; and that upon the said matter afterwards coming on to be heard, it was referred to S. C. C. Esq. to inquire what bills of fees of the said Charles Harrison were a lien upon the fund placed to the credit of the cause, and what the said Henry Smith was personally liable to pay; and that after such inquiry had, such further order should be made as should be just; and further reciting, that instead of prosecuting such inquiry, the said Henry Smith and the assignees had come to an agreement that the sum placed in the Bank should be divided into equal moieties, one

(a)¹ See note 1, by Williams, Serjt., on the case of *Potter v. North*, 1 Saund. 347, from which and the authorities there cited, this avowry appears to be pleaded in the usual manner.

(a)² Vide *Fry v. Malcolm*, 4 Taunt. 705. *Dowse v. Core*, 3 Bing. 20.

moiety to be paid to Henry Smith to his own use, and the other to the assignees on account of the fees, and in part payment of what should be found due by the Master's report; that until such report all further sums paid into the Bank should also be divided into equal moieties, one moiety to the said Henry Smith, and the other not exceeding, with the before-mentioned moiety, 1000l. to the said assignees, until the said fees should be paid, but subject to taxation as aforesaid, unless a compromise should take place; that if after the Master's report there should be found due to the assignees more than they should have received, pursuant to the said agreement, all further sums to be paid into the Bank should be divided in like manner until the assignees should be paid what should be reported due; that in default of sufficient being paid into the Bank to satisfy the assignees, the said Henry Smith should pay the deficiency between the fund and the sum reported due; that if after the report made there should not be found due to the assignees so much as they should have received pursuant to the agreement, they should pay to the said Henry Smith the difference between that money and the sum reported due; that the assignees, in case they should divide among the creditors of the said Charles Harrison the money to be received pursuant to the said agreement before the Master's report should be obtained, should be personally responsible to the said Henry Smith for what money should be received above what should be reported due to them; that all the matters aforesaid might be made a rule or order of the Court of Chancery, and should be obeyed and observed as such by the said parties thereto; the agreement concluded with these words: "And for the true performance of this agreement on the part of the said Henry Smith, he doth hereby bind himself, his executors and administrators, unto the said Samuel Whalley and Thomas Allport, their executors, administrators, [484] and assigns, and for the true performance of this agreement on the part of the said Samuel Whalley and Thomas Allport, they the said Samuel Whalley and Thomas Allport do and each of them doth hereby bind themselves and himself, their several and respective executors and administrators, unto the said Henry Smith, his executors, administrators, and assigns. Witness their hands," &c. The above agreement was afterwards made a rule of the Court of Chancery, and in pursuance thereof several orders of the said Court were made, directing sums paid into the Bank to the credit of the cause to be divided in equal moieties between the said Henry Smith and the assignees, by virtue of which the assignees afterwards received in the whole the sum of 937l. 12s. 1d. The Master to whom the bill of fees was referred taxed the same at 1795l. 10s. 10d. and also reported that the said Charles Harrison was indebted to the said Henry Smith, in respect of sums received for his use, 1612l. 2s. 5d. which being deducted from 1795l. 10s. 10d. at which he had taxed the bill, there remained due to the assignees, in respect of the said bill, the sum of 183l. 8s. 5d. The action was brought to recover 754l. 3s. 8d. being the difference between the said sum of 937l. 12s. 1d. received by the assignees, and the sum of 183l. 3s. 5d. due to them in respect of the bill.

The question for the opinion of the Court was, Whether this action was maintainable? If the Court should be of that opinion, the verdict to stand, and judgment to be entered for the Plaintiff. If the Court should be of a contrary opinion, then a nonsuit to be entered.

Clayton, Serjt., for the Defendants now contended, that the agreement on which the present action was brought was merely a proceeding in the course of a suit in Chancery, and that the money, if due, was only due under the order of that Court, and therefore not the ground of an assumpsit at common law; he cited *Emerson v. Lashley*, 2 H. Bl. 248, where it was held, that assumpsit would not lie to recover costs ordered to be paid under a rule of an inferior court in the course of a suit there, even though the inferior court could not compel the party on whom the order was made to pay them, because he lived out of the jurisdiction of the court; and observed that the present was an attempt for which there was no precedent.

Onslow, Serjt. contrâ, was stopped.

By the Court, who said, that though the general rule was clear that the mere order of another court was not a good ground of [485] action, yet that in the present instance the Defendants had, by the terms of their agreement, raised a sufficient ground of assumpsit against themselves.

Postea to the Plaintiff.

SEALE v. BARTER AND ANOTHER. June 25th, 1801.

[Referred to, *Phillips v. Phillips*, 1847, 10 Ir. Eq. R. 520. Approved and followed, *Clifford v. Koe*, 1880, 5 App. Cas. 470. Referred to, *Van Grutten v. Fomwell*, [1897] A. C. 680.]

A. devised all his estates in the county of D. to a trustee for 200 years to the use of the trustee during the life of his son J. S. to preserve contingent remainders, nevertheless to permit J. S. to receive the rents and profits, and after his decease to the use of the 1st son of the said J. S. to be begotten on the body of the woman as he should happen to marry, and the heirs male of such 1st son, and for want of such issue to the use of the 2d, 3d, 4th, and every other son of J. S. and the heirs male of their bodies in succession, and for want of such issue male then to the use of his daughter E. S., her heirs and assigns for ever; with a residuary clause in favour of J. S. The testator afterwards made a codicil, whereby he devised all his estates to his son J. S. and his children lawfully to be begotten, with power for him to settle the same by will or otherwise on such of them as he should think proper; and for default of such issue then to his daughter E. S., and her children lawfully to be begotten, with a similar power; and in default of such issue, to J. S. and E. S. equally between them; and he further provided that a settlement of 200l. per annum should be made on any woman whom his son should happen to marry; and that his estates should be chargeable therewith. At the time of making the codicil J. S. was married, but had no child. Held that the codicil was to be construed independent of the will; and that under the codicil J. S. took an estate tail, with a power to settle the estates on all or any of his issue in such a way as he should appoint; and thereby determine the estate tail so far as it should be inconsistent with such settlement (a).

This case was sent by the Lord Chancellor for the opinion of the Court.

John Seale, by his will, dated the 11th of February 1774, devised to his wife for life his messuage Barton farm, and demesne lands called Mount Boon, (with the furniture, stock, &c. also for her life,) and an annuity of 50l. for her life, charged upon a messuage called Combe, with power to distrain in case of non-payment; he then devised to Richard Harris and his heirs, all his manors, lordships, messuages, lands, tenements, houses, hereditaments, and premises, with their appurtenances, in the county of Devon, to have and to hold the same to the said R. H., his executors, administrators, and assigns, for a term of 200 years, without impeachment of waste upon trust, for the purposes and under the provisos thereafter mentioned, and from and after the determination of the said term upon trust and to the use of the said R. H. during the life of his only son John Seale, to support contingent remainders, nevertheless to permit his said son J. S. to receive the rents and profits during his life without impeachment of waste, and from and after his decease to the use of the 1st son of the said J. S. to be begotten on the body of such woman as he should thereafter happen to marry, and the heirs male of such 1st son lawfully issuing; and for want and in default of such issue, then to the use of the 2d son in like manner, and so to the 3d, 4th, and every other son and sons of the said J. S. and the heirs male of the bodies of every such son and sons [486] lawfully issuing, the eldest of every such son and sons, and the heirs male of his and their body and bodies always to take place and be preferred before the younger of such son and sons, as they and every other of them should be in seniority of age and priority of birth; and for want and in default of such issue male of his said son J. S. then upon trust, and to and for the only use and behoof of his daughter Elizabeth Seale, her heirs and assigns for ever, and to and for no other use, intent, and purpose whatsoever; and as to the said term of 200 years he declared that it should be lawful for the said R. H., when his daughter E. S. should marry, to raise a portion of 4000l. to be paid to her, and until that time to raise the annual sum of 250l. to be paid to her for her maintenance: after charging all his estates in the county of Devon with the payment of his debts, he devised all the rest, residue, and remainder of his lands and tenements not thereinbefore devised or disposed of whereof

(a) Vide *Doe d. Wright v. Jesson*, 5 M. & S. 95. *Bruce v. Bainbridge*, 2 B. & B. 123. *Doe d. Liversage v. Vaughan*, 5 B. & A. 464.

he should die seised in possession, reversion, or remainder, to his son J. S., his heirs and assigns, and all the rest of his personalty after payment of his debts and funeral expenses, he gave to R. H., and made him executor of his will, desiring him to see the same performed according to his true intent and meaning, nevertheless in trust, and to and for the only use and behoof of his said son J. S. On the 14th of February 1774, the testator made the following codicil to his will: "I John Seale of Mount Boon, within the parish of Townstall in the county of Devon, Esq., do this 14th day of February 1774, make and publish this codicil to my last will and testament, in manner and form following: first and principally it is my will and meaning, and I do hereby order and direct that no inventory of my goods and effects at Mount Boon be taken after my decease; it is likewise my will that all my lands and estates shall after my decease come to my son John Seale and his children lawfully to be begotten, with full power for him to settle the same, or any part or parts thereof, by will or otherwise, on them, or any of them, as he shall think proper; and for default of such issue, then that all my lands and estates come to my daughter Elizabeth Seale and her children lawfully to be begotten, with full power for her my said daughter to settle the same or any part or parts thereof, by will or otherwise, on them, or such of them as she shall think proper; and in default of such issue, it is my will and meaning that all my estates and lands shall belong to my said son and daughter equally between them, to whom in such case I do hereby give, devise, and bequeath the same: and whereas in and by my will Richard Harris is made a trustee for [487] payment of my debts, legacies, and expences, I do hereby direct and order that if my said son John Seale can raise the money otherwise, it shall be at his option. My will further is, that a settlement of two hundred pounds a-year shall be made upon any woman my son John Seale may happen to marry, and that my estates, or so much of them as he shall think proper, be chargeable with the payment thereof: and lastly, it is my desire that this my codicil be annexed to and made part of my last will and testament to all intents and purposes." The testator being seised of or entitled to considerable lands and tenements in the county of Devon, and of no other real estates whatsoever except a messuage or tenement in the parish of St. Sidwell, in the county of the city of Exeter, died in September 1777, leaving only two children (viz.) the said John Seale his only son, and the said Elizabeth his daughter, who was afterwards married, and is since dead, having left a son her only child, now in minority. At the time of making the codicil John Seale the testator's son was married, but had no child, but afterwards in February 1777, in the testator's life-time, John Seale the son had a daughter born, his eldest child (who is now living and lately married), and he has since had several other children, of whom his eldest son is now in minority.

The question for the opinion of the Court was, What estate or interest did the Plaintiff John Seale, the son of the said testator, take under the said will and codicil?

The case was twice argued; first in Hilary Term last, by Best, Serjt., for the Plaintiffs, and Bayley, Serjt., for the Defendants; and again in this term by Shepherd, Serjt., for the former, and Lens, Serjt., for the latter.

Arguments for the Plaintiffs. John Seale, the son of the deviser, took an estate in tail general, remainder in tail general to Elizabeth Seale, remainder in fee to the said John and Elizabeth Seale, as tenants in common. The question in this case turns upon the expressions introduced into the codicil, by which the testator devises all his lands and estates to J. S. and his children lawfully to be begotten, with full power for him to settle the estates, or any part or parts thereof, by will or otherwise, on them or such of them as he shall think proper; and for default of such issue, then that the estates shall go to his daughter E. S. and her children lawfully to be begotten, with the same power as to the son; and in default of such issue to J. S. and E. S. equally between them. [488] Unless these expressions be construed in the way contended for by the Plaintiff, it does not seem that the intention of the testator will be effectuated: and indeed the authorities applicable to the words of this codicil call for such a construction. A devise to a man and his children or issues, if he hath not any issue at the time of the devise, is sufficient to give an estate tail, for otherwise the children could not take. *Wyll's case*, 6 Co. 16, 17. Now, in the present case, at the time of the devise made, J. S. had no children. So in 1 And. pl. 110, a devise of land to one for life, and after his decease to the men children of his body and if he died without men children of his body then over, was held to give an estate in tail male. Indeed all the cases in which the words "sons," or "children," or "issue,"

have been used to describe the limitation, and an estate tail has been raised by the Court, are authorities to shew, that in this case also an estate tail must be raised. In *Sondley's case*, 9 Co. 128, where a devise was to T., and if he marry then his son to have the estate, and if he have no issue male, then over to another person, T. took an estate tail. And in *King v. Melling*, 1 Vent. 216, 225. 2 Lev. 58, S. C. a devise to Bernard Melling for his life, and after his death to the issue of his body, was held to give him an estate tail. And though in that case there was a power to B. M. to make a jointure of all the premises to a second wife, Lord Hale was of opinion that that circumstance did not defeat the estate tail, which affords an answer to any argument which may be raised from the power given in this case. So in *Wharton v. Gresham*, 2 Bl. 1083, the words to J. W. and his sons in tail male, and in default of such issue over, gave to J. W. who had no issue at the time of the devise, an estate in tail male. In the present case the devise is to J. S. and his children, and in default of such issue then only is it to go over: which shews that the children were intended to take an estate of inheritance, which they could not do but through their father, nor through him unless he took an estate tail. In *Davies v. Stevens*, Doug. 320, there was a devise of the fee simple and inheritance to William and his child or children for ever; and Lord Mansfield said the meaning is the same as if the expression had been to William and his heirs, that is to say, his children or his issue. The words "for ever" make no difference, for William's issue might last for ever. Now if in that case the word "children" was held synonymous to issue in order to restrain the devise to an estate tail, there is no reason why in [489] this case it may not be held to bear the same sense, in order to enlarge the devise to an estate tail. The general intention of the testator was, that the estate should not go over to L. S. until after an indefinite failure of the issue of J. S.; but if the word "children" is held to be a mere designatio persone, though there was no child in esse at that time, what is there to give to the children any thing more than estates for life? The intent of the testator, therefore, can only be effectuated in two ways: namely, by giving an estate tail to J. S. or by implying cross remainders between the children. In order to do the former by implication, the Court have gone great lengths, as in *Robinson v. Robinson*, 1 Burr. 38. *Roe d. Doulson v. Grew*, 2 Wils. 322. *Hodges v. Middleton*, Doug. 431. *Daintry v. Daintry*, 6 Term Rep. 307. *Doe d. Candler v. Smith*, 7 Term Rep. 531, and *Doe d. Cook v. Cooper*, 1 East, 229. But cross remainders among the children cannot be raised without raising a previous estate of inheritance, which in this case cannot be done, except through the medium of J. S. the devisee, and which when done establishes the Plaintiff's title. In all the cases in which cross remainders have been implied, there has been that preliminary step which will be wanting in this case, unless J. S. be held to take an estate tail, viz. a previous estate of inheritance. *Holmes v. Reynell*, Sir T. Ray. 452. Pollexf. 425. *Skin*. 17. Sir T. Jones, 172, S. C. *Wright v. Holford*, Cowp. 31. *Doe d. Atherton v. Pge*, 4 Term Rep. 710, and *Phipard v. Mansfield*, Cowp. 797.

Arguments for the Defendants. If the question in this case were, whether particular expressions not sufficiently formal in their nature might not be so modelled as to prevent the estate going over contrary to the intent of the testator, then the cases cited might apply. But in order to induce the Court to put such a construction upon this will, that has been assumed in argument which does not necessarily appear, namely, that the testator meant his estate to go in succession. The better construction of the devise seems to be, that John Seale took an estate for life, with remainder in fee to him and his sister Elizabeth Seale, depending upon the two contingencies, either of John Seale or of Elizabeth Seale having children. By the codicil a power is given to the devisee to settle the estate or any part thereof on such of the children as he shall think proper. Now if this be the case, why should the Court labour to effectuate a supposed interest of the testator to create an estate tail, when the power vested in the devisee enables him to put an [490] end to all the consequences resulting from such an estate. But if this mode of construction be objectionable, still it may be held that J. S. took an estate to himself for life, with remainder in fee to his children, if he had any, for it is not limited to all the children, but to such of them as J. S. shall appoint; and in several cases the word "estates" has been held to convey a fee. Indeed in this case the probability of the word "estates" being used in that view, is particularly strong, because in the ultimate remainder to J. S. and E. S. which appears clearly to have been intended to be a remainder in fee, the word

"estates" is again used, and no other word capable of carrying a fee. With respect to the case of *King v. Melling*, the power introduced there was only a power to jointure, which is very different from such a power as this to limit the whole estate: although the power therefore in that case was held not to defeat the estate tail, yet it is no authority in the present instance. It is observable also that the testator has had no anxiety to prevent the estate from being split into different portions, since the ultimate remainder in fee being given to J. S. and E. S. the heirs of both, and not the heirs of one only, would ultimately be entitled to take. In order to ascertain the intention of the testator, it is necessary to look at the will, which is dated only three days prior to the codicil. In the will the testator gives to J. S. an estate for life only, with limitations to his children in strict settlement. Now the only alteration which appears to have been intended by the codicil, is that of enabling J. S. to determine in what manner his children should take, but not to enlarge the estate originally devised to J. S. himself. It is not necessary to go through all the cases which have been cited: since most of them only diversify the principle which was laid down in *King v. Melling*, and *Robinson v. Robinson*, namely, that the general intent of the testator shall prevail, where that intent is apparent. In this case no such intent as is contended for by the other side being apparent, the Court will allow the words to operate as they stand. Indeed if it were necessary that cross-remainders should be raised in this case, there are words sufficient for that purpose, namely, "in default of such issue;" and it is not necessary in such case that the children should take an estate of inheritance through the father, for cross remainders may be raised where the father takes only an estate for life. In the case of *Doe d. Davy v. Burnfall*, 6 Term Rep. 30, and ante, vol. i. p. 215, the devise was somewhat similar to the [491] present, being to M. O. and the issue of her body as tenants in common, but in default of such issue then over, in which case M. O. was held to take only an estate for life, with contingent remainders to the issue of her body. In *Goodright v. Dunham*, Doug. 267, Lord Mansfield says, "the words 'in case he dies without issue' being tacked to the preceding clause (by which the testator had devised to his son for life, and after his death to all and every his children equally, and to their heirs,) must mean the same thing as in case he died without children." So in this case the words "such issue" must mean such children as he had before mentioned; which destroys the only argument from which an estate tail can be inferred.

Cur. adv. vult.

On this day the opinion of the Court was delivered by

LORD ALVANLEY, Ch. J., who, after stating the will, proceeded thus:—Under this will the estate was given to the testator's son for life, with remainder in tail male to his children by any aftertaken wife, remainder to the testator's daughter in fee. This will is stated in the case to bear date on the 11th of February 1774; and the case further states, but whether accurately or not I much doubt, that on the 14th of February 1774, only three days after the date of the will, the testator made the codicil in question. It is stated that at the time when the testator made this codicil, John Seale the testator's son was married, which seems to exclude the idea of his having been married at the date of the will, and indeed the expression in the will respecting children by any woman whom the testator's son should thereafter happen to marry, implies that no marriage was in immediate contemplation at the time when that will was made. It is also stated that at the time when the codicil was made the testator's son had no children, but that afterwards during the testator's life he had children, of whom the eldest is now in minority. The question submitted to this Court by the Lord Chancellor is, What estate the testator's son John Seale took under the will and codicil? Notwithstanding the apparent inaccuracy in the statement of dates, it will not appear material that the case should be altered when the grounds are known upon which we all concur in thinking that the testator's son took an estate tail. If we could by any possibility have referred the limitation in the codicil to the will, seeing the disposition made in the latter to the children of the testator's son, we should have been desirous to [492] apply the word "children" in the codicil, to the same children who are described in the will; and should have been inclined to suppose that the testator did not intend by the codicil to disturb the dispositions of the will, but only to give a power to his son to settle the estates upon such of the children mentioned in the will as he should think proper. And when I first read this case I was inclined to think that the true construction. But on further consideration I

think that cannot be the case: for by the will the testator had only given an estate in tail male to the first and other sons of his son, with a remainder in fee to his daughter, without any particular limitation to the daughter's children: and when we find in the codicil the same limitation to the children of the daughter as to the children of the son, it is impossible to apply the word "children" in the codicil to the same persons who are described by that word in the will. We are therefore of opinion that the codicil must be taken independent of the will; and that it is no longer to be considered as a codicil but as a substantive will: and the only question remaining for our consideration is, What estate the testator's son took under the words of that codicil? It has been insisted on the part of the Plaintiff that the words of the codicil convey an estate tail: and *Wylde's case* (which is the leading case upon this subject) was cited and relied on. I will shortly state that case as it is reported in 6 Co. 16, and in Moore, 397, under the name of *Richardson v. Yardley*: for though the titles of the cases are different, and one is stated to have been in the 41 Eliz. and the other in the 37 Eliz. it is hardly possible to consider them as different cases, especially as the name of Wylde occurs in both, and the circumstances are so nearly the same: and indeed in some books where the report in Moore has been cited, it has been said that the same case was better reported in Coke. According to the report in Coke, the devise was of land to A. for life, remainder to B. and the heirs of his body, remainder to Rowland Wylde and his wife, and after their decease to their children; Rowland and his wife then having a son and a daughter. It was resolved that Rowland Wylde and his wife took only joint estates for their lives: but a case was there put as good law, that if A. devise to B. and his children or issues, and he hath not any issue at the time of the devise, the same is an estate tail: and a case is cited from Serjeant Bendlowes' Reports, which was a devise to husband and wife, and the men children of their bodies begotten, and it [493] did not appear in the case that they had any issue male at the time of the devise, and therefore it was adjudged that they had an estate tail to them and the heirs of their bodies. According to the report in Moore, Popham and Gawdy held that Wylde took an estate tail, notwithstanding that he had children living at the time of the devise, though Fenner and Clench thought it was only an estate for life. It appears therefore that two of the Judges were disposed to think that an estate tail would pass even in a case where children were in esse at the date of the will, and they all agreed that if no children had been born it would have been an estate tail. The next case to which I shall allude is that of *King v. Melling*, where the devise was to Bernard Melling for life, and after his death to the issue of his body by his second wife, his first being then alive, and for default of such issue over, with a proviso enabling Bernard Melling to make a jointure on his second wife; there Rainsford and Twysden, Js., held that B. Melling took only an estate for life, but Hale, Ch. J., thought that it was an estate tail, and his opinion was afterwards confirmed by all the Judges in the Exchequer Chamber. The case referred to in the argument from *Anderson*, and *Sunday's case* are also authorities in favour of an estate tail: indeed in the latter case some argument arose on the clause introduced into the will restraining alienation, but it was held to make no difference. I now come to the case of *Wharton v. Gresham*, which appears to me to be very applicable to the present. It was there argued by Serjeant Glynn that there was a difference between the words "children" and "sons," the former implying future progeny, the latter not. But the Court were clear, upon the authority of *Wylde's case*, and that in *Anderson*, and *Sunday's case*, that John Wharton (who at the time of the devise had no issue) took an estate tail under a devise "to J. W. and to his sons in tail male, and in failure of such issue then over." Now in that case there was some reason to suppose that the testator intended to give an estate tail to the sons as purchasers: but the Court thought that the words "in failure of such issue" were not to be restrained to the sons, but must include all the male posterity of J. W. who must therefore take an estate tail. The doctrine laid down in the famous case of *Robinson v. Robinson*, as well as the words of the devise, bear strongly on the present question. Notwithstanding the devise was expressly limited to Launcelot Hicks for life, yet as it appeared that the testator by the words "such son as he should have," meant to embrace all his male issue, the Court of King's Bench held that L. H. took an estate tail. It is true that there [494] was some difference of opinion respecting the decision of that case: but when carried into error the judgment of the King's Bench received the final approbation of the House of Lords. So in *Roe d. Dodson v. Grew*, where the devise was to George Grew

for life, and after his decease to the issue male of his body, he having no issue at the time when the will was made, George Grew was held to take an estate tail. The only other case which I shall mention is *Hodges v. Middleton*. There the devise was to Mrs. Ann Middleton for life, and at her death to her children. Now it appears from the case that Mrs. Middleton had several children at the death of the testatrix, and it is singular enough that Serjeant Hill in arguing for the Plaintiff observes, that as the date of the will was only one year previous to the death of the testatrix, probably there were children of Mrs. M. in esse at the date of the will. Now if there were children in esse at the date of the will, and that there were appears pretty clear, that case is particularly strong, for the Judges certified that they were inclined to think that under the will Mrs. M. took an estate tail (a). On the part of the Defendants it has been contended, that admitting the general doctrine that a devise to a man and his children, he having no children at the time of the devise, must embrace all the posterity of the devisee, yet that it appears from the circumstances of this particular case that the testator did not intend so to limit his estate: and in the course of the argument the power given to John Seale to settle the estate on such of his children as he should think proper was mainly relied upon, and contended to be inconsistent with a devise of an estate tail to John Seale himself. It was urged that the power would be altogether unnecessary if an estate tail were already given, since it would be in the power of the tenant in tail to dispose of the whole estate in such manner as he should think fit, by cutting off the entail. But it may be observed that the power had some operation, since it enabled the devisee to dispose of the estate to his children without going through the forms of a recovery. Independent however of the operation of this power, I think there is a fallacy in the argument: for it supposes that the testator knew the legal [495] consequences of all the words which he had used, and all the privileges attached to a tenancy in tail. The same argument was urged in the great case of *Perryn v. Blake*; and in the Exchequer Chamber Mr. Baron Perrot exposed the fallacy of it: and it was agreed that a testator cannot be presumed to know the different privileges annexed to the several estates of tenant for life or tenant in tail. The true question to be considered is, whether the testator meant to give the estate to John Seale and his posterity? Probably if it had been asked of the testator whether he meant that his son should have a power to defeat the limitation, he would have answered, that he did not understand the effect of an estate tail, but that he wished the estate to go to his son and his posterity. If he meant to give his estate to his son and his posterity generally, it is an estate tail; on the other hand, if he meant to give it first to his son, and afterwards to select the sons and daughters of his son in order to give the estate to them, the son took only an estate for life. Now we are of opinion upon all the authorities, that the words "children lawfully to be begotten," in this case, are not to be considered as words of purchase, but that the intention of the testator was to give his estate to his son and the issue of his body generally. And though perhaps the power would not have been added had the testator known the full effect of the words which he has used, yet we do not think the power sufficient to control the effect which, according to the authorities referred to, has always been given to those words. We give no opinion what would have been the case if there had been children born at the time of the devise. We shall make a certificate to the Lord Chancellor, that John Seale under the codicil took an estate tail, with a power of appointment annexed.

Accordingly the following certificate was afterwards sent to the Lord Chancellor:

"We have heard the arguments of Counsel upon this case, and are of opinion that under the codicil John Seale the son took an estate tail in the testator's real estates,

(a) Lord Chief Justice Willes in delivering the judgment of the Court in *Ginger d. White v. White*, Willes, 353, (in which case most of the authorities cited in the present case are commented upon), makes this observation on *Wyllie's case*: "If a devise be to A. and his children, if there be no children then in being it gives an estate tail, because the devise is in words de præsenti, and there being no children they must take by way of limitation; but if a devise be to A. and after his decease to his children, A. has only an estate for life, because then the words plainly shew that the children were intended to take by way of remainders." With this latter position, the opinion of the Court in *Hodges v. Middleton* seems inconsistent.

with a power by deed or by his last will to settle the said estates, or any part thereof, upon all or any of his issue, for such estates and interests as he should thereby appoint, and thereby to determine the estate tail devised to him by the testator, so far as the same should be inconsistent with such settlement.

ALVANLEY. G. ROOKE.
J. HEATH. A. CHAMBRE."

[496] SIMPSON v. SCALES. June 25th, 1801.

If an act of Parliament for enclosing and allotting the common and waste lands of a parish through which a navigable river flows, empower commissioners to set out such public and private roads and ways as they shall think necessary, and direct that all roads and ways not so set out shall be deemed part of the lands to be allotted; an ancient towing path upon the bank of the river though not set out by the commissioners, still subsists, for it is not within their jurisdiction.

Trespass for taking and impounding the Plaintiff's horse drawing certain boats at Northwold in the county of Norfolk. Plea that a certain close called Arminghay Hill (the locus in quo) was the freehold of the Defendant, and that the horse was there taken damage feasant. Replication, that the said close from time whereof, &c. hath lain open and adjoining to a certain river called the Wissey, the said river being a navigable river between Stoke and Hilgay, and that the owners of boats, &c. navigating the same have been accustomed to pass and repass in, through, and over the said close with their horses, &c. for the purpose of haling and towing the said boats along the said river. Wherefore the Plaintiff entered the said close with the said horse for the purpose of haling and towing the said boats for the more convenient navigation of the said river; when Defendant of his own wrong took the horse. Rejoinder, taking issue on the right of way. Verdict for the Plaintiff, with 40s. damages, subject to be reduced to one shilling if the Court should be of opinion with the Defendant on the following case:

The Defendant is the occupier and owner of the close mentioned in the pleadings, lying in the parish of Northwold on the north bank of the river Wissey, which is a navigable river from Stoke in Norfolk to Hilgay in the same county. On the south side of the river opposite to Northwold there is a regular towing-path; but for the convenient navigation of the river, it is frequently necessary to change the horses from one side of the river to the other. The owners of boats and vessels navigating the said river have time immemorial been accustomed to pass and repass in, through, and over the said close in question with their horses for the purpose of haling their said boats and vessels along the said river, which they had constantly done without interruption, whenever necessity or convenience required; and without such occasional towing or haling it would be impossible to navigate the same. By an act of Parliament passed in the year 1796 for inclosing and allotting the commons and waste lands of the parish of Northwold, the commissioners therein named are directed to set out and appoint such public and private roads and ways, and to order and direct such [497] bridges, ditches, banks, wiles, gates, bars, inlets, drains, watercourses, and other works, as they shall think necessary and proper; and it is enacted, that when the said public roads and ways shall be so set out, appointed, and made, it shall not be lawful for any person or persons to use any other roads or ways, either public or private, within or upon the lands thereby directed to be divided and allotted, on foot, or with horses, cattle, or carriages; and that all roads and ways which shall not be so set out and appointed as the roads or ways within or upon the lands thereby directed to be divided and allotted, shall be deemed to be part of the lands and grounds thereby directed to be divided and allotted, and shall be divided and allotted accordingly. The said act provides, that the said Commissioners shall, before the setting out any roads or highways in pursuance of the act, cause a notice of their intention, and a description of all the public ways and roads intended to be set out and appointed by them, to be affixed upon the principal door of the parish church of Northwold, and to be inserted in a Norfolk newspaper 21 days at least before such roads or highways should be set out; and if any person or persons should have any objection to the said roads or highways, or any of them, or should propose any other roads or highways, such person or

persons should deliver their objections or proposals in writing to the said Commissioners at the times therein mentioned, and that the said Commissioners should thereupon hear the allegations and evidence offered and produced to them in support of the said objections or proposals; and after due consideration thereof, should set out and appoint all or any part of the public roads or highways described in the said notice, or such other public highways or roads in lieu thereof as they should think fit. The Commissioners did set out and appoint certain public and private roads accordingly, which roads were made and completed; and before the setting out of the said roads, the notice required by the act was duly given, and the other directions of the act complied with on the part of the Commissioners. No road was set out, in, or over the said close, and no person attended at any meeting of the said Commissioners to prove a right, or to assert a claim to the road in question. The close over which this road is claimed was, before and until the passing of the act of Parliament, part of the commons or waste land of the said parish of Northwold, and was inclosed and allotted by the Commissioners under the said act to the Reverend Richard Whish, [498] an owner of lands and commonable messuages within the said parish, and was before the time, in the declaration mentioned, sold by him for a valuable consideration to the Defendant. The Plaintiff's horse at the time he was taken by the Defendant was in the said close, and employed in haling the Plaintiff's barges on the said river Wissey.

Sellon, Serjt., was to have argued in support of the verdict;

But Praed, Serjt., for the Defendant being called upon by the Court, contended, that the object of the act of Parliament being to discharge the land to be divided from all unnecessary burthens, this towing-path, which at the time of the passing of the act was an existing public way, not having been set out and appointed by the Commissioners as such, must now be taken to have been deemed unnecessary by them, and ought therefore to be considered as part of the lands divided; that this argument was strengthened by the circumstance stated in the case, of the existence of a towing-path on the other side of the river; and that although arguments of inconvenience might have weight in a case where the words of an act of parliament were doubtful, yet that in the present, where the directions of the act were positive, such arguments could not prevail.

LORD ALVANLEY, Ch. J. I think there is no difficulty in the construction of this act of parliament. This act authorises certain Commissioners to enclose certain lands, and to set out such ways as they should deem necessary, and to shut up such as they should deem unnecessary. Before the passing of this act there was a navigable river bounded on the south by enclosed lands, over which there was a towing-path, and on the north by unenclosed lands, over which the public had also been accustomed to pass for the purpose of towing. The Commissioners have set out no towing-path. Now it appears to me that the reason of this omission must have been, that they did not consider the matter to be within their jurisdiction. It was not the intention of the Legislature to empower the Commissioners to shut up one public road without setting out another in lieu of it. In cases of roads it may be very easy to substitute one for another; and the Commissioners have done so in the present instance: but a towing-path can exist no where but upon the bank of the river. It would therefore be monstrous to hold the public precluded from their right to pass along the north bank of this river, when it neither appears to have been the intention of the Legislature to empower the Commissioners to interfere [499] with that right, nor do the Commissioners themselves appear to have had the towing path in their contemplation when they proceeded to make their allotment.

HEATH, J. This power of shutting up ways was given to the Commissioners, in order to prevent the waste of ground arising from a multiplicity of roads, for it never was intended to include the towing-path in that general power; and even if it had been included, the Commissioners must have set out some other towing-path in lieu of that which was taken away.

ROOKE, J. This act contains the usual saving of the King's rights. If therefore the Commissioners have set out no other towing-path in lieu of that which before existed, I should hold that the right of navigating this river, and of towing barges upon it, must still be reserved to the King. If one road be set out for another the public is not injured: but if the towing path be taken away the public is thereby deprived of the power of navigating the river. Supposing therefore that the towing-

path could be considered as falling within the words of the act, I should still be inclined to hold, that the right was saved by the exception in favour of the King, who is the protector of all these public rights.

CHAMBERE, J. I think that conclusions from acts of parliament against the rights either of the public or of individuals ought not to be enforced by too strict an adherence to the letter. In my view of the case, it was not the intention of the Legislature to give any jurisdiction to the Commissioners respecting any rights of way which form part of the navigation of the river. The ways intended to be included were ways in the popular sense of the word, leading from one vill to another. But this towing-path is only a part of that way which consists of the whole navigation of the river. The Commissioners have so considered it, and I think they have put the right construction upon the act.

Per Curiam. Let the verdict stand.

[500] (IN THE HOUSE OF LORDS.)

BETWEEN THE RIGHT HONOURABLE MARY ELEANOR BOWES (commonly called Countess of Strathmore), BY W. LYON, ESQ. her next friend, *Plaintiff*; and ANDREW ROBINSON BOWES, ESQ. AND WM. BIRCH, HENRY BOURN, AND GEORGE STEPHENS, *Defendants*. And between ANDREW ROBINSON BOWES, ESQ. *Plaintiff*; and THE RIGHT HONOURABLE MARY ELEANOR BOWES (commonly called Countess of Strathmore), WM. LYON, CHS. SHUTER, RICHARD HARBORNE, JAMES SETON, MARY MORGAN, AND FRANCES BENNET, *Defendants*. June 29th, 1801.

On the appeal of the Right Honourable John Bowes Earl of Strathmore, son and heir of the Right Honourable Mary Eleanor Bowes (commonly called Countess of Strathmore), deceased.

[S. C. 7 T. R. 482. Discussed, *Hulme v. Heygate*, 1816, 1 Mer. 294. Referred to, *Duffield v. Duffield*, 1829, 3 Bligh. N. S. 346. Followed, *Moneypenny v. Bristow*, 1832, 2 Russ. & M. 127; *Hughes v. Turner*, 1835, 3 Myl. & K. 694. Explained, *Farnold v. Wallis*, 1840, 4 Y. & C. 165. Distinguished, *Doe v. Walker*, 1844, 12 Mee. & W. 601. Considered, *Hughes v. Hosking*, 1856, 11 Moo. P. C. 14.]

A. by will devised "all his freehold and copyhold lands, tenements, and hereditaments," in trust for certain purposes, and afterwards purchased new lands; he then made a codicil, whereby after reciting that he had devised "all his freehold and copyhold lands, tenements, and hereditaments" to the trustees named in the will, he revoked the devise so far as it related to two of the trustees, and devised his "said lands, tenements, and hereditaments" to the other trustees upon the same trust; and concluded with declaring the codicil to be part of his will. Held that the after-purchased lands did not pass (a).

George Bowes, late of Streatlam Castle, in the county of Durham, Esq. deceased, by his last will in writing, bearing date the 7th of February 1749, executed and attested as by law is required for devising real estates, did (among other things) give and devise all his freehold and copyhold manors, messuages, lands, tenements, and hereditaments whatsoever, not held in mortgage or in trust for any other person, nor held by any lease or leases for lives, to his wife Mary Bowes, Edward Gilbert, Esq. the father of his wife, his (the testator's) sister Elizabeth Bowes, his sister Jane Bowes, and his friends the honourable Sir Hugh Smithson of Stanwick, in the county of York, Baronet, and Thomas Rudd, of the city of Durham, Esq. (whose trusteeship he afterwards revoked), their heirs and assigns, to the use of them, their heirs and assigns, upon such trusts and to and for such intents and purposes as thereafter mentioned (that is to say), in case he should leave any son or sons born in his [501] lifetime, or after his death, that the same should be in trust for his first and other sons successively

(a) Vide *Goodtitle v. Meredith*, 2 M. & S. 5. *Parker v. Biscoe*, 8 Taunt. 699, 709. *Duffield v. Elvers*, 3 B. & C. 705, 724. *Matthews v. Venables*, 2 Bing 136, 143. *Guest v. Willasey*, 2 Bing. 429.

in tail male ; and for default of such issue then in trust for his daughter Mary Eleanor Bowes, afterwards the Countess of Strathmore, for her life, without impeachment of waste, except wilful waste in houses ; and after the determination of that estate in trust during her life to support the contingent remainders ; and after her death, then in trust for her first and other sons successively in tail male : and for default of such issue, then in trust for all and every her daughters, as tenants in common, and the heirs of their respective bodies ; with cross remainders in tail general to the surviving daughter or daughters as tenants in common, in case of one or more of the daughters dying without heirs of their respective bodies ; with divers remainders over. After making the said will, and before making the codicil in question, the testator purchased several estates, and particularly the said testator, in the year 1754, purchased an undivided third part of a certain freehold estate in the county of Durham, which was sold under a decree of the Court of Chancery, and was seised in fee thereof at the time of his death. The testator afterwards made a codicil to his will, bearing date the 20th day of October 1758, which, with the testator's signature and the attestation thereto, is in the words and figures following (that is to say): "Whereas by my last will and testament, bearing date the seventh of February 1749, I have given and devised all my freehold and copyhold manors, messuages, lands, tenements, and hereditaments whatsoever, not held on mortgage or in trust for any other persons, nor held by any lease or leases for lives, to my dear wife Mary Bowes, her father Edward Gilbert, Esq. my sister Elizabeth Bowes, my sister Jane Bowes, my friends the Honourable Sir Hugh Smithson of Stanwick, in the county of York, Baronet, and Thomas Rudd, of the city of Durham, Esq. their heirs and assigns, and to the use of them, their heirs and assigns, upon the trusts, intents, and purposes therein mentioned ; now I do hereby revoke and make void all my above devise, so far as it relates to the above Sir Hugh Smithson, now Earl of Northumberland, and Thomas Rudd, and their heirs ; and I do hereby give and devise my said lands, tenements, and hereditaments, unto the above-named Mary Bowes, my said wife, Edward Gilbert, and my sisters Elizabeth Bowes and Jane Bowes, their heirs and assigns, upon the same trusts, intents, and purposes as I have given and devised the same by my said last will ; and do hereby revoke the legacies of five [502] hundred pounds each, which I have given to the said Sir Hugh Smithson, now Earl of Northumberland and the said Thomas Rudd. And I do hereby revoke and make void the executorship of the said Earl of Northumberland and Thomas Rudd, of my said last will and the guardianship of my daughter, devised to the said Earl of Northumberland ; and do hereby confirm and appoint my said wife Mary Bowes, the said Edward Gilbert, and said sisters Elizabeth and Jane Bowes, executors of my will ; and do also revoke and make void the trusteeship of the said Earl of Northumberland and Thomas Rudd, for the laying out of the savings of the produce of my real and personal estates in the purchasing of lands ; and do hereby make and declare this codicil to be part of my last will and testament. As witness my hand and seal, this twentieth day of October, one thousand seven hundred and fifty eight." Then followed the attestation thus: "Signed, sealed, published, and declared by the above-named G. B. as a codicil or part of his last will and testament, in the presence of us," &c. The testator died without having made any disposition of the after-purchased estates otherwise than by the above-mentioned will and codicil, leaving the late Countess of Strathmore, his only child and heiress at law, him surviving.

By an order in the above causes Lord Loughborough, C., directed a case to be made for the opinion of the Judges of the Court of King's Bench upon the question, Whether the codicil of the 20th of October 1758 was a republication of the testator's will of the 7th of February 1749 with respect to the estates purchased after the date of the said will ? The Court of King's Bench having answered this question in the negative, (see 7 Term Rep. 482) Lord Loughborough, C., by his order in the above causes, in effect confirmed that decision. Whereupon the present Appellant submitted that the said decision, and order founded thereon, were erroneous, for the following among other reasons :

1st, Because it is clear from the will the testator did not mean to die intestate as to any part of his property, but to dispose of all his real estates upon the trusts therein mentioned ; and it is equally clear, that when he made his codicil he did not mean to die intestate as to any part of the estates he then had.

2d, That the will and codicil ought to have effect according to the intention of the

Testator; that the Testator's intention, at the time of executing both the instruments, was to dispose of all the real estate which he had at the time of executing those in-[503]struments, as well as at the time of his death. That by legal construction the will could only operate upon estates the testator had at the time the will was made; but by the same rule, the codicil could operate upon all the estates the testator had subsequent to making the will, and previous to the codicil. And that the true construction of the will and codicil is this, that by the will the testator gave all his real estates to the trustees therein named, and by the codicil he gave all his real estates to the same trustees except two, who are thereby excluded.

3d, That in many cases a codicil has been held to be a republication of a will, so as to pass after-purchased estates, though the testator has not expressed any particular intention to republish his will; because, according to the general understanding of mankind, a man making a general devise of all his real estates by his will is presumed to intend to dispose of all the real estates he shall have at the time of his death.

4th, That in the argument for restraining the effect of the codicil to the estates which the testator had at the time of making his will, great stress was laid upon the word "said" in that part of the codicil where the testator devises the estates to the trustees therein named; but upon the true construction of the codicil, the word "said" is of no effect, because it only makes the testator, who had recited that he had given all his estates to trustees therein named, say, that in like manner, by his codicil, he gave all his estates to the trustees whom he therein names.

5th, That if in order to pass the lands in question it should be thought necessary to consider the codicil as a republication of the will, there is sufficient in this codicil to give it that effect: the testator declares the codicil to be a part of his will; and in the attestation it is mentioned that he publishes it as part of his will. If the codicil is so to be taken, it ought to have the same effect as if the testator had in the codicil transcribed his will, excluding only two of his trustees, and then it would have been in terms a devise to the trustees whom he chose to continue of all the estates which he had at the time of executing the codicil.

J. MANSFIELD.
E. LAW.

The Respondents hoped that the opinion of the Court of King's Bench and the order of the Lord Chancellor founded thereon, would be confirmed and established, for the following among other reasons:

[504] 1st, Because the expression contained in the codicil, bearing date the 20th day of October 1758, by which the testator devised his said lands, tenements, and hereditaments in the manner thereafter mentioned, manifestly confines the devise to such lands, tenements, and hereditaments as he was seised of at the time when he published his will, bearing date the 7th day of February 1749, and can by no possibility of fair grammatical import be construed to extend to lands purchased after the date of the will.

2d, Because no case can be found in which an expression in a codicil so qualified, has been construed to extend to after-purchased lands. All the cases relied on by the other side plainly discover an intention to devise after-purchased estates, and contain words sufficiently comprehensive to pass them.

3d, Because, if such a construction were admitted, it would have the effect of disinheriting the heir at law, by words of doubtful, if not overstrained implication, which courts of law will never allow to be done by any thing short of an intention signified in the most express and unequivocal terms. Many reasons might exist why the testator should leave certain parts of this estate in the discretion of the heir at law. Those reasons, without doubt, influenced his mind, otherwise it is impossible to suppose that he would not in direct and explicit terms have devised the after-purchased estates, especially when it is considered how technically and particularly his will is worded.

4th, Because, upon reading the codicil, it most clearly appears that the sole purpose of the testator in making it, is to revoke the trusts contained in the will, so far as they relate to two particular trustees; for the same estates are devised upon the same trusts, and to the same trustees, with the exclusion only of those two persons, in respect of whom the devise contained in the will is expressly declared to be revoked and made void. In short, it is manifest that the testator's object in making the codicil was neither more nor less than to strike out of his will the names of Sir Hugh

Smithson and Thomas Rudd, and that if those gentlemen had not been originally named as trustees and executors in the will, the codicil never would have been made.

T. ERSKINE.

J. RAINE.

This case was argued at the bar of the House of Lords on two several days by the Attorney-General (Law) and Mansfield for [505] the Appellants, and by Erskine and Raine for the Respondents. On the last day of argument (the 29th of June) the Lord Chancellor put the following question to the Judges, viz. Whether by the legal construction of the codicil of the testator George Bowes, bearing date the 20th of October 1758, and by him declared to be part of his last will and testament, dated the 7th day of February 1749, the real estate purchased after he made his will passed to the uses and upon the trusts, intents, and purposes mentioned in the said will?

MACDONALD, Ch. B. having conferred with the rest of the Judges present (a) upon the said question, delivered their unanimous opinion in the negative.

After the Judges had thus given their opinion, a debate took place in the House, in which Lord Thurlow differed in opinion from the Judges. His Lordship observed that a republication of a will of lands had always been held to speak as of the time of the republication, and that he knew no instance in which that rule had been departed from, and that this case must be decided upon reference to the principles upon which former cases had proceeded: That though it was true that where there was a particular description of lands devised, no subsequent codicil could extend to after-purchased lands, unless by particular reference to those lands, yet that in such case it was only the particular description of the lands which defeated the effect of the republication; That this distinction would be found to reconcile all the cases in which there was any appearance of difference; and the only question in this as in all other cases would be found to be, whether the republication was general or whether it were controlled by particular expressions? and that, indeed, in this very case, such seemed to have been the opinion of the Court of King's Bench, for in the certificate it was expressed that this codicil was not that sort of republication which would pass the lands in question; That if the testator had discovered any anxiety in the will, it was to convey all the estates of which he was possessed; That the bequest in the will was as ample as possible; That the testator began the codicil by referring to the largeness of the former devise, where he said, "whereas by my last will and testament I have given and devised all my freehold and copyhold," &c.; That this reference, unrestrained by any thing, would clearly have been sufficient to pass the after-purchased lands, and that probably the whole difficulty had arisen from the testator being mistaken in [506] point of law, and thinking that his after-purchased lands did pass by the first devise; That his general intent appeared to have been, that the rents and profits of all his estates should be laid out in the purchase of new lands, and yet the House must negative this general intent before they could decide in favour of the Respondents; that it appeared to him that the testator must be understood to say, whereas I have conveyed all my lands (including those purchased subsequent to the date of the will). I devise my said lands, referring to what he supposed he had conveyed; and that in this view of the case the introduction of the word "said" would not control the operation of the codicil.

THE LORD CHANCELLOR (Lord Eldon) supported the opinion of the Judges, saying, that although a republication of a will of lands certainly speaks as of the time of the republication, yet that in all cases of this kind which had come before the Courts for decision, the only question had been, whether the particular case was or was not within the general rule. His Lordship observed that it could not be denied that other circumstances than those of locality in the description of the lands devised, were sufficient to control the effect and operation of a codicil, and that wherever a question had arisen whether the operation of the codicil were controlled or not, those who had to solve the question had usually done so by satisfying themselves respecting the intent of the testator; That this testator's intention in the will clearly was to raise a fund to be applied to certain uses, but that possibly the undivided quality of the estate which he purchased in 1754 might be a reason inducing him not to pass that estate with the others; that however possible it might be that the testator might not be acquainted

(a) Hotham, B. Heath, J. Thompson, B. Rooke, J. Le Blanc, J. and Graham, B.

with the legal effect of his will, still he thought that the House ought to decide this question as if the testator actually did know that the will of 1749 had not passed the after-purchased lands; That when in the codicil he referred to the will as having passed all his lands, he did no more than recite his former devise, but that when he came to the operative part of the codicil he changed the tense of the verb; and though in the former part he said, "whereas I have devised," &c. in the latter part he said, "I do hereby revoke," &c. and "I do hereby give and devise," &c.; That if therefore by the former words of the codicil, "all my freehold and copyhold lands," the testator were understood to include all the after-purchased lands, by the latter words of the codicil he must be understood to be revoking a devise of these lands which he had [507] not at the time when the will was made; for his expressions of revocation were co-extensive with the expressions of devise; That these expressions therefore, unless explained by the context, would be unintelligible; but that the word "said" clearly shewed that they were both intended to be confined to the lands which the testator possessed at the time of the will, and that this construction rendered them consistent; That the intent of the testator (if it could be discovered) was the clue by which the House ought to direct itself; and though in the present case that intent could not be positively ascertained, yet that some cases might be put to illustrate the danger of the doctrine contended for on the part of the Respondents; for supposing the testator at the time of making his will to have been possessed of lands to the amount of 100l. per ann. only, and between that time and the time of making the codicil to have purchased lands to the amount of 10,000l. per ann. it would seem impossible to contend that by a mere reference to a devise of so small a part of the property he intended to pass so considerable an estate; That the true question seemed to be, whether from the words "my said lands" a special intention to exclude the after-purchased estate did not appear, in the same way as it would have appeared, had he referred to the lands originally devised by a description of locality; but that, indeed, if their Lordships were not satisfied that such a special intention did appear, the general rule respecting the operation of a republication must operate in favour of the Appellants.

THE EARL OF ROSSLYN (late Lord Loughborough Chancellor) and LORD ALVANLEY, Chief Justice of the Common Pleas, also spoke shortly in support of the opinion of the Judges.

THE LORD CHANCELLOR then moved that the appeal might be dismissed and the order therein complained of be affirmed; which motion passed in the affirmative without a division.

[508] THE KING v. JOHN EGGINTON, WALTER EGGINTON, THOMAS GIBBONS, JOHN FOULDS, AND WM. FOULDS. 1801.

[S. C. 2 Leach, 913. Referred to, *R. v. Middleton*, 1873, L. R. 2 C. C. 61.]

Indictment for a burglary laid in the 1st count to have been committed in the house of M. R. B.; in the 2d of J. B., and in the 3d of W. N. It appeared that the place where the robbery was committed was a centre building, having two wings; that in the centre building the business of M. R. B., J. B., W. N., and several other persons was carried on; that in part of one of the wings was the dwelling of M. R. B. and in the other part that of J. B. neither having any internal communication with the centre except by a window in the dwelling of J. B. which looked into a passage that ran the whole length of the centre: and that the other wing was occupied by W. N., from which there was no communication with the centre. Semb. that the robbery did not amount to a burglary (a).—If a servant, being solicited to become an accomplice in robbing his master's house, inform his master thereof, who thereupon tells him to carry on the business, and consents to his opening a door leading to the premises, and being with the robbers during the robbery; and also marks his property and lays it in a place where the robbers are expected to come, with a view to apprehend the robbers, this conduct of the master will not amount to a defence in an indictment against the robbers.

The four first Defendants were tried before Lawrence, J., at the Spring Assizes for

(a) And see *Rex v. Holden*, 2 Taunt. 334.

Stafford, 1801, for a burglary. The 1st count in the indictment charged them with breaking and entering the dwelling-house of Mathew Robinson Boulton, and stealing therein a quantity of silver and 150 guineas, laid to be the property of Mathew Boulton and John Hodges, 150 guineas laid to be the property of Mathew Boulton, Mathew Robinson Boulton, James Watt, and Gregory Watt; 150 guineas the property of Mathew Boulton, John Bonus, and William Nelson; 150 guineas the property of Mathew Boulton, Benjamin Smith, and James Smith; and 150 guineas the property of Mathew Boulton, John Hodges, Mathew Robinson Boulton, James Watt, Gregory Watt, John Bonus, William Nelson, Benjamin Smith, and James Smith. The 2d count laid the house to be the dwelling-house of John Bush. The 3d count laid the house to be the dwelling-house of William Nelson. The 4th count was for being in the dwelling-house of the said Mathew Robinson Boulton, and stealing as above, and burglariously breaking the house to get out of it against the statute, &c. The 5th count for being in the dwelling-house of John Bush, stealing the property, and burglariously breaking the house to get out of it against the statute, &c. The 6th count for stealing the property as above in an out-house belonging to the dwelling-house of said Mathew Boulton against the statute, &c. The 7th count for stealing the property as above in an out-house belonging to the dwelling-house of said Mathew Robinson Boulton against the statute, &c. The 8th count for stealing the property as above in an out house belonging to the dwelling-house of William Nelson against the statute, &c.

On the trial it appeared that the silver goods were the property of Mathew Boulton and John Hodges, the money the property of the several persons last mentioned in the indictment, with whom [509] Mathew Boulton was concerned in different manufactories, that is to say, with John Hodges, as manufacturers of plated goods; with William Nelson and John Bonus, as button makers; with James Smith and Benjamin Smith, as buckle makers; with Mathew Robinson Boulton, James Watt, and Gregory Watt, as engine makers. Besides which Mathew Boulton carried on two other manufactories on his own sole account. It farther appeared that the money and part of the silver were kept in a counting-house, which was used for transacting the money concerns, and keeping the accounts of all the different businesses in which Mathew Boulton was engaged; that other part of the silver was in a room, being one of several where the plate business was carried on, which rooms and counting-house formed a centre, having two wings adjoining, consisting of a dwelling-house inhabited by persons engaged in Mathew Boulton's manufactories; that one of them was inhabited by Mathew Robinson Boulton but that had no internal communication with the centre-building at the time of the offence being committed, a room in his house which communicated with the centre-building having been allotted to the purposes of the plating business, with which he had nothing to do, the door into it was shut up, and a working bench placed against it so as to stop the passage; that one Bush, a workman of Mathew Boulton, occupied another of the dwelling houses in the same wing, and from his house there was no way into the centre-building, but there was in it a window which looked into a passage that ran the whole length of the centre-building; that in the other wing was the dwelling-house of William Nelson, the partner of Mathew Boulton in the button business, which had no internal communication with the centre, and in that wing other persons lived; that in the front of this building was a terrace or front-yard fenced round in different ways, and at the end of the pile of building above described, by a wall with gates for horses and carriages, and a door for foot passengers. It further appeared that the prisoners had some time previous to the breaking into the centre-building applied to one Joseph Phillips, who was employed as a watchman to the manufactory at Soho, to assist them in robbing it, to which he assented, and informed first some of Mathew Boulton's servants and assistants, and afterwards Mathew Boulton himself of what was intended, of the manner and time they were to come, that they were to go into the counting-house, and that he was to open the door into the front-yard to the prisoners; that Mathew Boulton told him to carry on the [510] business; that Mathew Boulton was to bear him harmless, and that Mathew Boulton consented to his opening the door leading to the front yard, and to his being with the prisoners the whole time; that in consequence of this information Mathew Boulton removed from the counting-house every thing but 150 guineas and some silver ingots, which he marked, to furnish evidence against the prisoners, and lay in wait to take them when they should have accomplished their purpose; that on the 23d of December,

about one o'clock in the morning, the prisoners came, and Phillips opened the door into the front-yard, through which they went along the front of the building, and round it into another yard behind it, called the middle-yard; and from thence they and Phillips went through a door, which was left open, up a stair-case in the centre-building leading to the counting-house and rooms where the plate-business was carried on; that this door the prisoners bolted, and then broke open the counting-house, which was locked, and the desks, which were also locked, and took from thence the ingots of silver and guineas; that they then went to the story above into a room where the plate-business was carried on, and broke the door open, and took from thence a quantity of silver, and returned down stairs, when William Foulds unbolted the door at the bottom of the stairs, which had been bolted on their going in, and went into the middle-yard, when all except William Foulds (who escaped) were taken by the persons placed to watch them.

On this case two points were made for the prisoners; 1st, that no felony was proved, as the whole was done with the knowledge and consent of Mathew Boulton, and that the acts of Phillips were his acts. 2dly, That if the facts proved amounted to a felony, it was but simple larceny, as the building broken into was not the dwelling-house of any of the persons whose house it was charged to be, and as there was no breaking since the door was left open.

The jury found the prisoners guilty; but Lawrence, J., reserved the above points for the consideration of the Judges, before eleven of whom (absente Lord Eldon, then Lord Chancellor as well as Lord Chief Justice of the Common Pleas) it was argued on the 9th of May last.

Clifford, for the prisoners, began by arguing the second objection. The place in which the offence was committed was so completely separated from the dwelling-house as not to be the subject of burglary. The case of *The King v. Gibson, Mutton, and Wiggs*, 1 Leach, 396, ed. 1800, which is the strong-[511]-est authority in support of the proposition that this offence is a burglary, is very distinguishable from the present. There the person in whom the property of the house was laid was the sole occupier of the house to which the shop in which the offence was committed was attached, though he had leased part of his house with the shop to another person. But here, though M. R. Boulton was the sole occupier of the adjoining house in the wing of the building, yet the centre-part, where the offence was committed, was separated from the wing, and neither belonged to nor was in the sole occupation of M. R. Boulton; but was in the joint occupation of the several partners in the business. It appears from 1 H. P. C. 557, that a separation of a shop from a mansion-house by lease is a sufficient separation in law to prevent the former from being the subject of burglary. Indeed in *The King v. Martha Jones*, 2 Leach, 607, ed. 1800, where the rent of a house is paid from the partnership fund of A. and B., the property, so as to constitute burglary, was held to be ill laid in both, the house being in the single occupation of B. Clearly in an ejectment brought for these premises, the demise would not have been well laid in M. R. Boulton, and if so the property is not well laid to support the offence of burglary. With respect to the 1st objection, the consent of the prosecutor removes all criminality from the prisoners. In almost every species of offence committed against the property of another, it is of the essence of the offence that it should be committed against the will of the owner. Bracton, lib. 3, tr. 2, c. 32, fo. 150 b. defines theft thus, *contractatio rei alienæ fraudulenta cum animo furandi invito illo Domino cujus res illa fuerit*: and Lord Ch. J. Willes, in *The King v. Donally*, 1 Leach, 232, ed. 1800, seems to take it for granted that robbery must be against the will of the owner, when he says, "Wherever one man obtains property from the possession of another against his will, the law presumes the act to proceed from a felonious intention." The prosecutor's assent to the commission of the crime would undoubtedly have made him an accessory before the fact, had it not been an assent to the stealing of his own property. In *The King v. M'Daniel*, Fost. 125, it is laid down as incontrovertible, "that whoever procureth a felony to be done is a felon; if present, he is a principal; if absent, an accessory before the fact;" and the statutes 4 & 5 Ph. & M. c. 4, and 3 and 4 W. & M. c. 9, are referred to; which, in describing the offence, speak of persons who "ma[512]-liciously counsel, hire, command, comfort, aid, abet, or assist." Sir Edward Coke, in his commentary on the statute of West. 1, c. 14, 2 Inst. 182, says, that under the word "aid" is comprehended all persons "assenting and consenting" to the act. Now in this case the prosecutor did assent

and consent, and if his crime be done away by the circumstance of the property, to the stealing of which he assented, being his own, the same circumstance does away the crime of the prisoners also; for if this was a felony, the prosecutor is criminal as an accessory, and he can only shew himself not criminal as such by shewing that the prisoners committed no felony. Suppose Phillips the watchman had been indicted for the burglary, what could have prevented his being convicted of the crime but the assent of the prosecutor? Now that assent extends to all the persons concerned, and will operate to save the prisoners in the same way as it would have operated in his favour. To shew that without such assent Phillips must have been convicted, *Joshua Cornwell's case*, 10 Harg. St. Tr. 433, in the notes, may be referred to, where the opening the door of his master's house by the prisoner in the night-time, and letting in two persons to rob him, was adjudged by the twelve Judges to be burglary. In *The King v. M'Daniel*, all the prisoners were acquitted on account of the robbery having been committed in consequence of a previous agreement, and it is there said to be "of the essence of robbery and larceny that the goods be taken against the will of the owner." The only case in which the assent of the party robbed has been held not to take away the felony is that of *Norden*, cited in the judgment of *The King v. M'Daniel*, Fost. 129, but the answer to that case is there given, viz. that it was uncertain whether the robber would come or not, the officer having no concert with the highwayman, but only going upon the road in expectation of being robbed, and submitting to the robbery. In this case there was a regular plan for the robbery of the prosecutor's premises carried on through the intervention of the accomplice with the prosecutor himself.

Manley, on the part of the prosecution. 1st, With respect to the burglary, it is not necessary that a communication should exist between the part broken into and the rest of the house; it is sufficient if the former be parcel of the latter and under the same roof; this point seems clearly established by the case of *The King v. Gibson, Mutton, and Wiggs*. Nor is it any objection that the [513] place where the offence was committed was used in the business of several other persons jointly with M. R. Boulton, for being under the same roof with his dwelling-house it may well be considered as parcel of that house. If one of the partners in a banking-house occupy the dwelling-house to which the shop belongs, and the shop be broken into, there can be little doubt that it would amount to a burglary in the dwelling-house of the partner residing there. The case of *The King v. Martha Jones* is distinguishable from the present, it being expressly stated there that the two houses were perfectly distinct and separate from each other at the time the offence was committed. 2dly, It has been argued, that if the offence of the prisoners amount to a felony the prosecutor has made himself an accessory to that felony by his conduct, and that if he be not an accessory it must be because no felony was committed. But the essence of the felony consists in the felonious intent. Thus Bracton in the place cited on the other side, after saying that theft must be committed *cum animo furandi*, adds, *cum animo dico, quia siue animo furandi non committitur*. The prosecutor therefore was not particeps criminis, inasmuch as his consent was only given for the purpose of promoting the detection of the prisoners. The present resembles *Norden's case*, who went out with a view to be robbed in order that he might apprehend the robber. But in neither case was there any concert between the party committing the offence and the party on whom it was committed. Such also was the case of the man tried some little time back at Worcester Assizes, who being suspected of robbing in an inn there, a great-coat was placed in his way with a pocket-handkerchief hanging out of the pocket, and the man being watched and detected in stealing the handkerchief, was convicted before Mr. Baron Thompson, who overruled the objection that he was induced to commit the offence by the persons who placed the great-coat in his way. There is also a case in Fitzherbert's Justice of the Peace, by Crompton, Ed. 1617, p. 31 b. which is precisely in point. There the servant of an Alderman of London agreed with strangers to steal the plate of his master on a certain night in his house, and they had a false key of the place where the plate was kept; afterwards the servant revealed the design to his master, who on the appointed night had certain men ready at the place, et apres ils vient et enter in le dit lieu, with intent to steal the plate, and were taken and arraigned for burglary at Newgate, found guilty and hanged.

[514] The opinion of the Judges was never publicly communicated, though it was understood to be in favour of the prisoners on the question of burglary. The other

objection taken by their counsel was overruled, as appeared from the prisoners receiving a pardon on condition of transportation beyond seas. Indeed William Foulds, who had been included in the indictment found against his associates, having been taken between the Spring and Summer Assizes, was tried before Mr. Justice Lawrence at Stafford at the latter period, and being found guilty of the larceny received a similar punishment with the other prisoners.

End of Trinity Term.

[515] CASES ARGUED AND DETERMINED IN THE COURTS OF COMMON PLEAS AND EXCHEQUER CHAMBER, IN MICHAELMAS TERM, IN THE FORTY-SECOND YEAR OF THE REIGN OF GEORGE III.

FAWCETT v. CHRISTIE AND ANOTHER. Nov. 6th, 1801.

Defendant having been arrested on a *capias* returnable on the first return of the term, on the day before the *essoign* day, took out a summons to stay proceedings upon payment of the debt and costs; on the *essoign* day Plaintiff filed a declaration *de bene esse*, and on the day after the *essoign* day, Defendant obtained an order to stay proceedings. Held that the Plaintiff was entitled to the costs of the declaration (a)¹.

The Defendant in this case was arrested in August last upon a *capias* returnable on the morrow of All Souls (3d of November;) on the 2d of November he took out a summons and served it on the Plaintiff to stay proceedings on payment of the debt and costs; on the 3d, being the *essoign* day of the term, the Plaintiff filed a declaration *de bene esse*; on the 4th, the Defendant obtained an order to stay proceedings, and served the Plaintiff with an appointment to attend the taxation of costs upon the following day. On this last day (the 5th) the costs were taxed by the prothonotary, who allowed the costs of the declaration.

Best, Serjt., now moved that the prothonotary might be directed to review his taxation, contending that the Plaintiff was [516] not entitled to the costs of a declaration filed after a summons to stay proceedings on payment of the debt and costs, the summons being served before the return of the writ. He cited *Golding v. Grace*, 2 Bl. 749, as in point; where the Court held, that, though a declaration may be delivered *de bene esse* on the return day, and shall be good for many purposes, yet being in favour of the Plaintiff to expedite his cause, it cannot be delivered so as to charge the Defendant with paying for the declaration till the appearance day (a)².

But the Court were of opinion that the Plaintiff was entitled to the costs of his declaration, saying that the summons was no stay of proceedings, and that he had therefore a right to proceed until an order was made; that if it were otherwise the Defendant might make use of a summons for the mere purpose of gaining time; that he might lie by, as in the present case, till the eve of the *essoign* day, take out a summons to prevent the Plaintiff's declaring, and then abandon the summons.

Best took nothing by his motion.

CLEMPSON v. KNOX. Nov. 9th, 1801.

If bail be put in with the filazer of the county in which the Defendant is arrested on a *testatum capias*, the bail may be treated as a nullity, and an attachment issue.

(a)¹ And see *Partington v. Williams*, 2 N. R. 398.

(a)² The Court there observed, that if it were otherwise, "an attorney might delay the service of the writ till the night before the return, and charge the Defendant with the costs of the declaration as well as of the process." And it is said, that "in the King's Bench the master will not allow the costs of declaration delivered under such unfair circumstances," 1 Sell. Pr. 227, Ed. 2. But no authority of that Court is cited in support of this practice.

But if the Plaintiff appear to have been aware that bail were actually put in, though with the wrong filazer, the Court will relieve against the attachment (a)¹.

The Plaintiff in this case having sued out a *capias* into Middlesex, upon which non est inventus was returned, afterwards sued out a *testatum capias* into Staffordshire, in which last county the Defendant was arrested, and put in bail with the filazer for that county; this bail the Plaintiff treated as a nullity, and issued an attachment against the Sheriff of Staffordshire.

A rule nisi having been obtained for setting aside this attachment and all proceedings thereon,

[517] Bayley, Serjt., now supported (a)² the rule, and contended that the bail was regularly put in with the filazer for Staffordshire, for that the rule of this Court, Hil. T. 1782, which allowed the Plaintiff to arrest the Defendant in the county where he is to be found, and afterwards to declare against him in a different county without waiving the bail, had taking away the writ of *testatum capias*, Imp. Pr. C. B. 160, ed. 4, and that the writ upon which the Defendant was actually arrested and put in bail was to be considered in the nature of an original *capias*.

Best, Serjt., contra, insisted, that the rule of this Court, Hil. T. 1781, Imp. Pr. C. B. 159, ed. 4, had removed the only difficulty in cases of this kind, by obliging the sheriffs to specify on their warrants for the *testatum capias* from what county the original *capias* issued, so that a Defendant can now be under no difficulty in ascertaining the county where bail are to be put in: and that the rule of Hil. T. 1782 did not apply to this case, for though the Plaintiff by that rule be allowed to sue out an original *capias* into a different county from that in which he means to declare, yet if he first sue out an original *capias* and follow it up by a *testatum capias*, the bail must be put in as if that rule had not been made. He cited *Harris v. Culvert*, 1 East, 603, where a *capias* having issued into London, and the Defendant afterwards having been arrested on an alias *capias* in Middlesex, and bail having been put in in the latter county, the Court of King's Bench set aside the proceedings upon a *scire facias* against the bail, saying it was the same as if no bail had been put in, and the Plaintiff might have proceeded against the Sheriff for that default. He also observed that the objection was stronger in the Common Pleas than in the King's Bench, because in the latter there is but one filazer for all England, whereas in the former there are different filazers for the different counties.

Bayley observed, that *Harris v. Culvert* did not apply, because no rule existed in the King's Bench similar to that in the Common Pleas of Hil. T. 1782.

The Court thought the attachment regular, observing however that they did not proceed upon the authority of the case in the King's Bench, but upon the practice of this Court, and [518] adding that the comment in Impey's Practice, which lays down that the rule of Hil. T. 1782 has taken away the *testatum capias*, is rather inaccurate. But it appearing that the Plaintiff at the time when he proceeded was aware of the bail having been actually put in with the filazer for Staffordshire, they made the rule absolute for setting aside the proceedings, leaving the attachment to stand as a security.

(IN THE EXCHEQUER CHAMBER.)

G. BROWN, H. BROWN, AND J. P. RICHARD v. KEWLEY, AND ANOTHER; IN ERROR.
Nov. 13th, 1801.

Assumpsit for goods sold and delivered. Plaintiff proved that having sold goods to the Defendant, he received from him a check upon a J. S. a banker, directing the latter two months after date to pay to the Plaintiff a bill at two months, for the amount of the goods, which check was indorsed by the Plaintiff, and paid by him into the

(a)¹ Vide *Partington v. Williams*, 2 N. R. 398. *Rex v. Sheriff of Middlesex*, 3 M. & S. 532.

(a)² Previous to shewing cause a preliminary objection was taken to the affidavit on which the rule was founded, viz. that it was intitled in the cause, whereas it ought to have been intitled *The King v. The Sheriff of Staffordshire*. The Court held the objection well founded; but it was afterwards waived.

banking-house of J. S. who entered it short in the Plaintiff's account; that the Plaintiff and Defendant both kept accounts with J. S. and that the general course of business between J. S. and most of his customers was to settle accounts on certain quarterly days; when he advanced bills for his customers, or received bills from them, he entered the whole amount in his books as bills; but on the quarterly days he debited his customers with the whole amount of bills advanced to or for them, crediting them at the same time for interest from such day to the day when the bills would become due, and credited his customers for the whole amount of bills paid in by them, debiting them for the interest in like manner, and when a check was paid in for a bill to be drawn at a future day, he calculated and allowed interest, on the next quarterly day, to the time when such bill, if drawn, would become payable; that the account of the Plaintiff and J. S. had been settled only six times between May 1788 and March 1793, but that each of those settlements took place on a quarterly day; that on the 18th of March 1793, J. S. became bankrupt, a quarterly day having intervened between the payment of the check into the house of J. S. and his bankruptcy, upon which last quarterly day no settlement of accounts between Plaintiff and J. S. took place, nor was the amount of the check ever carried out as cash, or any calculation of interest made thereon till after the bankruptcy; that when the check was paid into the banking-house of J. S. there was a balance of 51l. 11s. in favour of the Plaintiff, which was much overdrawn before the bankruptcy of J. S. without any other addition to the credit side of the Plaintiff's account than the check in question. The Defendant offered to prove, that on the last mentioned quarterly day the account between himself and J. S. was settled, at which time he was debited for the whole amount of the check, and credited for interest thereon from the day of settlement to the day when the bill mentioned in the check, if drawn, would have become due. Held 1st, that the check in question did not, under all the circumstances of the case, amount to a payment for the goods by the Defendant; 2dly, that the evidence offered by Defendant was not admissible (a).

This was an action for goods sold and delivered; and was tried before Heath, J., and a special Jury at the Lancaster Spring Assizes 1795. The learned Judge having rejected the evidence offered by the Defendants below (the Plaintiffs in error), and directed the Jury to find a verdict for the Plaintiffs below (the Defendants in error), a bill of exceptions was tendered, from which when annexed to the record in this Court, the case appeared to be in substance as follows. The evidence of the Plaintiffs below was to the following effect: that on the 19th of January 1793 Kewley and Co. who were merchants at Liverpool, by Messrs. Greeves and Dennison their brokers, sold and delivered to G. and H. Brown, who were also merchants at Liverpool, 42 hogsheds of coffee, at the price of 176l. 17s. 10d. to be paid for in two months by [519] bills at two months' date; that this coffee was purchased by G. and H. Brown on the joint account of themselves and J. P. Richard, also a merchant at Liverpool; that on the 7th of February, 1793, G. and H. Brown, on behalf of themselves and J. P. Richard, delivered to Kewley and Co. the following check on Caldwell and Co. bankers at Liverpool:

"Messrs. Caldwell and Co.

Liverpool, 7th February, 1793.

"Two months after date pay Messrs. J. and P. Kewley a bill at two months for one thousand one hundred and sixty-one pounds seventeen shillings and ten pence, charging one half to account of Messrs. Richard and Co.

"£1761 17s. 10d.

G. BROWN and H. BROWN."

That G. and H. Brown on their partnership account, and J. P. Richard on his own account, and Kewley and Co. on their partnership account, respectively dealt with Caldwell and Co. as bankers, and in the remitting and negotiating of money and bills of exchange; that on the 19th of February 1793 the above check was indorsed by Kewley and Co. and paid by them to Caldwell and Co. to be placed to their account, and was accordingly entered short by Caldwell and Co. in their account with Kewley and Co. and also in the duplicate account kept by Kewley and Co.; that on the 18th of March 1793, Caldwell and Co. became bankrupts; that before the bankruptcy of Caldwell

and Co. the general usage and course of dealing between them and most of their customers was to settle their accounts quarterly, viz. on the 28th of February, the 31st of May, the 31st of August, and the 30th of November. "When Caldwell and Co. advanced bills for their customers, or received bills from them, they always entered the whole amount of such bills in their banking books as bills, but on the settlement of accounts they drew out an interest account, and made such persons debtors for the interest of all bills paid by the said Caldwell and Co. to or for such persons from the time when such bills became due until the next day of settlement, and on the contrary they gave such persons credit for the interest of bills which they had paid into the said bank from the times when such bills respectively became due until the day on which such settlement took place (a), and the balance of such interest-account was on [520] such settlement charged to the debit or credit of the persons with whom the said Caldwell and Co. kept accounts, according to the state of such interest-account, and on such settlement the interest to debit or credit made a component part of the principal sum which was carried on as a fresh balance; and so they from time to time carried on such account. The interest when to the debit of the customer was entered at the time of settlement thus—'Interest to debit deducted £———;' and the amount was deducted from the credit side of the account: the interest when to the credit of the customer was entered thus—'Interest to credit £———;' and the amount was added to the credit side of the account. And when any checks or orders were given for bills, which bills were to be drawn at a future period after the date of the check or order, and such check or order was paid into the bank, the interest was at the next day of settlement in like manner calculated and allowed from the time when such bill, if it had been drawn, would by the tenor of the check or order have become payable;" that Kewley and Co. began to deal with Caldwell and Co. on the 1st of May 1788, and the accounts between them were settled at the respective times following, viz. on the 31st of August 1788, the 30th November 1789, the 28th February 1790, the 31st of August 1790, the 28th February 1791, and the 31st May 1792; that when the said check was paid in by Kewley and Co. and entered in the book of Caldwell and Co. the whole account from the last-mentioned settling day on the credit side in favour of Kewley and Co. was as follows, viz.

| | |
|--|------------|
| By balance 31st May 1792 | 322 0 11 |
| Oct. 13. Greaves and Co.—16 Dec. | 123 11 9 |
| Feb. 9. Order G. B. and H. and R. M. and Co.—10 June | |
| | 1761 17 10 |
| | <hr/> |
| | 445 12 8 |

That the letters "G. B. and H." expressed that G. and H. Brown were the drawers of the check, and the letters "R. M. and Co." that half the amount of the check was to be placed to the account of J. and P. Richard, and that "10 June" expressed the time when the bill required by the check was to become due; that after this entry, but before the bankruptcy, the sums in the cash column of the above [521] account were added up by one of the partners in the bank, which amounted to 445l. 12s. 8d. without including the 1761l. 17s. 10d.; which still remained entered short, and so remained at the time of the bankruptcy; that after the bankruptcy one of the clerks carried out the said 1761l. 17s. 10d. into the cash column, and erased the sum 445l. 12s. 8d. instead of which he inserted the whole amount of the sums contained on the credit side of the said account, including the said sum of 1761l. 17s. 10d.; that no calculation of interest on the said 1761l. 17s. 10d. was ever made or

(a) It is manifest that some error must have crept into this part of the bill of exceptions. From the latter part of the bill, as well as from the whole course of the argument, the usage appears to have been this, viz. To debit the customs on each quarterly day for the whole amount of the bills advanced to or for them, and at the same time to credit them for the interest on such bills from such quarterly day to the day when they would respectively become due; and on the other hand, to credit the customers on the quarterly day with the whole amount of bills paid in by them, and to debit them with the interest from such day to the day when the bills would respectively become due.

inserted in the book containing the account of interest between Kewley and Co. and Caldwell and Co. before the bankruptcy of the latter, the clerk who usually transacted that part of the business having been forbidden to insert such charge by one of the partners in the house of Caldwell and Co. till he should have seen one of the partners in the house of Kewley and Co. ; but in the books of Caldwell and Co. when produced, the whole account of Kewley and Co. appeared to have been balanced, and interest to have been charged on the bill for 1761l. 17s. 10d. which balance was settled by one of the clerks in the house after the bankruptcy ; that at the time when Kewley and Co. paid in the bill for 1761l. 17s. 10d. to the banking-house of Caldwell and Co. the balance of accounts in their favour amounted to no more than 51l. 11s. but after that payment, and before the bankruptcy of Caldwell and Co. they received from Caldwell and Co. (without any fresh advance on their part) in cash and bills which were afterwards paid 294l. 3s. 5d., and several other bills to the amount of 856l. 12s. 11d. which were not paid in consequence of the bankruptcy of Caldwell and Co., but returned and taken up by Kewley and Co., and that no bill was ever paid or required to be paid by Caldwell and Co. for the amount of the check of the 7th February.

On the other hand Brown and Co. in order to prove that the check given by them to Kewley and Co. was paid to and received by Caldwell and Co. upon the terms and in the usual course of business above-mentioned, notwithstanding the interest on the 1761l. 17s. 10d. was not entered in the account of Kewley and Co. to their debit till after the bankruptcy, offered evidence that in the respective accounts between Caldwell and Co. and G. and H. Brown, and Caldwell and Co. and J. P. Richard, one moiety of the amount of the check in question was entered to the debit of G. and H. Brown, and the other moiety to the debit of J. P. Richard ; that on the 28th of Fe-[522]-bruary 1793, which was the next settling day after the delivery of the check by Kewley and Co. to Caldwell and Co. G. and H. Brown and J. P. Richard were according to the usage above-mentioned credited in their respective accounts with the interest of their respective moieties from the last mentioned settling day for so many days as the bill required by the check to be paid would have to run before it would become due.

This evidence being objected to by the counsel for Kewley and Co. as inadmissible, was rejected by the learned Judge : upon which the counsel for Brown and Co. insisted that the delivery of the check to Kewley and Co. and the receipt of the same in payment of the goods, and the indorsement over of the check to Caldwell and Co. operated as a legal payment and satisfaction for the goods, but the learned Judge directed the jury that it was not a legal payment or satisfaction, and that the evidence given on the part of Kewley and Co. if believed, entitled them to a verdict. Whereupon a bill of exceptions was tendered, and afterwards sealed by the learned Judge.

The assignment of errors proceeded upon the rejection of the evidence tendered on the part of Brown and Co., and the direction given to the jury.

Giles for the Plaintiffs in error on a former day argued, 1st, That if the books of Caldwell and Co. were admissible in evidence on the part of Kewley and Co. to shew how the account stood between them and Caldwell and Co., they were admissible also on the part of the Browns, to shew how their account stood with Caldwell and Co. ; for that the act of the bankers, if available against one party, was available also against the other : 2dly, that the whole difficulty of the case had arisen from the neglect of Kewley and Co. to settle their account upon the 28th of February, for had they so done they would then have been credited for the whole amount of the check minus the interest from that time to the 10th of June, which would clearly have been a satisfaction for the goods ; that although Kewley and Co. had not regularly settled their account on all the quarterly days from the time of their beginning business with Caldwell and Co. yet it appeared from the evidence that the days on which they had settled their accounts were all quarterly days, and therefore they must be considered as being within the usage ; that if such was the case, Kewley and Co. must be treated as if they had actually settled their accounts on the 28th of February ; that although no balance was actually struck, yet that Kewley and Co. had obtained credit and [523] derived advantage from the check having been paid in to Caldwell and Co. for that they had drawn beyond the amount of their account as it stood when the check was paid in, without having increased their credit by any additional bills or cash.

Lambe for the Defendants in error contended, 1st, That the manner in which Caldwell and Co. kept their accounts with Brown and Co. could not controul a

contract made between the latter and Kewley and Co., it being a general principle that whatever passes between two persons cannot bind a third who is no party to the transaction; 2dly, that it did not appear that Kewley and Co. ever acceded to the usage stated in the bill of exceptions, only six settlements of account between them and Caldwell and Co. having taken place from May 1788 to the period of the bankruptcy; that in fact the usage was only stated to extend to most of the customers, and that Kewley and Co. therefore were not under the necessity of negating their having acceded to the usage; that no bill was in fact demandable till the 7th of April, before which time Caldwell and Co. had become bankrupts, and were unable to give any bill, and therefore it resembled the case of a bill dishonoured, which is no payment; that at any rate the check being entered short up to the time of the bankruptcy, proved decisively that it was never considered as cash in the account between Caldwell and Co. and Kewley and Co., for that according to the case of *Zinck v. Walker*, 2 Bl. 1154, it was a mere deposit, and the property remained unaltered; and that it did not appear that the money advanced to Kewley and Co. was on the faith of the check in question, but might have been advanced on the general confidence subsisting between the two parties.

Cur. adv. vult.

On this day the opinion of the Court was delivered by

LORD ALVANLEY, Ch. J. (who after stating the principal facts of the case, proceeded thus). It would have been very material in this case for Brown and Co. to have shewn that a settlement had actually taken place between Kewley and Co. and Caldwell and Co. after the bill was paid in, and previous to the bankruptcy of the latter, whereby that which was in its inception merely a bill transaction, would have been converted by the act of both parties into a money transaction. It happens however that the contrary fact has been established, viz. that the last settlement between Kewley and Co. and Caldwell and Co. [524] took place on the 31st of May 1792, a period of nearly a year antecedent to the time at which the bill of Brown and Co. was paid into the banking-house. Now it is most clear that Kewley and Co. cannot be bound by any settlement of accounts between themselves and Caldwell and Co., to which they did not agree. Indeed in this case the bill in question continued in that column of the account where bills are entered short until after the bankruptcy of Caldwell and Co., after which period any alteration in the account would of course be perfectly ineffectual. Up to that time therefore it stood as a running bill, and was never accepted by Kewley and Co. as payment of their debt from Brown and Co., nor to their knowledge ever considered by any one else as payment of that debt. It is stated indeed, that after the bill had been paid into the banking-house, Kewley and Co. overdraw their account as it stood before it was paid in, and were accommodated by Caldwell and Co. with bills instead of money, which bills on the failure of the latter were not paid. But this accommodation does not by any means appear to have proceeded on the ground of the bill in question being paid in, but the only inference to be collected from that circumstance is, that these bankers who were in the habit of accommodating their customers to a considerable extent, permitted Kewley and Co. to overdraw their account. Nor indeed if that permission resulted from the circumstances of the bill being paid in, would it constitute a payment between Kewley and Co. and Brown and Co. for the goods sold by the former to the latter. The first question to be considered is, whether this transaction can be deemed a payment accepted by Kewley and Co., and in considering that point it will be necessary to inquire, whether Kewley and Co. could have maintained an action against Caldwell and Co. for the amount of the bill? Now I think it very clear that no such action could have been sustained; for till Caldwell and Co. actually credited Kewley and Co. in their books for the amount of the bill as money received by them, there would exist no evidence to charge them with such a demand; and indeed it is admitted on all sides that while the bill remained entered short, nothing but an assent of the respective parties could bind either to accept the bill as a payment of money. If therefore Caldwell and Co. were not liable to any demand from Kewley and Co. for the amount of the bill, it will be impossible to work up this transaction into a payment as between Kewley and Co. and Brown and Co. The next question [525] that arises is, whether the evidence rejected by the learned Judge was properly rejected? That perhaps is the most doubtful question of the two. Clearly, if when admitted, the evidence would have proved nothing, it was not admissible. It was asked, why should

not this sort of evidence be admitted on the part of Brown and Co. in the same manner as it was admitted on the part of Kewley and Co.? For this plain reason, that the evidence admitted on the part of Kewley and Co. was an essential part of the transaction, and arose as much out of the case on one side as the other. It does not therefore follow that evidence of the same sort not introduced by the same necessity was admissible. Kewley and Co. were bound to shew what had become of the bill given to them by Brown and Co. for the goods. It is true that a day of settlement between Brown and Co. and Caldwell and Co. had arrived, and that the former had agreed to be accounted debtors to the latter for the amount of the bill. But Kewley and Co. were not informed that they had acquired this new credit in the books of Caldwell and Co., and the latter, if called upon in consequence of this agreement between them and Brown and Co. to pay the amount of the bill to Kewley and Co., might have answered, it is true that we have admitted Brown and Co. to be our debtors for the amount of the bill, but what use can you a third party make of that agreement between us? I think it clear that Caldwell and Co. could not have been charged by Kewley and Co. in consequence of any thing that passed between the former and Brown and Co., and that the debt between Brown and Co. and Kewley and Co. remained no further discharged than all debts are for which a bill not due is given in payment. We think therefore that the learned Judge was right in rejecting the evidence offered by Brown and Co., 1st, Because evidence of what passed between themselves and Caldwell and Co. without the privity of Kewley and Co. could not bind the latter; and 2dly, because if admitted it would have been of no avail. On the 1st point I have already said we are of opinion that the check was never accepted by Kewley and Co. in payment of their debt, and consequently that Brown and Co. at the time this action was brought remained debtors to them for the value of the goods.

Per Curiam. Judgment affirmed.

[526] HARRIS v. MANLEY. Nov. 16th, 1801.

An indorser of a bill of exchange may be bail for the drawer in an action against him upon the same bill.

An indorser upon a bill of exchange was brought up to justify as bail in an action against the drawer of the same bill.

Best, Serjt., objected that he ought not to be admitted, inasmuch as the Plaintiff's security would not be increased by the recognizance of the indorser, who was already liable to the Plaintiff upon the bill.

Onslow, Serjt., on the other side, stated that a similar objection had been taken to a person who came up to justify as bail in the King's Bench in an action against the Portland-Place Bank, and had been overruled.

The Court (absente Lord Alvanley, Ch. J.) thought the objection of no weight, and accordingly

Admitted the bail.

GRIGBY v. OAKES AND ANOTHER. Nov. 19th, 1801.

Bank notes are not made a legal tender by the 37 Geo. 3, c. 45.

This was an action on a promissory note; the Defendants as to all but five guineas pleaded non assumpsit, and as to the remaining five guineas they pleaded a tender. The cause came on to be tried at the Summer Assizes for Suffolk, before Mr. Biron Hotham, when a verdict was found for the Plaintiff, with one shilling damages, subject to the opinion of the Court upon the following case:

"The Defendants are bankers at Bury St. Edmunds, and issued the note in question for five guineas, payable on demand to the bearer. On the 31st January last the Plaintiff carried several notes to the shop of the Defendant and demanded payment. He first presented other notes, to the amount of 50 guineas, for which he received payment, partly in Bank of England notes and partly in cash, the cash being ten pounds, and being the proportion of money they usually pay. He then presented the note in question, for which the Defendants tendered in payment a 5l. Bank of England note and five shillings in silver. This the Plaintiff refused, on the ground that the

tender was partly in a Bank of England note, objecting to such [527] note, and insisted on being paid wholly in money. The Defendants refused to pay wholly in money. The Plaintiff did not at the time say he wanted money for his own particular accommodation, but stated that he came on purpose to have cash for the note, or to bring an action if payment in money was refused."

The question for the opinion of the Court was, Whether, under the circumstances before stated, the Plaintiff was entitled to recover?

Shepherd, Serjt., for the Defendants, argued, that though unquestionably previous to the passing of the 37 Geo. 3, c. 45, commonly called the Bank Act, a bank note would not have been a legal tender, yet that since the passing of the above act such notes must be considered as cash, for that the necessary consequence of the above act being to absorb a vast proportion of the actual cash of the country, the Legislature must have intended to give a new character to bank notes by way of substitute; that they had specifically declared them to be a good tender, so as to prevent an arrest, and yet if the same spirit which actuated the present Plaintiff in the commencement of this action was to continue to influence his conduct, and that of others also, a Defendant, though exempted from arrest, might ultimately be taken in execution though ready to pay in bank notes, since he might possibly be unable to satisfy the judgment obtained against him altogether in money; because even if a sale of his goods took place, the sheriff might not be able to avoid receiving a large proportion of bank notes from the purchasers; that indeed in some respects bank notes were privileged by the 37 Geo. 3, c. 45, beyond cash, inasmuch as a tender of them in satisfaction of a debt operated to discharge a party from arrest, which was not the case with a tender of money, which must be pleaded in bar; and that no contrary inference could be drawn from the 8th section of the act, which declared payments in bank notes to be equivalent to payments in cash, if made and accepted as such, because that must have been the case before the passing of the act, and therefore that clause must be deemed nugatory.

Sellon, Serjt., contra, was stopped by the Court.

LORD ALVANLEY, Ch. J. The question for the Court to decide is a mere question of law, arising, as it has been contended, out of the provisions of the 37 Geo. 3, c. 45. In fact we are called upon to say, whether it follows as a necessary consequence from [528] that act that a tender in bank notes is equivalent to a tender in money? It may be very true that individuals may be occasionally subjected to great inconveniences from the operation of that act; but are we therefore to say that the Legislature has enacted that which the provisions of the act do not warrant? If we were at liberty to refer to our own private knowledge of the language that was held in Parliament while this act was pending, no doubt could be entertained upon the subject. We know that it was very much canvassed by many persons at that time, whether or not the Legislature ought to go the length of declaring bank notes a good legal tender. If therefore it had been intended by the Legislature so to make them, that intention would have been expressed in such clear terms that no question could have arisen upon the subject. Indeed it is expressly provided in the 2d section of the act, that if the Governor and Company of the Bank of England shall be sued on any of their notes, or for any sum of money, payment of which in their notes the party suing refuses to accept, they may apply to the Court in which such proceedings are instituted to stay proceedings during such time as they are restricted from paying in cash. But with respect to individuals, it was not intended to prevent any creditor who should be so disposed from captiously demanding a payment in money, though such a creditor is deprived of the benefit of arresting his debtor. Thank God few such creditors as the present Plaintiff have been found since the passing of the act! But yet, whatever inconveniences may arise, and to whatever length they may go, Parliament and not this Court must be applied to for a remedy. Inconvenience arising from the operation of an act of Parliament can be no ground of argument in a Court of law; and even if it were, still I should entertain no doubt that it was the intention of the Legislature to make bank notes a legal payment only in certain cases by them expressed, and that in all other cases they should remain upon the same footing upon which they stood before the act, except as to the exemption from arrest which they afford to the party tendering them in payment. The 8th section of the act, which has been treated as nugatory in the argument, however it may enact nothing new, still appears to me pregnant with the intentions of Parliament, and to speak loudly the resolution not

to alter the character of bank notes but in those cases which are specially provided for. Without, however, referring to any of those specific clauses, and arguing from [529] them as to the intent of the Legislature, I should be clearly of opinion that the present Plaintiff is entitled to our judgment in his favour.

HEATH, J. I am of the same opinion. The question for us to decide is, Whether a tender in bank notes is a good legal tender? Now the 37 Geo. 3, c. 45, appears to me to negative that question; for the several provisions of the act making them a good legal tender in certain excepted cases excludes the idea of their being so generally in cases not provided for by the act. It has been argued however that the operation of the act will in many cases be very injurious, unless we determine it to be a necessary inference from the act that bank notes were intended by the Legislature to be put upon the same footing as cash. But whatever inconveniences may arise, the Courts of Law cannot apply a remedy. I think indeed the Legislature acted wisely, having the recent example of France before their eyes, to avoid making bank notes a legal tender; for in France we know that legislative provisions of that kind in favour of paper currency only tended to depreciate the paper it was designed to protect, and were ultimately repealed as injurious in their nature.

ROOKE J. I am of the same opinion.

CHAMBER, J. This case appears to me almost too plain for argument. It has been thought that the Courts went a great way in holding a tender in bank notes to be a good tender, if not objected to at the time (*a*). Certainly that was an innovation; though perhaps a beneficial one. But the act upon which the present question arises affords nothing but arguments against the inference attempted to be drawn from it. Surely the observation that in some respects the Legislature have put bank notes on a more favourable footing than cash, leads to a conclusion directly contrary to that which it was intended to support. If the Legislature have not gone far enough, it is for them, not for us to remedy the defect. Indeed, by making bank notes a good tender in certain cases specifically provided for, they appear to me to have negatived the construction we are now desired to put upon the act.

Postea to the Plaintiffs.

[530] HUNTLEY v. LUSCOMBE. Nov. 19th, 1801.

Service of a demand of a copy of the commitment on the turnkey of a prison is not sufficient to support an action against the gaoler for the penalty incurred by him under the habeas corpus act, for not delivering the copy to the prisoner within due time after the demand made, if the gaoler himself were in the prison. Quære, Whether a commitment in execution for a penalty on conviction before a magistrate for an offence against the Excise Laws, be a commitment for "a criminal matter," within the provisions of the habeas corpus act, so as to entitle a prisoner to an action against the gaoler for not delivering a copy within a certain time after demand made?

This was an action on the case against the Defendant as keeper of the gaol at Portsmouth for not delivering to the Plaintiff, who stood committed and detained in his custody, "under and by virtue of a certain warrant or certain warrants of commitment and detainer for a certain supposed criminal matter not being felony or treason," a true copy of the warrant of commitment.

The cause was tried before Thompson, Baron, at the last Spring Assizes at Winchester, when it appeared that the Defendant was in custody under a warrant of commitment, granted by two justices in consequence of a return of nulla bona to a previous warrant of distress to levy a penalty of 20l. recovered against the Plaintiff for an offence against the excise laws. The warrant of commitment authorized the officers to whom it was directed "to take and arrest the body of the said H. Huntley (the Plaintiff), and forthwith to carry the same to the gaol or prison of and for the borough or place where they should take and arrest the same, and the same together with a duplicate of the warrant there to deliver into the custody of the gaoler or keeper of the said gaol or prison of and for the said borough or place, there to remain in safe custody until she should satisfy and pay the sum of 20l. by the said justices adjudged

(a) See *Wright v. Reed*, 3 Term Rep. 554.

against her on an information exhibited against her by J. P. as well on behalf of His Majesty as of himself for a certain offence committed by the said H. Huntley against the laws and statutes of excise, whereof she stood convicted." At the trial it was proved that one of the persons then in confinement in the prison, on the part of the Plaintiff, served the turnkey on the 25th of November with a notice directed to the Defendant of a demand of a copy of the warrant, and that on the 27th the turnkey delivered to the Plaintiff a copy of the warrant indorsed by the Defendant; whereas by the 31 Car. 2, c. 2, s. 5, such copy is required to be delivered within six hours after the demand. The Defendant was resident in a house, the door of which opened into the prison yard.

[531] It was objected on behalf of the Defendant, in the early part of the trial, that the notice of a demand of a copy having only been served on the turnkey, there was no evidence as to the time at which it came to the Defendant's hands. The learned Judge over-ruled the objection, but said he would reserve it for the Defendant's counsel, in case they should be inclined to move the point. Afterwards it was objected that the commitment under which the Plaintiff had been detained being only for the non-payment of a penalty, was to be considered as a commitment in execution in a civil matter, in which case the 31 Car. 2, c. 2, s. 5, upon which the action was founded would not apply. Upon this point the learned Judge nonsuited the Plaintiff, with liberty to move that the nonsuit might be set aside, if this Court should be of a different opinion.

Accordingly a rule Nisi for that purpose having been obtained in the course of last Easter Term,

Lens, Serjt., shewed cause in Trinity Term last. Two objections arise in this case, first, that the offence for which the Plaintiff was committed was not a criminal or supposed criminal matter; and secondly, that he was committed in execution. The preamble of the 31 Car. 2, c. 2, recites that great delays had been used by sheriffs, &c. to whose custody any of the King's subjects had been committed for criminal or supposed criminal matters, in making returns of writs of habeas corpus to them directed; and then proceeds to make several provisions for the relief of the subject in that respect. Now one of the means offered to the party in custody for procuring that ease which is the object of the statute is the enabling him to demand a copy of the warrant under which he is committed, and punishing the gaoler who neglects to grant it within a given time. But not only the previous provisions with respect to the granting a return of the habeas corpus, but also this mode of obtaining information of the offence for which the party is detained, have reference to the words in the preamble, "any of the King's subjects committed for criminal or supposed criminal matters." And the third section uses the words "committed for any crime:" and the fifth section, which authorizes prisoners to demand a copy of the warrant, for the purpose of enabling them to obtain their habeas corpus, must certainly be confined to those persons who are entitled to an habeas corpus under the third section. Indeed, [532] the Plaintiff in this declaration has alleged that he was committed for a supposed criminal matter; unless therefore that allegation be supported by the evidence, the Plaintiff must fail. But the commitment is only for non-payment of a penalty of 20l. incurred by a breach of the excise laws, which must be considered as a civil matter. All suits in the Exchequer for penalties of this nature, though in the name of the King, are considered as civil suits; for the Court of Exchequer is not a criminal court (a).

(a) *The Attorney General v. John Bowman.* Sittings at Westminster coram Eyre, Ch. B. 16th Jan. 1791.

Upon the trial of an information against the Defendant for keeping false weights, and for offering to corrupt an officer, the Defendant's counsel called a witness to character. The evidence being objected to by the Court,

Plumer for the Defendant urged, that it was admissible as tending to shew that the Defendant was incapable of the crime imputed to him. He said that such evidence had been received on the Oxford Circuit in an action upon the statute for cheating at play, imputing a general fraud; and that he believed it had also been received in a revenue prosecution in the Exchequer, either for forging or making use of a false stamp.

Newnham, contra, insisted that such evidence had never been received in any penal action, and that the information was not a criminal proceeding, for that Lord

There can be no doubt that if the 5th section is to be connected with the 3d section, this action cannot be maintained. For the 3d section expressly excepts from its provisions "persons convict or in execution by legal process;" under which exception the present Plaintiff falls: and that the 3d and 5th sections are to be connected appears evident, because the former having directed the nature of the returns to writs of habeas corpus, the latter enacts, that if the officers neglect to make the returns aforesaid, or bring the body or bodies "of the prisoner or prisoners," that is, the prisoners provided for in the 3d section, they shall be punished. So at the end of the 5th section the penalties are given to "the prisoner or party grieved;" that is, the prisoner or party against whom the officers have offended by omitting to comply with the directions of the 3d section.

Shepherd Serjt., in support of the rule. The 5th section of the habeas corpus act extends not only to those writs of habeas corpus which are given by that act, but to all other writs of habeas corpus at common law; now although a person in execution be [533] not entitled to an habeas corpus under the new jurisdiction created by the 3d section of that act, yet he is clearly entitled to an habeas corpus at common law. But if the provisions of the habeas corpus act are extended only to such writs of habeas corpus as are granted under the directions of that act, all other writs of habeas corpus might in vain be issued by the courts, since the penalties imposed by the act for disobedience would not in such cases affect the officers to whom they were directed. Indeed, it is clear from the act itself, that the 5th section was intended in some cases to extend further than the 3d section; for the 2d section, which directs officers to make returns of writs of habeas corpus directed to them, extends to all commitments except those in which treason or felony is plainly expressed in the warrant, and the 5th section imposes a penalty upon officers neglecting or refusing to make "the returns aforesaid," which must extend to the returns mentioned in the 2d section. It may be observed that the 3d section seems to stand by itself: whereas the other parts of the act extend to all commitments except those in which treason or felony is expressed in the warrant. No evil can well arise from the construction contended for on the part of the Plaintiff, whereas great danger may ensue from a contrary construction; for a prisoner who gets a copy of his commitment does not of course obtain his discharge, but only where he is committed improperly; whereas to hold that a prisoner in execution is not entitled to a copy of his commitment, will suggest an effectual mode of preventing every prisoner from obtaining his discharge from any commitment, however illegal; as for instance, a commitment for six months, where the law only authorizes a commitment for three months; because if the commitment be but framed in the shape of a commitment in execution, the party committed not being able to procure a copy of his commitment will not be able to ask for that relief to which he is entitled. With respect to the question, whether the offence for which the Plaintiff was committed is to be considered as criminal matter, it seems clear from the nature of the proceeding that it must be so considered. The statute of 35 Geo. 3, c. 113, s. 7, imposes a penalty for the particular breach of the Excise Laws of which the present Plaintiff was guilty, and enacts that it may be recovered by action of debt or information. Now although it might have been contended, if the action of debt had been resorted to, that the subject-matter of the action must be considered to be of a civil nature, yet as the penalty [534] has been recovered by information before a justice, it cannot be viewed in any other light than as a proceeding for a criminal matter. Giving a pecuniary penalty by way of punishment cannot alter the nature of the offence.

Chief Baron Parker had often said that the Court of Exchequer had no criminal jurisdiction.

EYRE, Ch. B. I cannot admit this evidence in a civil suit. The offence imputed by the information is not in the shape of a crime. It would be contrary to the true line of distinction to admit it, which is this; that in a direct prosecution for a crime, such evidence is admissible, but where the prosecution is not directly for the crime but for the penalty, as in this information, it is not. If evidence to character were admissible in such a case as this, it would be necessary to try character in every charge of fraud upon the Excise and Custom-House Laws. The Defendant may move the Court upon the ground of evidence having been rejected which ought to have been received, but I am of opinion that the evidence offered is not admissible.

The Court desired the case might stand over until this Term, saying it was of great importance, and they should probably consult the other Judges upon the point.

Early in this Term Lord Alvanley, Ch. J., observed that the 1st objection taken at the trial, which appeared upon the learned Judge's report, had not been spoken to at all, and desired there might be a further argument of the case upon that point.

Accordingly on this day Williams, Serjt., on the part of the Defendant contended, that as this was an action to recover a penalty, the Plaintiff should be strictly held to shew that the Defendant had committed the offence on which the penalty attached; that as the notice of a demand was only served on the turnkey, it did not appear that it ever came to the hands of the Defendant, and that it clearly appeared from the conduct of the Defendant that he had no intention to withhold a copy of the warrant, since he actually delivered one the next day but one after the demand made.

Best, Serjt., *contra*, insisted that the habeas corpus act was not to be considered as a penal statute, but on the contrary a highly remedial law; that the provision in question was framed in a different manner from all penal provisions whatsoever, inasmuch as the Legislature in case of the death of the offending party had given a right of action against his executors and administrators; that the title of the statute demonstrated the intention of the Legislature to make it a remedial law, it being entitled "An act for the better securing the liberty of the subject, and for prevention of imprisonments beyond the seas;" and that it therefore required the most liberal construction. He cited the words of the 5th section of the act, "that if any officer or officers, his or their under-officer or officers, under-keeper or under-keepers, or deputy, shall neglect or refuse to make the returns aforesaid (*viz.* the returns to writs of habeas corpus), or to bring the body or bodies of the prisoner or prisoners, according to the command of the said writ, within the times aforesaid, or upon demand made by the prisoner or person in his behalf, shall refuse to deliver, or within the space of six hours after demand shall not deliver to the person so demanding a true copy of the warrant or warrants of commitment and detainer of such prisoner, which he and they are [535] hereby required to deliver accordingly, all and every the head gaolers and keepers of such prisons and such other person in whose custody the prisoner shall be detained, shall for the 1st offence forfeit to the prisoner or party grieved the sum of 100*l.*, and for the 2d offence the sum of 200*l.*, and shall and is hereby made incapable to hold or execute his said office; the said penalties to be recovered by the party grieved, his executors or administrators, against such offender, his executors or administrators." He then argued that it appeared clearly from these words to have been the intention of the Legislature that in case of default by any of the inferior officers, the head gaoler should be responsible, and that this agreed with the general principle of law *respondet superior*; that the same intention further appeared from comparing the above section of the act with the 2d section, which directs "that whenever any person or persons shall bring any habeas corpus directed unto any sheriff or sheriff's gaoler, minister, or other person whatsoever, for any person in his or their custody, and the said writ shall be served on the said officer, or left at the gaol, that the said officer or officers, his or their under-officers, under-keepers or deputies, shall within three days make return of such writ and bring up the body;" for that if the gaoler was subjected to penalties for neglecting to obey a writ of habeas corpus left at the gaol, the probable intention of the Legislature was that he should also be liable for neglecting to give a copy of the warrant within six hours after demand made upon the turnkey; and that if this construction were not to prevail, the provisions might be defeated by the principal keeping out of the way.

LORD ALVANLEY, Ch. J. I assent to the argument which has been advanced in favour of the Plaintiff, so far as it goes to state that the habeas corpus act is a remedial law; and that the Judges of every court are bound to enforce its provisions according to their spirit, in such a manner as most effectually to relieve the subject from illegal imprisonment. But though it be a remedial law so far as it respects those persons for whose protection it was framed, it is grievous in its penalties with respect to those persons who neglect the duties thereby imposed upon them. It is remedial quoad some persons, but it is penal quoad others. It becomes incumbent upon the Court therefore to take care that those who claim the benefit of this act have used due diligence on their own part, and that they [536] avail themselves of the provisions of the act for the real purpose of obtaining the rights intended to be secured to them. Though we are bound to look with jealous eyes at all those who may be

suspected of having wilfully infringed the provisions of this act, we must still take care that no person makes use of so remedial a law for the purpose of loading with penalties those who, if they had had notice, would not have disobeyed its directions. If a prisoner therefore be desirous of availing himself of that part of the statute which inflicts a penalty on the gaoler for neglecting to comply with his demand of a copy of his warrant of commitment, he must so conduct himself that there may be no reason to suspect that the object of his demand was not a copy of the warrant, but an opportunity to bring an action. The question then in this case is, on whom ought the service of the demand to have been made? I admit that it is sufficient if the service be made upon the person who has the custody of the prisoner; and that if the principal be not present and accessible to the prisoner, that service on the deputy who at that time has the custody of the prisoner will make the principal answerable. But in construing the words, "officer or officers, his or their under-officer or under-officers, under-keeper or under-keepers, or deputy," may we not understand them to relate to the principal in the first place, and if he be not present then to any other person who in his absence shall have the custody of the gaol? Can we suppose that they were intended to extend to every porter at the gates of the prison? Or can we say that a turnkey is an under-keeper within the true meaning of the expressions; it being stated that the gaoler was at that time in the gaol, and therefore accessible to all the prisoners? The case then stands thus. A prisoner about six o'clock in the evening puts into the hands of an ignorant turnkey notice of a demand of a copy of the warrant, directed to the gaoler; the turnkey is not called as a witness; it does not appear that the nature or exigency of the demand was explained to him, possibly he could not read, and if he could, the notice does not express the exigency of the demand, and the turnkey was not at the time the keeper, the under-keeper, or the deputy, since the principal was amenable to the notice. But was the notice put into the hands of the turnkey for the purpose of obtaining that which was the object of the demand? It does not appear ostensible that the Plaintiff made any inquiry, or took any pains that the notice should come to the hands of the Defendant; yet there was a [537] door to the Defendant's house which opened into the yard of the prison, and if it had been intended by the Plaintiff that the demand should be literally complied with by a delivery of a copy of the warrant by 12 o'clock at night, is it to be conceived that he would have been so remiss? If indeed he had been informed at the door that the Defendant was not accessible, leaving a notice at the door might have been sufficient: for the gaoler is bound to have some person to answer for him: but I cannot think that this service upon a common turnkey is such a reasonable and proper service as to entitle the Plaintiff to maintain an action which seeks to recover a heavy penalty denounced by the Legislature against persons wilfully neglecting their duty, in order to facilitate the delivery of prisoners from illegal imprisonment. He who seeks a remedy must do his part: and if it appear to the Court that his object is not a copy of the warrant, but an action; or if by his conduct he has brought the Defendant into a situation in which he would not have been placed had he had reasonable notice, I cannot think that the efficacy of the statute will be done away, by holding that the Plaintiff has not entitled himself to maintain an action for the penalty against a person with whom he has so dealt. Without therefore entering into any discussion upon the former point, I am of opinion that the nonsuit was right.

HEATH, J. I entirely concur in opinion with my Lord; but as this is a matter of consequence, and respects an act which is deservedly popular, I shall deliver my opinion the more at large. In the first place, therefore, though I admit that this is a remedial statute, (and if I know my own heart, I should be the last person to concur in any decision tending to weaken this act, which was made to secure the liberty of the subject,) yet I consider it as penal with respect to this Defendant. We must therefore take particular care that its provisions are not perverted to purposes of iniquity and oppression. The governor of the gaol being present, I think it was necessary that the Plaintiff or some person on his behalf should have made a demand on him; or should at least have demanded access to him. It does not appear but that if any person had desired to see the governor, he might have done so. Instead of this a notice is put into the hands of the turnkey, without any explanation of its contents; the governor being at that time in the gaol. I agree that the second and fifth sections of the act must receive the same interpretation. The reasonable construction is, that [538] if the governor be present there is then no deputy or under-keeper on whom

the service can be made ; but if the governor be not present then the deputy may be served ; and if the deputy have no deputy, then in the absence of the deputy service may be made on the turnkey, or may be left at the gaol, for it is the duty of the governor to leave some person in his place. The rule respondeat superior only applies where the superior is absent. This being the case, according to my apprehension of the second and fifth sections of the act, the service of the notice was not sufficient. I am therefore of opinion that the action in this case is not maintainable, especially as there is reason to believe that this service of the notice was only intended as a snare to entrap the Defendant.

ROOKE, J. I should be as unwilling as any man to concur in any thing injurious to the rights of the subject. The habeas corpus is a very wise and beneficial statute : and the Judges have always been disposed to put such a construction upon it as will favour the real liberty of the subject. But we must be careful that those acts which have been made for the benefit of the subject, are not turned into engines of oppression : nor must we, under the idea of promoting general liberty, withhold that degree of favour from individuals which is consistent with the security of the public. It appears to me therefore that gaolers are entitled to all the protection which the law can afford them consistently with the liberty of the subject. By the fifth section of the act it is provided, that if any officer, his under-officers, under-keepers, or deputy, shall neglect or refuse to make return to a writ of habeas corpus, or bring up the body, as directed by the second section, or upon demand made shall refuse or neglect to deliver within six hours a copy of the warrant of commitment, the head-gaolers and keepers, and such other persons in whose custody the prisoner shall be detained, shall be liable to a penalty. Now I think the true construction of this latter part of the act is, that if the gaoler be within the gaol and accessible, the demand must be made on him ; but if he be not accessible it may be made on the deputy. At any rate, however, the demand should have been served in such a way that the person to whom it was delivered should understand its nature, and some pains should have been taken that it should come to the hands of the principal. On this view of the statute, and of the circumstances of this case, I can neither reconcile it to justice nor to a love of liberty to hold that [539] the Defendant in this action is liable to the penalty. Such a doctrine would be founded on no principle but that of oppression. In this case I suspect that the notice was delivered for the express purpose of founding an action ; and if it be possible that the provisions of the statute should be so perverted, it is our duty to take care that such a perversion should be prevented.

CHAMBERE, J. I entirely concur with the rest of the Court in the construction which has been put upon this statute, and I have little to add to what has already been said. There is no doubt that this act is to be considered as a remedial act, and indeed the most highly remedial act which stands upon the statute book. But the most remedial act may contain penal clauses ; and if the argument which has been urged on the part of the Plaintiff were sound, this act would be most oppressive in its consequences ; since it might subject a person to heavy penalties, and perhaps to an incapacity to hold his office, though he might be as innocent as any man living. It is true that the disability to hold the office is not incurred upon the first conviction ; but the first conviction is one step towards it, and if a person may innocently become liable to a first conviction, he may in the same manner become liable to a second. This statute therefore is highly penal in these respects. At the same time we must not fritter away the salutary provisions of the act by too liberal a construction. The words of the statute " officer or officers, his or their under-officer or under-officers, under-keeper or under-keepers, or deputy," are all descriptive of the persons having the actual custody of the prisoner at the time, and if there were any doubt upon this point, I think that the conclusion of the clause which subjects " the head-gaolers and keepers of such prisons, and such other person in whose custody the prisoner shall be detained "(a), to the penalties, would operate strongly to explain that doubt. Whatever

(a) It may be observed, however, that the expression " other person having prisoners in his custody," is used in the second section to denote the superior officer of the prison, in contradistinction to his under officers : it should seem therefore that when the fifth section provides that in case of any default either of the superior or inferior officers, " the head gaolers and keepers, and such other persons in whose custody the prisoner shall be detained," shall be liable to the penalty, it must be construed to impose the

the views of the Plaintiff may have been in bringing this action, she has certainly not proved her case as satisfactorily as she might have done; she has been remiss in not calling the turnkey to shew at what [540] time the notice came to the hands of the Defendant. Service on a turnkey may be good for many purposes, but we must look to the nature of the present demand in order to decide whether it be good or not in this particular case. It is the duty of a turnkey to take care of the door; could he therefore have complied with this demand? If then the demand never came to the hands of the principal, where is the justice and where is the advantage to the public in subjecting him to the penalty for non-compliance with the demand? Upon the whole, I am perfectly satisfied with the construction which has been put upon this Act of Parliament.

Rule discharged.

SCHOLEY v. DANIEL. Nov. 20th, 1801.

A. being indebted to B. in 700*l.* applied to C. to lend him that sum, who agreed so to do provided A. would allow him to deduct therefrom 80*l.* due from B. to himself upon stock-jobbing transactions. Accordingly C. advanced 620*l.* and A. gave him a promissory note for 700*l.* A. then paid over to B. the 620*l.* who gave him a discharge for the whole 700*l.* The promissory note for 700*l.* given by A. being paid when due, B. brought an action against C. to recover 80*l.* as money had and received by C. to his use. Held that B. could not maintain the action, but that it must be brought by A. if by any one.

This was an action for money had and received.

At the trial before Lord Alvanley, Ch. J., at the Guildhall Sittings after last Term, it appeared that the Plaintiff's son being indebted to him in the sum of 700*l.* and being pressed for payment, represented his situation to the Defendant, and applied to him for the loan of 700*l.*; the Defendant answered that he would have nothing to do with the Plaintiff, for that the Plaintiff was already in his debt upon stock-jobbing transactions to the amount of 80*l.* which he had refused to pay; but that he, the Defendant, would lend the Plaintiff's son the money if he would allow him to deduct the 80*l.* which his father owed; that the Plaintiff's son acceded to this offer, and accordingly received 620*l.* from the Defendant, and gave the latter his promissory note for 700*l.* and lodged with him the lease of a house as a collateral security; that the Plaintiff's son repaid his father 620*l.* and that his father resolving that the Defendant should not retain the 80*l.* gave his son credit in the account for the 80*l.* which he had paid to the Defendant, and considered the debt between his son and himself satisfied; the note for 700*l.* being paid when due and the lease restored to the son, the present Plaintiff commenced this action to recover the 80*l.* which the Defendant, in order to repay himself a debt founded on [541] an illegal consideration, had deducted from the 700*l.* advanced to his son. A verdict was taken for the Plaintiff, reserving liberty to the Defendant to move the Court that this verdict should be set aside and a nonsuit entered.

Accordingly a rule nisi having been obtained for that purpose,

Best, Serjt., now shewed cause, and contended that it appeared clearly from the evidence that the Defendant had obtained money without consideration which he had no right to retain, but that the only question was, who ought to have brought the action? That the Plaintiff's son, having received credit in account for the amount of the sum retained, had no cause to complain, and that he therefore could not be entitled to any action against the Defendant; but that the father, who was the only loser by the transaction, had clearly a right to maintain this action, the object of which was to recover that sum of money from the Defendant, which he unjustly retained, and which the Plaintiff ought to receive.

Shepherd and Bayley, Serjts., insisted that as the money which had been received by the Defendant was neither paid by the Plaintiff nor with his money, he could not be entitled to maintain this action; and that any transaction between the Plaintiff and his son, to which the Defendant was no party, could not vary the case.

penalty upon the superior officers of the prison only, and not on the person in whose actual custody the prisoner may be at the time.

LORD ALVANLEY, Ch. J. This is not money had and received to the use of the father. The son has thought fit to pay a sum of money to the Defendant, but there was no transaction between the Defendant and the father. There was no undertaking either express or implied on the part of the Defendant to repay this money to the Plaintiff; and the Plaintiff's son, if any one, ought to have brought the action.

HEATH, J. I think there can be no doubt on the question. It was the policy of the common law to forbid the transfer of rights of action. If this were not forbidden, men would often pay the debts of others and bring actions upon them, to the great increase of litigation.

ROOKE and CHAMBRE, Js. were of the same opinion.

Rule absolute.

[542] ROE EX DEM. PELLATT AND OTHERS v. FERRARS, Clerk. Nov. 20th, 1801.

J. S. demised lands to the rector of D. for 40 years at a certain rent; in the lease the rector, after covenanting for payment of the rent, further granted to J. S. the tithe of oats of the parish of D.; the lease also contained a proviso for re-entry in case the rent should be in arrear, or J. S. his heirs, &c. should be disturbed by the rector or his assigns in the receipt of the tithe, and concluded with a covenant on the part of J. S. that the rector should quietly enjoy the lands under the covenants, grants, and agreements contained in the lease. After the expiration of the lease the rectors continued to hold the land, but withheld the rent for more than 20 years, the heirs of J. S. at the same time continuing to take the tithe of oats, and some confusion existing as to the respective rights of the rector and the heirs of J. S., the latter being portionists of the tithes of the parish. Held that the possession of the land by the rector was not adverse, so as to let in the operation of the statute of limitations.—If the Defendant give in evidence an answer in Chancery of the Plaintiff, it will not entitle the Plaintiff to avail himself of any matters contained in such answer which are only stated as hearsay. *Semb.(a)*.

This ejectment was tried before Heath, J., at the Lent Surrey Assizes, and a verdict found for the Plaintiff as to certain lands called The Sharps, situate in the parish of Beddington, subject to the opinion of the Court, whether the Plaintiff's right of recovery in this action was not barred by the statute of limitations.

The lessors of the Plaintiff, who were lords of the manor of Beddington, sought to recover these lands as parcel of the manor, and the Defendant, who was rector of the parish of Beddington, disputed their title, claiming them as parcel of the rectorial glebe. The lords of the manor of Beddington had the right of presentation to the rectory; and were also entitled to a portion of the tithes. At various times there had been a mutual interchange of lands and tithes between the lords of the manor and the rectors, which had given rise to much confusion concerning their respective rights. To prove possession in the lessors of the Plaintiff a deed was produced, dated on the 18th of November 1703, by which the then lords of the manor demised to one Richard Reddall, parson of Beddington, the lands in question (among others) for 40 years, "yielding and paying therefore yearly during the said term, the sum of forty-three shillings and fourpence, and also paying and delivering yearly during the said term at the barn-door, in the yard of the mansion-house, all the tythe-straw both of wheat and rye coming and growing within the parish of Beddington, and also 7 quarters of wheat, 4 quarters of rye, and 30 quarters of barley." The deed then went on, "and the said Richard Reddall, for himself, his executors, &c. doth covenant, promise, and grant to and with the said Sir J. J. &c. (the lords of the manor), their heirs, &c. that he, the said Richard Reddall shall not only well and truly pay, or cause to be paid from time to time, and at all times during the continuance of this present demise, unto the said Sir J. J. &c. their heirs, &c. the said yearly rent of forty-three shillings and fourpence at the said mansion-house, but also shall and will deliver the said tithe-straw, together with the said wheat, rye, and barley, in such manner and form as [543] the same shall grow due and payable by virtue of these presents; and further the said Richard

(a) Vide *Kahl v. Jansen*, 4 Taunt. 565.

Reddall doth grant unto the said Sir J. J. &c. their heirs, &c. that they shall have and enjoy all the tithe-oats hereafter to be arising or growing within the said parish of Beddington, to be yearly taken by the said Sir J. J. &c. their heirs, &c. during the said term (except the tithes of the glebe lands and portionary hereby demised, while it is in the said parson's own occupation); provided always that if the said yearly rent of forty-three shillings and fourpence, or any part thereof, shall be behind and unpaid by the space of one-and-twenty days, next after any of the feast-days on which the same ought to be paid as aforesaid, being lawfully demanded, or if the said corn or straw above-mentioned be not well and truly delivered in manner and form aforesaid, within 14 days next after request thereof made as aforesaid, or if the said Sir J. J. &c. their heirs, &c. shall be molested or troubled by the said Richard Reddall or his assigns, in taking or enjoying the said tithe-oats by these presents mentioned to be granted as aforesaid, that then and from thenceforth it shall and may be lawful for the said Sir J. J. &c. their heirs, &c. into the said demised premises, with all and singular their appurtenances to re-enter, and the same to have again as in their former estate." At the conclusion of the deed there was a covenant by the lords of the manor, that "the said Richard Reddall and his assigns shall quietly and peaceably enjoy the said demised premises, paying the yearly rent, and under the covenants, grants, and agreements before in these presents contained, without any lawful let or interruption of them, the said Sir J. J. &c. their heirs, &c. during the said term." To rebut this evidence, and shew an adverse possession, the Defendant read an answer to a bill in equity of a late date, filed by himself against the lessors of the Plaintiff, for an account of the tithe of oats which he then claimed, in which, though they did not mention the deed of 1703, yet they referred to a similar lease of a much older date, and stated that such leases had from time to time been granted to the rectors by the lords of the manor, and that about 1753, upon some dispute between Sir N. H. Carew, the then lord of the manor, and the Reverend John Pryce, then incumbent of the living of Beddington, the latter taking advantage of the former being a man of an indolent temper and inattentive to business, withheld the rents reserved on the lands in question, but permitted him [544] to continue to take the tithe of oats. Upon the above part of the answer being read in evidence by the Defendant, the counsel for the Plaintiff also read the following sentence from the same answer: "That the lessors of the Plaintiff had heard as truth that the said John Pryce did pay or deliver to the said Sir N. H. Carew divers quantities of corn and straw, and that the said Sir N. H. Carew did receive the tithe of oats within the said parish;" which corn and straw he insisted were delivered by way of render, and the tithe of oats received in consideration of the demise, and on the footing of the several agreements contained in the several leases. No rent appeared to have been paid by the rectors of Beddington to the lords of the manor since the year 1753; but the latter continued to take the tithe of oats until a decree made in favour of the rector in consequence of the above-mentioned bill in equity. The present Defendant was instituted to the living of Beddington in the year 1782, and it was not till after that period that the lease of 1703, which had been lost, was discovered.

A rule nisi for setting aside the verdict having been obtained in Easter Term last, the case was argued by Best, Serjt., for the Plaintiffs, and Shepherd and Bayley, Serjts, for the Defendant, and the Court took time to consider of their opinion, during which time Lord Alvanley succeeding to the situation of Chief Justice, it was again argued on a former day in this Term by the same counsel.

Arguments for the Plaintiffs. It is perfectly clear that the statute of limitations cannot operate unless an adverse possession in the Defendant be satisfactorily established. Now in the present case the possession of the several incumbents of the living of Beddington must be deemed the possession of the lords of the manor of Beddington until a very strong case can be made out to prove that the tenancy under which the former originally came into possession of the premises had completely determined. But here, though the rents reserved in the lease of 1703 have not been paid for above 20 years to the lords of the manor, still, as the latter have been permitted to take the tithe of oats up to a very recent period, the possession of the incumbent is a mere possession by consent of the lords; for as long as any part of the rent reserved continues to be paid, the possession is not adverse. It is to be observed, that the grant of the tithe of oats to the lords of the manor is not contained in a distinct deed, but is part of that very lease under which the [545] lands in dis-

pute were demised to the incumbents of the living, and forms one of the express terms of the deed. It is true that it is not part of the *reddendum*; but being inserted in the same deed, it must be taken to be part of the consideration of the demise. That it was part of the consideration is manifest from the clause of re-entry which is limited to take effect not only in case of the rent being behind or unpaid, but in case the lords of the manor should be molested or troubled in taking the tithe of oats. And this is strongly confirmed by the covenants on the part of the lords of the manor with which the deed concludes; that the lessee shall quietly enjoy the premises, "paying the yearly rent, and under the covenants, grants, and agreements before in these presents contained." Possibly in the year 1753 the Carew family finding the rent reserved too large, agreed with the then rector to allow him to retain the lands in question for the single consideration of the tithe of oats, remitting all the other renders.

Arguments for the Defendant. Had the incumbents of the living of Beddington been holding up to the present period under an existing lease, their refusal to pay rent would not have created an adverse possession. But here the lease under which the tenancy commenced, expired in 1743, since which time they have claimed to hold *proprio jure*. The refusal to pay the rent was a disclaimer of the title of the lords of the manor, and if the latter really had title they might then have brought their ejectment, to support which no notice to quit would have been necessary. It is true that the lords of the manor have been permitted to take the tithe of oats: but that permission only continued because the incumbents did not know under what title the lords of the manor claimed the tithe; and at any rate was a permission by the incumbents in their character of parsons and not in their character of tenants. It would have been a very different case had it been in evidence that the incumbents knew that they had the common law right to the tithe of oats; and that the lords of the manor could not claim it except as a render for the lands in question. The mere taking of the tithe is not sufficient to defeat the adverse possession, unless it has been taken *eo intuitu* as rent. Indeed it appears that the incumbents refused to permit the lords of the manor to take that which was expressly reserved as the rent; it is therefore to be presumed that they were suffered by the incumbents to take the tithe of oats under the [546] apprehension that they were entitled to them in some other right than that which grew out of the lease, and probably the confusion arose from the circumstance of their being portionists of the tithe together with the rector. Besides the grant of the tithe of oats is perfectly distinct from the reservation of the rent; and although it is provided that the lords of the manor shall have a right to enter upon the land in case of their being disturbed in taking the tithe, yet it does not follow that the tenure of the land depends on the incumbents suffering the lords of the manor to take the tithe. It does not lie on the Defendant to make out a strong case of adverse possession, but on the Plaintiff to establish his own title clearly and satisfactorily.

LORD ALVANLEY, Ch. J. If the rules of law will permit me to do otherwise, I shall be very sorry to give any countenance to the defence which has been resorted to in the present case. And the more so, because the two parties in ascertaining their respective rights meet upon very unequal terms; the one as the representative of the church, being barred by no lapse of time in the claim of any dormant rights, whereas the other has to encounter the difficulties opposed to him by the statute of limitations. It is not disputed that the premises in question were demised to the rectors of Beddington by the predecessors of the present lessors of the Plaintiffs, reserving to themselves certain rents, and also the tithe of oats within the parish. Since the year 1753 the rectors have ceased to pay the rents reserved in the lease, but the Carew family have continued to receive the tithe. Possibly therefore at the time at which the rents were withheld, it was agreed between the then rector and the representative of the Carew family, that if the latter were permitted to receive the tithe as before, the former should be permitted to retain the land demised. Considering therefore that this is a question to be submitted to a jury, and understanding from the learned Judge who tried the cause, that whatever was contested at the trial was submitted by him to the jury, I am of opinion that the present verdict ought not to be disturbed.

HEATH, J. The doctrine of remitter furnishes a strong analogy in favour of the present lessors of the Plaintiffs; for the rule is, that a man who is in by a *puisé* estate shall be remitted without any acts of his own, but by mere operation [547] of

law to his *cigné* estate (a). Now that rule seems to me very applicable to the present case, for it is clear that the Carew family continued to receive the tithe of oats, and therefore should, as it appears to me, be held to have received them in that right which they acquired under the demise by which they granted the premises in question. Besides, it is to be recollected that this question arises upon the statute of limitations, which always receives a strict construction from the Courts.

ROOKE, J. It is clear that the Carew family and the rectors of Beddington agreed to create the relation of landlord and tenant between themselves by the lease of 1703, and up to the present time the one has continued to receive the tithe and the other to hold the land. The present rector attempts to avail himself of a rule of law highly favourable to the church, by which he may without any limitation of time reclaim the tithe granted as a consideration for the enjoyment of the land in question by his predecessor, and yet prevent the Carew family from reclaiming their land by setting up the statute of limitations in bar of their demand. This is so unjust that I shall be glad to find out any ground upon which we may be enabled to defeat his attempt. Now it does appear to me that the former rectors of the parish may be presumed to have intended to do justice, and therefore to have permitted the Carew family to receive the tithe of oats by way of compensation for the land which they continued to hold. If so, the present rector not having succeeded to the living till 1782, the possession of the premises in question was not adverse up to that period, and since that period 20 years have not elapsed. Upon the whole therefore I think there ought not to be a new trial.

CHAMBERE, J. Upon this question I have entertained considerable doubts; nor indeed is my mind altogether free from doubts at the present moment. Those doubts do not respect the justice of the case, for that is most clearly with the lessors of the Plaintiff. [548] I am not indeed altogether without suspicion that the contract entered into between the rectors of Beddington and the Carew family originated in simony; the latter reserving to themselves much more than they were entitled to under the name of a compensation for the manor-house and lands. But however that may be, it will not affect the present question. If this case were to be again submitted to a jury, I think they might fairly conclude that in 1753 the then rector of Beddington quarrelled with the terms of his lease, and though he refused to continue the stipulated renders to the Carew family, yet permitted them to receive the tithe of oats. Possibly at the trial the question was not put to the jury quite so fully as it might have been, but reserved rather too much as a dry point of law. Indeed could I be convinced that the jury had considered and decided the precise question, my doubts would be removed. Certainly in the litigation of their respective rights, these parties contend on very unequal terms; the rector availing himself of a maxim of law in favour of the church to which the Carew family as laymen cannot resort. The point however which in this case has most embarrassed my mind, is the degree of positive proof drawn from the answer in Chancery of the lessors of the Plaintiff in their own favour. It is true that it was introduced into the cause by the Defendant, on whose behalf some parts of the answer was read. But in those parts on which the lessors of the Plaintiff relied, they speak only to what they "have heard as truth." I think that was not admissible evidence, for it appears to me that where one party reads a part of the answer of the other party in evidence, he makes the whole admissible only so far as to waive any objection to the competency of the

(a) With respect to this analogy however it is to be observed, that remitter never operates to divest a tortious freehold, in order to revest a rightful term for years, the latter title being of no esteem in the law. 2 Roll. Abr. tit. Remitter, F., fo. 420, l. 35. Com. Dig. tit. Remitter, c. 7. But the right to the tithe claimed by the Carew family as portionists was a freehold, whereas the right derived under the lease was but a right to take from year to year, arising out of the implied assumpsit which resulted from the Defendant holding over the lands in question after the expiration of the lease. It may further be observed, that as the Carew family never had been out of possession of the tithe from the time when the lease was granted to the time when the Defendant was instituted to the rectory, if any right to the tithe under the implied assumpsit remained in them at this latter period, the right and the possession never having been separated, the estate was complete without the operation of remitter.

testimony of the party making the answer, and that he does not thereby admit as evidence all the facts which may happen to have been stated by way of hearsay only in the course of the answer to a bill filed for a discovery (a)¹. This point does not indeed appear to have been contested at the trial. Had it been contested I should have [549] thought the Court bound to send the case down to a new trial. Upon the whole, however, I am disposed to concur with my Lord and my brothers, that there ought not to be a new trial in this case.

Rule discharged.

M'CONNELL v. HECTOR. Nov. 23d, 1801.

In an action of trespass directed by the Lord Chancellor to try a question of bankruptcy the Court of C. B. will not restrain the Defendant from pleading the general issue together with special justifications.

Marshall, Serjt., shewed cause against a rule for pleading several matters to a declaration in trespass for taking goods; the pleas were, 1st, not guilty; and, 2dly and 3dly, two special justifications under two of the acts of Parliament respecting bankrupts: he stated that this was an action directed by the Lord Chancellor to try a question of bankruptcy, and that therefore the plea of not guilty, putting in issue the taking of the property, would only hamper the Plaintiff at the trial, and prevent the parties from litigating the real subject of the issue.

Best, Serjt., in support of the rule insisted, that as the pleas were not inconsistent, the Court would not interpose.

LORD ALVANLEY, Ch. J. seemed to think that the Court ought to restrain the Defendant from pleading a plea which would tend to embarrass the trial of the only question which the Lord Chancellor wished to have tried.

But the rest of the Court were of opinion that as the pleas were not inconsistent, the Defendant ought to be permitted to plead them, and the Plaintiff ought to apply to the Lord Chancellor to prevent the Defendant from taking advantage at the trial of any thing which went to shut out the real point at issue.

Rule absolute (a)².

[550] BENNETT v. FRANCIS. Nov. 23d, 1801.

Where money is paid into Court generally upon a declaration in contract, it is an admission of the existence of a contract in every transaction which is capable of being converted into a contract by the assent of the parties. Therefore where a Defendant who had possessed himself of goods belonging to the Plaintiff, and had sold part and kept the residue in specie, paid money into Court generally upon a declaration containing a count for goods sold and delivered, it was held that he had thereby admitted the transaction to have been converted into a contract, and that the Plaintiff was entitled to recover the value of all the goods under the count for goods sold and delivered (a)³.

Assumpsit for goods sold and delivered, money lent and advanced, money paid, money had and received, and on an account stated. The Defendant pleaded generally

(a)¹ But all the cases agree that where part of an answer is read against a party he may insist on having the whole read, *Lynch v. Clerke*, 3 Salk. 154, per Holt, Ch. J., or at least on reading the remainder himself. *The Earl of Bath v. Bathersea*, 5 Mod. 9. Gilb. Law of Ev. 51, Ed. 3, unless the part read be merely to shew the incompetency of a witness as interested in the event of the cause, *Sparin v. Drac*, Mich. 27 Car. 2, Bull. N. P. 238, 2d ed. An answer indeed being treated as the admission of the party against whom it is read, it does seem reasonable that the whole admission should be read to the Jury for the purpose of shewing under what impressions that admission was made, though some parts of it be only stated upon hearsay and belief. But whether the party against whom the answer is read be entitled to have such parts of it as are not expressly sworn to left to the Jury as evidence (however slight) of any fact, does not appear to have been hitherto decided.

(a)² Vide *Shaw v. Everett*, ante, vol. i. p. 222. *Angerstein v. Vaughan*, ibid. in notis. *Lechmere v. Rice*, ante, p. 12, and *Thyatt v. Young*, ante, p. 72.

(a)³ Vide *Mellish v. Allnutt*, 2 M. & S. 106. *Broadhurst v. Baldwin*, 4 Price, 58.

to the declaration, 1st, non assumpsit as to all except 4l. 3s., upon which plea issue was joined; 2dly, a tender of the said 4l. 3s., and paid this sum into Court generally. The Plaintiff admitted the tender and took the money out of Court.

The cause was tried before Chambre, J., at the Guildhall Sittings after last Easter Term, when it appeared that the action was brought to recover the value of four out of six hides belonging to the Plaintiff, which had come to the hands of the Defendant. Two out of the six hides had been returned by the Defendant; one had been sold by him for 1l. 12s., but the money had not been paid over to the Plaintiff; and the three others remained in the Defendant's possession. The Plaintiff conceiving himself entitled to the value of all the hides, sent in a bill of parcels to the Defendant, in which he charged for the four which had not been restored to him as follows: "One hide at 2l. 10s.; two ditto 3l.; one ditto 1l. 12s.; total 7l. 2s." The Defendant did not dispute the Plaintiff's right to the value of one hide which had been sold, but claimed the other three as his own. The Jury being satisfied that all the six hides belonged to the Plaintiff, gave him a verdict for 2l. 19s., which, together with the 4l. 3s. paid into Court, made up the value of the four hides for which the Plaintiff had not received any thing. The learned Judge in making his report observed, that the 4l. 3s. tendered and paid into Court was more than the value of the single hide which had been sold by the Defendant, and for which the money had not been paid over, and that indeed it did not precisely appear to what it was intended to be applied. Leave was given to the Defendant to move to enter a nonsuit, if the Court should be of opinion that the Plaintiff could not recover in this action. Accordingly a rule nisi for this purpose having been obtained on a former day,

Best, Serjt., now shewed cause. In a case of this kind, though a tort may have been committed by the Defendant, yet the [551] Plaintiff is at liberty to waive the tort and bring his action as upon a contract. The value of the goods being proved, and the receipt of them by the Defendant, it cannot be permitted to the latter to say that he obtained them wrongfully in order to avoid the contract by virtue of which the Plaintiff alleges him to have received them. In support of this proposition may be cited *Feltham v. Terry*, cit. Cowp. 415, 416, 419, and 1 Term Rep. 387, where goods having been taken and sold under an execution upon a conviction which was afterwards quashed, the Plaintiff was allowed to maintain an action for money had and received, though a trespass had been committed. So Lord Mansfield in *Hamblly v. Trott*, Cowp. 375, when speaking of the actions which are maintainable against an executor, seems to hold the same doctrine; he says, "in most if not in all the cases where trover lies against the testator another action may be brought against the executor which would answer the same purpose." Indeed he observes, that an action on the custom of the realm against a common carrier is for a tort and supposed crime, yet assumpsit, which is another action for the same cause, will lie; and that if a man take a horse from another and bring him back again, though trespass will lie against him, yet an action for the use and hire of the horse will lie against his executor. Though Mr. Justice Buller, in *Birch v. Wright*, 1 Term Rep. 386, seemed to doubt the authority of a case there cited as decided at the Launceston Assizes, when Mr. Justice Gould was at the bar, in which it was held that use and occupation might be maintained for the value of premises held after the time of the demise laid in an ejectment tried at the same assizes, yet he expressly recognized the authority of *Feltham v. Terry* as deciding that the tort might be waived and an action maintained for the money due. It is true that in *Lindon v. Hooper*, Cowp. 414, where the Plaintiff had paid money for the release of his cattle which had been wrongfully distrained, the Court held that he could not maintain an action for money had and received, but that trespass or replevin was the proper remedy. But the ground of that decision was, that the Defendant would be laid under great difficulty by the form of action adopted by the Plaintiff, since he could not be prepared to make his defence unless the Plaintiff's right was stated upon record, which it would be in trespass or replevin. But the same objection does not apply to the present case, where the Defendant learns nothing more of the Plaintiff's right from the pleadings in trover than he does from the pleadings in assumpsit. [552] And indeed the Defendant in the latter form of action is entitled to an advantage, viz. that of a set-off, of which he could not avail himself in the former. At any rate, however, the payment of money into Court amounts to an admission on the part of the Defendant that the transaction between the parties, though originally a tort, had been converted into a contract: it is therefore no longer competent to the Defendant to object to the

form of the action. It was contended at the trial that the money paid into Court could only apply to the money actually received by the Defendant: but in answer to this it may be observed, that the Defendant has paid into Court 4l. 3s., whereas if he had intended to confine his payment to the transaction respecting the money received, he would only have paid in the exact sum received, viz. 1l. 12s., and would have specifically applied the payment to the count for money had and received. In *Burrough v. Skinner*, 5 Burr. 2639, which was an action brought by a purchaser to recover back the deposit from an auctioneer in consequence of an objection to the title, the question was, whether the auctioneer was liable, and the Court held that having paid money into Court he had acknowledged himself liable to the action. So in *Watkins v. Towers*, 2 Term Rep. 275, it was held, that giving evidence of a rule of K. B. for payment of money into Court was a sufficient compliance with an undertaking, to give evidence of some matters in issue arising in Middlesex; because it admitted the cause of action, and superseded the necessity of all that proof which the Defendant must otherwise have given. Lord Kenyon likewise in *Baillie v. Cazalet*, 4 Term Rep. 579, says, "where a Defendant pays money into Court on some of the counts only, it is saying in other terms, that he admits the Plaintiff has a cause of action against him to a certain extent, but that he means to defend himself against the charges contained in the other counts;" from which it may be inferred that if the money had been paid in generally, his Lordship would have considered it as an admission of a cause of action on all the counts. Indeed in *Gutteridge v. Smith*, 2 H. Bl. 374, it was expressly decided that payment of money into Court generally in an action on a bill of exchange dispensed with the necessity of proving the handwriting of the drawer. It is true that payment of money into Court does not admit an illegal demand beyond the sum actually paid in, *Cox v. Parry*, 1 Term Rep. 464; and that if part of the Plaintiff's demand be legal and part illegal, the Court will not allow the money paid in to be applied [553] to the illegal part, *Ribbans v. Crickett*, ante, vol. i. p. 264. But these two latter cases will not affect this case, where the objection is not to the legality of the demand, but merely to the form of the action.

Vaughan, Serjt. contrâ, was desired by the Court to confine himself to the last point.—Payment of money into Court admits a cause of action to the extent of the money paid in, and no further. This position is expressly established by the case of *Cox v. Parry*: and in *Gutteridge v. Smith*, Eyre, Ch. J., says, that on the authorities there is nothing to shew that the cause is not in all material respects in the same situation after payment of money into Court as before. With respect to the case of *Burrough v. Skinner*, the only question which there arose was this, Whether the Defendant or some other person were liable on the Plaintiff's demand? And the Court thought that the Defendant, by paying something into Court, had acknowledged himself to be the person liable: but no objection to the nature of the demand was raised: and the case of *Watkins v. Towers* only goes the length of shewing that payment of money into Court is an admission that something is due on the contract stated in the declaration, but does not decide that it amounts to any admission of the contract beyond the sum paid. If the doctrine contended for on the other side were to be admitted, this absurd consequence would follow, that in an action upon contract where money has been paid into Court generally, the Plaintiff would be at liberty to give in evidence every species of injury upon which he might be entitled to receive a compensation from the Defendant, though it should consist of a trespass or even an assault, and the Defendant would be precluded from objecting by his supposed admission that the cause of action was not a tort but a contract. With respect to the amount of the sum paid into Court in the present case, there can be no reason for supposing that it was not intended to be applied to the money actually received by the Defendant, since it is always usual for Defendants on similar occasions to pay in rather more than is really due.

Cur. adv. vult.

On this day the opinion of the Court was delivered by

LORD ALVANLEY, Ch. J., who, after stating the case, proceeded as follows: At the trial it was contended for the Plaintiff, that he was at liberty to give in evidence, in order to increase the damages beyond 4l. 3s. not only the value of the skin which had been sold, and for which the money had been [554] received by the Defendant, but also, as on a contract for goods sold and delivered, the value of the skins which still remained in the Defendant's possession. On the other hand, the Defendant insisted

that he was not at liberty to give in evidence the value of these last skins on a count for goods sold and delivered, since nothing had passed between the parties reducing the transaction into a contract of that sort; and that as to those skins the Plaintiff could only proceed in trover. The learned Judge however admitted the evidence, reserving the point for the consideration of this Court: and the only question now is, Whether, as the case stood at the time of the trial, the Judge did right in admitting the evidence upon this count for goods sold and delivered? When the case came on before this Court, a wide field of argument was entered into on this question, namely, whether in all cases where a party has converted goods of another to his own use, it is competent to the Plaintiff to change the transaction into a contract for goods sold and delivered? We thought it right to stop the counsel for the Defendant, being of opinion that the case would not turn on that point: and I do not now intend to give any positive opinion upon it. But thus far I will say, that it does appear to me monstrous to carry the causes to any such extent as that which has been contended for, and that they do not warrant the conclusion which has been drawn from them. The cases cited were *Hamblly v. Trott*, *Lindon v. Hooper*, and *Feltham v. Terry*. Lord Mansfield, in the case of *Hamblly v. Trott*, confines the doctrine to the case of money had and received; and I do not find that the Judges in any of the cases have gone so far as to hold that a tort may, at the option of the Plaintiff only, be converted into a contract. In the case of money had and received, where nothing more than the money actually received can be recovered, no injury can arise to the Defendant: and indeed he derives some advantage, since he becomes entitled to avail himself of a set-off. But where any inconvenience may arise to the Defendant, the Court will not allow the principle to be extended, even in the case of money had and received; and therefore in the case of *Lindon v. Hooper*, where the Plaintiff had paid money for the release of his cattle, which had been distrained by the Defendant for damage feissance, the Court refused to allow the former to maintain an action for money had and received. All that is to be collected from the cases is this, that if the goods be converted into [555] money, the Court will allow the Plaintiff to waive the tort and bring an action, in which he can recover nothing more than the sum actually received. But if it were competent to the Plaintiff in a case like this to waive the tort, and convert the transaction into a contract, it might involve the Defendant in great difficulties. Goods are demanded of a person who claims them as his own, and insists on keeping them. Now if the party demanding the goods be at liberty to convert this into a contract for goods sold and delivered, the consequence would be, that on proving his property in the goods the other party would be obliged to pay the value of them, though possibly to his utter ruin: whereas if the former had declared in trover, nominal damages only would probably be given, and the goods would be restored (a). For these reasons, it is my private opinion, and I believe that the rest of the Court agree with me on this head, that the general proposition contended for on the part of the Plaintiff cannot be supported. But although it be true that the Plaintiff cannot at his option alone convert this transaction into a contract for goods sold and delivered, yet it was hardly contended but that by consent of both parties it might be converted into such a contract. If goods be demanded by the Plaintiff, upon which the Defendant refuses to give them up, but says that if the Plaintiff will prove his property in them, he the Defendant will pay for them, that will turn the tort into a contract. And the question therefore is, Whether payment of money into Court on a declaration in contract, does not amount to a consent upon the part of the Defendant that the transaction shall be treated as a contract? and we are of opinion that it does. With respect to the effect of paying money into Court, several modern cases have been cited. In *Cox v. Parry* the Plaintiff would have been entitled to recover nothing if the Defendant had not paid money into Court, the policy being illegal: but Mr. J. Ashhurst observed, that the Defendant having paid money into Court, he had thereby admitted that the Plaintiffs were entitled to maintain their action on the policy to the amount of the sum paid in. And in *Baillie v. Cazalet*, Lord Kenyon says, "where a Defendant pays money into Court on some of the counts only, it is saying in other terms that he admits that the Plaintiff has a cause of action against him to a certain extent: but that he means to defend himself against the charges contained in the [556] other counts." Now from these words I collect the opinion of Lord Kenyon, that the payment of money into Court is an admission of a

(a) See 1 Esp. N. P. 597.

cause of action on every count, in every case in which a cause of action in its nature applicable to any of the counts can exist: we are not therefore obliged to admit the absurd consequence that evidence may be received of trespass or battery, for such transactions are not capable in their nature of being converted into a contract. In the case of *Watkins v. Towers*, Mr. Justice Ashurst and Mr. Justice Grose were of opinion that evidence of payment of money into Court was a compliance with the rule to give material evidence, because it amounted to an admission of the contract in the declaration. It is true that in *Gutteridge v. Smith*, Lord Chief Justice Eyre does throw out some doubts respecting the effect of paying money into Court, but my Brothers Heath and Rooke, were of opinion that it amounted to such an admission of the validity of the bill there declared upon as to preclude the necessity of proving the handwriting of the drawer. It is also observable, that in the case of *Ribbans v. Crickett*, which was posterior to that of *Gutteridge v. Smith*, Lord Chief Justice Eyre in giving the opinion of the Court that money paid into Court could not be applied to an illegal demand, does admit that it amounts to an acknowledgment of any legal demand which according to the nature of the declaration the Plaintiff could have on the Defendant. Then, without carrying the effect of payment of money into Court to the extravagant length which has been objected to, we are of opinion that such a payment on the whole declaration, is an admission of a contract on every count, in every transaction upon which such a contract can arise. Let us however consider whether the Defendant had sufficient notice of the transaction for which the action was brought: for certainly we would not suffer him to be entrapped. Here the declaration was for goods sold and delivered, and for money had and received: and it may be said that it does not specify the transaction in question. But it may be observed, that by the modern practice of the Court, if the Defendant be at a loss to ascertain the cause of the Plaintiff's demand, he may apply for a bill of particulars. The Defendant here must have known that he had made no contract with the Plaintiff except what might arise out of the transaction relating to the skins. If he had applied for a bill of particulars he would have been informed that the Plaintiff meant to charge for the value of the skins not sold, and the money received on account of [557] that which was sold. But he chose to pay money into Court generally. If therefore at the trial any evidence were given from which a contract under any circumstance might arise, it was competent to the Plaintiff to insist that the Defendant had admitted such a contract. I mean therefore to be understood to say, that although an action of trover cannot at the option of the Plaintiff only be converted into an action for goods sold and delivered, yet that an action for goods in the custody of the Defendant, may by contract be converted into an action for goods sold and delivered: and that under the circumstances of this case it was competent to the Plaintiff to give in evidence the payment of money into Court by the Defendant, as evidence that the transaction between the parties had been converted into a contract; which reduced the dispute to a mere question, whether sufficient had been paid to cover the value of the skins unsold and the money received upon that which had been sold. We are therefore of opinion that in this case there ought not to be a nonsuit.

Per Curiam. Rule discharged (a).

CATOR v. HOSTE. Nov. 24th, 1801.

At the time of executing an annuity deed, one R. W. the agent of J. C. the grantee entered into an agreement for redemption, beginning thus, "Memorandum, I undertake and agree," &c. and concluding, "Witness my hand, R. W. agent for J. C." The memorial stated that J. C. entered into an agreement by R. W. his agent, and that it was witnessed by R. W. Held that the memorandum was sufficient.

This was an application calling on the Plaintiff to shew cause why the bond and warrant of attorney and all other securities of an annuity granted by the Defendant

(a) So if a Plaintiff declare against a carrier upon a contract to carry certain goods safely, and the carrier pay 5l. into Court, he will not be at liberty to give in evidence a notice by which he declares that he will not be liable for any loss beyond 5l. for by paying money into Court he has admitted the contract as stated, and shall not be at liberty to set up any exception to it, but must pay so much as the damage sustained by the Plaintiff actually amounts to. *Yute v. Williams*, 2 East, 128.

to the Plaintiff should not be delivered up to be cancelled, and why a sum of money levied under an execution in this cause should not be restored to the Plaintiff, and all further proceedings be stayed. The objection to the annuity arose from the mode in which an agreement for a power of redemption had been memorialized. From the affidavits in support of the application it appeared [558] that the annuity had been purchased and the consideration money paid by one R. Woodgate as agent for the Plaintiff at the time of the execution of the securities by the Defendant, Woodgate alone being present and attesting the deeds, and that an agreement was entered into at that period in the following terms: "Memorandum, I undertake and agree that in case the said D. Hoste, of, &c. shall be desirous of repurchasing the annuity granted by him for his life to J. Cator of," &c. (it then proceeded to set out the terms on which the redemption was to be effected, and concluded) "witness my hand this 30th day of September 1795. R. Woodgate, agent for J. Cator, Esquire." The manner in which this clause was noticed in the memorial was as follows: "And also of a memorandum, bearing date the 30th day of September 1795, whereby the said J. Cator, by R. Woodgate, his agent, undertook and agreed, that in case the said D. Hoste should be desirous of repurchasing the annuity," &c. (setting out the terms as in the memorandum, and concluding) "or the said memorandum was to such purport or effect; and which said memorandum is witnessed by the said R. Woodgate." Hence it was objected that the agreement was not truly set forth in the memorial, it being there described to be an agreement and undertaking by the Plaintiff, whereas it was an agreement and undertaking by R. Woodgate, and though said to be witnessed by him, was in fact signed by him not as a witness but as the contracting party.

Best, Serjt., now shewed cause and argued that the agreement was in substance truly memorialized, inasmuch as Woodgate, though the contracting party, contracted on the behalf of his principal, not on his own behalf; and that it was not necessary that the agreement should have been witnessed at all.

Praed, Serjt., in support of the application contended, that it was not sufficient to state the substance of the agreement in the memorial, but that the form also must be pursued; that it had been considered by the Court that the object of the annuity act was to prevent men from entering into such improvident engagements, and therefore was construed strictly in support of applications like the present, *Ex parte Ansell*, ante, vol. i. p. 64; that in this case Woodgate and not Cator was the contracting party, the grantor possibly having preferred the undertaking of the former; that the true statement of mere formal matters had been required by the Courts, as for instance, the precise manner [559] in which the consideration money had been paid (a), and the precise hand by which it had been paid (b).

LORD ALVANLEY, Ch. J. I do not think the objection to this annuity can possibly prevail, notwithstanding the rigorous extent to which the provisions of the annuity act have been carried. Whatever my opinion might have been originally, I must now acquiesce in the determination that the hand by which the consideration money is paid must be stated. But that statement is not mere matter of form, for the reason upon which that decision proceeded was that the Court, by having before them all the dramatis personæ, might be able to ascertain all the particulars of the transaction. Indeed according to the letter of the act, such a statement does not appear necessary. Undoubtedly a clause of redemption must be truly stated, because it is part of the consideration of the annuity. But it does appear to me that the memorial in the present case has very truly stated the agreement for redemption. What was the present transaction? Woodgate, as agent for Cator, signs the contract for the annuity, and then enters into the agreement for the repurchase of the annuity on which the present question turns. He must therefore be taken to have entered into the agreement as agent only for Cator, and the agreement must be considered as substantially Cator's and not Woodgate's. The former only is liable on this undertaking and not the latter. With respect to the observation that it is said to be signed by Woodgate

(a) *Rumball v. Murray*, 3 Term Rep. 298. See also *Ex parte Fallon et Uz*, 5 Term Rep. 283, and *Kelfe v. Ambrose*, 7 Term Rep. 551.

(b) *Dalmer v. Barnard*, 7 Term Rep. 248, and *Glasse v. Mount*, ib. 390. But this rule applies to the deed only, not to the memorial, per Eyre, Ch. J. *Ex parte Ansell*, ante, vol. i. p. 63, note a.

as a witness, when in fact it was signed by him as an agent, the answer is that it was not necessary that it should be witnessed.

HEATH and ROOKE, Js., expressed themselves of the same opinion.

CHAMBRE, J. The names of the witnesses are required to be stated, in order that evidence of the transaction may at any time be obtained. But that reason does not apply to this case, where the only person present is stated in the memorial, but whether present as witness or agent is the single point in dispute. If indeed this mode of memorializing the agreement had a tendency to mislead, that might be a ground for the application, but we [560] ought to extend the rules adopted with respect to memorials no further than justice requires.

Rule discharged.

WHEELER *Demandant*, HILL Tenant, and HESELTINE AND OTHERS Vouches.
Nov. 24, 1801.

Amendment of a recovery by inserting a new parish in the writ of entry, on affidavit of the original intent of the parties to include all their property within the county, and of the assent of all persons interested at the time of the amendment.

Williams, Serjt., moved to amend a common recovery by inserting in the writ of entry "the parish of Charles." The recovery was suffered in Hilary Term, 25 Geo. 3, of lands in the parish of St. Andrew, in the county of Devon, by the tenant in tail, with reversion to himself in fee. The deeds to lead the uses conveyed "all those two fields or closes of land called 'Sherwell's Fields,' in the parish of St. Andrew in Plymouth in the county of Devon, and all other the hereditaments wherein M. T. was seised, of any estate of inheritance in Plymouth or elsewhere in the county of Devon." After the recovery had been suffered it was discovered that the closes called "Sherwell's Fields" were situated in the parish of Charles in Plymouth, and not in St. Andrew. It was now stated by affidavit to have been the intention of all the parties to the recovery that all the estates of M. T. situate in the county of Devon, should be included therein, and that all the issue of the tenant in tail were of age, and consented to the present application. He cited *Watson v. Cox*, 2 Bl. 1065.

LORD ALVANLEY, Ch. J., hesitated much in acceding to the application, and said that he would not have concurred in the amendment if all the parties whose interests might be affected had not assented to it.

Per Curiam. Amendment allowed (*a*).

[561] STOVIN ONE, &C. v. PERRING AND ANOTHER, Sheriffs of London.
Nov. 24th, 1801.

In an action against the Sheriff for an escape on mesne process, it is sufficient to aver that the Sheriff had not the body at the return of the writ, without negating the appearance of the party or his putting in bail. If the writ issue from C. B. and the declaration for an escape aver that the Defendant "had not the body before our said Lord the King" on the return day, it is bad on special demurrer.

Action on the case.

The first count of the declaration stated that one John Pugh being indebted to the Plaintiff for work and labour, the Plaintiff sued and prosecuted out of the Court of our Lord the King of Common Bench, a writ of attachment of privilege, directed to the Defendants as Sheriffs of London, whereby they were commanded that they should attach the said John Pugh and have him before the King's Justices at Westminster on Saturday next after eight days of St. Hilary, to answer, &c.; that the writ was duly indorsed for bail and delivered to the Defendants, who did arrest the said John Pugh, but that the Defendants afterwards suffered the said John to escape; and that the Defendants so being Sheriffs of London as aforesaid had not the body of the said John before our said Lord the King upon or at the day mentioned in the said writ, and so thereby appointed for the return thereof as aforesaid, according to the exigency

(a) Vid. *Cross v. Pead*, ante, vol. i. p. 137, and the notes to that case.

of the said writ, and the rules and practice of the said Court of our said Lord the King of Common Bench on that behalf.

The second count, after stating the delivery of the writ to the Defendants as in the first count, averred that the said John Pugh after such delivery, and before the return of the said writ, to wit, on, &c. and on divers other days and times between that day and the return day of the writ, was within the bailiwick of the Defendants, and might and could at any or either of those days and times have been arrested. Yet that the Defendants did not, nor would at any or either of those days or times, or at any other time whatsoever before the return of the last-mentioned writ, take or arrest the said John at the suit of the Plaintiff, under and by virtue of the said last-mentioned writ, but wholly refused and neglected so to do, neither had they the body of the said John before the Justices of the said Lord the King of the Common Bench upon or at the day mentioned in the said last-mentioned writ, and thereby appointed for the return thereof according to the exigency of the said last-mentioned writ, and the rules and practice of the said Court of the said Lord the King of Common [562] Bench in that behalf, but so to do wholly neglected and omitted, and therein failed and made default, to wit, at, &c. by means whereof the Plaintiff was delayed in the recovery of his debt.

To this declaration there was a special demurrer assigning for causes "that it is not stated or alleged in or by the said first count of the said declaration, that the said Defendants as such Sheriffs of London had not the body of the said John Pugh before our said Lord the King's Justices at Westminster at the return of the said writ in that count mentioned, but only that they the said Defendants, so being Sheriffs of London as aforesaid, had not the body of the said John before our said Lord the King upon or at the day mentioned in the said writ in that count mentioned, which, inasmuch as the said writ in that count mentioned was issued out of and returnable in the Court of our Lord the King of the Common Bench at Westminster, they were not commanded or requested to do. And also that it is not stated in and by the said first count, nor in any other part of the said declaration, that the said John Pugh did not appear or put in bail to the said writ in that first count mentioned in the said Court of our Lord the King of the Common Bench at Westminster at the return of the said writ, according to the exigency thereof." And as to the last count "that it is not in or by that count of the said declaration, nor in any other part of the said declaration, stated or alleged that the said John Pugh did not appear or put in bail to the said writ, in the said last count mentioned, in the said Court of our Lord the King of the Common Bench at Westminster on the return of the said writ, according to the exigency thereof. And also that the said declaration is in various other respects uncertain, insufficient, and informal," &c.

Vaughan, Serjt., having admitted, upon a question being put to him by the Court, that the first count was not maintainable,

Lens, Serjt. was now called upon to support the objection to the second count. He contended that it was not sufficient for the Plaintiff to allege that the Sheriff had not the body at the return of the writ, without negating that the party appeared or put in bail, for that he might have voluntarily surrendered himself and put in bail without any arrest; and he cited *Hawkins v. Plomer*, 2 Bl. 1048, to shew that it is sufficient if the Defendant appear at the return of the writ, and that in actions for escape on mesne process the writ shall surmise that ad lar-[563] gum ire permisit et non comperuit ad diem, though on process in execution ad largum ire permisit, is quite sufficient.

Vaughan, Serjt., for the Plaintiff insisted that if the party appear and put in bail, it is a compliance with the writ and will negative the allegation that the Sheriff had not the body; for that if the Sheriff be ruled to bring in the body, putting in good bail satisfies the rule, *Wolfe v. Collingwood*, 1 Wils. 262. That with respect to the distinction between actions on mesne process and on process of execution, though it be not sufficient in the former case to say, ad largum ire permisit, yet it is not necessary to allege both that the Sheriff had not the body, and that the party did not appear at the day, which are synonymous allegations, though indeed it be necessary that one of them should be added; that the command of the writ is that the Sheriff have the body to answer, &c. and that it is therefore sufficient to allege a breach in the words of the writ.

LORD ALVANLEY, Ch. J. I can entertain no doubt that the Plaintiff has alleged a

sufficient breach of duty in the Sheriff to entitle himself to an action for the damage which has ensued. If the party had appeared at the return of the writ, the sheriff would have had the body.

HEATH and ROOKE, Js., concurred.

CHAMBRE, J. It seems to me to be sufficient in this case to follow the language of the writ; though I confess that I do not like to depart from the established forms of pleading (a)¹ for which there often are reasons which do not at first occur. In the present instance however it does appear to me that the breach is sufficiently stated.

Judgment for the Plaintiff on the second count.

[564] REDIT, GENT. ONE, &C. v. BROOMHEAD. Nov. 25th, 1801.

An attorney's clerk, though not clerk to the Defendant's attorney, cannot become bail above.

The bail in this case, being about to justify, were opposed by Williams, Serjt., on the ground of one of the bail originally put in being clerk to an attorney, in whose room one of the now bail had been substituted, and notice given that the bail thus added would with the other original bail justify. He observed that the bail put in at first being a nullity, because one of them was clerk to an attorney, it was impossible to add any bail to what did not exist.

Bayley, Serjt., contra, insisted, that the bail originally put in not being clerk to the attorney of the Defendant in the action, did not fall within the reason of the rule, which had been at first adopted with respect to attornies only, and subsequently extended to their clerks.

But The Court (not without much hesitation on the part of Lord Alvanley, Ch. J.,) finding the practice had been uniform (a)² not to allow attornies' clerks to become bail, rejected the bail; and Heath, Rooke, and Chambre, Js., expressed themselves clearly of opinion that the rule was a very beneficial one, and had with reason been extended to all attornies' clerks.

[565] COKER v. GUY. Nov. 26th, 1801.

A. being tenant to B. under a lease containing covenants by which the former was bound to fetch 75 bushels of coals from Poole yearly, and deliver them at the mansion-house of the latter, and also to supply him with as much good wheat as he should want in his family at five shillings per bushel; it was agreed between them that the lease should be surrendered up, and a new one granted, omitting the above covenants. A new lease was accordingly executed, and at the same time an agreement was entered into, whereby A. agreed with B. that he would fetch and bring to the dwelling-house of B. his heirs and assigns, 75 bushels of coals yearly

(a)¹ In Herne's Pleader, p. 129, there is a precedent of a declaration in case for an escape, in which the allegation of the debtor's non-appearance on the return day is like the one adopted in the principal case, viz. "did suffer freely to go at large whither he would, and the said R. before the said Justices of the said King at Westminster aforesaid at the said morrow of All Souls, according to the effect of the said writ, he had not." But in *Toone v. Theobald*, Lill. Ent. 60, where the averment is, that the Sheriff neglected to have the body on the return day, it is followed by an allegation that the debtor "was not committed to the Marshal of the Marshalsea, nor put in any bail." The modern practice is to allege that the debtor did not appear according to the exigency of the writ; which single allegation negatives both his having put in bail, and that the Sheriff had his body. In this form are most of the MSS. precedents. See also Wentw. Plead. vol. viii. p. 456; though in the same volume, p. 482, there is a precedent similar to the one adopted in the principal case.

(a)² Vid. *Boulogne v. Vautrin*, Doug. 567, in notis. *Laing v. Cundall*, 1 H. Bl. 76, and *Cornish v. Ross*, 2 H. Bl. 350. Indeed the words of the rule, Mich. 6 Geo. 2, on which the practice is founded, are very strong, viz. "no attorney of this or any other court, or any person practising as such." Where any person within the prohibition of this rule is put in as bail, the Plaintiff may take an assignment of the bail-bond, *Fenton v. Ruggles*, ante, vol. i. p. 356, and *Wallace v. Arrowsmith*, ante, p. 49.

for 12 years (the term of the new lease), and yearly supply B. his heirs and assigns, with as much good wheat as he should want in his family at five shillings per bushel. B. having parted with his reversion in the farm, and also quitted the mansion-house in which he resided at the time when the agreement was made, held that he was not entitled to maintain an action against A. for refusing to deliver the wheat at the stipulated price; that the agreement being entire, must receive one uniform construction; and as it was clearly local in respect to the delivery of coals, it could not be deemed personal in respect to the wheat (a). Held also that no parol evidence could be admitted to explain the agreement, there being no latent ambiguity.

Assumpsit. The first count of the declaration stated, that heretofore and before the making of the agreement, promise, and undertaking hereinafter mentioned, to wit, on the 4th day of May 1793, at Salisbury, in the county of Wilts, the Defendant became and was tenant to the Plaintiff of a certain messuage and farm of the said Plaintiff, in the parish of Handley, in the county of Dorset, by virtue of a certain lease and demise thereof then and there made by the said Plaintiff to the said Defendant, for a certain term of years, to wit, for the term of 14 years then next following, wherein the said Defendant amongst other things covenanted with the said Plaintiff that he, the said Defendant, his executors and administrators, should and would yearly and every year during the continuance of the said lease, fetch 75 bushels of coals from Poole, and all the peat, turf, and other fuel which the said Plaintiff should want to make use of, and deliver the same at his mansion-house gratis; and also should and would during the said term supply the said Plaintiff with as much good wheat as he should want to expend in his family at 5s. per bushel, and as much good barley and oats as he should want for his horses, pigs, and dogs, at one guinea per quarter; that thereupon, afterwards and before the end and expiration of the term of 14 years above-mentioned, and during the continuance of the lease aforesaid, to wit, on the 27th day of May 1796, at Salisbury, in the county of Wilts aforesaid, it was agreed mutually by and between the said Plaintiff and Defendant, that the lease so granted as aforesaid should be surrendered up and cancelled, and that the said Plaintiff should grant a new lease to the said Defendant for the term of twelve years, to commence from the then preceding 29th day of September, and which said new lease should not contain any covenant on the part and behalf of the said Defendant, [566] his executors, or administrators, to fetch yearly and every year during the continuance of the said new lease 75 bushels of coals, &c. (following the words of the former covenant); and that it was then and there further agreed by and between the said Defendant and the said Plaintiff, that the said Defendant and his executors should fetch and bring to the dwelling-house of the said Plaintiff, his heirs and assigns, 75 bushels of coals from Poole yearly and every year during the term of twelve years from the 29th day of September then last past, and all the peat, turf, and other fuel, and also supply him with wood for his fencing and hedging his lands, gratis, when reasonably required, and also permit the said Plaintiff, his heirs and assigns, to winter two rother beasts with straw in the backsides or straw bartons, with the milch cows belonging to said Defendant, his executors and administrators, gratis, and permit and suffer the pigs to go out to stubble with the pigs of the said Defendant, his executors and administrators, gratis; and also yearly and every year during the said term, supply the said Plaintiff, his heirs and assigns, with so much good wheat as he or they should want to expend in his or their family at 5s. per bushel, and also so much good barley and oats as he or they might want for his or their horses, pigs and dogs, at 2s. 7½d. per bushel; and in failure of the performance thereof, or any part thereof, to pay to the said Plaintiff, his heirs and assigns, the sum of 100l. in lieu and satisfaction thereof; that in consideration that the Plaintiff promised the said Defendant to perform the said agreement in all things on his part to be performed, the Defendant promised to perform the same in all things on his part to be performed; that afterwards, to wit, on the same day and year last aforesaid, at, &c. the said first-mentioned lease was surrendered up and cancelled, according to the said agreement; and that afterwards, to wit, on the same day and year last aforesaid, at, &c. he the said Plaintiff did execute a new lease to the said Defendant, according to the said agreement so made as aforesaid, and did do and perform all things in the said agreement contained on his part and behalf to

(a) Vide *Jourdain v. Wilson*, 4 B. & A. 266.

be done and performed, to wit, at, &c.; yet the Defendant had not yearly, from the said 29th of September to the suing out of the original writ of the Plaintiff, fetched and brought to the dwelling-house of the Plaintiff 75 bushels of coals from Poole aforesaid, &c. (negating the Defendant's performance of any of the terms of the agreement); by reason whereof, and according to the tenor of the said agreement, the said De[567]ndant became liable to pay to the Plaintiff the sum of 100l. when requested, &c.

The Defendant pleaded *Non assumpsit*.

The cause was tried before Graham, Baron, at the last Summer Assizes at Salisbury, when it appeared that the first lease stated in the declaration was surrendered, and a new one granted in the manner therein mentioned, and that the agreement therein also mentioned was executed on the same day as the new lease; that the Plaintiff at the time when the new lease and agreement were executed, was possessed of two mansion-houses in the parish of Handley, one called Stricklands, the other called Williams's, in the former of which he then resided; but that he afterwards sold Stricklands, together with the reversion in the Defendant's farm, and from that time resided in Williams's; that from the time when the Plaintiff quitted Stricklands, the Defendant had omitted to perform the agreement, and that the action was brought to recover damages for such non-performance. The learned Judge was of opinion that the written agreement was to be considered independent of the lease, and that although such parts of the agreement as required a local delivery or local performance could not be enforced after the Plaintiff had quitted Stricklands, yet that as some parts of it did not require such local delivery or performance, the Plaintiff had still a right to insist upon the Defendant's compliance with those parts, though the latter was no longer tenant to the Plaintiff. He therefore directed the Jury to consider what damage the Plaintiff had sustained by the Defendant's refusal to supply him with a sack of wheat, which had been demanded at the price mentioned in the agreement. The Jury found a verdict for the Plaintiff, damages 20 shillings.

A rule having been obtained calling on the Plaintiff to shew cause why this verdict should not be set aside, and a new trial be granted,

Best, Serjt., shewed cause. It was agreed between the parties that the covenants of the old lease in favour of the landlord should be excepted out of the new lease, and the evident reason why this was done was, that the landlord being about to quit the premises on which he then resided, wished to make the undertaking of the tenant personal to himself, and thereby secure to himself those advantages which would otherwise have passed to his assignee. From the terms of the agreement it appears, [568] indeed, that some of the covenants were only to be performed while the Plaintiff resided in his then dwelling-house; but the stipulation respecting the wheat is not to be so restrained; for the agreement is general that the Defendant shall supply the Plaintiff with so much wheat at so much per quarter, which implies this provision, viz. if the Plaintiff shall demand the same of the Defendant, which demand must be made at the Defendant's residence. Nor is there any reason why the tenant should be relieved from such stipulation, for he of course has had a valuable consideration for it in the amount of his rent; and if the present Plaintiff cannot maintain this action, the Defendant will be altogether discharged; for whether the Plaintiff or his assignee of the reversion be entitled to the benefit of the agreement, the action must be brought in the name of the Plaintiff.

Lens, Serjt., *contra*, was stopped by the Court.

LORD ALVANLEY, Ch. J. I cannot construe this agreement in any other way than as referring to the relation of landlord and tenant subsisting between the parties, and that it was meant to continue between the Plaintiff and Defendant only so long as that relation should exist between them (*a*). The words "heirs and assigns" being

(*a*) But it should seem that if the Plaintiff had parted with his interest in the lands demised to the Defendant, or even with his estate in the mansion-house called Stricklands, but had continued to reside in the latter, so as to be capable of deriving a benefit there from the performance of the agreement, he might have maintained his action. For where a parson covenanted with R. B., who was tenant by the curtesy, to find a priest to perform divine service in the house of R. B. every Saturday in the year during the life of the said R. B., and afterwards R. B. surrendered his estate to the reversioner, and took back a term for years, it was held that the covenant was not

introduced throughout clearly shew that it could not be intended as a mere personal agreement. Indeed many of [569] the covenants are such as could not possibly be performed to any given assignee of the Plaintiff's living at any distance whatsoever from the demised premises, but only to such assignee as should succeed to the Plaintiff's dwelling-house at Stricklands, and stand in all respects in the same relation as the Plaintiff himself did at the time the agreement was entered into. It is observable also that these words "heirs and assigns" are used in the stipulation respecting the wheat as well as the other stipulations, and we must give one uniform and entire construction to the agreement, and not hold some parts of it to be personal and others not so. The parol evidence in this case cannot vary this construction. I am therefore of opinion that we are bound to consider the Defendant as having executed this agreement in the capacity of tenant to the person who should continue to sustain the character of landlord.

HEATH, J. I am of the same opinion. In the first place, it appears to me that no parol evidence can be admitted unless there be a latent ambiguity in the agreement itself (a). It is contended, however, that the agreement itself is personal; but many of the stipulations in the agreement are clearly local, and not to be performed at a distance from the premises. The covenant to serve the Plaintiff's family, must mean his family in that place, and not wheresoever they may happen to reside.

ROOKE, J. Had this agreement been reversed in its order, and the stipulations respecting the wheat been placed at the beginning, there might have been some ground for the Plaintiff's argument. But here the agreement begins with a provision that the Defendant shall bring coals to the Plaintiff's dwelling-house, and then goes on to stipulate that the Defendant shall furnish fuel and also wood for fencing his lands; then follow other provisions respecting the Plaintiff's cattle, and then the stipulation to supply the Plaintiff with as much wheat as he should want in his family. Now the meaning of the term family must be his family residing upon the premises. Every agreement must receive its construction from its own terms, without the introduction of any evidence dehors the agreement, unless there be some latent ambiguity.

CHAMBRE, J. If there be any ambiguity respecting the particular articles mentioned in this agreement, we must look to the whole of the agreement in order to ascertain the sense of it. It is admitted that some of the articles can only relate to the [570] situation of landlord and tenant; but it is concluded that the stipulation respecting the wheat is to be separated from the rest, and to be construed as a personal agreement; but I find nothing in the language of the agreement which calls upon us to divide any part of it from the rest. The heirs and assigns mentioned in the agreement must either mean the heirs and assigns who should be entitled to the estate in lease to the Defendant, or the heirs and assigns who should be entitled to the house in which the Plaintiff resided: but in either of these cases the present Plaintiff would be precluded from maintaining his action.

Rule absolute.

extinct, and that R. B. might maintain an action for non-performance of the covenant, 6 H. 4, 1. 1 Roll. Ab. Covenant O. pl. 1, fol. 522. 1 Bac. Ab. Covenant G. fol. 540, ed. 1736. 6 Vin. Ab. Covenant O. So where the covenant was to perform divine service in the chapel of D., not describing it as belonging to the manor, it was held that the heir of the covenantee might maintain the action, though, in consequence of mesne alienations, he was not seised of the manor in his own right, but in that of his wife, for the covenant being personal, descended upon the heir of the covenantee, and not upon the purchaser of the manor; but in that case it seems also to have been holden that if the chapel had been described as belonging to the manor, the heir after alienation could not maintain the action: nor even the alienee (adds Broke), as it should seem, for he is not privy in blood, 2 H. 4. 6 Bro. Ab. tit. Covenant, pl. 17. Fitz. Ab. tit. Covenant, pl. 13. But this latter position of Broke is contradicted by 42 Ed. 3, 3, also abridged by Broke, tit. Covenant, pl. 5. There the covenant was to chaunt in the chapel of such a manor for the lords and their servants, and it was admitted that the purchaser of the manor might maintain an action on the covenant, though not privy as heir to the covenantee; for the covenant went with the land.

(a) Vide etiam *Preston v. Merceau*, 2 Bl. 1249.

SLADE ET UX. Tenants v. DOWLAND *Demandant*; in False Judgment.
Nov. 26th, 1801.

If a demandant in a writ of right count upon the seisin of his ancestor in dominico suo ut de feodo, omitting et de jure, it seems to be bad.—If the demandant in deducing his title through a female, describe her as sister and heir of J. S., and it appear upon the face of the count that J. S. left a son who survived his aunt, it is fatal; although it also appear that upon failure of issue of the son, the issue of the sister of J. S. became his heirs.

Writ of false judgment directed to the Sheriff of Dorsetshire commanding him to go to the Court of the Manor and Forest Manor of Gillingham, and there cause to be recorded a plaint between the Plaintiffs and the Defendant of a plea of land, wherein the Plaintiffs complained that false judgment had been given. The Sheriff returned that he had recorded the plaint and set out the proceedings, viz. a writ of right close; and the count founded thereon, which was as follows: “Thomas Dowland by Augustin John Mayhew his attorney, demands against William Slade and Elizabeth his wife, 18 acres of land, 18 acres of meadow, 18 acres of pasture, and 18 acres of furze and heath, with the appurtenances situate, lying and being in the tithing of Bourton, in the manor of Gillingham, in the county of Dorset, and within the jurisdiction of this Court, and whereof he says that Thomas Gamlyn was seised in his demesne as of fee, according to the custom of the manor aforesaid in the time of peace, in the time of the Lord George the Second, late King of Great Britain, &c. and within sixty years now last past, by taking the esplees thereof to the value, &c. and died thereof seised, leaving one Elizabeth his wife him surviving, and from the said Thomas Gamlyn the right to the said tenements, with the appurtenances, descended and came to one William Gamlyn, as brother and heir of the said Thomas Gamlyn, subject to the estate of free bench of the said Elizabeth therein, according to the custom of the manor [571] aforesaid, and from the same William Gamlyn the right to the said tenements, with the appurtenances, subject to the said estate of the said Elizabeth Gamlyn, descended and came to one Hannah Dowland, as eldest cousin and heir of the said William Gamlyn, according to the custom of the said manor, that is to say, as eldest daughter and heir of Hannah Ball, who was the only sister and heir of one other Thomas Gamlyn, who was the father as well of the said first-mentioned Thomas Gamlyn as of the said William Gamlyn, which said Elizabeth Gamlyn died in the lifetime of the said Hannah Dowland; and from the said Hannah Dowland the right to the said tenements, with the appurtenances, descended and came to one Thomas Dowland, as son and heir of the said Hannah Dowland; and from the said Thomas Dowland, the son and heir of the said Hannah Dowland, the right to the said tenements, with the appurtenances, descended and came to the said Thomas Dowland the now demandant, as son and heir of the said Thomas Dowland, the son and heir of the said Hannah Dowland, and that this is his right, he the said Thomas Dowland the now demandant offers,” &c.

Several imparlances followed at the prayer of the tenants, and then a general demurrer; after which other imparlances at the prayer of the demandant, and a joinder in demurrer. Then came a judgment for default of the tenant's appearance, that the premises demanded should be taken into the hands of the lord of the manor; and a precept to the bailiff of the manor to take the same into the hands of the lord, and to make known the day of the caption at the next court, and summon the tenants to hear the judgment: at the next court the bailiff returned that the precept came to his hands too late for him to execute it before the next court; and therefore the same judgment was given, and precept awarded as before. At the next court the tenants again made default, and the bailiff returned that he had taken the premises into the hands of the lord, and that he had summoned the tenants to hear the judgment; whereupon judgment was given that the demandant should recover his seisin of the tenements, with the appurtenances, against the tenants; and the demandant prayed a precept to the bailiff to cause him to have his full seisin thereof, which was granted, and at the following court the bailiff returned that he had caused the demandant to have full seisin. Upon this record the present Plaintiffs assigned errors thus: “And hereupon the said William Slade and Elizabeth his wife say, [572] that the record aforesaid is vicious and in many respects defective, and that false judgment is given

against them in the proceedings aforesaid in many instances, that is to say, in this, that is to say, that no seisin of right of the premises in the said count mentioned, is in the said count alleged and averred in Thomas Gamlyn, who is therein alleged to have been last seised, and from whom the said Thomas Dowland deduces his title, and that the right is in that count alleged to have descended to the several persons therein named in succession from the said Thomas Gamlyn, who for any thing which appears in the said count, had no right, and that the title is attempted to be deduced to the said Thomas Dowland from an ancestor who is not alleged to have any right, but for any thing which in the said count appears might have been seised of wrong, and the right have been in those who had been seised of and held the same premises since the death of the said Thomas Gamlyn, and that the right is stated to descend from one who no right had, and that the root of the said Thomas Dowland's title is erroneously, imperfectly, and defectively alleged; and also in this, that supposing the said Thomas Gamlyn the last seised to have had any right, no right is deduced from the said Thomas Gamlyn to the said Thomas Dowland, inasmuch as the said Hannah Dowland is in the said count alleged to be the heir of the said William Gamlyn, and the right to the premises in the said count mentioned to have descended to the said Hannah Dowland as the heir of Hannah Ball, which said Hannah Ball must therefore have died before the said William Gamlyn, or the said Hannah Dowland could not have been heir to the said William Gamlyn, or the right have descended from the said William Gamlyn immediately to her the said Hannah Dowland, and yet the said Hannah Ball is in the said count stated to have been the sister and heir of Thomas Gamlyn the father, who must therefore have died in the lifetime of the said Hannah Ball, and to which said Thomas Gamlyn the father William Gamlyn his son who survived the said Hannah Ball must have been heir, and to which said Thomas Gamlyn the father Hannah Ball never could have been heir, if it be true as is in the said count alleged, that the said Hannah Dowland was heir to William Gamlyn at the time of his death, and that the right descended immediately from him to her; and also in this, that no custom of the said manor is any where alleged, whereby it appears that eldest daughters and eldest female cousins are entitled to be heirs alone, [573] and exclusively of their younger sisters; and also in this, that judgment in the plea aforesaid is given for the said Thomas Dowland against the said William Slade and Elizabeth his wife, when by the law of the land judgment in the plea aforesaid ought to have been given for the said William Slade and Elizabeth his wife against the said Thomas Dowland; and also in this, that judgment is given in the plea aforesaid without any regard to the matter of law before the court on the proceedings, by the demurrer to the said count and joinder thereto; and so the said William Slade and Elizabeth his wife say, that in the said court of the said manor false judgment hath in divers instances been given against them upon the proceedings aforesaid, and they pray that the said judgment for the said defects, and for others in the said record appearing, may be reversed, annulled, and utterly made void, as being false and erroneous, and that the said William Slade and Elizabeth his wife may be restored to every thing which they have lost on occasion of the said judgment, and that the said Justices here may proceed to the examination of the said premises." The Defendant joined in error thus: "And the said Thomas Dowland says, that the judgment aforesaid ought not to be reversed, neither ought the said William Slade and Elizabeth his wife to be restored to any thing which they may have lost thereby, because he says that in the record aforesaid there is not any error, nor is any false judgment given in the said court of the said manor and forest-manor, upon or in any of the proceedings aforesaid; and this the said Thomas Dowland is ready to verify, and he prays that the Court here may proceed to the examination of the premises aforesaid, and that the judgment aforesaid may be in all things affirmed, and adjudged good and sufficient to remain in its full force."

The case was argued on the last day of last Trinity Term; when Williams, Serjt., for the demandant was desired by the Court to begin. With respect to the first objection it is sufficient to state in the count that the party was seised in his demesne as of fee, without adding the words "and of right." Every seisin in fee implies a right to that seisin; and the Court will not intend that the party came to his estate by disseisin. It is enough if it appear that the ancestor of the demandant was actually seised in fee-simple, that being the only estate which can be recovered in a writ of right, Fitz. N. B. 1, 5, *Dally v. King*, 1 H. Bl. 1. Now in this case the demandant

has alleged that his [574] ancestor was seised in his demesne as of fee; which is a more apt way of pleading in the case of an estate in possession than to say, "as of fee and right," which rather implies to an estate in reversion. Thus in *Wrotesley v. Adams*, Plowd. 187 a. the estate in fee-simple in possession is described in dominico suo ut de feodo, but the fee-simple expectant on an estate for years ut de feodo et jure, fo. 187 b., and this distinction was approved by the Court, fo. 191 a. If however it be contended that the seisin in this case may have been obtained by wrong, it may be answered that in some cases such a seisin may be sufficient to maintain a writ of right, as appears from Co. Litt. 280 b. 281 a.; and if there be any case in which such a seisin will support the action, it cannot be essential to state that the seisin was of right. But independent of general reasoning, this mode of pleading is supported by precedents. In *Rastal's Entr. title False Judgment*, pl. 9, fo. 323 b. ed. 1586, the count runs thus: Et unde dicunt quod ipsimet fuerunt seisiti de mesuagiis terris & prædictis cum pertinentiis in dominico suo ut de feodo tempore pacis tempore Domini Regis nunc capiendo, &c. In *Rastal. Ent. tit. Formedon in Remainder* (a)¹, pl. 3, fo. 347 b. the words de jure are also omitted, and so in the bar to a count in a writ of right close, Co. Ent. tit. False Judgment, pl. 2, fo. 306 b. 2dly, With respect to the repugnancy in deducing the title, the introduction of the word "heir" in describing *Hannah Ball*, must be taken to have no other effect than to point out the relationship in which she stood to *Thomas Gamlyn* the father. It would not have been sufficient to have described her as eldest sister, since that description would not have excluded the existence of a brother. But the word "heir" imports that the person to whom it is applied is the person through whom the succession to the estate is derived; and not that such person ever stood in the situation to claim the estate herself as having survived *Thomas Gamlyn* to whom she is described as heir. In *Herne's Pleader*, tit. Formedon in Reverter, fo. 501 b. ed. 1657, there is a precedent to which the same objection would have applied. There *Richard* the demandant makes title to the land as the right heir of *E. F.* the donor thus: "and from the same *S. and A.* (the donees), for that they died without heirs of their bodies begotten, the right reverted by form, &c. to the same *Richard*, who now demands as cousin [575] and heir of the said *E. F.*, to wit, son of *S. B.*, son and heir of *L. F.* son and heir of *W. F.*, brother and heir of the said *E. F.* the donor, and which after the death," &c. *Richard* the demandant therefore was heir to the donor at the time of the death of the donees without issue, and consequently *S. B.*, *L. F.* and *W. F.*, though whom he claimed, must all have been dead at that time. In this indeed there is no repugnancy. But the plea shews that *J. and A.* the donees were the daughters of the donor: if therefore *W. F.* the donor's brother died before them, he could never have been heir to the donor. This is precisely the same objection as that which is now raised: and had it been considered of importance would probably have been taken advantage of in the former case. In the case of a lineal descent it may be incorrect to describe a person as heir to another who survived him; but in describing a collateral descent, the word "heir" is used to shew that the ancestor to whom it is applied would, if living, have been heir to the person last seised. If however it should be thought that the objection has any weight, yet as *Hannah Dowland* is properly described as cousin and heir of *William Gamlyn*, and the steps by which her title is deduced, are stated under a scilicet, the Court may reject the latter part as unnecessary (a)², or consider the word "heir" as surplusage. Indeed the proceedings in a court of this description are not to be canvassed with the same accuracy as the judgments of the Courts in Westminster Hall, as appears from *Ash v. Rogle and the Dean and Chapter of Saint Paul's*, 1 Vern. 367, Show. Par. Cas. 67, where a common recovery in a Court Baron was supported, though erroneous, not merely on the ground of its being a common assurance, but because it was suffered in a Court Baron.

[The counsel for the Plaintiff intimated that he should not insist upon the third objection, and the Court observed that there was nothing in it.]

(a)¹ There are also three precedents in Co. Ent. tit. Formedon, viz. fo. 328 b. pl. 14, 338 b. pl. 15, and 340 b. pl. 16, where the words de jure are altogether omitted.

(a)² But it seems that it would not have been sufficient to describe the demandant as cousin and heir, without showing in what manner she was heir. See 1 Ass. pl. 15, where this doctrine was laid down in a writ of mordancester.

Lens, Serjt., for the Plaintiff. Undoubtedly these objections are very nice. But the Court must consider them as if taken upon a special demurrer: for as there has been a general demurrer in the Court below to which the statute respecting special demurrers does not extend, the assignments of errors upon the writ of false judgment are in the nature of special causes of de-[576]-murrer. 1st, It is not sufficient in a writ of right for the demandant to set forth a seisin only; he must shew that he has the mere right. The issue is not taken upon the seisin but upon the right; and unless an allegation of the right be made no issue can be taken. The passages cited from Fitzherbert only shew under what circumstances a writ of right may be maintained; but do not point out what particular allegations are necessary to be made in the count. So the case of *Dally v. King* only lays down that an allegation of an actual seisin is necessary, but does not say whether or not that seisin must be alleged to be of right. With respect to the case of *Wrotesley v. Adams*, though it was there said to be correct to describe a seisin in reversion "as of fee and right," yet it was not there holden that in a writ of right it would not be necessary to describe a seisin in possession as "of right" also: that was not a case of a writ of right; and the distinction there taken was between a seisin in demesne as of fee, and a seisin as of fee and right, the former of which was thought rather to apply to a seisin in possession on account of the word "demesne," and the latter to a seisin in reversion. As to the passage in Co. Litt., though it be true that a seisin commencing by disseisin may in some cases be sufficient to maintain a writ of right, because the tenant may be precluded from disputing it, yet it by no means follows that such a seisin must not be alleged in the count to be a seisin of right. The entry in *Rastal tit. False Judgment*, pl. 9, is indeed an authority in support of this count; but in that case as the parties joined issue on the fact, the objection could not arise; besides which it may be observed, that although the words "de jure" are omitted in the description of the seisin, the demandant at the beginning of the count claims the estate "as his right and inheritance," which in this case the demandant has omitted to do. As to the other entries cited from *Rastal tit. Formedon*, and *Co. Entr. tit. False Judgment*, it may be observed, that the former is no authority in a writ of right, and that the omission of the words "de jure" in the latter was not in the count but in the bar (a). With the exception of the precedent in *Rastal, tit. False [577] Judgment*, pl. 9, the entries will be found universally to have the words "de feodo et jure." To this effect are the entries in *Rastal, tit. Droyt Close*, pl. 1, fo. 233, pl. 5, fo. 234 b. ed. 1566, and another in the same book, title *Copyhold*, pl. 1, fo. 129, in which last case it appears to have been thought necessary in an action in the manor court in the nature of a writ of right patent, for the copyholder to allege his seisin in dominico suo ut de feodo et jure ad voluntatem domini secundum consuetudinem, &c. 2dly, If there be any inconsistency in a statement of the demandant's title, that part which creates the inconsistency, though under a videlicet, cannot be rejected, for it is perfectly clear that in a writ of right all allegations of title are material allegations, for the title must be regularly set out, and proved as laid. Now if any thing appear upon the face of the title which could not by possibility be proved, the title becomes defective: and in this case had the parties gone to trial, it would have been impossible to prove that Hannah Ball ever was the heir of Thomas Gamlyn. The demandant could not have resorted to any other mode of deriving his title than that set forth upon the record, and by that it appears that Hannah Ball died before William Gamlyn, who was the heir of Thomas Gamlyn.

Williams, in reply, insisted that a writ of false judgment could not be considered in the nature of a special demurrer, but was to be compared to a writ of error on which nothing but defects in substance can be taken advantage of: and that one precedent in point was sufficient to induce the Court in a cause of this sort to support the judgment given below.

(a) Indeed in *Formedon* the general issue is not joined upon the mere right, as in a writ of right, but upon the gift of the donor. For the estate demanded and recovered in *Formedon* is not the mere right, i.e. the fee-simple, but an estate-tail. See Booth on Real Actions, fo. 88. See the form of the general issue non dedit, Co. Entr. tit. *Formedon*, pl. 5, 14, 16, fo. 322 b. 329 b. 341 a. *Rast. Entr. tit. Formedon*, pl. 5, 14, 16, fo. 322 b. 329 b. 341 a. *Rastal Entr. tit. Formedon in Remainder*, pl. 1, 2, fo. 347, tit. *Resceit in Formedon*, pl. 3, fo. 349 a.

Cur. adv. vult.

On this day the opinion of the Court was delivered by

LORD ALVANLEY, Ch. J. We are to decide whether any of the errors assigned upon this record are fatal: for if any of them prevail judgment must be given for the tenant. The errors assigned are three in number. The 1st objection is, that it is not alleged that Thomas Gamlyn, from whom the demandant deduces his title, was seised in his demesne as of fee and right. Upon this point we do not mean to decide the case. But thus far I will say, that the objection appears to me fatal, for all the precedents, with the single exception of one cited by my brother Williams, contain the above-mentioned allegation. It was contended that the word "right" was unnecessary, except where a reversion is described, but that is not the case, for an estate in possession must be averred in the same manner as an estate in reversion, except [578] that in the latter case the words "in his demesne" should be omitted. The Court however do not intend to give judgment upon that point, being clearly of opinion that the second objection is fatal. The second objection is, that no right is deduced from Thomas Gamlyn to Thomas Dowland the demandant, inasmuch as Hannah Dowland is alleged to be the heir of William Gamlyn, and the right to have descended to the said Hannah Dowland as the heir of Hannah Ball, which said Hannah Ball must therefore have died before the said William Gamlyn, or Hannah Dowland could not have been heir to William Gamlyn, or the right have descended from William Gamlyn immediately to her, and yet Hannah Ball is stated to have been sister and heir of Thomas Gamlyn the father, who must therefore have died in her lifetime, and to which Thomas Gamlyn the father, William Gamlyn the son, who survived Hannah Ball must have been heir, and to which Thomas Gamlyn the father, Hannah Ball never could have been heir, if it be true as alleged that Hannah Dowland was heir to William Gamlyn at the time of his death, and that the right descended immediately from him to her. No doubt there is a complete blunder in the mode of deducing the title: and it is equally clear that if the title be not accurately deduced through a series of ancestors properly described, the demandant must fail. Now we are of opinion that this being a real action, though originating in a manor court, all the forms of proceeding must be as strictly observed as if it had been a writ of right originally commenced in this court, and that the tenant has a right to avail himself of any inaccuracy which the demandant may have committed in the course of the proceedings. The consequence is, that there must be judgment for the tenant, and that the demandant take nothing by his writ

DOWSE GENT. *Demandant*, LLOYD Tenant, AND REEVE Vouchee. Nov. 26th, 1801.

Writ of entry and subsequent proceedings in a recovery amended by inserting the words "all and all manner of tithes whatsoever, yearly arising, &c. from and out of the said premises," on an affidavit setting out the vouchee's title to the tithes, and stating his intention to have passed all his interest in the premises; the word "hereditaments" being contained in the deed to lead the uses (a).

Bayley, Serjt., moved on the part of the vouchee, to amend the writ of entry and subsequent proceedings in a recovery suffered in Michaelmas Term, 39 Geo. 3, by inserting the words "and all and all manner of tithes whatsoever [579] arising growing or renewing from and out of the said premises." It appeared by the affidavit of the demandant that the grandfather of the vouchee by his will, dated the 14th of October 1785, gave and devised all and every his freehold manors, messuages, farms, lands, tenements, and hereditaments, situate in the counties of Suffolk, Kent, Berks, or elsewhere within the kingdom of Great Britain, thereinbefore undevised, to the use of his grandson J. P. Reeve and the heirs of his body; that the said J. P. Reeve by bargain and sale, dated the 26th day of November 1798, for the purpose of making a tenant to the præcipe, conveyed to J. Lloyd all that farm called Greyberry's Farm, with the several closes, pieces, and parcels of arable, meadow, pasture, and wood land thereto belonging, containing, &c. situate in the parish of Eton Bridge, in the county of Kent, and all other the manors, messuages, lands, tenements, and hereditaments of him the said J. P. Reeve, and which were theretofore the estate and inheritance of

(a) And see *Phillips v. Jones*, 3 B. & P. 362. *Copland v. Bigg*, 8 Taunt. 86.

J. Plumsted, late of &c. situate in the several parishes thereinbefore mentioned, together with all rights, privileges, advantages, hereditaments, and appurtenances belonging or appertaining or to or with the same then or at any time theretofore held, used, occupied, possessed, or enjoyed, or accepted, reputed, deemed, taken, or known as part, parcel, or member thereof, or as belonging thereunto respectively; and all the estate, right, title, interest, use, trust, possession, property, claim, and demand whatsoever of him the said J. P. Reeve, of, in, to, or out of the premises, to hold to the said J. Lloyd, his heirs and assigns, for the purpose of enabling him to suffer a recovery to enure to the use of the said J. P. Reeve, his heirs and assigns; that a recovery was accordingly suffered of lands in Eton Bridge, but that in the said recovery no mention was made of tithes, the demandant, who was concerned as attorney for J. P. Reeve the vouchee, not being apprised that the said J. P. Reeve was entitled to the tithes of the estate, but that he had since discovered that J. Plumsted was seised of the tithes of the estate, and that the same passed by his will to the said J. P. Reeve the vouchee. The affidavit further stated that it was the intention of the said J. P. Reeve and of the demandant, that the said bargain and sale and recovery should comprise all the estate and interest of the said J. P. Reeve, in the parish of Eton [580] Bridge, which had passed to him by the will of the said J. Plumsted the testator.

Bayley, Serjt., relied on a case of *Milbanke v. Jolliffe*, decided in the Court of Pleas at Durham, 23d July 1772, with the concurrence of the late Mr. Justice Gould and Mr. Justice Willes, who were consulted upon it (*a*).

(*a*) The following is a note of that case.

Milbanke v. Jolliffe. In the Court of Pleas at Durham. And see Horne demandant, 3 Taunt. 462.

On the 11th of January 1704 Ralph Hedworth Esq. by his will devised to his son John Hedworth Esq. and his heirs, all his manor of Chester deanery, with the appurtenances, and all his messuages, lands, and hereditaments whatsoever in the county of Durham, and all other his real estates. On the 27th and 28th August 1714, by lease and release (on the marriage of John Hedworth with Susannah Sophia Pelsant) he conveyed to trustees all that the manor or lordship, or deanery of Chester le Street, with the appurtenances, and divers lands, &c. (as described), and all other the messuages, lands, tenements, and hereditaments whatsoever of him the said John Hedworth in Chester le Street or elsewhere in the county of Durham, wherein he had any estate of freehold or inheritance, together with all hereditaments, rights, members, and appurtenances, to the said manor, lordship, or deanery, and premises belonging, enjoyed therewith, or reputed as part thereof, (excepting tithes and mines), to the use of himself and his heirs until the marriage, then to himself for life, remainder to the first and other sons of the marriage in tail male, remainder to himself and the heirs male of his body, remainder to the daughters of the marriage in tail, remainder to his own right heirs. There was issue of this marriage one daughter only, Eleanor, married to Sir Richard Hilton, and mother of Mrs. Jolliffe. The said John Hedworth (previously to his marriage with a second wife, the mother of Lady Milbanke), being a tenant in tail under the above settlement, barred the limitations to the daughters of the first marriage, by recovery suffered in consequence of a lease and release, dated the 4th and 5th September 1724, whereby he granted, bargained, sold, and released all that the manor or lordship, or deanery of Chester le Street, with the appurtenances, &c. (describing the premises in the same words as used in the settlement), and all other his lands, tenements, coal mines, tithes, and hereditaments whatsoever, to A. B. as tenant to the præcipe for suffering a recovery to the use of himself in fee. The recovery was suffered on the 2d October, 11 Geo. 1, of the manor or deanery of Chester le Street, with its members and appurtenances, 30 messuages, 120 cottages, 1 dovehouse, 10 gardens, 1300 acres of land, 1400 acres of meadow, 1300 acres of pasture, 20 acres of wood, 200 acres of furze and heath, 400 acres of moor, and also mines of coal and common of pasture for all cattle, with the appurtenances in the parish of Chester in the Street. On the 15th December 1746 John Hedworth by his will devised to Sir Richard Hilton and Sir Ralph Milbanke, and their heirs, all that his deanery, prebend, rectory, and vicarage of the collegiate church and parish of Chester in the Street, and the manor and royalties thereof, and all tithes, &c. thereunto belonging, and all other his messuages, lands, and hereditaments, in trust as to one moiety thereof for his daughter Eleanor, Lady Hilton (mother of Mrs. Jolliffe),

[581] The Court, after some hesitation on the part of Lord Alvanley, Ch. J., allowed the amendment.

and the heirs of her body; and as to the other moiety for his daughter Elizabeth (the mother of Lady Milbanke), and the heirs of her body, with remainders to the heirs of his body. The testator gave his copyhold estates upon the like trusts, and in his devise thereof directed that if his daughter Lady Hilton should make any other claim upon them than under his will, every devise in her favour contained therein should be void. On the 26th and 27th June 1754, Sir Richard and Lady Hilton conveyed all that moiety and all other the part and share of Lady Hilton of and in the manor and deanery of Chester le Street, with the appurtenances, and the advowson, donation, and right of presentation of, in, and to the church, curacy, or donative of Chester aforesaid, and of all those farmholds, tithes, &c. late of the said John Hedworth, &c. to a tenant to the præcipe for suffering a recovery, to the uses therein mentioned. The recovery then suffered was of a moiety of the manor or deanery of Chester, &c. and also of all and all manner of tithes, &c. and also of the advowson, donation, and right of presentation of, in, and to the church of Chester in the Street. Sir Ralph and Lady Milbanke afterwards suffered a recovery of the other moiety by the same description.

On the 31st of March, 1772, Mr. Jolliffe contesting the alternate right of presentation derived through Lady Milbanke, a rule was obtained in the Court of Pleas at Durham, on behalf of Sir R. Milbanke and his eldest son by Elizabeth his wife deceased, calling on Mr. Jolliffe and Eleanor his wife to shew cause why the writ of entry of the recovery suffered by John Hedworth 2d October, 11 Geo. I., should not be amended by inserting the words, "*ac etiam advocationem, presentationem, donationem, nominationem, liberam dispositionem et jus patronatus ecclesiæ de Chester le Street, ac etiam advocationem, presentationem, donationem, liberam dispositionem et jus patronatus de curatione de Chester le Street,*" next after the words *quadragint. acras moræ*; and why the writ of seisin and the record of the recovery, and exemplification thereof, and all entries and proceedings relating to the same recovery, should not also be amended accordingly.

On the part of Mr. and Mrs. Jolliffe it was insisted, that by the settlement of the 27th and 28th of August, 1714, the curacy of Chester le Street passed under the general word *hereditaments*, and was properly settled to uses, and remained so settled, there being no words in the recovery proper for a recovery to pass the nomination to the curacy, consequently that Mrs. Jolliffe, as heir of the body of John Hedworth by Susannah Sophia his first wife, was solely entitled to the nomination. The amendment to the recovery therefore was opposed as affecting the right of Mrs. Jolliffe.

On the part of Sir Ralph Milbanke and his son it was urged, that it appeared from the whole case, and particularly from the devises in the will of John Hedworth of the 15th of December, 1746, that it was his intention by the settlement of the 4th and 5th September, 1724, and the recovery suffered thereupon, to include the advowson; and the recovery suffered by Sir Richard and Lady Hilton in 1754, was also relied upon to shew that they did not consider themselves entitled to more than a moiety of the advowson. It was therefore contended that as the intention of John Hedworth to include the advowson appeared, if the recovery did not contain proper words to effectuate such intention it was amenable.

The matter having been argued before the Justices of the Court of Pleas on the 16th of April, 1772, it was referred to Mr. Justice Gould, and Mr. Justice Willes, the temporal chancellor of the county palatine of Durham, and both of them Justices of the Court, for their opinion thereupon, who were desired to appoint the parties to attend them by their counsel if they thought proper, in order to have the said matter of law fully argued before them; and the said Justices were requested to certify their opinion to the said Court.

The certificate was as follows:

"We are of opinion that the recovery ought to be amended by inserting the words in the manner prayed by the motion. H. Gould, E. Willes, Serjeants Inn, June 2d, 1772."

On the 23d of June, 1772, after hearing counsel on both sides, the Court of Pleas made the rule for the amendment absolute.

[582] HARTSHORN AND ANOTHER, Assignees of Wright, a Bankrupt, v. MARY SLODDEN. Nov. 27th, 1801.

If a debtor at the instance of his creditor give goods out of his shop in part payment of a bond not then due, and shortly afterwards become bankrupt, the mere circumstance of the bond not being due will not alone vitiate the part payment on the ground of fraudulent prejudice (*a*).

Trover for goods. The cause was tried at the last Summer Assizes for Kent, before Lord Kenyon, and a verdict found for the Plaintiffs for 90l., with liberty to the Defendant to move to have a nonsuit entered, if the Court should think him entitled to do so under the following circumstances: The Bankrupt being indebted to the Defendant in 150l. for which he had given his promissory note, was applied to by her on the 10th of September, 1800, for a further security, upon which he gave her a bond for payment of the debt with interest in six months. After this, hearing that the bankrupt was in failing circumstances, the Defendant on the 29th of November in the same year desired the bankrupt to let her have some of the goods out of his shop, which was a shop for the sale of earthenware, and full of goods, in payment of her debt. The bankrupt having agreed to this, a person on behalf of the Defendant went to the bankrupt's house about three o'clock in the afternoon of the same day, and began packing up and sending away to the Defendant's a considerable quantity of Staffordshire ware. The packing up lasted till after it was dark, and some of the goods were removed in the dark, but no privacy in the transaction was attempted. The bankrupt made out a bill of parcels to the Defendant, in which he charged the goods at 90l. which was more than their value, and an indorsement was made upon the bond for the receipt of 90l. in part payment of the debt. The quantity of Staffordshire ware removed was considerably more than the Defendant could have any use for in her family, and she was not in trade. On the 5th or 6th of December following, the bankrupt was arrested, and on the 9th, while in prison, executed an assignment of all his effects, which constituted the act of bankruptcy. It being contended that this was a fraudulent preference on the part of the bankrupt, because the bond was not due at the time the goods were required by the Defendant and delivered to her, Lord Kenyon advised the Jury to find a verdict for the Plaintiffs for 90l. the amount of the charge in the bill of parcels, in order that the point might be [583] brought before the Court, and no further expence be incurred if they should think such a verdict could be maintained in law.

Accordingly a rule nisi for entering a nonsuit having been obtained on a former day,

Best and Praed, Serjts, now shewed cause. If the transfer of the property in question was made in contemplation of an act of bankruptcy, it was clearly void. Now the nature and quantity of the goods, as well as the time and manner of removal, equally shew that the transaction was not in the ordinary course of trade; and indeed the demand of the goods was founded on a knowledge that the bankrupt was in failing circumstances. It cannot be said that the transfer was made under any threat or fear of legal process, since the Defendant was not in a situation to threaten the bankrupt, the original debt being extinguished by the bond, and the bond itself not being due. The transaction therefore must be taken to be a voluntary transfer in contemplation of bankruptcy, for the purpose of giving the Defendant a preference over the other creditors. In *Alderson v. Temple*, 4 Burr. 2239, Lord Mansfield considers the question, whether a transfer made upon the eve of a bankruptcy be void or not, as depending on this, Whether it be done in the ordinary course of business? And in *Rust v. Cooper*, Cowp. 633, Lord Mansfield says, where a sale of goods is fraudulent, and done with no other view whatsoever but to defeat the equality of the bankrupt laws, it is void on account of such intended fraud; and he also relied on the circumstance that the Defendant in that case never bought or dealt in the kind of goods transferred. The case of *Smith v. Payne*, 6 Term Rep. 152, is no authority in the present case, because there the Jury expressly negatived any fraudulent preference, whereas here

(*a*) S. C. 4 Esp. Rep. 60. And see *Bayley v. Ballard*, 1 Campb. 416. *Crosby v. Crouch*, 11 East, 261. S. C. 2 Campb. 166. *Dixon v. Baldwin*, 5 East, 175. *Thornton v. Hargreaves*, 7 East, 544. *Fidgeon v. Sharpe*, 5 Taunt. 539.

the question of fraud is left open for the Court to decide. Besides, in that case the debt was due (a) at the time when the goods were delivered to the creditor.

Shepherd, Serjt., in support of the rule. The only question is, Whether the circumstance of the bond not being actually due at the time when the goods were delivered, will make that delivery void, which would clearly have been good had the bond [584] been over-due? A bond is debitum in presenti, though solvendum in futuro; and if the obligor upon application from the obligee, pay the debt before the day of payment expressed in the bond there can be no ground to impute fraud. The case of *Thompson v. Freeman*, 1 Term Rep. 155, is decisive of this point. For there the Defendant having joined with the bankrupt in two bonds, the latter, before the bonds became due, or the Defendant had been damnified, sent for the Defendant in consequence of a letter intimating his failing situation (which letter he by mistake conceived to have come from the Defendant's agents), and proposed to him to take out his debt in goods; to which the Defendant acceded, and a warrant of attorney was given, upon which the goods were taken; and the Defendant was held to be entitled to retain the goods.

LORD ALVANLEY, Ch. J. The case of *Thompson v. Freeman* has satisfied the only doubt which I entertained. The impression of the case upon my mind was favourable to the Defendant, and I only wished for an authority to sanction my opinion: such an authority has now been produced, for the case of *Thompson v. Freeman*, as far as principle is concerned, is decisive of the present. In this case a debt was bonâ fide due from the bankrupt to the Defendant upon a promissory note; and the latter finding that the former was in failing circumstances, applied for a better security, and received a bond, with a condition that it should be void on payment of the debt in six months. Though it be clear in point of law that this bond extinguished the debt, and that it did not give any new right of action until after the lapse of six months; yet the parties probably knew nothing of all this; and for any thing that appears they may have supposed that the defendant had the same right to enforce the bond by action which she had before to enforce the debt. Soon after the Defendant began to suspect that the bankrupt's circumstances were growing worse; upon which she demanded a further security for her debt, namely, a delivery of goods, which demand was accordingly complied with. It is admitted that a trader cannot in contemplation of bankruptcy dispose of his goods of his own accord without application on the part of his creditor. But it is not sufficient to avoid the delivery of goods by a trader that such delivery be made voluntarily on his part, and that an act of bankruptcy ensues; it must also appear that he had the act of bankruptcy in contempla-[585]-tion at the time of the delivery. Nor has it ever been held that if a creditor press for payment of his debt, and thereby obtain goods, that the intention of the bankrupt shall be called in aid to set aside the transfer. If the goods be delivered through the urgency of the demand, or the fear of prosecution, whatever may have been in the contemplation of the bankrupt, this will not vitiate the proceeding. The case which has been cited directly applies. Mr. Justice Buller there left it to the Jury to consider, "whether the means which the bankrupt put into the Defendant's hands to pay himself were fraudulent or not; for if she had executed the warrant of attorney from necessity in order to save herself, though perhaps acting by mistake, or under a false apprehension that the Plaintiff was taking due means to enforce his demand upon her, it was certainly a legal act; but if she had acted with a view to favour the Defendant, and give him an unjust preference, it was void." From the report of Lord Kenyon we are certainly not to consider this as a case of fraud, except so far as fraud is to be inferred from the circumstance of the bond not being due. The cases of *Alderson v. Temple* and *Harman v. Fisher*, proceeded on the ground of the transfer of property not being completed; and therefore do not apply to this case; but it has been established by subsequent decisions, that it is competent to a creditor to press his debtor for a further security at any time previous to the bankruptcy; and if a security be bonâ fide given under the impression of an obligation, and not springing from the voluntary act of the bankrupt, such security is good. And the case of *Thompson v. Freeman* completely

(a) Indeed in *Singleton and Others, Assignees of Howell v. Butler*, ante, p. 283, where payment of a note was defeated on the ground of fraudulent preference, Lord Eldon partly distinguished the case from that of *Smith v. Payne* by observing that in the latter "the security was taken for a debt actually due."

satisfies me, that the circumstance of the bond not being enforceable by immediate arrest makes no difference. Here the Defendant demanded a further security for the debt previous to any act of bankruptcy; and we are not to presume that the delivery was voluntary on the part of the bankrupt, since we must understand from the report of the noble and learned Judge, that if it had not been for the question of law respecting the bond not being actually due, the Jury would have found a verdict for the Defendant.

HEATH, J. I am of the same opinion. It appears to me that there is not only no fraud found in this case, but no ground from which the Jury could have inferred fraud. A bankrupt has the disposition of his property till the moment when he commits an act of bankruptcy; and unless he dispose of it in fraudem legis, [586] his transfer will be good. Fraud indeed changes the complexion of things both in civil and criminal cases. Thus, if thieves under pretence of legal process persuade those within the house to open the door, and then rush in and rob the house, it is nevertheless burglary, for the law will supply the breaking, because the device by which they entered was in fraudem legis. But it is not sufficient to impeach a payment that the debtor voluntarily pay his creditor, unless at the time he so pay him he has an act of bankruptcy in contemplation. If a father advance portions to his children, such advance is voluntary, but not fraudulent, unless in contemplation of bankruptcy.

ROOKE, J. I entirely concur in opinion with the rest of the Court in thinking that a nonsuit ought to be entered. There may perhaps be some circumstances in the report leading to a suspicion of fraud; but I have no doubt that if the whole case had been left to the jury, a verdict would have been found for the Defendant, and the imputation of fraud would have been negatived; for Lord Kenyon advised the jury to find a verdict for the plaintiff, merely for the purpose of bringing the question of law before this Court. The question, exclusive of fraud, is this, Whether the Court must necessarily imply this transaction to be illegal from the single circumstance of the bond not being due? It is true, that by giving the bond, the nature of the debt was changed, and the payment of it could not have been enforced at the time when these goods were given. But I do not hold that every bonâ fide payment of a debt, to which the party could not be absolutely compelled, is necessarily a fraud upon the bankrupt laws. Though the payment be so far voluntary that it could not have been enforced, yet it is not therefore void, unless made collusively between the parties in contemplation of bankruptcy. In the present instance the payment was by way of anticipation of a debt not then actually enforceable. Now the case of *Thompson v. Freeman* is in point to shew, that such a payment may be good if made at the request of the creditor. There is also a case of *Hassell v. Simpson*, Co. B. L. 85 (Fourth Edition) in which Lord Mansfield seems to hold the same doctrine. The bankrupt there having conveyed to the Defendant (who had become surety for him in a bond which the Defendant was not called upon to pay till after the bankruptcy) a copyhold estate and [587] all his stock in trade, and personal estate, Lord Mansfield says, "if he had conveyed only the copyhold, and that at the request of the surety, it would have been good." This case appears to me strongly to corroborate that of *Thompson v. Freeman*. On general principles likewise a trader has as much right to pay his debts before they become actually due as any other person; and the creditor is not to lose the benefit of such payment because a bankruptcy ensues, unless it be made with a view to defeat the policy of the bankrupt laws.

CHAMBER, J. The payment of a debt before it is recoverable may be a material circumstance, from whence a Jury may infer, together with other circumstances, that such payment was fraudulent. The rule appears to me to be this; any payment made by a trader before an act of bankruptcy, and in contemplation of such act, and with a view on his part to give a preference to a particular creditor, is void. This doctrine indeed is new, and has been introduced within our own memory; but affords a good rule, because founded in equity. In this case however the question is, Whether the circumstance of the debt not being payable is of itself, and in point of law, sufficient to avoid the payment altogether as fraudulent? I cannot think that it is. It is perfectly clear that the Defendant in this case sought for payment of her debt, because she was apprehensive of a bankruptcy; judging from appearances, she thought her debtor in bad circumstances, and therefore used due diligence to obtain payment of her debt, as any fair creditor might have done. But we cannot say that the single circumstance of the bond not being payable at the time is sufficient to make the payment fraudulent. Perhaps it might have been as well if the whole question had

been left to the Jury; but I understand from the report, that if this point had not occurred, the verdict must have been for the Defendant; and indeed I think it ought to be for the Defendant notwithstanding this point. Great stress has been laid on the late delivery of the goods, but although that circumstance shews that the Defendant was under apprehension, it does not prove fraud; for it appears that the persons who removed the goods began early, and we can only infer therefore that they were unwilling to leave the work unfinished. Indeed, if a fraudulent preference had been intended, the bankrupt would have paid off the whole debt, for the shop was full of goods, and those removed by the Defendant constituted only a small part of the stock. Besides, the bankrupt made a very good bargain, for in [588] making out his bill of parcels he charged the Defendant a higher price than the goods were worth. It is true that the Defendant could not have put the bond in suit at that time, but still she might have injured the bankrupt's credit by being clamorous for her debt, and perhaps have prevented him from continuing his trade. It appears to me therefore that if the case had been left entirely to the Jury, the weight of evidence was so much in the Defendant's favour, that they must have found for her; for I do not perceive any circumstance from which fraud can be inferred. Considering indeed that the payment of the bond at a time when it was not capable of being enforced by action was the only point reserved, I think a nonsuit ought to be entered.

Rule absolute.

FOOTT v. COARE. Nov. 27th, 1801.

If the Plaintiff in an action of assault having recovered only 20 shillings damages, whereby he is entitled to no more than 20 shillings costs, bring an action on the judgment, and obtaining judgment by default in that action enter it up for debt and costs, the Court on affidavit of the Defendant being resident in the city of London and liable to be summoned to the Court of Requests, will, under the 39 & 40 Geo. 3, c. 104, set aside the judgment as to the costs (a).

This was an application to set aside the judgment entered up in this case as to the costs. The circumstances under which the application was made were as follow: In Hilary Term last the Plaintiff commenced an action of assault in this court against the Defendant, and at the Guildhall Sittings after that Term obtained a verdict for 20 shillings, whereby he became entitled to no more costs than damages. The Plaintiff then brought an action of debt upon the judgment, upon which the Defendant's attorney tendered to the Plaintiff's attorney his 40 shillings, and gave him notice that if he took a judgment by default and entered it up for costs, the Court would be moved to set that judgment aside as to the costs. This tender was refused, and judgment being suffered to go by default, was signed by the Plaintiff's attorney for debt and costs in Trinity Term last, and an execution issued thereon in the vacation following. To found this application there was an affidavit on the part of the Defendant, stating that he was an inhabitant and resident in the city of London, and liable to be summoned to the Court of Requests in that city, and that the debt sued for and recovered by the Plaintiff amounted to no more than 40 shillings.

A rule nisi had been obtained on a former day, at which time the Court were referred to the 39 & 40 Geo. 3, c. 104 (local and [589] personal acts) repealing so much of the statutes of Jac. 1, c. 15, and 14 Geo. 2, c. 10, as confined the jurisdiction of the Court of Requests to 40 shillings, and extending that jurisdiction to 5l. The 12th section of the act enacts, "that if any action or suit shall be commenced in any other court than the said Court of Requests for any debt not exceeding the sum of 5l. and recoverable by virtue of the statutes of Jac. 1 and Geo. 2, and of this act or any of them, in the said Court of Requests, then and in every such case the Plaintiff or Plaintiffs in such action or suit shall not by reason of a verdict for him, her, or them, or otherwise have or be entitled to any costs whatsoever."

Best, Serjt., now shewed cause, and relied in the first place on an affidavit, stating, that when a plea was demanded of the Defendant's attorney, the answer given was, that the Plaintiff might take a judgment if he pleased: 2dly, He insisted that the

(a) Vide *Watchhorn v. Cook*, 2 M. and S. 348. *Calvert v. Everard*, 5 M. and S. 510. *Lawson v. Moggridge*, 1 Taunt. 396.

application was made too late, for that the Plaintiff signed his judgment in Trinity Term last, at which time the Defendant ought to have applied to the Court, and not have suffered the Plaintiff to take out execution before he made any complaint (a)¹: 3dly, He argued, that as this was the case of a judgment by default, the Court would not attend to the application, and cited *Brampton v. Crabb*, 1 Str. 46: and, 4thly, That the words of the 39 and 40 Geo. 3 being, "by reason of a verdict or otherwise," this case did not fall within the provision, being a judgment by default.

Shepherd, Serjt., in support of the rule observed, that even supposing the Defendant to be late in his application, still that objection could not apply to a case like the present, where the ground of the application was, that the judgment for the costs was void, the Plaintiff being deprived of costs by the provisions of 39 and 40 Geo. 3; but he contended that the application was made as early as possible, the execution having only been taken out in the vacation (till which time the Defendant had no reason to suppose the Plaintiff would attempt to enforce a judgment contrary to law) and the Court being moved early in this Term. He also contended, that under the words "by verdict or otherwise," a judgment by default was clearly included, unless the words "or otherwise," were to be deemed altogether inoperative.

[590] CHAMBRE, J., at first expressed some doubt, whether actions of debt upon judgment were not local, and therefore not within the provisions of the 39 and 40 Geo. 3.

But on considering the words of the act, which are (s. 1), "all debts whether upon simple contract or otherwise," and that the only exception of specialty debts was (s. 11), "any debt by specialty which shall not be for the payment of a sum certain," and that actions on judgments were not within the exception;

The whole Court was of opinion that the present case fell within the provisions of the act, and that it would be most vexatious if every Plaintiff obtaining a small sum by way of damages should be at liberty to bring an action of debt upon the judgment in the superior court, and harass the Defendant with additional costs.

Rule absolute.

LAWSON v. M'DONALD. Nov. 27th, 1801.

Affidavit to hold to bail made by A. in respect of a debt due to B. before his discharge under an insolvent act, whereby B.'s estate became vested in the Clerk of the Peace, and negating a tender in bank notes to the knowledge or belief of A. held sufficient, the Court allowing A. and B. by subsequent affidavit to shew that A. usually transacted B.'s business when out of town, and that at the time when the affidavit to hold to bail was made, B. was out of town, and that an immediate arrest was necessary, as the Defendant was about to sail on a voyage (a)².

The Defendant in this case was holden to bail upon the affidavit of Jonah M'Ewin, who deposed that the Defendant was justly indebted to the estate of Andrew M'Ewin, formerly of &c. late of &c. and also late a prisoner in the King's Bench prison, and discharged therefrom under the late insolvent act, 41 Geo. 3, in the sum of 41l. 9s. 6d. for goods sold and delivered by the said Andrew M'Ewin to the Defendant before the 1st of March last, and before his taking the benefit of the said act; that the Defendant was commander of a ship bound for Jamaica, and that he was about to sail for Jamaica on Saturday then next, as the deponent had been informed and believed; that by virtue of the said act the legal estate of and in the effects of the said Andrew M'Ewin, which before the 1st of March last he was possessed of or entitled to, became vested in the Plaintiff, the clerk of the peace for the county of Surrey, in trust for the benefit of the creditors of the said Andrew M'Ewin, under and by virtue of the said act, as the [591] deponent had been informed and believed; and that no tender or offer had been made to pay the said sum of 41l. 9s. 6d. or any part thereof, in notes of the Governor and Company of the Bank of England, expressed to be payable on demand, to the knowledge or belief of the deponent.

(a)¹ But the judgment in this case being defective, not irregular, the lateness of the application could not cure the defect, *Goodwin v. Parry*, 4 Term Rep. 577. *Hussey v. Wilson*, 5 Term Rep. 254.

(a)² And see *Smith v. Barclay*, 3 B. & P. 219,

A rule nisi was obtained for discharging the Defendant upon a common appearance, on the ground of the tender in bank-notes not being properly negatived, inasmuch as it did not appear that Jonah M'Ewin the deponent had any connection with the parties to the action, and as he only negatived the tender to his knowledge or belief.

Shepherd, Serjt., now shewed cause, and produced affidavits of Jonah M'Ewin, and also of Andrew M'Ewin the insolvent, the former of whom stated that he was the father of the insolvent; that he was in the habit of transacting his son's business when he was out of town, and that having heard that the Defendant was about to sail, he made the above affidavit for the purpose of holding him to bail: and the latter stated that he was out of town at the time when the arrest was made, and added that the debt was due, and that no tender in bank-notes had been made to him. He contended, that although no supplemental affidavit could be admitted for the purpose of supplying any defect in the original affidavit relative to the tender in bank-notes, yet that it was competent to the Plaintiff to produce affidavits to explain the situation of the Deponent in the affidavit to hold to bail, and to shew the reasons which entitled him to make such an affidavit; that it now appeared that the insolvent was not in town at the time when the arrest became necessary, and that his father had the management of his affairs when he was out of town, which therefore enabled him to make the affidavit; and that if he was entitled to make the affidavit, it could not be necessary that he should do more than swear to his knowledge and belief. He insisted that in these cases the affidavit must in general be made by some person different from the original creditor, since the insolvent himself is seldom to be found; and that the clerk of the peace could not be required to make it, since although the property be vested in him by law, he can know little of the affairs. He cited *Chatterley v. Finck*, ante, 390, to shew that an affidavit explanatory of the deponent's situation might now be received, and to prove, that where the principal is not in town the affidavit may be made by another person who has cognizance of [592] the circumstances; also *The Mayor of London v. Dias*, 1 East, 237, to shew, that where the affidavit may be made by any person but the principal, it is sufficient if he negative a tender to the best of his knowledge and belief.

Best, Serjt., contra, relied upon *Bolt v. Miller*, ante, 420, to shew, that no such explanatory affidavits as had now been produced ought to be received, and also that at all events the insolvent ought to have joined in the affidavit (a); observing that it did not appear but that a tender might have been made to him previous to the 1st of March, when the assignment of his effects took place.

LORD ALVANLEY, Ch. J. In a case circumstanced like this, it is impossible to expect a positive affidavit. But there must be reasonable evidence appearing upon the face of the original affidavit that no tender was made; and no supplemental affidavit as to that point can be admitted. But an affidavit may be admitted to shew, that the deponent was in such a situation as to entitle him to negative the tender to the best of his knowledge and belief. The best evidence must be obtained which the case will admit of. In this case the insolvent was out of town at the time of the arrest, and if the arrest had not been made then, the Defendant would have sailed, and the opportunity of arresting would have been lost.

HEATH, J. Every thing having been done in this case which could be done, I think that the arrest is good.

ROOKE and CHAMBRE, Js., concurred.

Rule discharged.

[593] WHITBREAD v. MAY AND ANOTHER. Nov. 28th, 1801.

A. devised his "estate at Lushill in the county of Wilts, and Hearne and Buckland in the county of Kent," to his son in fee. At the time of the devise A. had lands in the parish of Hearne, and also in the several parishes of C., W., S., R., and S., all which he purchased by one contract from one person, and used to call his "Hearne estate," or "Hearne Bay estates." The estates at Lushill in Wilts, and

(a) Had he been in London when the affidavit was made, this would have been necessary, according to the case of *Bolt v. Miller*, and the tender must then, as it should seem, have been expressly negatived, *ibid.* and *Elliott v. Duggan*, 2 East, 24.

also a farm called Buckland Farm in Kent, were sold before the testator's death, and at the time of his death he had no estate in Kent except that which lay in the parishes of Hearne, C., W., S., R., and S.—Qu. Whether the above facts be admissible in evidence to shew that the testator intended to pass the land in the several parishes of C., W., S., R., and S., as well as that in the parish of Hearne (a)?

This was an issue directed by the Court of Chancery under a decree made by the Master of the Rolls, to try, Whether the several lands (situate in the several parishes of Hearne, Chislet, Winsborough, Sturry, Reculver, and Swacliffe) which the Plaintiff contracted to sell to the Defendant, passed by the codicil to the will of the testator, Samuel Whitbread (the Plaintiff's father), bearing date the 24th of June 1795?

The cause was tried before Lord Eldon, Ch. J., at the Guildhall Sittings after Hilary Term last, when a verdict was found for the Plaintiff, damages 20l., subject to the opinion of the Court on the following case:

On the part of the Plaintiff it was proved, that Samuel Whitbread, Esq. deceased, the father of the Plaintiff, being seised in fee of very considerable real estates situate in different parts of the kingdom, by his will, dated 24th June, 1795, devised all and every his freehold estates and hereditaments whatsoever and wheresoever (except as therein was excepted) unto certain trustees therein named, and their heirs, upon the trusts in the said will specified, and amongst others in trust for his son, Samuel Whitbread, Esq. the Plaintiff, and his assigns, for life, with divers remainders over in strict settlement, and by a codicil to his said last will and testament, dated the 24th day of June 1795, the said testator devised as follows: "And whereas I have in and by my said will given, devised, and bequeathed, all and every my freehold estates and hereditaments whatsoever and wheresoever, except such of them as are included in my son's marriage settlement, and such parts of my brewhouse as are freehold, unto my son-in-law James Gordon, jun. and my nephews Jacob Whitbread and John Wingate Jennings, and their heirs, to the use of my son Samuel Whitbread for life, with remainder over as therein expressed; and it is my will and desire to give part of my estates, and hereinafter-mentioned lands unto my son absolutely; now I do hereby revoke my said will so far as relates to my several estates at Lushill, in the county of Wilts, and Hearne and Buckland, [594] in the county of Kent; and I do hereby give, devise, and bequeath, the same estates at Lushill, Hearne, and Buckland, unto my said son Samuel Whitbread, his heirs and assigns, for ever, in order that he may immediately sell the same if he thinks proper."

On the part of the Plaintiff was also read in evidence a general rental of all the testator's estates made out regularly in a book by his private clerk; and it was proved by that clerk that the testator was in the habit of constantly looking into and examining that book, in which was contained the following entry relating to the estates mentioned in the declaration in this cause, and referred to by the said will and codicil.

"Kent.

Hearne, &c.

Hearne Bay estates,

Purchased of Sir George Colebrooke, Bart., and his trustees, 30th June 1773.

Consists of sundries, as under, expectant on the death of Gilbert Knowler, Esq. in failure of issue by his wife Barbara; and after his death subject to the payment of 230l. per annum, part of 350l. per annum, her whole settlement payable to the said Barbara during her life, provided she survives the said Gilbert Knowler.

Viz.

The manors of Underdowns and Lotting.—A capital mansion-house and garden, with coach-house and stables, and other appurtenances, now in the occupation of Mr. Knowler, with the following lands, viz.

| | | | | | | | |
|------------------------------------|---|---|---|---|-----|---|---|
| Pasture ground adjoining the house | . | . | . | . | £40 | 0 | 0 |
| Hop ground | . | . | . | . | 7 | 0 | 0 |
| Carry forward | . | . | . | . | £47 | 0 | 0 |

(a) Vide *Doe d. Brown v. Brown*, 11 East, 441. *Doe d. Chichester v. Oxenden*, 3 Taunt. 147, 152.

| | | | | |
|---|-----------------|------|---|----|
| | Brought forward | £47 | 0 | 0 |
| Wood ground about | | 60 | 0 | 0 |
| | | £107 | 0 | 0 |
| Nine messuages and tenements, being 4 farms and 5 cottages, with arable and pasture lands, in the parishes of Hearne, Chislet, Winsborough, Sturry, Reculver, and Swacliffe, amounting to about | | 453 | 0 | 0 |
| | | £560 | 0 | 0" |

And the Plaintiff also produced in evidence a memorandum book, all in the testator's handwriting, containing a particular [595] of the said estate purchased by him from Sir George Colebrooke, Bart., and his trustees; at the top of each page whereof, in the said testator's writing, are the words "Hearne estate."

The estate in the several parishes of Hearne, Chislet, Winsborough, Sturry, Reculver, and Swacliffe, called by the said testator in his said books, "the Hearne," or "Hearne Bay estate," consists of the reversion or remainder expectant on the decease of Gilbert Knowler, Esquire, of and in premises situate in the parish of Hearne, and also in the said several parishes of Chislet, Winsborough, Sturry, Reculver, and Swacliffe, the whole of which were purchased in one contract from Gilbert Knowler, Esquire, by Sir George Colebrooke, and from him and his trustees by the testator; and it was proved that the testator used to speak of the whole together as the "Hearne estate;" but the same is not called or described by the name of the "Hearne Bay estate," in any of the title-deeds belonging to the said premises. The estate at Lushill, devised in the codicil with the Hearne estate, consists of the manor of Lushill, and between 500 and 600 acres of land in the parish of Castle Eaton and Hannington, in the county of Wilts, and was sold by the testator in his lifetime, after he had made his said will and codicil. The testator had no estate at Buckland; but the Buckland estate, also mentioned in the codicil, consisted of a messuage and about 10 acres of land, all in one farm, called Buckland farm, in the parish of Winsborough, and was also sold in the testator's lifetime, after he had made his said will and codicil. The testator at his decease had no estate whatever in the county of Kent, except the reversion of the said estate in the parishes of Hearne, Chislet, Winsborough, Sturry, Reculver, and Swacliffe, above mentioned.

The question for the opinion of the Court is, Whether the evidence above stated to have been produced on the part of the Plaintiff ought to have been admitted at the trial of this cause, and whether the verdict of the jury is supported by that evidence? If that evidence ought to have been admitted, and the verdict of the jury is supported by it, the verdict to stand. If it ought not to have been admitted, or does not support the verdict of the jury, a verdict to be entered for the Defendant.

This case was argued in Trinity Term last.

Best, Serjt., for the Plaintiff. Upon the principles adopted in the determination of *Lord Walpole v. Lord Cholmondeley*, [596] 7 Term Rep. 138, the evidence in question was properly admitted at the trial. In that case Lawrence, J., says, "That in order to let in parol evidence, the Court must feel, that, if the evidence proposed be admitted, it will raise an ambiguity." Now it is impossible to contend, that the evidence introduced into this case does not raise a doubt whether the testator did not, by the terms of his codicil, mean to describe all that property which he usually called his "Hearne estate," and not merely those lands which lay in the parish of Hearne. Indeed it is very improbable that the testator should have had the intention of separating a small part of that entire estate which he had purchased of Sir George Colebrooke from the residue. His intent appears to have been to pass all the lands of which he was possessed in Kent; and accordingly he mentions by name his Buckland estate, because that not being part of the lands purchased from Sir George Colebrooke, did not fall within the description of his Hearne estate. The case of *Doe d. Clements v. Collins*, 2 Term Rep. 498, is applicable to the present case in two respects; 1st, To shew the admissibility of evidence to prove that premises not falling within the words of a will are to be annexed to those which do fall within the words of the will; and 2dly, To shew that arguments of inconvenience arising from the separation of property which has usually gone together, are entitled to great weight in construing the intention of a testator. So in *Byran v. Wetherhead*, Cro. Car. 17,

the Court received evidence to shew, that a building adjoining to a messuage passed under the words "the messuage called Keyshams cum appurtenentiis," and they were of opinion that it did not there pass, because it had not been reputed parcel of the house, and that case arose on the construction of a deed, yet Hobart conceived "that in a devise peradventure it might pass." The expressions of the testator respecting this estate are stronger evidence in the construction of this devise than any which could result from common reputation; and indeed it would be absurd to suppose that he meant to give his son the power of selling only a small part of a particular estate, at the same time that he was tying up the remainder in strict settlement.

Heywood, Serjt, *contra*. The evidence in this case was improperly admitted; and even if it was properly admitted, still the verdict, as found by the jury, is not supported by that evidence. The case of *Lord Wulpole v. Lord Cholmondeley* has established [597] the true distinction, viz. that parol evidence is not admissible, unless, if admitted, it would raise a doubt to what the words of the will apply. If it only raise a conjecture, it is not sufficient. Now, in the present case, the premises in question were described by the testator as the "Hearne Bay estate," and the "Hearne estate;" but the words in the codicil are "my estates at Lushill, Hearne, and Buckland." The testator had lands in the parish of Hearne sufficient to satisfy the words of the will; if, therefore, evidence be admitted to shew that lands in five other parishes were intended to pass under the words of the codicil, it will not be admitted in explanation, but in contradiction of the codicil. It is true, that in *Godbolt*, 16, under a devise of a house and lands called "Jacks," it was held that 100 acres of lands passed; but the reason given by Anderson, Ch. J., for that decision was, "that Jacks was the entire name of the house and lands;" whereas Hearne is not the entire name applicable to the lands in question, since the greater part of them lie in parishes bearing other names. So in *Wyndham v. Wyndham*, 1 And. 58, the Court admitted evidence to shew, that a messuage, described to be the messuage Ricardi Cotton at H. in a deed of feoffment, was so named by the feoffor by mistake, he having no messuage at H. but one which belonged to Thomas Cotton. If the verdict of the Jury is to stand, their decision in effect will be, that these lands lie at Hearne, when in fact they do not lie there. Nothing appears upon which either the Jury or the Court can raise a doubt; and indeed no case can be cited in which a will has been explained by evidence, where there has been something upon which the words of the will could operate.

Cur. adv. vult.

On this day Lord Alvanley, Ch. J., said—There is a difference of opinion upon the Bench as to the admissibility of the evidence in this case; and in consequence of that difference of opinion no conclusive judgment can be given in this Court. We have, therefore, communicated with the Lord Chancellor, before whom the cause was tried, upon the subject, and His Lordship has declared himself ready to put his seal to a bill of exceptions as if tendered to him at the trial, in order to enable the parties to take the opinion of another Court. The question will be, Whether the words "the same estates at Lushill, Hearne, and Buckland," are so descriptive of [598] locality as to preclude the admissibility of evidence that the testator intended to use them in any other sense? In this Court judgment *pro formâ* must of course be given for the Plaintiff.

Judgment for the Plaintiff.

CUNNINGHAM v. MACKENZIE AND ANOTHER. Nov. 28th, 1801.

If in the deed securing an annuity it be declared, that the judgment to be obtained under a warrant of attorney given at the same time shall be only a collateral security for the regular payment of the annuity, and that no execution shall issue thereon till default made in the payment for 14 days, and the memorial does not notice the above declaration, and in setting forth the warrant of attorney only states generally that "such warrant of attorney was executed for the better securing the payment of the annuity as in the above-stated deed is particularly mentioned?" the Court will set aside the annuity for such defect in the memorial (a).

This was an application to the Court to set aside a judgment entered up on a

(a) Vide *Doe d. Mason v. Phillips*, 5 M. & S. 369.

warrant of attorney given to secure an annuity, and to have the warrant of attorney delivered up to be cancelled.

The principal objection to the annuity was, that in the indenture by which it was secured it was declared that the judgment to be obtained under the warrant of attorney was to be only a collateral security for the regular payment of the annuity, and that it was agreed that no execution should be issued or taken out thereon until default should be made in the payment of the annuity by the space of fourteen days, whereas the memorial, in setting forth the deed, did not specify any such declaration or agreement; and in setting forth the warrant of attorney, it only stated generally that such warrant of attorney was "executed for the better securing the payment of the annuity, as in the above-stated deed is particularly mentioned."

Shepherd, Serjt., shewed cause, and contended that it was apparent upon the face of the memorial that the warrant of attorney was given as a collateral security for the payment of the annuity; and if it were a collateral security, it followed that no execution could be taken out until default made in payment of the annuity; that a proviso of this sort did not resemble a proviso of redemption, which is an essential part of the description of the annuity granted, a redeemable annuity being a distinct thing from an annuity which is irredeemable; whereas the proviso in the present case only related to the mode of obtaining a remedy in case of default being made in payment.

Best, Serjt., on the other side, was stopped by the Court.

[599] LORD ALVANLEY, Ch. J. The ground on which the Court of King's Bench proceeded in the case of *Sawyer v. Bunce* (a) was, that the clause of redemption being for the benefit of the grantor, it was right that he should have an easy access to it. If so, how does the present case vary in point of principle? Undoubtedly the clause omitted to be noticed in the memorial is a clause introduced for the benefit of the grantor.

HEATH, J. I see no distinction between this case and those in which annuities have been set aside because the clause of redemption was not noticed in the memorial. Possibly the grantor of this annuity never would have entered into the engagement which he has done, if this clause, restraining the issuing of any execution against him for a certain period, had not been introduced.

ROOKE, J. I am of the same opinion.

CHAMBRE, J. This clause in favour of the grantor appears to me more necessary to be inserted than the clause of redemption, because this is to regulate the annuity while it subsists, whereas the other is only to put an end to it.

However, Lord Alvanley, Ch. J., expressing a wish to have an opportunity of looking into the cases before the point was finally decided, the case stood over till this day, when His Lordship and the rest of the Court retaining the opinion thrown out by them when the case was argued,

The rule was made absolute.

[600] GOODRIGHT, ON THE SEVERAL DEMISES OF GEORGE EARL OF BUCKINGHAMSHIRE AND ALBINIA his Wife, SIR CHARLES STEWART AND ANNE LOUISA his Wife, JOHN EARL OF WESTMORELAND, AND THOMAS FANE, v. ARTHUR MARQUIS OF DOWNSHIRE, AND MARY his Wife. Nov. 28th, 1801.

A. devised certain estates to B. for life, remainder to his sons and daughters in strict settlement, remainder to C. for life, remainder to his sons and daughters in like manner, remainder to his own right heirs, and died. B. being seised of the above estates as tenant for life, and also entitled to one-sixth of the reversion as one of the right heirs of A., made his will, whereby he gave to his wife, for life, all such freehold and copyhold lands as he had purchased or was seised of in fee-simple, or in exchange for other lands in Kent, and then after reciting that he had granted a lease for years to D. of the lands whereof he was tenant for life under A.'s will, declared that in case such persons as should be tenants for life or otherwise of that

(a) E. 35 G. 3, B. R. Hunt on Annuities, c. 1, s. 5, p. 74. Ed. 2, cited 6 Term Rep. 737. See also *Stedman v. Purchase*, 6 Term Rep. 737. *Harris v. Stapleton*, 7 Term Rep. 205, and *ex parte Ansell*, ante, vol. i. p. 62.

estate by virtue of A.'s will should not molest D. in the possession of the said lands as leased, and at the expiration of the lease should grant a new lease to his, B.'s, wife for her life, then he devised his lands purchased of E. and F. and all lands that he then had or might have a right to, both freehold and copyhold, arising from exchange of land, act of Parliament, or otherwise in Kent, devised to his wife for her life, to go with and be subject to the same entail as the estates left by A. were or might be subject to by virtue of A.'s will, to take effect immediately after the decease of his wife, and in such case recommended his wife to give the furniture which belonged to the house on the estates left by A. to whomsoever might be living to enjoy it; but in case such persons as should be tenants for life or otherwise by virtue of A.'s will should refuse to grant such lease, or should disturb D., then he gave to his said wife and her heirs all his freehold and copyhold lands and houses which he had before devised to her for life only. And all the rest and residue of his real estate whatsoever, and all the rest and residue of his personal estate of what nature or kind soever or wheresoever, he gave to his said wife and her heirs, executors, administrators, and assigns for ever. D. was not molested, and a new lease was granted to the wife of B. for her life. Held that the wife of B. was entitled to the one-sixth of the reversion under the residuary clause in B.'s will (a).

Ejectment for one third part of a moiety of lands in Chislehurst, Mottingham, and Bromley, in the county of Kent. The cause was tried at the Maidstone Summer Assizes 1800, and a verdict was found for the Plaintiffs, subject to the opinion of the Court on the following case.

Thomas Farrington, of Chislehurst in the county of Kent, Esq. being seised in fee-simple (amongst others) of certain estates in Chislehurst, Mottingham, and Bromley, in the said county (which estates are of the tenure of Gavelkind) duly made and published his last will and testament, which bears date the 13th day of January 1758, and is attested by three witnesses; and he thereby gave and devised all his manors, messuages, lands, tenements, hereditaments, and real estates whatsoever and wheresoever, which he, &c. unto and to the use of his nephew Lord Robert Bertie, and his assigns, for his life, remainder to the use of trustees and their heirs during the life of the said Lord Robert Bertie in trust, to pre-[601]-serve contingent remainders, with remainder to the use of the first and other sons of the said Lord Robert Bertie, and the heirs of their bodies severally and in succession; and in default of such issue, to the use of the first and other daughters of the said Lord Robert Bertie, and the heirs of their bodies severally and in succession; and for default of such issue, to the use of his cousin Charles Townshend, Esq. for his life, with remainder to the use of trustees and their heirs during the life of the said Charles Townshend in trust, to preserve contingent remainders, with remainder to the use of the first and other sons of the said Charles Townshend, and the heirs of the bodies of such sons severally and in succession; and in default of such issue, to the use of the first and other daughters of the said Charles Townshend, and the heirs of their bodies severally and in succession; and in default of such issue, then he gave and devised all and every his said manors, messuages, lands, tenements, hereditaments, and real estate aforesaid, unto his own right heirs for ever.

The said Thomas Farrington died seised of the said estates in the month of February 1758, leaving the descendants of his deceased sister Albinia, the wife of the Duke of Ancaster, that is to say, Lord Vere Bertie, Augusta Bertie and Frances Bertie, the only children of Lord Montagu Bertie then deceased, and Lord Robert Bertie named in the will of the testator, the said Lord Vere Bertie, Lord Montagu Bertie, and Lord Robert Bertie, being the sons of the said Albinia Duchess of Ancaster, and his, the testator's, other sister Mary Selwin, his heirs according to the custom of gavelkind.

Upon the death of the said Thomas Farrington, the said Lord Robert Bertie entered upon and took possession of the said estates in Chislehurst, Mottingham, and Bromley, and continued to receive the rents and profits thereof until the time of his death, which happened on the 10th of March 1782.

(a) Vide *Doe d. Cholmondeley v. Weatherley*, 11 East, 322, 331. *Goodtitle v. Meredith*, 2 M. & S. 5. *Doe v. Scott*, 3 M. & S. 300-304. *Morgan v. Surman*, 1 Taunt. 288. *Doe d. King v. Frost*, 3 B. & A. 546, 552.

The said Lord Robert Bertie left no issue, and on his decease the said Charles Townshend entered upon and took possession of the said estates, and continued to receive the rents and profits thereof until the time of his death; and he died on the 10th day of August 1799, without leaving any issue.

The said Lord Vere Bertie died in the year 1770, leaving Albinia, now the wife of George Earl of Buckinghamshire, and [602] Ann Louisa, now the wife of Sir Charles Stewart, his daughters and coheirs according to the custom of gavelkind.

The said Augusta, one of the daughters of the said Lord Montagu Bertie, intermarried with Lord Berghersh, and died on the 3d of January 1766, leaving John, now Earl of Westmoreland, and the Honourable Thomas Fane, her sons and coheirs according to the custom of gavelkind; and the said Frances, the other daughter of the said Lord Montagu Bertie, died in or before the month of February 1771, leaving the said John Earl of Westmoreland, and the said Thomas Fane, her nephews and coheirs according to the custom of gavelkind.

The said Lord Robert Bertie at the time of his death, which happened on the 10th March 1782, as before stated, left the said Albinia, the wife of the said George Earl of Buckinghamshire, Ann Louisa, the wife of the said Charles Stewart, John Earl of Westmoreland, and Thomas Fane, the lessors of the Plaintiff, his heirs according to the custom of gavelkind.

The said Lord Robert Bertie being in possession of the said estates in Chislehurst, Mottingham, and Bromley, devised to him by the said will of the said Thomas Farrington, and being seised in fee-simple of certain other freehold estates in Chislehurst aforesaid, which he had purchased or taken in exchange, duly made and published his last will and testament in writing, which bears date the 7th day of March 1782, and is attested by three witnesses; and he thereby gave and devised unto his dear wife and her assigns, during her life, all such freehold and copyhold lands which he had purchased, and which he was seised of in fee-simple, or in exchange for other lands in Kent; and he thereby also gave and devised in manner following, that is to say, "And whereas I have granted a lease of Chislehurst house, gardens, meadows, and other lands in hand, and also of Holbrookwood, to the Honourable Mrs. Ann Maria Blundell, for the term of eleven years from Lady Day 1778, at the yearly rent 84l. 1s.; which lands and woods were valued by Richard Busby of Chislehurst, steward to the Right Honourable Thomas Townshend, and James Wiffin of Chislehurst, my steward, at the yearly value of 4l. 1s. Now my will and meaning is, that in case such of my relations as shall be tenant or tenants for life or lives of the Chislehurst estate, by virtue of my uncle Mr. Thomas Farrington's will, shall not molest the [603] said Honourable Mrs. Ann Maria Blundell, in the quiet possession of the said house and lands so leased to her, and shall at the expiration of the said lease grant a new lease of the said house and lands to my wife, Lady Robert Bertie, for the term of eleven years, if she my said wife shall so long live, and renew it as often as she may require, under the same covenants, and at the same rent, so that she may enjoy it during her natural life; I do then and in that case give and devise my lands and houses purchased of William Russell, and lands purchased of Lord Camden, with the houses thereon, and all lands that I now have or may have a right to, both freehold and copyhold, arising from exchange of lands, acts of Parliament, or otherwise in Kent, devised to my wife for her life, to go with and be subject to the same entail as the estates at Chislehurst, left to me by my uncle Thomas Farrington, are or may be subject to by virtue of his said will, to take effect immediately after the decease of my said wife; and then and in such case I do recommend and desire my said wife to give the furniture which now belongs to the house and farm to whomsoever may be living, to enjoy the Chislehurst estate after her decease; but in case Charles Townshend, Esq. or such of my relations as shall be tenant or tenants for life, or otherwise entitled to the Chislehurst estate, by virtue of the said will, shall refuse or neglect from time to time to grant such lease or leases in manner aforesaid, or disturb the said Honourable Mrs. Ann Maria Blundell or her assigns, or my wife or her assigns, in the possession of the said house or premises during her life, then and in such case I give and devise to my said wife, her heirs and assigns, for ever, all my said freehold and copyhold houses and lands, which I have before devised to her for her life only, and all the rest and residue of my real estates whatsoever; and all the rest and residue of my personal estate, of what nature or kind soever or wheresoever, I give, devise, and bequeath, to my said wife, her heirs, executors, administrators, and assigns, for ever."

The Honourable Mrs. Ann Maria Blundell, named in the will of the said Lord Robert Bertie, was not molested in the quiet possession of the house and premises, of which he had granted her a lease. She died on the 16th of November 1798, and at or before the expiration of the said lease, the said Charles Townshend being then the tenant for life of the Chislehurst estate, by virtue of the said will of the said Thomas Farrington, granted a lease of the said house and premises to Lady Robert [604] Bertie, the widow of the said Lord Robert Bertie, as directed by his said will, under which she enjoyed and had the possession of the said house and premises so long as she thought proper.

The said Lady Robert Bertie died on the 13th of April 1798, leaving Mary, the wife of Arthur Marquis of Downshire, her heir according to the custom of gavelkind.

The premises for which this ejectment was brought were part of the estates devised by the will of the said Thomas Farrington, and the question for the opinion of the Court was, Whether the lessors of the Plaintiff, or any of them, were entitled to recover the possession of the premises in question in this action, or any part thereof? And if this Court should be of opinion that the lessors of the Plaintiff, or any of them, were entitled to recover, the verdict was to be entered according to such opinion: but if the Court should be of opinion that the lessors of the Plaintiff, or any of them, were not entitled to recover, then a verdict was to be entered for the Defendants.

This case was argued three times; 1st, In Easter Term last by Shepherd, Serjt., for the Plaintiffs, and Best, Serjt., for the Defendants; 2dly, By Lens, Serjt., for the former, and Bayley, Serjt., for the latter, and now again in this term by Shepherd, Serjt., for the Plaintiffs, and Williams, Serjt., for the Defendants.

Arguments for the Plaintiffs.—Admitting that the residuary clause in Lord Robert Bertie's will be sufficiently comprehensive to carry the ultimate reversion of the estates devised by Mr. Farrington's will to which he was entitled, yet if it appear to have been his intention not to include such reversion in the residuary clause, it will not pass under that clause, though no express mention was made of it in the former part of the will. *Strong v. Teatt*, 2 Burr. 912. 1 Bl. 200. The question therefore turns upon the intention of the testator, as it is to be collected from the situation of the parties, and from the will. From the situation of these parties, and the interest of Lord Robert Bertie, it appears not only that he meant to give this reversion, but the reason is plain why he did so. Lord Robert Bertie had a power over the whole estate for his life; but in case he died without children, his whole interest (exclusive of his share in the ultimate reversion) became extinct. The next in remainder was Mr. C. Townshend, to whom the estate was limited in strict settlement. The object therefore of Lord Robert Bertie was after his death to secure to Mrs. Blundell the quiet enjoyment of the house and lands at Chislehurst during the conti-[605]nuance of the lease granted by him, and a renewal of the lease upon the same terms on the expiration thereof, to his wife for her life. In order therefore to induce Mr. C. Townshend and his issue, and the heirs of Mr. Farrington (of which Lord Robert Bertie was but one) to acquiesce in these views, he declares that, provided they do so, all the lands over which he has a control, and which he has devised to his wife for life, shall go in the same line as the estates left to him by Mr. Farrington's will, to take effect immediately after the decease of his wife. And though indeed he uses the expression "subject to the same entail," yet the meaning of that expression must be understood to be, that they shall be subject to the same sort of limitation, in which case the ultimate limitation to the heirs of Mr. Farrington will be included; and Lord Robert Bertie's share of the reversion, instead of going to his wife, will go among the heirs of Mr. Farrington. The manifest intention of the testator appears to have been to secure to his wife for her life every thing over which he had no control; and in order to effectuate that intention, he was willing to give every thing over which he had a control to the persons in whose power it might be, as entitled to the Farrington estates, to contravene his intention in favour of his wife. This appears strongly from the recommendation to his wife to give the furniture belonging to the Chislehurst house to the person who should be living to enjoy the house after her decease, provided she were permitted to continue in it during her life. It can scarcely be supposed to have been the intention of the testator to give this remote reversion to his wife by the residuary clause, when the manifest object of the will appears to have been, to secure a provision to his wife for her life; and when it is considered that the lands which he had himself purchased are only given to her in fee, in case she should not be permitted

to enjoy the Farrington estate for her life. Besides, considering that Mr. C. Townshend, who was the next in the entail, was only thirty-six years of age, whereas Lady Robert Bertie was sixty-four (a), the probability was, that she would never enjoy the reversion during her life. It seems indeed to have been decidedly the testator's wish, that the Farrington estate and his [606] own estates should be enjoyed together, and go in the same line, which object would be altogether defeated, by holding that the ultimate reversion in the former passed to Lady Robert Bertie under the residuary clause, while the latter are expressly limited to follow the entail of the Farrington estate, and must therefore go to the heirs of Mr. Farrington. If then it appear to have been the intention of the testator that the reversion should go according to the limitation of the Farrington estate, the words in the will are fully sufficient to effect that purpose. For the testator first gives to his wife for life all the estates of which he was seised in fee-simple; and he afterwards directs that all lands in Kent, both freehold and copyhold, arising from exchange of lands, acts of parliament, or otherwise devised to his wife for life, shall go with and be subject to the same entail as the Farrington estates. Now the words "seised in fee-simple," in the first devise to his wife for life, are sufficient to include the reversion, and the words "or otherwise," in the subsequent limitation, will also include the same whether it came to the testator by descent from Mr. Farrington, or by the devise in his will; and the words "shall go with" will carry the limitation to the heirs of Mr. Farrington, even supposing the words "subject to the same entail" to be inadequate to that purpose. It is not necessary to contend that the right heirs of Mr. Farrington would take as purchasers; for though they should be entitled to take by descent, yet the mention of them in the will as devisees, is sufficient to except the estate devised out of the residuary clause. *Smith d. Davis v. Saunders*, 2 Bl. 736, and *Amesbury v. Brown*, coram Lord Hardwicke, cit. ibid. If, however, it can be supposed that the reversion was altogether out of the contemplation of the testator, then it neither passed by the special limitations or by the residuary clause; and it must therefore descend to the lessors of the Plaintiff as the heirs of Mr. Farrington.

Arguments for the Defendants.—Unless this reversion can be held to pass by implication under the limitations in the former part of the will, it will pass under the residuary devise to Lady Robert Bertie; for although this particular reversion may not have been in the contemplation of the testator, Lord Robert Bertie, yet as it appears to have been his intention that every thing to which he was entitled should pass to his wife, and the words are large enough to include the reversion, it will accordingly pass. *Freeman v. The Duke of Chandos*, Cowp. 360, 363. Supposing Lord [607] Robert Bertie not to have been aware that he was entitled to devise this reversion, it clearly would not pass under the special limitations in his will; on the other hand, supposing him to have been aware that he was entitled to devise it, he has not used expressions calculated to convey it to the heirs of Mr. Farrington; for the limitation of the ultimate reversion in Mr. Farrington's will had no operation, since that will only directed that the reversion should go to those very persons who would take it by descent. Mr. Farrington's will therefore created nothing but estates for life and estates in tail, consequently when Lord Robert Bertie directs that the reversion shall go according to the entail in Mr. Farrington's will, that devise can extend no farther than the estates created by the will to which he alludes. There is nothing upon the face of Lord Robert Bertie's will to shew that he had this reversion in contemplation, for though the words "seised in fee-simple" in the first limitation to his wife for life are sufficient to include the reversion, provided an intention to pass it be manifest, yet those words seem rather to describe estates in possession; and if the reversion was not included in the first limitation, it cannot be included in the second, which is expressly confined to the estates before devised for life to Lady Robert Bertie. In the next place, it does not appear to have been in the contemplation of Lord Robert Bertie that the heirs of Mr. Farrington could have it in their power to molest his wife, but only the persons claiming under the will; it is not therefore to be presumed that any thing was given as a reward for abstaining from such molestation, to any persons but those whom he thought entitled to molest her; for Lord Robert Bertie speaks only

(a) The respective ages of Mr. Charles Townshend and Lady Robert Bertie at the date of Lord Robert Bertie's will, together with some other facts, were added to the case after the second argument at the desire of the Court, and are stated by Lord Alvanley, Ch. J., in the beginning of the judgment.

"of tenant or tenants for life, or otherwise entitled to the said Chislehurst estate by virtue of the said will." It has been contended that the testator must have intended to devise the reversion to the heirs of Mr. Farrington, because otherwise the lands which he had himself purchased would go in a different channel; but that is not so, for under the word "entail" neither the one nor the other description of lands were limited to any persons but the lineal descendants of Mr. C. Townshend. It is not to be presumed that the testator was ignorant of the meaning of the word "entail," but that he knew the law as well as any other person. *Purefoy v. Rogers*, 2 Saund. 384. If the devise of the reversion be extended to the right heirs of Mr. Farrington, yet it cannot go with and be subject to the same entails, for in one case the heirs of Mr. Farrington would take a different [608] species of estate from that which they would take in the other. The Farrington estate they would take by descent, the reversion they must take by purchase. The Farrington estate, if it descended among daughters, might be held in coparcenary, whereas the reversion must be held by them in joint-tenancy or tenancy in common. The former would be held in gavelkind, which could not be the case with the latter, that species of tenure only applying to lands coming by descent. From the words used in the devise to the persons entitled to the Farrington estate it further appears, that the testator could not intend to include a remote reversion, since he directs that immediately upon the decease of his wife the lands should go to the devisees, which shews that such lands were intended as might pass all together, whereas reversionary lands might or might not be in a state to pass according to circumstances. As to the directions respecting the furniture, it might be reasonable for the testator to advise that his wife should give that at her decease to the persons who would then be entitled to the estates in possession, the furniture being of a perishable nature, and not likely to last till the reversion in the lands would fall in; but the reversion itself being a permanent thing, there was good reason for including it in the residuary devise to Lady R. Bertie, since her heirs might enjoy it though she herself should not survive the persons entitled to the particular estates. The Court therefore cannot hold that the ultimate reversion passed to the heirs of Mr. Farrington under Lord Robert Bertie's will, without doing violence to the expressions of that will, and possibly defeating the intention of the testator.

Cur. adv. vult.

On this day the opinion of the Court was delivered by

LORD ALVANLEY, Ch. J. After this case had been argued the second time at the bar, the Court expressed a desire to be informed of the ages of Lady Robert Bertie and Mr. Charles Townshend at the time when Lord Robert Bertie made his will, and also whether Lord Robert Bertie had any estates in possession except his estates in Kent. This was done with a view to ascertain the intent of the testator respecting the annexation of the estates, and the effect of the residuary clause. It had been argued that Mr. Charles Townshend was so much younger than Lady Robert Bertie that the testator could never have thought of guarding his wife against anything which was to happen after the death of Mr. C. Townshend [609] without issue; but it now appears that at the time when he made his will Lady Robert Bertie was 64 years of age and Mr. C. Townshend 49, and unmarried. There was therefore only 15 years difference between their ages; and as Mr. C. Townshend had no issue, the possibility of the event taking place was not very remote. It also appears that the testator was seised of a fee farm rent in Middlesex of about 16l. per annum; his right to which, although disputed, and the arrears of rent withheld for four years before his death, was constantly asserted by him. This must therefore be taken to be a subject upon which the residuary clause might operate out of the county of Kent. The question then, and the only question in this case is, Whether the one third of a moiety of the estates devised by Thomas Farrington to his right heirs (but which notwithstanding certainly descended upon them), and of which right heirs Lord Robert Bertie was one, passed by the residuary clause of Lord Robert Bertie's will? The principles upon which this case is to be determined were not disputed. It was admitted on the part of the lessors of the Plaintiff, that it was incumbent upon them to prove by necessary consequence arising from the other parts of the will, that the residuary clause had not the operation which according to the rules of construction it was allowed to have, namely, that of carrying every real interest of every kind whatsoever, whether known or unknown to the testator, provided it were not manifestly excluded. It was admitted that it was necessary to shew that it would be inconsistent with the general intent of the testator and the particular provisions of the will to impute to the testator any

intention to convey the one-third of a moiety of the estate of which he was seised as right heir of Mr. Farrington; and that it was not necessary that the testator's mind should be active in including the subject-matter, but that even if he did not know that he had it, still it would pass, provided he did not mean to exclude it. Looking therefore at the provisions of this will we are to consider, not whether the testator had not this particular estate in contemplation, but whether he meant that the residuary clause should not have that effect which the law attributes to it. This is the principle upon which analogous cases have been determined. Of these I will presently mention two or three. I will state the governing principle of those cases, and the grounds upon which it was held in one case that the testator did not intend that the lands should pass, and in another that they did pass; and by [610] comparing the grounds of these cases with the case now before the Court, I will endeavour to shew how far they are analogous in the construction of this testator's intent, and whether any one of them will enable us to decide that the lands in question were not included in the residuary clause. In order to prove that the lands in question were not included, much argument was used to shew that the effect of this will was to annex the purchased estates to the settled estates, not only during the continuance of the estate tail, but also when the settled estates should come into the hands of those who should be entitled to the reversion in fee. For the sake of argument, I will suppose this to have been the intent of the testator, it not being a very improbable intent, considering that the general object of the testator was to secure at all events to his wife that part of the settled estates over which he had no power, by holding out to those entitled to the settled estates that they should have the enjoyment of his unsettled estates after the death of his wife. Then taking this to be the case, it is said to be a necessary consequence of that intent, that those persons who claimed the purchased estates under him would also be entitled under him to one-third of a moiety of the reversion of the settled estates, of which he was seised as heir at law of Mr. Farrington. But non constat that the testator knew he was seised of this estate at the time when he made his will, and what he would have done had it been stated to him at that time that he was so seised, I will not allow myself, sitting as a judge, to speculate, because I consider that to be the most dangerous mode of construction which can possibly be adopted. There is indeed nothing absurd in supposing that his object was to annex the two estates together, provided his wife should not be molested: and taking it for granted that this was his object, it has been argued, that it would be inconsistent with that object to suppose that the testator intended any person to take this third of a moiety, except those who should be the heirs at law of Mr. Farrington. But this argument proceeds upon the supposition that the testator knew that he was one of the heirs of Mr. Farrington. Supposing however that the testator had been the sole heir of Mr. Farrington, this circumstance would not be sufficient to restrain the operation of the residuary clause. In that case the annexation of the two estates would have been unnecessary to guard his wife from molestation after the expiration of the entail: for if he were entitled to the reversion, his wife would [611] derive the best security for her quiet enjoyment, by taking the reversion under the residuary clause. We are therefore of opinion, that if the testator had been the sole heir of Mr. Farrington, the residuary words would have been sufficient to carry the estate. The case then would have amounted to this, that the testator at the time when he made his will was seised of an estate, of which he was not cognizant; and that it is not inconsistent with the rest of his will to permit that estate to be included in the residuary clause. I will now state the cases from which it appears to me that we are not at liberty to exclude any real interest from the operation of this residuary clause. The first case which I shall mention is that of *Strong v. Teatt*, in which it was held that the reversion was not included in the residuary clause. Lord Mansfield, in giving his judgment, which was afterwards confirmed in the House of Lords, states the question to be, "Whether by this sweeping residuary clause the testator intended to devise the reversion?" He then says, "The generality of the expression, 'and also all other the lands, tenements, and hereditaments, in the said counties of Tyrone and Meath, or either of them, whereof I am seised in fee-simple, or of which any other person is seised in trust for me, together with their and every of their appurtenances,' if unrestrained and unqualified by any other words, would carry all the testator's estate in possession, reversion or remainder. But these general words may, by other words and expressions in the will be restrained to any or either of these: and it is the same thing whether it be directly expressed, or clearly and

plainly to be collected from the will. Now" he observes, "here are plain expressions which are fully sufficient to shew that the testator did not intend to devise the reversion of this settled estate." Then after stating the numerous inconsistencies which would arise from supposing that the reversion was intended to pass, he says, "The consequence is too manifest to bear an argument: if it be but attended to, what absurdities must follow from construing the reversion to pass;" and after commenting upon the particular expressions of the will, and the description of locality in the residuary clause, he adds, "But these minute and critical observations serve only to weaken the argument; since there are in this will sufficient general words, which expressly and clearly shew that the testator had no intention to include the reversion of the settled estate in his will, as much as if he had used particular words and expressions [612] to declare it directly and explicitly;" and concludes, "It appears clearly upon the very words of the whole will taken together, that there can be no doubt of the testator's intention, that the reversion of the settled estate should not be included in it, but only the lands which he had in possession." Mr. Justice Wilmot wondered how any one could entertain any doubt upon the question; it being as clear, he said, upon the whole tenor and complexion of the will as the strongest express negative clause could make it. The Court therefore did not proceed upon the argument of presumption of an intention to exclude, but upon the inconsistencies and absurdities which would arise from including the estate in question. In the next case which I shall state, it was held that the estate in question was included in the residuary clause, and that inference and presumption were not sufficient to exclude it. That was the case of *Freeman v. The Duke of Chandos*. As far as inference, conjecture, and supposition could avail, there was every reason for holding that the estate was intended to be included; but there was no inconsistency in holding the contrary. The Court certified, "that though the remote reversion might not be particularly thought of, yet the general words were sufficient to include it, and the intention of the parties was to include all. Therefore they were of opinion that the reversion in fee of one undivided seventh part of the estate in question did pass by the act of parliament in the pleadings mentioned to the Defendant the Duke of Chandos." From this case I collect, that the same principle which induced the Court in *Strong v. Teatt* to hold the estate excluded, here prevailed to induce them to hold it included: there being no inconsistency in permitting the words to have their legal effect, the Court would not by surmise contract their operation. There is another case which is not immaterial in the present consideration, namely, that of *Smith d. Davis v. Saunders*, in which a principle was laid down upon which we must decide this case, viz. that a residuary clause will extend to every latent reversion which the testator may have in him, unless it be expressly excluded by devise to some other person, though indeed if such latter devise be to the testator's own right heirs, it will equally operate as an exclusion of the residuary devise, though the heirs cannot take as purchasers. The question therefore recurs to this, Whether it appears from any particular clause of this will, or from the general intent of the testator manifested in the will, that it would be [613] inconsistent with the other parts of the will to permit the residuary clause to take its legal effect? We are of opinion, that there is not sufficient in this will to shew any such inconsistency or repugnancy. The general intent would not be obstructed, but on the contrary would rather be promoted, by suffering the testator's wife to take this share of the reversion, since she would thereby be enabled to protect herself to the extent of such share against molestation: and yet this is the only circumstance which has been materially relied upon for the lessors of the Plaintiff. With respect to the circumstance of the testator having had an estate out of the county of Kent, which might satisfy the words of the residuary clause, it does not follow from thence that the reversion in question was to be excluded: for, I have before observed, that it is not necessary that the testator's mind should be active in including it. The will as it stands, speaks thus, "If Mr. Charles Townshend shall die without issue, my wife will take my share of the reversion." Whether, if the testator had been informed that he was entitled to dispose of this reversion, he would have given it to his wife or not, we cannot undertake to decide; but there certainly is nothing in the particular provisions of the will, or the general intent of the testator, to warrant the Court in saying that such a disposition is manifestly repugnant to either.

Per Curiam. Let the Postea be delivered to the Defendants.

End of Michaelmas Term.

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